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CONDITIONS IN THE LAW OF CONTRACTS

MERTON FERSON*

EXPRESS AND IMPLIED CONDITIONS

Conditions Precedent. Assume that a contract obligation has been created. When must the obligor perform? In some cases the performances become due by the mere passing of time. But in many cases the performances are not due until and unless certain other events have occurred. These other events are called conditions precedent. Until they come to pass the obligor may omit performance with impunity. He has an excuse that will stay the hand of the obligee.

The case of *Shadforth v. Higgin*¹ will serve to illustrate the immunity of an obligor when a condition precedent has not come to pass. In that case Shadforth had promised to send, and did send, a ship from England to pick up a cargo in Jamaica. The defendant, Higgin, had promised to provide a cargo, and pay freight on it, on condition that the ship should arrive in Jamaica and be ready to load by the 25th of June. It turned out that the ship did not arrive in Jamaica until July 3d. There was thus a failure to satisfy the express condition precedent—*viz.* that the ship should arrive and be ready to load by June 25th. The result was that Higgin was excused permanently from his obligation to provide a cargo.

The Term "Conditional Obligation." The idea of an obligor who need not perform is a paradox. A common explanation is that the obligation is conditional. But this explanation falls short of clearing up the paradox. The existence of the obligation is not at all conditional. The obligor, by our assumption, is firmly bound. The right of the obligee is vested. He has a thing. It can be bought, sold, taxed and inherited. The term "conditional obligation" is, at best, an elliptical, *i.e.*, an incomplete description of a situation and calls for a more extended statement.

A condition precedent comes into play when the obligor is bound,

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1. 3 Camp. 385, 170 Eng. Rep. 1419 (N.P. 1813).

but, by express provision or otherwise, he has an excuse that will stay the hand of his obligee even if the obligor does not perform. The condition precedent (fact or event), if it occurs, puts an end to the excuse. In *Shadforth v. Higgin*² for instance, the merchant, defendant, had an excuse. He was bound, but he could with impunity omit to furnish a cargo unless the plaintiff, shipowner, brought his ship and made it ready for loading by June 25th. If that event had occurred it would have put an end to the defendant's excuse. A condition in the sense of fact or event does not protect the obligor. It is the excuse, expressed or implicit in the situation, that protects him. The condition (fact or event), when it occurs, takes away his protection. When all the conditions precedent have occurred, the obligor is exposed to an action if he does not immediately perform. It is the right of action, not the basic right, that is conditional.

Condition Precedent: Another Sense of the Term. The term "condition precedent" is sometimes used to mean a fact or event that must exist or occur in order to create a contract obligation. To be specific, there must be capable parties, mutual assent, suitable form, consideration and lawful subject matter. All these factors are conditions precedent to the very existence of a contract obligation. Such use of the term "condition precedent" is accurate enough. But, according to more general usage, the term means a fact that exists or shall occur after a contract obligation has been made, in order to create a duty of immediate performance.³

The word "condition" is used in still another sense. Sometimes it means what is herein being called the "excuse" of the obligor. In that sense it is a concept, *i.e.*, a mental device. And a condition precedent in that sense is a mental summation of facts whereby an obligor is protected from suit. The use of the word "condition" as meaning the concept "excuse" appears in the following sentences: "Breach of promise subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Breach or non-occurrence of a *condition* prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability."⁴

This double and triple sense in which the word "condition" is used may be confusing at times. But the context generally makes it clear which meaning is intended.

Express Conditions. Recall the case of *Shadforth v. Higgin*.⁵ The defendant promised to provide a cargo for the plaintiff's ship at Jamaica "provided she arrives out and ready by the 25th of June." The agreement of the parties, expressed in words, was that the defendant

2. *Ibid.*

3. RESTATEMENT, CONTRACTS § 250, and comment *a* (1932).

4. 3 WILLISTON, CONTRACTS § 665 (rev. ed. 1936).

5. 3 Camp. 385, 170 Eng. Rep. 1419 (N.P. 1813).

should have a duty. It was likewise agreed, and stated in words, that the defendant should not come under an immediate duty to perform unless the ship should "arrive out and ready by the 25th of June." That event was an express condition. Pending that event, the plaintiff had a right and the defendant had an excuse.

One coherent bit of writing or speaking may include a promise and a condition. This coherence of language should not be allowed to obscure the fact that two ideas are expressed. One idea is that the promisor undertakes to do something. The other idea is that the promisor shall have an excuse that will shield him until a specified event shall occur. Suppose *A*, for a consideration, signs the following memorandum: "I promise to pay *B* five dollars, on condition that *B* shall saw my pile of wood." The second clause is not a promise. It does not create or add to any obligation. It does not commit anyone to do anything. It is rather a statement which operates to reserve an excuse to the obligor. The same idea could be expressed in two sentences, one promissory and the other declarative, like this: "I promise to pay *B* five dollars" (promise); "I shall not be amerced so long as *B* has not sawed my wood" (excuse). This last sentence is not a promise. And it does not add to nor subtract from the promise.

It affects only the right of action. So long as *B* does not saw the wood, *A* has an excuse to which courts will give effect by denying a right of action against *A*. The right of *B* exists. He may sell and assign it, but he has no right of action.

Implied Conditions Precedent. Just as promises (undertakings) are sometimes express and sometimes implied, so are excuses sometimes express and sometimes implied. In *Thurnell v. Balbirnie*⁶ it appeared that the defendant had contracted to buy a stock of goods at a valuation to be made by a Mr. Matthews and another. Mr. Matthews refused to act in the matter. The participation of Mr. Matthews was taken to be an implied condition precedent to the liability of the defendant. The plaintiff, failing to satisfy that condition, was unable to recover. In *Morton v. Lamb*⁷ it appeared that the defendant had agreed to sell and deliver a quantity of corn to the plaintiff at Shardlow. The corn was not delivered and the plaintiff sued, alleging default on the part of the defendant. But the plaintiff omitted to allege the satisfaction of an implied condition precedent—*viz.* that the plaintiff was ready to pay for the corn.

Shaw, C. J. gives this illustration: "Suppose *B* agrees to build, at his own shop, a carriage for *A*, of *A*'s materials; *A* stipulates seasonably to furnish materials, and to pay *B* in four months. . . . The furnishing or tendering the materials by *A* is a condition precedent."⁸

6. 2 M. & W. 786, 150 Eng. Rep. 975 (Ex. 1837).

7. 7 T.R. 125, 101 Eng. Rep. 890 (K.B. 1797).

8. *Cadwell v. Blake*, 6 Gray 402, 409 (Mass. 1856).

When a bilateral contract calls for an extended performance by one of the parties and the performance of the other party can be rendered in a moment, the extended performance is usually a condition precedent to the other party's duty of immediate performance.⁹ This proposition is applied in service contracts like this: "A promises to work for B for six months, and B promises to pay him \$100.00 a month. The salary for any one month is not due until the work for that month has been done."¹⁰

Express Promises: Express Conditions: Problem of Interpretation. When a contract makes reference to an act that one of the parties should do, it is sometimes a nice question whether the party that should do the act, (a) has promised (undertaken) to do the act, or (b) has agreed that its own right of action is conditional on the act being done. In *Southern Surety Co. v. MacMillan Co.*¹¹ for instance, the surety company had given a bond to assure the performance of a contract between the MacMillan Company and the Oklahoma Book Company. The bond provided "That in the event of any default on the part of the Principal, written notice . . . shall within sixty days after such default be mailed to the Surety." The Oklahoma Company (principal) was tardy in making reports and remittances from time to time, but the MacMillan Company gave no notice of such delinquencies for a year or more after they occurred. The MacMillan Company sued on the bond. The court therefore had to deal with the "difficult question, Is this Agreement as to notice a condition precedent to liability, or is it a concurrent promise, for breach of which plaintiff is liable for such damage as may flow from the breach?" It was held by a divided court that the provision with regard to notice stated a promise by the MacMillan Company to give the notice, but not a condition precedent to its own right of action on the bond. The Surety Company was held liable.

It would be hard to demonstrate that the interpretation put upon the notice clause in the *MacMillan* case was right or wrong. The lesson to be learned from the case is this: Since the legal effect of a promise and of a condition precedent are so markedly different, a draftsman should make it clear whether a clause he inserts states a promise or a condition precedent. As said by Professor Williston, "When a contract reads 'it is agreed,' or 'it is provided,' or 'it is stipulated,' or 'it is understood,' that A shall do a certain act, or simply that the act shall be done, it is not perfectly clear whether A promises to do the act in question, or whether he will acquire a right against

9. RESTATEMENT, CONTRACTS § 270 (1932); *Stewart v. Newbury*, 220 N.Y. 379, 115 N. E. 984 (1917).

10. RESTATEMENT, CONTRACTS § 270, illustration 2 (1932).

11. 58 F.2d 541 (10th Cir. 1932); cf. *Franklin State Bank v. Maryland Cas. Co.*, 256 Fed. 356 (5th Cir. 1919).

the other party only by doing that act."¹² Suppose, for example, a contract whereby *A* promises to pay *B* ten dollars, and *B* promises to saw *A*'s wood. Suppose further that the contract contains this provision: "A is to furnish the saw." Does that mean that *A* promises to furnish the saw? Or does it mean that *B* promises to saw the wood on condition that *A* furnishes the saw?

Variety of Conditions Precedent. Conditions precedent are of infinite variety. The most common kind are acts to be performed by the promisee. For example, *A* obligates himself to pay *B* on condition that *B* shall saw *A*'s wood. Such a condition induces *B* to render the desired performance.

In rare cases, the condition is an act to be done by the promisor. In *Reinert v. Lawson*,¹³ for instance, Lawson contracted to buy a gin mill from the plaintiff on condition that he (Lawson) should close a deal he had theretofore made, to buy a farm. Lawson did not buy the farm, owing to his own default. Since the buying of the farm was a condition precedent, Lawson did not have to buy the gin mill. In *Work v. Beach*¹⁴ it appeared that the defendant had undertaken to pay \$14,570.00 "When I shall be able to do so." Three years later suit was brought against him. It was shown that he had been receiving an annual salary of \$15,000.00, a large salary at that period (about 1890). But the plaintiff did not prove the defendant's ability to pay the debt. Such proof was essential to the plaintiff's right, so he failed to recover and, said the court, "It is useless to speculate as to what the defendant could or should have done."

The condition may also be an event that is not within the control of either party to the contract. Familiar examples are the promises of insurers to pay the insured on condition that his ship shall be lost or his house shall burn.

There may be any degree of probability that the condition will or will not occur. A promise to pay in thirty days is essentially a promise to pay on condition that thirty days shall elapse, *i.e.*, that the earth shall rotate thirty times. It is impossible to imagine that this condition will not come to pass. But, as in the case of other conditions precedent, the obligee gets no right of action until it does occur.

Satisfaction as a Condition Precedent. The satisfaction of a defendant, or the dissatisfaction of a plaintiff, with a performance of the other party is sometimes a condition precedent. In *Van Demark v. California Home Extension Association*¹⁵ it appeared that a seller of land undertook to buy it back if "the buyer should be dissatisfied with the investment." The buyer, alleging that he was dissatisfied with the

12. 3 WILLISTON, CONTRACTS § 665 (rev. ed. 1936).

13. 113 S.W.2d 293 (Tex. Civ. App. 1938).

14. 59 Hun. 625, 13 N.Y. Supp. 678 (1891); see also *Smith v. Hargett*, 171 Kan. 679, 237 P.2d 391 (1951).

15. 43 Cal. App. 685, 185 Pac. 866 (1919).

investment, sued to get his money back. His own dissatisfaction was clearly a condition precedent. But his own allegation of dissatisfaction was deemed sufficient to meet the condition. He did not have to give his reasons. "The purpose of the agreement," said the court, "was to submit the matter to the personal option and judgment of the purchaser."

A more common condition precedent is that the obligor shall be satisfied with an article sold or job done by the plaintiff. It is sometimes difficult to make out whether the defendant is satisfied or not. The fact of satisfaction, or lack of it, is within the defendant's mind. It is not exposed to the view of others. The defendant's own word may be the only evidence available. That is always so where satisfaction has to do with the artistic effect of a job. But where the defendant's satisfaction has to do with the utility of a job, there may be objective facts that discredit the defendant's word.

Suppose *A* is to saw a pile of wood into sticks one foot long. And *B* is to pay *A* on condition that he is satisfied with the job. Suppose further that *A* saws the wood perfectly, according to his contract, but *B* says he is not satisfied. Now there are conflicting indicia as to whether *B* is satisfied. On one hand *B* says, "I am not satisfied." On the other hand the wood is perfectly sawed and *B* has an interest in representing that he is not satisfied. The objective facts may have enough probative force to overcome *B*'s statement. In *Hawkins v. Graham*,¹⁶ for instance, the plaintiff had agreed to set up a heating apparatus in the defendant's building that would heat the building to seventy degrees in the coldest weather. The defendant promised to pay for the job if he were satisfied. The heating apparatus was installed, but the defendant said he was not satisfied with it. How was the fact of defendant's satisfaction to be determined? Holmes, J., said that the defendant's declaration was not conclusive and that the fact was "to be determined by the mind of a reasonable man, and by the external measures set forth in the contract."

Employment contracts sometimes provide that an employee shall be retained so long as his services are satisfactory to the employer. In this type of case there may or may not be evidence, external to the employer's mind, as to whether he is honestly dissatisfied. It depends on what the employee is to do. In *Crawford v. Mail and Express Publishing Co.*¹⁷ the employee was to write articles for a newspaper and to be retained so long as his services "shall be satisfactory to the publishers." The publishers had a right to discharge the plaintiff at any time they might elect. "It was their taste, their fancy, their interest and their judgment that was to be satisfied." But in *Stevens*

16. 149 Mass. 284, 21 N.E. 312 (1889). See also *Winkelman Co. v. Barr*, 178 F.2d 341 (6th Cir. 1949).

17. 163 N.Y. 404 (1900).

*v. Rugo & Sons, Inc.*¹⁸ where the plaintiff had been hired as an estimator for so long as his services were satisfactory, a different result was reached. It was held to be a question for the jury as to whether the employer had reasonable cause for dissatisfaction.

Approval by or Satisfaction of a Third Party as a Condition. The approval or satisfaction of a third party is frequently made a condition precedent. A promise to buy land, for instance, may be made on the condition that a certain lawyer shall approve the title. A more common provision is that an employer shall pay for a building operation on condition that a certain architect shall certify that the job has been done according to specifications. The purpose of requiring an architect's certificate is obvious. The promisor wants to make sure that he will get what he pays for. And the architect's certificate is a means to that end.

In a good many cases builders have been allowed to recover without furnishing the architect's certificates. It is uniformly held that a builder can so recover if the architect dies, or colludes with the owner, or fails to examine the work or fails to exercise an honest judgment.¹⁹ But suppose an architect is honestly dissatisfied with a piece of work, and yet the judge or jury believes the work was properly done. There is a difference of opinion among the courts when that situation arises.

In *Nolan v. Whitney*,²⁰ for instance, the plaintiff had undertaken to do mason work for \$11,700.00. He was to do the work to the satisfaction of an architect and was to obtain a certificate from the architect before any payment could be required to be made. The plaintiff failed to obtain the architect's certificate. But the referee found that the plaintiff had done the work according to the terms of the agreement. It seems to have been conceded by the referee that there were "trivial defects" for which a deduction of \$200.00 should be made. The plaintiff was allowed to recover.

The weight of authority is probably against the decision in *Nolan v. Whitney*.²¹ The decision in that case takes away from the employer the benefit of an important condition that was set up in the contract. Whether a building operation has been done well and according to specifications is often a complicated question of fact, and calls for determination by an expert. When an owner has fortified himself by providing for the determination of that question by an expert, the owner's case should not lightly be submitted to the opinion of an inexperienced judge or jury.

18. 209 F.2d 135 (1st Cir. 1953).

19. RESTATEMENT, CONTRACTS § 303 (1932).

20. 88 N.Y. 648 (1882). *Contra* (on similar facts), *Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573 (1897).

21. *Hebert v. Dewey*, 191 Mass. 403, 77 N.E. 822 (1906); *T. F. Callahan, Inc. v. Commissioners*, 102 N.J.L. 705, 133 Atl. 408 (Ct. Err. & App. 1926); *Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573 (1897).

Conditions Subsequent: Property. Conditions subsequent are common enough in the law of property. But they are extremely rare in the law of contracts. The phrase has a significance in the law of property that is different from its significance in the law of contracts. By way of illustrating the meaning and effect of a condition subsequent in the law of property, note the case of *Hale v. Finch*.²² In that case it appeared that Hale had sold a steamboat to Finch. In the bill of sale there was this recital: "And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not . . . to be run upon" certain specified waters. That provision was a condition subsequent. Said Justice Harlan in the course of his opinion, "The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition specified. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred." Speaking generally, a condition subsequent in the law of property means some event that may occur subsequent to the owner's acquisition of title and operate to terminate the title or give the grantor a power of termination.

Condition Subsequent: In Contracts. Let us next attend to the meanings of "condition precedent" and "condition subsequent" in the law of contracts. The noun "condition" means some fact or event that may come to pass. The adjectives "precedent" and "subsequent" imply a point of reckoning. A condition is precedent or subsequent relative to what? They are dated with reference to the accrual of a cause of action. And it should be observed that the definition of these two kinds of conditions is more than pedantic. There is a substantial difference in the operation of the one and the other. A condition precedent is a fact or event that must occur before there can be a cause of action.²³ For example, a party who contracted to furnish a cargo on condition that the plaintiff's boat should arrive in Jamaica by a certain date was not subject to a right of action unless the boat arrived by that time. In contrast, a condition subsequent is an event that operates to take away a right of action that has accrued. For example, an insurance policy provided that no suit should be brought on the policy more than twelve months after the loss.²⁴ The normal operation of such a condition would be this: The plaintiff would have a right of action after making proof of his loss. But that right of action would be taken away by the lapse of twelve months following a loss. Another illustration of a condition subsequent would be found in a case where there came, first a cause of action, followed by a failure of consideration. The following illustration

22. 104 U.S. 261 (1881).

23. RESTATEMENT, CONTRACTS § 250 (1932).

24. *Semmes v. Hartford Ins. Co.*, 13 Wall. 158 (U.S. 1871).

is taken from the *Restatement*: "A contracts to sell and B to buy a specific horse on July 1, 1927. B contracts to pay the price on June 15. B fails to pay as he promised and A acquires a right of action. Before July 1 the horse dies. A no longer has a right of action."²⁵

Condition Precedent: Subsequent in Form. An express condition may be subsequent in form when it is really a condition precedent. In *Clark Co. v. Banner Packing Co.*,²⁶ for instance, there was an undertaking to sell canned corn. And then came this provision: "In case of the destruction of the Canning Factory, seller is not liable for non-delivery." That sounds like a condition subsequent. But, look again! It will be seen that no right of action shall accrue if the factory burns. In other words, the continued existence of the factory is a condition precedent.

The distinction between conditions precedent and conditions subsequent has practical importance in the matter of procedure. Since a plaintiff must make out his cause of action, it follows that he has the burden of pleading and proving conditions precedent. But when he has established his cause of action, the defendant has the burden of pleading any fact (condition) that he relies on to take away the cause of action that existed against him. This general rule with regard to the burden of proof must in some instances give way to considerations of justice and convenience. An insurance policy, for instance, is so studded with conditions precedent that it would be tedious and difficult for an insured to prove all of them. He is, therefore, required in many jurisdictions to prove only the ones that the insurance company sets up against him.²⁷

CONSTRUCTIVE CONDITIONS

Basis of Constructive Conditions. Express conditions and implied conditions are set up by the parties to the contract. Express conditions are found in the words of the agreement. Implied conditions are found when the parties have somehow, other than by words, indicated that the conditions exist. An express condition and an implied condition are alike, except that one is proved by words, and the other by acts from which the condition can be inferred.

Constructive conditions are not set up by the parties to a contract. They are set up by the courts in the interest of justice. There may, in some instances, be an overlapping. That is, a condition may exist for two reasons—*viz*, the parties apparently intended to set it up, and the court would have set it up anyway. We are dealing, at the

25. *RESTATEMENT, CONTRACTS* § 277, illustration 1 (1932); see also *Beecher v. Conratt*, 13 N.Y. 108 (1855), 64 Am. Dec. 535 (1911).

26. 12 Ohio App. 87, 31 Ohio C.C. (N.S.) 285 (1919); see also *Gray v. Gardner*, 17 Mass. (16 Tyng) 188 (1821); *RESTATEMENT, CONTRACTS* § 259 (1932).

27. *RICHARDS, INSURANCE* § 366 (5th ed. 1952).

moment, with conditions that are set up by the courts, regardless of whether the parties provided or intimated that such a condition should exist.

Concurrent Conditions It is common parlance to say that parties make "a contract," as though they make a single thing. We even speak of a bilateral contract as though it were a single thing. But it makes for accuracy to remember that bilateral contract is two things. When *A* and *B* make a bilateral contract: *A* undertakes, and thus creates, an obligation that rests on him; *B* undertakes, and thus creates, an obligation that rests on him. Each party is an obligor as to one of the obligations and an obligee as to the other. It is no cause for wonder that, when bilateral contracts came to be enforceable, courts took the view that each obligation was independent of the other. And so, in the absence of any condition inserted by the parties, each obligation was enforced as it would be if it were a unilateral contract. For example, it appeared in *Nichols v. Raynbred*,²⁸ that the plaintiff had promised to deliver a cow to the defendant and the defendant had promised to pay fifty shillings to the plaintiff. The plaintiff was allowed to recover the fifty shillings although he did not aver delivery of the cow. That is, the seller could sue for the price. The buyer could sue for non-delivery of the cow. That was logical and complete redress according to the terms of the two obligations.

The unfairness of subjecting a defendant to judgment in favor of a plaintiff who had not performed, or tendered performance of his own obligation impressed the courts, and constructive conditions came to be set up in the interest of justice. Although a bilateral contract consists of two obligations, its overall aspect is usually a bargain to exchange performances. That is especially obvious when the two performances are to be rendered at the same time. The courts finally took account of this exchange idea. They held that a plaintiff, suing on such a contract, was subject to a concurrent condition—*viz.*, he must show that he, at least, tendered his own performance.

In contrast with the case of *Nichols v. Raynbred* decided in 1615, wherein a seller was allowed to recover the price of a cow without delivering the cow, we note the case of *Goodisson v. Nunn*,²⁹ decided in 1792. In this case the plaintiff had engaged to sell land to the defendant, and the defendant had undertaken to pay to the plaintiff £210. The plaintiff sued for the price without tendering the land. He was not allowed to recover. Said Lord Kenyon, C. J., "The old cases, cited by the plaintiff's counsel, have been accurately stated; but the

28. Hobart 88, 80 Eng. Rep. 238 (K.B. 1615).

29. 4 Term R. 761, 100 Eng. Rep. 1289 (K.B. 1792). See also *First Nat. Bank in Salem v. Morgan*, 132 Ore. 515, 284 Pac. 582, *rehearing denied*, 132 Ore. 515, 286 Pac. 558 (1930).

determinations in them outrage common sense. . . . I am glad to find that the old cases have been overruled, and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained."

It will be observed that concurrent conditions cannot be deemed to exist in all bilateral contracts. They are not appropriate unless the promises can be simultaneously performed and the parties can be assured that they are being so performed. We shall, in later sections, deal with the question of constructive conditions in bilateral contracts where one, or both, of the performances called for will consume an extended period of time. We shall also consider cases where performances rendered are more or less complete. Concurrent conditions that can be performed in an instant and that are completely performed, or not performed at all, are relatively simple. They, however, illustrate the basic idea of "agreed exchange" and serve as an introduction to problems that arise with regard to constructive conditions that are not concurrent.

Conditions Where Performance of One Promise Extends over a Period of Time and the Other Does Not. A bilateral contract that calls for a performance on one side that can be rendered in a moment, and for a performance on the other side that will consume time, may still be a contract for an agreed exchange. But the performances cannot be concurrent conditions. They cannot be simultaneous. One party must perform and trust the other to render the counter performance. In a service contract, for instance, there cannot be a simultaneous payment of wages and rendition of service. Must the worker perform and trust the employer? Or must the employer pay the wages and trust the worker? The question came up in *Coletti v. Knox Hat Co.*³⁰ The plaintiff had promised to render services to the defendant as sales agent for a year, and, at the end of the year, the defendant was to pay commissions to the plaintiff. The plaintiff, having served only eight months of the year, sought to recover commissions. It was held that the plaintiff could not recover commissions, because performance by him through the entire year was a condition precedent to his right of action. Said Kellogg, J., "When the performance of a contract consists in doing (*faciendo*) on one side, and in giving (*dando*) on the other side, the doing must take place before the giving." "The law will never presume" said Professor Langdell³¹ "that a thing is to be paid for before it is done." A more general statement of the rule appears in the *Restatement of Contracts*.³² It is to the effect that where performance on one side will extend over a

30. 242 N.Y. 468, 169 N.E. 648 (1930). See also *Stewart v. Newbury*, 220 N.Y. 379, 115 N.E. 984 (1917).

31. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS § 125 (1880).

32. RESTATEMENT, CONTRACTS § 270 (1932).

period of time and the other will not, the former is a condition precedent to the latter.

Substantial Performance. When one party to a contract for an agreed exchange fails altogether to perform his duty under the bargain, he is precluded from recovery against his co-contractor. He is blocked by a constructive condition set up by the courts for the sake of justice. But a plaintiff's failure to perform may be more or less complete. And there may be extenuating circumstances. In case the shortage in the plaintiff's performance is small and has occurred in spite of his care and diligence, denial to him of his right of action would be unjust. And, says Judge Cardozo, "There will be no assumption of a purpose to visit venial faults with oppressive retribution."³³ In the next paragraph of his opinion Judge Cardozo goes on to say, "Where the line is to be drawn between the important and the trivial [shortage] cannot be settled by a formula. 'In the nature of the case precise boundaries are impossible.' Williston on Contracts, 841. The same omission may take on one aspect or another according to its setting."

Since a plaintiff's performance may have been more or less complete, his reasons for a shortage may be more or less meritorious and the shortage may be more or less injurious to the defendant, the constructive condition that a plaintiff must satisfy is summed up like this: He must have substantially performed. The criteria that make out substantial performance, or lack of it, are admirably set forth in the *Restatement of Contracts*.³⁴

"Substantial Performance" generally means something less than full and exact performance. A party who falls short, much or little, of rendering complete performance of his contractual duty is liable to a suit for damages. The question we are pursuing at the moment, however, is whether and how much one party can fail to perform his own undertaking and still recover from his co-contractor.

Substantial Performance: Illustrations. "Substantial performance" says Pound, J., "is a term of law which conveys little, if any, meaning to the lay mind and ordinarily sends the lawyer to his digests to discover the most recent illustrations of its judicial use."³⁵ Even the illustrations leave the lawyer in a quandary, because the facts of the cases where the term is used are so varied. Here are a few cases where it was held that the plaintiff did not substantially perform: In a California case³⁶ the plaintiff had contracted to erect a building for \$3,565 on certain land. It was not deemed substantial performance when he erected it partly upon an adjoining street and the cost of

33. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889, 891 (1921).

34. *RESTATEMENT, CONTRACTS* § 275 (1932).

35. *Steel Storage and Elevator Const. Co. v. Stock*, 225 N.Y. 173, 121 N.E. 786, 787 (1919).

36. *Herdal v. Sheehy*, 163 Cal. 163, 159 Pac. 422 (1916).

correcting the fault would exceed \$660.00. In a New York case³⁷ the plaintiff had contracted to construct an elevator with a capacity of 4,000 bushels per hour. It was not a substantial performance when the plaintiff constructed an elevator with a capacity of only 3300 bushels per hour. In a Wisconsin case³⁸ a boxer sued to recover the price of his professional services. He had contracted to box ten rounds under certain rules. In the second round he struck a foul blow, in violation of one of the rules and disabled his opponent. "[He] thus," said the court, "by his own act made substantial performance impossible."

On the other hand, here are a few cases where defective performances were deemed substantial performances: In a California case³⁹ the plaintiff bargained to do a plumbing and heating job for \$27,332.00. The cost of the entire building was \$186,000.00. The plaintiff's performance was defective to the extent that it reduced the value of the building by \$2,180.00. It still amounted to substantial performance. A Washington case⁴⁰ was an action for the price of cardboard cartons. It appeared that two words in small print, descriptive of the product contained in each carton, were spelled incorrectly. Still the performance was deemed substantial. In a United States Court of Appeals case⁴¹ action had been brought on a surety bond. The plaintiff, assured, had promised to give prompt notice in the event of any default on the part of the principal debtor. There were defaults by the principal debtor from time to time and the plaintiff omitted for more than a year to give notice thereof. Still the plaintiff was able to recover.

The case of *Jacob & Youngs, Inc. v. Kent*⁴² is important by reason of what it holds, and by reason of Judge Cardozo's illuminating opinion. The facts were that the plaintiff had undertaken to build a country residence for the defendant at a cost of \$77,000. One of the specifications called for the installation of "'Standard Pipe' of Reading Manufacture." Owing to the inadvertence of a sub-contractor, Cohoes pipe, instead of Reading, was installed. When the defendant discovered that the wrong kind of pipe had been used, his architect directed the plaintiff to do the work anew. But at this juncture the pipe had been encased in the walls of the building. In order to put in Reading pipe, it would have been necessary to demolish substantial parts of the completed structure, at enormous expense. The plaintiff left the work as it was. The architect refused to give him a certificate

37. *Steel Storage & Elevator Const. Co. v. Stock*, 225 N.Y. 173, 121 N.E. 786 (1919).

38. *Moha v. Hudson Boxing Club*, 164 Wis. 425, 160 N.W. 266 (1916). See also *Jerome v. Queen City Cycle Co.*, 163 N.Y. 351, 57 N.E. 485 (1900).

39. *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 197 Pac. 105 (1921).

40. *Discount Corp. of Washington v. Philippine Mfg. Co. of America*, 150 Wash. 274, 272 Pac. 970 (1928).

41. *Southern Surety Co. v. MacMillan*, 58 F.2d 541 (10th Cir. 1932).

42. 230 N.Y. 239, 129 N.E. 889 (1921).

that the final payment was due. The plaintiff sued for \$3,483.00, the unpaid balance of the cost price. He tried to show at the trial that the Cohoes pipe, installed by mistake, was the same in quality, appearance, market value and cost as Reading pipe. After diverse rulings had been made in the lower courts the court of appeals held that the plaintiff should have judgment.

It was clear that the plaintiff's performance fell short of compliance with his contract. But how should the extent of his shortage be computed? Should it be computed according to what it would cost the defendant to install Reading pipe and so make the finished job conform to the contract? Or should it be computed according to the difference in value of the house, equipped as it was with Cohoes pipe, and, what its value would be if equipped with Reading pipe? The shortage would be enormous if appraised by the former standard and trivial if appraised by the latter standard. The court decided that "In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing."⁴³

Other courts have used the same method of computing shortages.⁴⁴ Judge Cardozo's opinion, however, is notable for its exposition of substantial performance as a condition precedent. The difference in value between a piece of work as it has been done, and the value it would have if it had been done according to contract is not always the measure of a plaintiff's shortage. Judge Cardozo is careful to point out that: "The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract."⁴⁵

Another limitation on what is held in the *Jacob & Youngs* case is stated by Judge Cardozo as follows: "This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture."⁴⁶

Belated Performance. Delay in performance is not a perfect performance. It may, however, be a substantial performance, depending

43. *Id.* at 891.

44. *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 197 Pac. 105 (1921); *Discount Corp. of Washington v. Philippine Mfg. Co.*, 150 Wash., 274, 272 Pac. 970 (1928).

45. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889, 891 (1921).

46. *Ibid.*

on the length of the delay and the circumstances. It is commonly said that performance at the time set by the contract is more important in cases of mercantile contracts than it is in cases that have to do with the sale or purchase of land.⁴⁷ It seems to be a matter of relative importance in either case. In *Helgar Corporation v. Warner's Features, Inc.*,⁴⁸ it appeared that a buyer of films who omitted to pay for an installment of films for two days after payment was due had not yet materially failed. On the other hand, time may be deemed to be of the essence in a real estate contract if the seller knows that the buyer needs to get the property promptly.⁴⁹

Obligor Ignorant of His Excuse. Let us draw an analogy: It is elementary that a person can be vested with a contract or property right although he does not know that he has it. For example, a third party in whose favor the bargaining parties have made a contract may have a right without knowing it. And a grantee or devisee of property may own the property without knowing that he owns it. Now to introduce an analogous situation: Suppose that a contractor has an excuse for not performing what he promised to do, but is unaware of having such excuse. To illustrate the problem, suppose that a master, being unaware that he has grounds for doing so, discharges his servant. And suppose further that, unbeknown to the master, the servant has been guilty of drunkenness or other misconduct that would justify his discharge. In such a case the master is not liable.⁵⁰ And it can be taken as a general rule that, when an excuse for not performing has accrued to an obligor, it is valid, whether or not the obligor knows that he has such excuse.

Lack of Consideration: Failure of Consideration. In the discussion of bilateral contracts, the phrases "lack of consideration" and "failure of consideration" have meanings that are distinctly different. The term "lack of consideration" is pertinent to the making of a contract. It is elementary that such a lack negates the very existence of a contract. But the assumption of an obligation by one party can be consideration for the obligation assumed by another party. When, therefore, the parties to a bilateral contract have assumed their respective obligations, there is no "lack of consideration." Both parties are bound.

The phrase "failure of consideration" comes into play at a later stage in the dealings of the parties—*viz.*, when one party is being sued for his alleged default. It has a technical meaning that is not literally expressed by the words. When a plaintiff is blocked from

47. RESTATEMENT, CONTRACTS § 276 (1932).

48. 222 N.Y. 449, 119 N.E. 113 (1918). See also *Benedict v. Harris*, 158 Ore. 613, 77 P.2d 442 (1938).

49. *Browning v. Huff*, 204 Ky. 13, 263 S.W. 661 (1924); *Hermanson v. Slatter*, 176 Wis. 426, 187 N.W. 177 (1922).

50. *Green v. Edgar*, 21 Hun. 414 (N.Y. Sup. Ct. 1880).

recovery owing to a "failure of consideration," it does not mean that the consideration, i.e. the obligation, has failed. It means that the plaintiff has failed. He has not rendered a performance according to his undertaking.

Failure of Consideration: Secondary Effect. Let us suppose that A and B have made a bilateral contract. That is, each has assumed an obligation in exchange for an obligation assumed by the other. In that situation, it is the law that A must substantially perform according to his obligation in order to hold B. Such performance is a condition precedent. And a prospective failure on the part of A will preclude him from recovering. The absence of such a prospect is a condition precedent. So long as A fails, or seems likely to fail materially, in the rendering of his performance, B is under no duty immediately to perform.

Now turn the tables. A's omission to perform may constitute a breach of his duty,⁵¹ as well as a failure of consideration. If that is so, B will desire to recover against A. Must B substantially perform what he was to do as a condition precedent to his right of action against A? The answer is: No. B has been excused from performing. In other words, B is not under an immediate duty to perform. Since he is not under such a duty there would be no justice in setting up performance by him as a condition that he must meet in order to hold A.

Divisible Contracts: Defined.

The doctrine of implied dependency in contracts for agreed exchange gets to be complicated as it is applied to "divisible contracts." The first difficulty lies in defining "divisible contract." And the second difficulty lies in figuring out according to the decision what difference it makes whether or not a contract is divisible.

The definition of a divisible contract, according to the *Restatement*, is this: "[A] contract is divisible where by its terms, 1, performance of each party is divided into two or more parts, and, 2, the number of parts due from each party is the same, and, 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party."⁵²

It will be noted that the definition pertains to the divisibility of performances and not to the acts whereby the contract obligations have been created. For example, a customer with a charge account at a store may purchase articles from time to time and so build up an obligation to pay. This does not make out a divisible contract although the obligation was made piecemeal. Or suppose that one party has performed and the other is to pay the price in installments: this would not be a

51. The failure of consideration on the part of A does not necessarily include a breach by A of his duty.

52. RESTATEMENT, CONTRACTS § 266. comment e (1932).

divisible contract. It should be noted, too, that the definition quoted above contemplates a bilateral contract. It cannot have meaning unless there are two obligations—each party being bound to make a series of exchanges. The English case of *Withers v. Reynolds*⁵³ affords a simple illustration of a divisible contract. In that case it appeared that a farmer bargained to deliver a load of straw to a stable keeper every two weeks, and the stable keeper bargained to pay for each load as it was delivered. Each party was to perform by installments, and each installment was set opposite an installment to be rendered by the other party.

The mere fact that one or both parties to a contract are to render their performances by installments does not make the contract a “divisible” one. It must further appear that each installment is to be in exchange for a specified installment to be rendered by the other party. For example, a contract whereby an owner undertakes to pay a builder certain amounts at specified stages of construction, which payments would amount to three-fourths of the price, and then to pay the balance when the building has been completed is not a divisible contract.⁵⁴

A divisible contract, as defined by the *Restatement* and illustrated by the bargain in *Withers v. Reynolds*, seems to contemplate intervals of time between performances. The Uniform Sales Act gives a definition that is not so restricted: *viz.* “‘Divisible contract to sell or sale’ means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.”⁵⁵ That definition seems to mean that where a commodity is sold or contracted to be sold at so much per unit—*e.g.* wheat at \$2 per bushel—it is a divisible contract even though the delivery or the payment is to take place at one time. The facts in *National Knitting Co. v. Bouton & Germain Co.*^{55a} would make out a divisible contract according to this information. The contract in that case was to sell “a quantity of gloves of different kinds at fixed prices, aggregating \$322.86.” The seller’s delivery was short “one item of 18 dozen gloves, and another item of 6 dozen gloves.” The court held that the contract was divisible. Winslow, C. J., who wrote the opinion went on to say, “The question of entirety is a question of intention. Severability of the subject-matter and measurement of consideration by units may assist in determining, but do not of themselves necessarily determine, the question.”

The concept “divisible contract,” according to either one of the above definitions, is that of one single obligation on each side calling for a series of matched performances. In the *Withers* case, for instance, each

53. 2 B. & Ad. 882, 109 Eng. Rep. 1370 (K.B. 1831).

54. RESTATEMENT, CONTRACTS § 266, illustration 4 (1932).

55. UNIFORM SALES ACT § 76.

55a. 141 Wis. 63, 123 N.W. 624 (1909).

party was under a single obligation. But the seller was to deliver several loads of straw, and the buyer was to make several payments matched against the deliveries. And in the *National Knitting Company* case the obligation of each party was single and indivisible; but the performances were divisible, *i. e.*, divisible into exchanges of each pair of gloves for the price thereof.

Courts frequently say, as did Judge Winslow, that contracts are divisible or not, according to the intention of the parties. It must be assumed, however, as a premise that the performances are capable of being divided. For example, a contract to sell a mule for \$100 cannot be divisible. That is flat. But a contract to sell one hundred bushels of oats at one dollar a bushel can be divisible if the parties so intend. And, says Judge Winslow "courts incline" to hold such contracts severable, *i. e.*, divisible.

A provision in the Sales Act seems to give a buyer the option to treat a contract as divisible even if the seller did not so intend. It is this:

"Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest."⁵⁶

When the seller sends a quantity of goods in excess of the amounts he contracted to sell, or when he sends the right amount mixed with other goods, he offers to sell what he sends. Logically an acceptance of that offer would have to be a taking of the entire amount. But, in the interest of convenience, this section of the statute allows the buyer to divide the seller's performance by taking only the goods his original contract called for.

As noted above, the subject matter of a contract must be capable of severance in order that a contract can be divisible. After it appears that the subject matter can be divided, it becomes a question whether the parties intended that their contract should be divisible. One objective test sometimes used in determining the intention of the parties is this: Does each segment of performance have full value in use? Or must the segments be combined in order to have full value in use? For example, a contract to buy an oil tractor engine and gang plows, each suited to the other, was deemed an entire contract even though the purchase price was apportioned and separate notes were given for the respective articles.⁵⁷

Divisible Contract: So What? Now we come to the question of de-

56. UNIFORM SALES ACT § 44(2) and (3).

57. *Hart-Parr Co. v. Duncan*, 75 Okla. 59, 181 Pac. 288, 4 A.L.R. 1434 (1919).

pendency in divisible contracts. First what about dependency within each division? And, second, what about dependency with regard to the whole contract, *i.e.*, with regard to the sum total of all the divisions?

The problem with regard to dependency within each division is relatively simple. The rules applicable are the same as they would be if the two performances within the division were the whole contract.⁵⁸ Accordingly, if the two performances within the division were to be rendered at the same time, they are concurrently conditional.⁵⁹ And, if one of the performances was to precede the other, the earlier performance is a condition precedent.⁶⁰ Another incident is this: Under a divisible contract to sell the seller has the privilege to deliver an installment, even though it is only a fraction of the whole amount, and the buyer then becomes indebted for the price.⁶¹ This, however, would be true under a contract that called for performance by installments, even though it was not a divisible contract.⁶² But the exact amount to be paid for the installment would not be fixed by the contract unless it was a divisible contract.

When a court has to deal with a divisible contract as a whole, it could proceed on either one of two theories. First, it could treat each division as a separate contract. Second, it could recognize an inter-divisional dependency. The alternative approach that is chosen affects the result in a good many cases. Looking at each division as a separate contract the rule to be applied would be this: The failure or prospective failure of consideration under one contract does not affect the rights and duties of the parties under another contract.⁶³ But American courts are inclined to use the other approach and to deem that there is an inter-divisional dependency. That is, if one party fails badly to do his duty in one division, it may preclude him from recovering against the other party for omitting to perform what he was to do in another division. When a party to a divisible contract has broken his duty with regard to one or more installments, it may amount to a material failure on his part with regard to the whole contract. The injured party may be thus excused from performing any more installments.⁶⁴

The distinction between a "divisible" and an "entire" contract is

58. RESTATEMENT, CONTRACTS § 272 (1932).

59. *Id.* § 272, illustration 1.

60. *Id.* § 272, illustration 2.

61. *Evans v. Barbourville Brick Co.*, 205 Ky. 561, 266 S.W. 46 (1924).

62. *Thompson and Petty v. Conover*, 32 N.J.L. 466 (Ct. Err. & App. 1865).

63. "The doctrine is well established that the breach of one contract does not justify the aggrieved party in refusing to perform another separate and distinct contract." Note, 27 A.L.R. 1157 (1923).

64. *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 140 S.W. 595 (1911); *Heller v. Continental Mills*, 233 N.Y. 641, 135 N.E. 951 (1922); *Harton v. Hildebrand*, 230 Pa. 335, 79 Atl. 571, 574 (1911) ("The contract was entire as to the erection of the 19 houses, and divisible and severable as to the payment of the installments for the work and material furnished.").

difficult to make. Is it worth while? Where suit is brought to recover the price of an installment that has been performed, it is helpful to find that the contract was divisible. In such a contract the parties have by agreement fixed the price of each installment. But, in a suit where the crucial question is whether an obligee has substantially performed what he was to do it does not seem to make any difference whether or not the contract was divisible. In a divisible, just as in an entire contract, the usual tests⁶⁵ are applied.⁶⁶

Sales of Land. A bilateral contract for the sale of land is nearly always a contract for an agreed exchange. The buyer is obligated to pay the price, and the seller is obligated to convey the land. The usual rules with regard to the dependency of the obligations apply when the subject matter of the contract is land, just as in other cases. The application of these rules to land contracts, however, present special problems.

The simplest form of a land sale contract is this: the buyer promises to pay, and the seller promises to convey at a stated time in the future. In such a case the parties probably intend that their performances are concurrent conditions. But, even if the parties did not so intend, courts would construe that the performances are concurrent conditions. Neither party could recover from the other without making a tender of his own performance.⁶⁷

But suppose that a considerable part of the purchase price is paid when a contract to purchase land is made. And suppose that the balance of the purchase price is to be paid and the conveyance made at a stated time in the future. Must the seller, in such a case, tender a conveyance of the land in order to recover the deferred payment? It will be observed that, while each party has an obligation to perform and the same time has been set for both performances, yet, it is not a bargain for clean cut exchange of all the consideration on one side for all of the consideration on the other side. The buyer owes only a part of the price. When settlement day comes, the buyer is to render only a fraction of his total performance. Some early cases deemed that, in this situation, the performances were not concurrent conditions.⁶⁸ But later decisions are to the effect that the seller must, in such a case, tender a conveyance in order to recover the final payment.⁶⁹ The later

65. Recited in RESTATEMENT, CONTRACTS § 275 (1932).

66. "It would seem that a great deal of the confusion of the cases might be avoided if each case were regarded rather from the importance of the non-performance, than from the viewpoint of whether or not the particular contract involved shall be regarded as 'entire' or 'severable.'" Comment, *Entire and Divisible Contracts*, 37 YALE L. J. 634, 642 (1928). See also Note, 8 CORNELL L.Q. 158 (1923).

67. *Maury v. Unruh*, 220 Ala. 455, 126 So. 113 (1930); *Phillips v. Sturm*, 91 Conn. 331, 99 Atl. 689 (1917).

68. *Pordage v. Cole*, 1 Wms. Saund. 319, 85 Eng. Rep. 449 (K.B. 1669).

69. *Kane v. Hood*, 13 Pick. 281 (Mass. 1832); *Robinson v. Harbour*, 42 Miss. 795 (1869). See also RESTATEMENT, CONTRACTS § 268 (1932).

rule seems equitable. While the buyer trusted the seller by making the first payment, there is no justice in requiring him to extend further credit, by making the final payment, without getting the land.

Contracts for the sale and purchase of land frequently provide that the buyer shall pay the price in installments and that the seller shall convey at the time of the last payment. Such a contract does not put the seller under a duty to convey before the due date of the last installment. He can, therefore, recover unpaid installments without tendering a conveyance, so long as his own performance is not due.⁷⁰ But suppose he delays suing for unpaid installments until his own performance is due. Now can he bring an action against the buyer without first tendering a conveyance? That depends on what he seeks to recover.

At this juncture it is necessary to note a distinction between (a) an action by a aggrieved party to recover the price of a performance that the plaintiff has rendered or will render, and (b) an action to recover the amount of damage the plaintiff suffers because the exchange contracted for has not and will not be made. It is not consistent with an action for the price for the plaintiff to withhold a performance that is due from him to the defendant. But an action for damages suffered because the defendant prevented the exchange from being made contemplates that the plaintiff will omit the performance he was to have rendered in fulfilling the contract. Thus, the question of whether a plaintiff must tender a performance that is due from him depends on whether he is suing for the price of his performance or is suing to recover for the damage he suffers owing to the exchange not going through.

Land Contracts: Payments By Installments. Let us assume that *S* has contracted to sell a piece of land to *B* for \$2,000.00 on these terms: *B* is to pay \$500.00 at the end of each quarter during the year 1953, the last payment thus falling due December 31. *S* is to convey the land to *B* on December 31, 1953. Let us assume also that the value of the land is \$1,800.00

Suppose that, in August 1953, *B* has made no payments, and that his omission amounts to a breach and a material failure of consideration. What can *S* do about it? One thing he can do is to sue for the sum total of the unpaid installments.⁷¹ Another thing he can do is to treat the exchange as off and sue to recover the damage he suffers because it does not go through. If he chooses the latter alternative he should,

70. *Benjamin v. Savage*, 154 Minn. 159, 191 N.W. 408 (1923); *Beecher v. Conradt*, 13 N.Y. 108 (1855); *Turner & Happersett v. Hall & Connor*, 128 Va. 247, 104 S.E. 861 (1920); *Stevens v. Irwin*, 132 Wash. 289, 231 Pac. 783 (1925).

71. The plaintiff could have sued for each installment when it fell due. But he has only one cause of action for all of the installments that were due when he brought suit. *Beecher v. Conradt*, 13 N.Y. 108 (1855).

according to our assumption that the land is worth \$1,800.00, get judgment for \$200.00. Must *S* tender a conveyance? Since no conveyance is due from *S* (August 1953), it would seem that he can proceed on either alternative basis for his suit without tendering a conveyance. If, however, he chooses to sue for installments of the price, he continues bound to convey, come December 31.

Now suppose that January 1954 arrives and that *B* still has made no payments. What can *S* do? The same choice is open to him now as was open to him in August. That is, he can either sue to recover the unpaid installments, or he can call off the exchange and sue for the damage he suffered owing to its not going through. The situation has changed since August, in that the time has come and passed when *S* was to convey. Does that change the duties and conditions that rested on *S*? He now has an excuse for not having conveyed on December 31. He is not liable for his omission. And, being thus excused from his duty to convey, he is also excused from making or tendering a conveyance as a condition precedent to his right of action against *B*, if he sues to get the damages he suffered from loss of the exchange. If, however, *S* sues to recover the unpaid installments, that is consistent only with the idea that the exchange is going through. He has no right to those installments except in exchange for the land. Suit for the installments means that *S* is not availing himself of the excuse he could have used to shield himself from liability for his omission. In view of the choice *S* makes in suing for the installments, he stands bound to convey, and *B* stands bound to pay. Their performances are both due and are concurrent conditions. *S* must tender in order to recover.⁷² *S* had an unqualified right to recover one or all of the earlier installments when they fell due. But he cannot make out a right to have the last installment except by tendering a conveyance. Suppose that, after all installments are due, *S*, without tendering a conveyance, sues for the earlier ones and remits the last one. Some cases have held that he should thus be allowed to get judgment for the earlier installments.⁷³ But the weight of authority is to the contrary.⁷⁴ And on general principles he should not be allowed to recover the earlier installments without tendering a conveyance. It is pertinent to observe that *S* has only one cause of action for the unpaid installments. The judgment he gets, even if it is for less than all of the installments, is all the purchase price he will ever get. And it is not equitable that he should get the purchase money without giving up the land. He should not be able to eat his cake and keep it.

Contract to Sell: Chattel to be Sold Deteriorates. Consider first a

72. *Beecher v. Conradt*, 13 N.Y. 108 (1855).

73. *Gray v. Meek*, 199 Ill. 136, 64 N.E. 1020 (1902). For a collection of cases pro and con, see Note, 35 A.L.R. 108, 119 (1925).

74. 3 WILLISTON, CONTRACTS § 887 (rev. ed 1936).

contract to sell a specific chattel. Suppose that, while the vendor still owns the chattel, it receives an injury so great that the character of the chattel is substantially changed. Would there be substantial performance on the part of the seller if he tenders the injured chattel? The law on this point is settled as stated in the Sales Act,⁷⁵ viz., the buyer may at his option treat the contract as avoided. In other words, the seller does not substantially perform by tendering the injured chattel. The risk that the chattel would be injured or that it would substantially deteriorate remained with seller, assuming that neither party was to blame for the loss. The buyer can, however, elect to receive the injured chattel, being liable, if he does so, for the full purchase price.

Sale with Security Title Reserved. A security device extensively used is the conditional sale, under which the seller retains the title to the chattel. But the buyer gets the beneficial ownership and a right to have title on condition that he shall pay the purchase price. Under this arrangement the buyer has the hope of gain and risk of loss.⁷⁶ He must pay the purchase price even if the chattel he bought shall perish. There is no failure of consideration on the seller's part even if the chattel perishes and the buyer never gets title to it. The seller substantially performed when he transferred the beneficial ownership.⁷⁷ A comparable situation exists when a seller and shipper of goods withholds from the buyer, by means of the bill of lading, a security title. In *First National Bank of Seattle v. Gidden*,⁷⁸ for instance, these were the facts: Gorman & Co. of Seattle contracted to sell 5,000 cases of salmon to the defendant. The salmon was shipped on a bill of lading that made it deliverable to the order of the plaintiff bank. A bill of exchange for the price of the salmon was drawn on the defendant buyer, which it was his duty, under the original contract, to pay or accept. The plaintiff's agent later received a warehouse receipt for the bill of lading. And the defendant accepted the bill of exchange in lieu of his earlier duty to pay or accept it. When the defendant buyer tendered payment of the bill of exchange, the plaintiff's agent could not at the moment find the warehouse receipt. It was later found and was tendered to the defendant on the following day. Suit was brought against the defendant on the bill of exchange. Was there a failure of consideration when the plaintiff's agent omitted to make timely delivery of the warehouse receipt? Title was thus withheld from the buyer. But the court noted that the warehouse receipt was held only as collateral security, and held that the delay in its delivery did not constitute a failure of consideration.

75. UNIFORM SALES ACT § 8(2).

76. *Id.* § 22 (a).

77. RESTATEMENT, CONTRACTS § 281, comment c (1932).

78. 175 App. Div. 563, 162 N.Y. Supp. 317 (1st Dep't. 1916).

Contracts to Sell: Real Property Suffers Injury Pending Conveyance. Consider next a contract to sell real property. And suppose that, pending conveyance, a substantial part of the property is destroyed—*e.g.*, a valuable building on the land is burned. Can the vendor substantially perform by tendering what is left of the property? The question has come up time and again. A majority of the American jurisdictions hold that the vendor can substantially perform by conveying what is left of the property. The buyer is bound to pay the full purchase price.⁷⁹ The majority rule calls for some explanation.

It is generally taken for granted that the owner of property must bear the risk that it may perish or be injured. But when a contract has been made to sell real property, the buyer gets, at once, many of the attributes of ownership. He gets more than a right *in personam* against the vendor. Among the attributes of the vendee's status under a contract to purchase are these: He can require specific performance by the vendor. In case the vendee dies his rights under the contract are distributed as real property, rather than as personal property. And, if the vendee records his contract, he can hold his rights in the property even against a later purchaser who gets a conveyance. These attributes go far to make out ownership in the vendee.

One who contracts to buy real property automatically gets rights in the property that are comparable to the rights of a conditional vendee of a chattel. In one case, as in the other, the buyer lacks only the formal title. And that usually is held back only to secure the seller that he will get paid. And so the seller, in either case, substantially performed when the original contract was made, even though title was not at that time passed to the buyer.⁸⁰

Leases: Are Covenants Dependent? Is a lease a contract for an agreed exchange? The owner agrees to let the premises for a period and, perhaps, makes other promises relative to the property. The tenant agrees to pay rent at intervals. Are the rights of the landlord and tenant respectively dependent or independent? For reasons that are partly historical and partly theoretical a lease is not at common law deemed to be a contract for an agreed exchange. And, accordingly, the rights of the respective parties are independent. That doctrine, taken literally, means that a tenant can be held for the rent even if the premises are greatly damaged or destroyed. It means, too, that a landlord must perform his covenants even if the tenant does not pay his rent.⁸¹

The historical explanation of the doctrine is this: The law with regard to leases developed as a part of the law of real property and

79. See Note, 22 A.L.R. 575 (1923).

80. RESTATEMENT, CONTRACTS § 281, comment c (1932).

81. *Id.* § 290.

became settled before the doctrine of mutual dependence in bilateral contracts became established.

The theoretical reason why covenants in a lease are independent is this: A lease is not a contract for an agreed exchange. The landlord grants an estate and thus renders the greater part of his performance at the outset.⁸²

The doctrine that the covenants in a lease are independent has seemed harsh, particularly when it operated to hold a tenant bound to pay rent after the premises had been injured or destroyed. There has, accordingly, been some modification of the doctrine. An eviction of the tenant operates to excuse the tenant from his promise to pay rent.⁸³ And if the premises become uninhabitable, even without the landlord's fault, modern courts are inclined to deem that there has been a constructive eviction. In such a case the tenant can abandon the premises and avoid a further payment of rent.⁸⁴ Such decisions might as well be put on the ground that the covenants are dependent and that there has been a failure of consideration on the part of the landlord. Indeed Cardozo, J., expressly rests his decision on that ground. Says he, "It [the eviction] suspends the obligation of payment . . . because it involves a failure of consideration for which rent is paid."⁸⁵

The legislatures of some states have given relief to tenants in cases where the premises are injured or destroyed.⁸⁶

Prospective Failure of Consideration. A plaintiff who has not substantially performed according to his own undertaking cannot recover on the defendant's counter promise. What if there has been no failure to perform, but it seems likely that the plaintiff will fail to render his performance when it later becomes due? For example, suppose that *S* has contracted to transfer his horse Pompey to *B* on March 1, and that *B* has promised to pay the price of \$200.00 in advance—*viz.* on February 1. Suppose further that before February 1 arrives Pompey has died. On that day *B*'s performance is due according to the letter of the contract. And there has been no failure on the part of *S*. His performance was not due. But it is clear that *S* will not perform when the time comes for his performance. This prospective failure on the part of *S* operates as would an actual failure—*i.e.*, it affords a shield to *B*. He need not perform in the face of the prospect that he will not get what he was to have according to the bargain. Other sorts of events may occur to dim the prospect that a counter performance, set by the contract for a later date, will actually be rendered.

82. 3 WILLISTON, CONTRACTS § 890 (rev. ed. 1936).

83. Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917); Ellison v. Charbonneau, 101 S.W.2d 310 (Tex. 1936).

84. Ingram v. Fred, 210 S.W. 298 (Tex. Civ. App. 1918).

85. Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579, 580 (1917).

86. Typical statutes are OHIO REV. CODE ANN. § 5301.11 (Baldwin Supp. 1953); TENN. CODE ANN. §§ 7619, 7620 (Williams 1934).

Suppose that *A* and *B* are parties to a contract for an agreed exchange and that *A* states in advance of the time for his performance that he doubts whether he can perform, or that he will perform even if he can. Such a statement makes out a prospective failure of consideration. *B* can, with impunity, withhold his performance while that prospect continues.⁸⁷ And if *B* changes his position while that prospect continues, he is permanently discharged from a duty to perform his promise. *A* can, however, nullify the effect of his statement if he retracts it before *B* has materially changed his position.⁸⁸

Another manner in which a prospective failure may come about is this: *S*, having contracted to sell specific land or goods to *B*, sells them to a third person.⁸⁹ In such a case, if *S* regains title to the land or goods before *B* has changed his position, *B*'s excuse is taken away.⁹⁰

The insolvency of one party may in some cases amount to prospective failure and excuse the other party from going forward. This type of prospective failure has wide application in connection with sales of chattels. In *Ex parte Chalmers. In re Edwards*⁹¹ these were the facts: The defendant had contracted to deliver thirty tons of bleaching powder per month from February to December, 1871. Payment was to be made fourteen days from the date of each delivery. The buyer, Edwards, became insolvent, and the defendant refused to deliver any more bleaching powder under the contract. Suit was brought in behalf of the insolvent buyer, but there was no recovery. The defendants "committed no breach of the contract," said Sir G. Mellish, L. J., in his opinion. He goes on to say, "What are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him." The insolvent party can, however, reinstate his right of action if, within a reasonable time, he gives security that his performance will be rendered.⁹²

Frustration By Unexpected Turn of Events. The fact that a performance bargained for brings no profit or advantage to the contractor who was to receive it usually affords no defense to the disappointed party. In some cases, however, where the disappointment was owing to unexpected conditions which neither party brought about, the dis-

87. *Benedict v. Harris*, 158 Ore. 613, 77 P.2d 442 (1938).

88. RESTATEMENT, CONTRACTS § 280(2) (1932).

89. *Brimmer v. Salisbury*, 167 Cal. 522, 140 Pac. 30 (1914); *James v. Burchell*, 82 N.Y. 108 (1880).

90. RESTATEMENT, CONTRACTS §§ 283, 284 (1932).

91. L.R. 8 Ch. 289 (1873). See also *Diem v. Koblitz*, 49 Ohio St. 41, 29 N.E. 1124 (1892).

92. *Ex parte Chalmers. In re Edwards*, L.R. 8 Ch. 289, 291 (1873). See also RESTATEMENT, CONTRACTS § 287 (1932).

appointed parties have been absolved from liability. *Krell v. Henry*⁹³ will serve as an illustrative case. That grew out of a bilateral contract. The plaintiff promised to let to the defendant a window overlooking the Pall Mall in London on a day that had been set for the coronation procession of King Edward VII. The defendant promised to take the window on that day. He made a deposit when the contract was made and undertook to pay the balance at a later time. When the day came for the procession, the King was ill and the procession had to be postponed. In that situation each party could perform exactly what he had undertaken to do. The plaintiff could furnish the window, and the defendant could pay the price. But the plaintiff's performance—*viz.* furnishing the window—would do the defendant no good. There was no procession for him to enjoy. Must the defendant pay the price? Can he set up failure of consideration as a defense? There was no literal failure of consideration. That is, the plaintiff presumably was willing to have the defendant occupy the window. But the defendant could get no profit or satisfaction in using the window. He was frustrated. This disappointment of the defendant was not anticipated by the contractors and was not owing to the fault of either one. Suit was brought for the unpaid part of the hire defendant had undertaken to pay. The court held that the defendant should be excused.

Disappointed Lessees. A good many cases have arisen where property leased for a certain purpose could not profitably be used for the intended purpose, owing to an unexpected turn of events. Must the lessee in such a case go on paying rent? The case of *Wood v. Bartolino*⁹⁴ will serve to illustrate. In that case the property had been leased "for use solely as a filling station." Then came an order of the Federal Government "freezing" automobiles, tires and tubes. It also rationed the sale of gasoline. The lessee could not continue in business except at heavy loss. The defendant resisted a claim for rent on the grounds of "commercial frustration." The defendant was required to continue paying rent. That decision probably represents the weight of authority in cases where the lessee's business is made unprofitable but not altogether unlawful by the government order.⁹⁵ But where the continued use of the premises for the purpose intended would be unlawful, the tendency is to excuse the tenant.⁹⁶

Frustration: Other Illustrations. In La Cumbre Golf and Country

93. [1903] 2 K.B. 740.

94. 48 N.M. 175, 146 P.2d 883 (1944).

95. *Megan v. Updike Grain Corp.*, 94 F.2d 551 (8th Cir. 1938); *Brown v. Oshiro*, 68 Cal. App. 2d 393, 156 P.2d 976 (1945); *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47 (1944).

96. *20th Century Lites, Inc. v. Goodman*, 64 Cal. App.2d 938, 149 P.2d 88 (1944); *McCullough Realty Co. v. Laemmle Film Service*, 181 Iowa 594, 165 N.W. 33 (1917); *Hizington v. Eldred Refining Co. of New York*, 235 App. Div. 486, 257 N.Y. Supp. 464 (4th Dep't 1932); *O'Neill v. Derderian*, 138 Misc. 488, 246 N.Y. Supp. 341 (N.Y. Munic. Ct. 1930). See *Pedrick and Springfield, War Measures and Contract Liability*, 20 TEXAS L. REV. 710 (1942).

*Club v. Santa Barbara Hotel Co.*⁹⁷ the facts were these: the defendant, owner of the Ambassador Hotel in Santa Barbara, contracted to pay to the Golf Club \$300 per month during a given season. The Golf Club in return contracted to give all guests of the hotel full privileges to use the facilities of the Club. Early in the season the hotel burned. After that there could be no guests of the hotel to use the facilities of the Golf Club. The defendant hotel company was excused from making payments provided for in the contract.

In *Alfred Marks Realty Co. v. Hotel Hermitage Co.*⁹⁸ it appeared that the defendant had contracted to pay for an advertisement in a program and souvenir of yacht races that were to be held. The book was printed and a limited number of copies were issued. But the yacht races were declared off on account of war. The defendant was not required to pay.

Aleatory Contracts. Almost all bilateral contracts are for an agreed exchange.⁹⁹ And it has come to be the law, with regard to such contracts, that a party who is substantially in default, or seems likely not to perform, cannot hold the other party.¹⁰⁰ A notable exception exists with regard to aleatory contracts.

A promise is "aleatory" if it is conditional on the happening of a fortuitous event, or on an event that is supposed by the parties to be fortuitous.¹⁰¹ And a bilateral contract is aleatory if one or both of the promises are aleatory.¹⁰² Insurance contracts are familiar illustrations of aleatory contracts. In such a contract the insured pays, or promises to pay, a relatively small amount (the premium), and the company promises to pay a large amount if the insured shall suffer a loss—*e.g.*, if his house shall burn. Insurance contracts are often unilateral. That is, the insured often pays the premium in advance. When an insurance contract is unilateral, substantial performance by the insured cannot be a constructive condition precedent to his right of action. He has already performed. Even if an insurance (or other aleatory) contract is bilateral, the promises are not for an agreed exchange, and hence the promises are not dependent.¹⁰³ Why are they, unlike the promises in other bilateral contracts, not for an agreed exchange? It is because one of the promises, by the very terms of the contract, may never have to be performed, depending on a fortuitous event. It is obvious that a promise by an insured to pay a \$50.00 premium and a promise by the company to pay \$5,000.00 if a certain house shall burn are not promises to exchange \$50.00 for \$5,000.00. The company takes a risk, calculated at 100 to 1, that it will not have to perform at all. A contract can hardly

97. 205 Cal. 422, 271 Pac. 476 (1928).

98. 170 App. Div. 484, 156 N.Y. Supp. 179 (2d Dep't. 1915). *But see* Retail Merchants' Business Expansion Co. v. Randall, 103 Vt. 266, 163 Atl. 357 (1931).

99. RESTATEMENT, CONTRACTS § 266 (1932).

100. *Id.* §§ 274, 280-88.

101. *Id.* § 291.

102. *Id.* § 292.

103. *Id.* §§ 292, 293(1).

be a contract to exchange performances when, by its terms, the chances are that, on one side, there will be no performance.

In cases that involve ordinary bilateral contracts a plaintiff who is in material default cannot recover. This is not because of a vindictive instinct on the part of judges. It is not merely a means to punish the plaintiff. It is because the defendant's promise was to make an exchange. Absent the exchange idea, a plaintiff's default does not excuse the defendant. And so a defendant is not excused by the plaintiff's default in case suit is brought on an aleatory contract. For instance, an insured who has failed to pay a premium note when it was due can still recover against the company on a policy that did not expressly condition the company's liability on such payment being made.¹⁰⁴

While a party to an aleatory contract cannot set up, as a defense, the other party's failure to perform, he has remedies. As in other kinds of contracts, a promise of an aleatory contract can sue for damages when the promisor breaks his contract. Another thing the injured party can do is this: If the other party has materially broken his contract, or seems likely to, and if the fortuitous event insured against does not seem more probable than it did when the contract was made, the injured party can, by giving notice, rescind the contract.¹⁰⁵ Such decision would end the rights of both parties under the contract.

CONDITIONS PRECEDENT—HOW DISPENSED WITH:

Obligor's Excuse: A Concept. So long as a condition precedent has not come to pass and has not been excused, the obligor can omit performance of his promise with impunity.¹⁰⁶ The situation can be described in either one of two ways. It can be said that the obligee's right of action is conditional on the existence or occurrence of the condition. Or the situation can be broken down into this: The obligee has a right. The obligor has an excuse that shields him from liability. This latter manner of speaking treats the excuse as a concept. Just as the obligee's right is a concept, a weapon of offense, so the obligor's excuse is a concept, a weapon of defense. It operates to stay the hand of the obligee. The net result is the same under either manner of speaking—*viz.*, there can be no recovery on the right until the condition has come to pass or the obligor's excuse has, in some other way, been removed. Suppose, for example, that *A* has contracted to build a fence for *B*, and that *B* has contracted to pay *A* \$20.00 on the express condition that *A* shall build the fence and paint it green before June 1. So long as *A* has not satis-

104. *Reliance Life Ins. Co. v. Russell*, 208 Ala. 559, 94 So. 748 (1922); *Trade Ins. Co. v. Barraciff*, 45 N.J.L. 543 (Ct. Err. & App. 1883); *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240 (1876); *Langbehn v. American Ins. Co. of Newark, N.J.*, 41 S.D. 581, 171 N.W. 820 (1919).

105. RESTATEMENT, CONTRACTS § 293(2) (1932).

106. *Id.* § 250(a).

fied the factual condition—*i.e.*, built and painted the fence green before June 1—*B* has an excuse. He need not pay. *B*'s immunity in this situation is a legal advantage. It is something he has, and, for the sake of convenience, it is treated as a concept in the following sections. *A* has a right. *B* has an excuse.

Obligor's Excuse: "Waiver" By Obligor. An obligor may be willing to give up his excuse. Can he do it? Being technical for a moment, it should be remembered that the question is not whether the obligor can give up a condition. A condition is a fact. It is not a fit subject of gift. A fact or occurrence cannot be given. Now, assuming that *A* has not completed his task, can *B* give up his excuse?

The question might come up with regard to an excuse that has fully accrued. For example, in the fence illustration used above if June 1 has come and gone without *A* having completed his task, *B*'s excuse would have fully accrued. No condition precedent could occur that would take it away. Can *B* gratuitously surrender it?

The question would be different if it came up with regard to an excuse that has not accrued. Suppose the time has not come when *A* must complete his performance in order to hold *B*. At this juncture, *B*'s excuse has not accrued as a permanent thing. *A*'s performance still may occur and put an end to *B*'s excuse. Maybe *A* will perform; maybe not. *B* does not yet have *A*'s non-performance as a final excuse. *B* cannot give away an excuse that he does not have. He can only promise that he will give up the excuse if he later gets it. Is such a promise valid without consideration?

There is a basic difference between a gift of something the giver has and a promise to give something that he may get later. It is necessary therefore, to consider separately these two questions: (a) Can an obligor gratuitously surrender an excuse that has finally accrued in his favor? (b) Can an obligor gratuitously, or otherwise, bind himself to renounce an excuse that may accrue to him later?

Excuse Accrued: Gratuitous Surrender. The concept, excuse, is comparable with the concept, right.¹⁰⁷ The one and the other is a legal advantage to the person in whom it is vested. An excuse, like a right, is a fit subject for a gift. And an excuse that accrues from an unperformed condition can be given up without consideration unless the condition was a substantial part of an agreed exchange.¹⁰⁸ Suppose that *B* has promised to pay *A* on condition that *A* shall build a fence and paint it green before June 1. Suppose further that *A* fully performed the conditions except that he painted the fence yellow. It would seem that a gratuitous surrender by *B* of his excuse would be effective and leave *B* liable. But suppose that *A* had omitted to build

107. See Ferson, *Excuse as a Legal Concept in The Law of Contracts*, 7 U. OF CIN. L. REV. 362, 370 (1933).

108. RESTATEMENT, CONTRACTS §§ 88, 309 (1932).

the fence at all and that *B*, after June 1, purported to surrender that excuse. The net result of such a surrender would, if valid, leave *B* bound to pay for a performance that he never got—even substantially. It would thus be an attempt to create an absolute duty on the part of *B* instead of the duty originally assumed by him, which was to make an exchange.

Implied Surrender of Excuse. The surrender of an accrued excuse by an obligor is rarely formal, or even express. But it can be implied in fact from what an obligor does. In *Fox v. Grange*,¹⁰⁹ for instance, the parties had made a bilateral contract for the sale of land. The purchase price was to be paid by installments in advance, and the contract provided emphatically that “time of payment should be of the essence of the contract.” The purchaser was repeatedly late in making her payments, and the vendor accepted the late payments. It will be observed that the vendor had an accrued excuse as soon as the purchaser was late in making even one payment. The vendor’s repeated acceptances of late payments was consistent only with the idea that he remained bound to his obligation. And so the court held. The motive of the vendor was probably to get further payments under the contract. His taking the late payments could be called an “election.” That is, he had an election to call off the whole contract or to go on with it. But calling his conduct an “election” does not alter the plain fact that he surrendered his excuse for no consideration.

In *Ratcliffe v. Union Oil Co. of California*¹¹⁰ it appeared that the plaintiff, a dealer, and the defendant, an oil company, had made a bilateral contract whereby the plaintiff was to distribute products of the defendant. The defendant company failed to live up to its undertaking. The court assumed that the default of the oil company may have been so great that it would excuse the dealer from continuing to be bound by his undertaking. But after the company’s default deliveries of oil were made by the company and accepted by the plaintiff. This acceptance of further deliveries recreated the dealer’s duties under the contract.¹¹¹

Gratuitous Surrender of Excuse: Broad Doctrine. The proposition that an accrued excuse can be surrendered gratuitously, if it does not forgive a performance that is a substantial part of an agreed exchange, is part and parcel of a broad doctrine. The excuse that accrues to an obligor when a condition precedent has not, and will not be, performed has much in common with excuses that derive from a variety of other

109. 261 Ill. 116, 103 N.E. 576 (1913). See also *Carlson & Sullivan, Inc. v. Bigelow & Dowse Co.*, 202 F.2d 654 (1st Cir. 1953).

110. 159 Ore. 221, 77 P.2d 136 (1938). See also, *Pasquel v. Owen*, 186 F.2d 263 (8th Cir. 1950); *In re Malko Milling & Lighting Co.*, 32 F.2d 825 (D. Md. 1929); *Malone & Co. v. Stone & Co.*, 214 Ky. 443, 283 S.W. 407 (1926).

111. *Pasquel v. Owen*, 186 F.2d 263 (8th Cir. 1950); *RESTATEMENT, CONTRACTS* § 309 (1932).

facts. There are many things that operate to vest obligors with excuses. For example, an obligor has an excuse and so can avoid liability if he was an infant when he made his promise, or, if he was defrauded, or, if the statute of limitations has run in his favor, or, if he has been discharged in bankruptcy. In all such cases obligors can surrender their excuses without consideration.¹¹²

Giving Up Excuse: Retaining Right. A gift is perhaps the most elementary kind of legal transaction. Tangible chattels can be given, and, within limits, intangible things can be given.¹¹³ The subject of the gift must be identified. That is relatively simple in the giving of tangible chattels. But when a party to a contract has a right against his co-contractor, and also has an excuse that would let him out of performing his own promise, it may become a question as to what he gives up. The case of *Morse v. Moore*¹¹⁴ will serve to illustrate. In that case it appeared that the plaintiff had contracted to sell and the defendant had contracted to buy "good clear merchantable ice." Looking at the contract analytically, the seller was under a duty to supply "good clear merchantable ice"—and in order to hold the buyer he had to meet a condition—he had to supply "good clear merchantable ice." A delivery by the seller of good ice would satisfy both the duty and the condition. Stating the same thing from the buyer's point of view, he had a right to get good ice; and he also had an excuse for not paying so long as he did not get good ice. In pursuance of the contract the plaintiff (seller) tendered and the buyer accepted the poor ice. Did he give up his excuse? Did he give up his rights? The case assumes that the buyer (defendant) gave up his excuse, and it is generally true that one who accepts a defective performance waives the defect.¹¹⁵ It is not consistent that he should accept the performance and at the same time deny that he is liable. But when the buyer accepted the poor ice, and thus gave up his excuse, did he also give up his right to have delivered to him "good clear merchantable ice?" That is a separate question. The case holds that the buyer did not, by accepting the poor ice, give up his right to have good ice. And, to the extent that the buyer suffered from the defective performance, he was allowed to have recoupment from the price he was to pay.

The case discussed above indicates that a person can give up an excuse that shields him without necessarily giving up his right against the other party. He may, however, give up his right also if he retains

112. Ferson, *Excuse as a Legal Concept In the Law of Contracts*, 7 U. OF CIN. L. REV. 362 (1933); FERSON, *THE RATIONAL BASIS OF CONTRACTS* c. 10 (1949); 3 WILLISTON, *CONTRACTS* § 693 (rev. ed. 1936); RESTATEMENT, *CONTRACTS* § 88 (1932).

113. RESTATEMENT, *CONTRACTS* §§ 88, 158, 410-16 (1932).

114. 83 Me. 473, 22 Atl. 362 (1891). See also *Smelt Fishermens Ass'n v. Soleim*, 39 Wash.2d 524, 236 P.2d 1057 (1951).

115. RESTATEMENT, *CONTRACTS* §298 (1932).

what he received for a long time and fails to complain.¹¹⁶

Excuse of Condition: Prevention or Hindrance By Obligor. When the condition on which the liability of an obligor depends is something to be done by the obligee, justice dictates that if the obligor prevents the obligee from doing that thing the obligor cannot stand on the condition. His excuse will no longer avail. In *United States v. Peck*,¹¹⁷ for instance, it appeared that Peck contracted to cut hay in a certain area and deliver it to the Government. Performance by Peck was, of course, a condition precedent to a right of action for the purchase price. In this situation the Government went in and cut the hay that Peck was to cut. The Government's action prevented Peck from performing and so excused his non-performance. The case of *Arlotte v. National Liberty Ins. Co.*¹¹⁸ will serve as further illustration. In that case it appeared that the defendant company had insured the plaintiff's building against injury by falling aircraft or by automobiles, trucks and motorcycles. The policy provided that the plaintiff should give immediate notice of loss and file proof within sixty days. The plaintiff's building was injured when a truck crashed into it and started a fire. The plaintiff gave timely notice of his loss but was under the impression that his insurance policy had been burned in the fire. An agent of the company then told the plaintiff that the policy covered loss by falling aircraft only and did not cover damage caused by a collision of a truck with the building. The plaintiff was thus dissuaded from filing proof within the time it should have been filed. Thereafter plaintiff's policy turned up and revealed that it covered losses from truck collisions as well as from falling aircraft. After plaintiff's policy turned up, he filed proof of loss and was allowed to recover. It was the company's misrepresentation that prevented him from meeting the condition that he must file proof within sixty days after loss.

Excuse of Condition: Repudiation of Contract By Obligor. Repudiation by an obligor of his duty tends to prevent the obligee from performing conditions that were incumbent on him. Such a repudiation amounts to an admonition to the obligee like this: "Whatever you do by way of performing a condition will be in vain. I shall not perform anyway." The obligee is justified in taking the obligor at his word and refraining from the doing of a useless thing. The following illustration is taken from the *Restatement of Contracts*: "A, an insurance company provides in a policy that is issued to B, that in case of loss no payment will be made unless notice is given within 60 days after loss,

116. *Id.* § 412; UNIFORM SALES ACT § 49.

117. 102 U.S. 64 (1880).

118. 312 Pa. 442, 167 Atl. 295 (1933). See also *Dabovich & Co. v. Emeric*, 12 Cal. 171 (1859); *O'Toole & Neddeau Co. v. Boelkins*, 254 Mich. 44, 235 N.W. 820 (1931); *Dilworth v. Brown & Bigelow*, 128 Pa. Super. 124, 193 Atl. 125 (1937); *Feddas v. Insurance Co. of State of Pennsylvania*, 300 Pa. 555, 151 Atl. 285 (1930).

nor except after arbitration as provided in the policy. A loss occurs. The insurance company promptly learns of it, and for no adequate reason informs B that payment will not be made. The conditions of notice and arbitration are excused."¹¹⁹ The case of *Cort & Gee v. Ambergate Ry. Co.*¹²⁰ will serve as further illustration. In that case it appeared that the defendant company had undertaken to receive and pay for railway chairs to be manufactured by the plaintiffs. The defendant notified the plaintiffs that it would not accept the chairs. The plaintiffs accordingly did not make or tender the chairs. Owing to the repudiation, the plaintiffs were able to recover for loss of profits without having made or tendered the chairs.

This section should be compared with the discussion on Prospective Failure of Consideration, *supra*. That section views the repudiation as a prospective failure of consideration. It has to do with the discharge of the injured party from his duty to perform his promise. The present section relates to his right of action against the repudiator.

It should be added that if the condition would not have been performed anyway the obligor's repudiation does not excuse the obligee for not performing it. Again, drawing an illustration from the *Restatement*, it is this: "A contracts to sell and B to buy a specified horse on July 1 for \$500. B informs A on June 15 that B will not take the horse. On June 20 the horse dies. The constructive condition of tender by A is not excused since a failure to perform was not induced by B's repudiation."¹²¹

Excuse of Condition by Giving Inadequate Reason for Rejection. Suppose that a plaintiff has not performed a condition that was precedent to his right of action. And suppose further that the defendant refused to perform, basing his refusal on something other than the non-performance by the plaintiff of his condition. Does the defendant stand excused by the failure of the condition to occur? The case of *List & Son Co. v. Chase*¹²² will serve to illustrate the problem and to answer the question. The facts of the case were that the plaintiff had contracted to sell and the defendant had contracted to buy 74 cases of eggs. Shipment was to be made over a designated railroad. The plaintiff, purporting to carry out the contract, shipped to the defendant 195 cases of eggs over a railroad other than the one that had been designated. When the eggs arrived, the defendant refused to accept them on the ground that they "did not stand inspection." The trial court took the position that the defendant thus waived the fact that a wrong quantity had been shipped and over a wrong railroad. But the supreme court reversed the lower court. Said Davis, J., "When the buyer has

119. RESTATEMENT, CONTRACTS § 306, illustration 1 (1932).

120. 17 Q.B. 127 (1851).

121. RESTATEMENT, CONTRACTS § 306, illustration 2 (1932).

122. 80 Ohio St. 42, 88 N.E. 120 (1909). See also *Cawley v. Weiner*, 236 N.Y. 357, 140 N.E. 724 (1923).

absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor cannot be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds."

While a promisor does not lose his excuse by failing to put it forward, he may, in the circumstances, estop himself from using the excuse. That happens when the promisor's attitude leads the promisee away from making a proper tender. *Smith v. Pettee*,¹²³ for instance, is a case where a seller of iron could have tendered the right amount and quality of iron, but was persuaded not to do so because the buyer refused to take the iron for other reasons. And when a check is tendered, where legal tender was called for, a rejection of the tender on other grounds may excuse the failure to tender actual money. It will excuse the defective tender if the person who made the tender could have tendered money and was lulled away from doing so by a rejection that was stated to be made on other grounds.¹²⁴

Excuse Not Accrued: Contract to Surrender. It is obvious that a person cannot give or sell a thing he does not have. And a purported sale or gift of something to be acquired later does not operate to pass title to the thing when the seller or giver later acquires it.¹²⁵ It is, of course, possible for a person to contract that he will give up this or that when he does get it. These general propositions are applicable to the disposal of excuses. That is, an obligor cannot presently give up an excuse that has not accrued. But he can contract that he will renounce the excuse when it shall accrue.

Let us suppose that an act of a promisee is a condition precedent to his right of action, and that he may or may not perform it. Suppose further that the obligor, expressly or impliedly, says to this promisee, "I will perform even though you do not meet the condition." At this juncture the promise of the obligor is gratuitous. But going on, suppose the promisee in reliance on the obligor's promise omits to perform the condition. There would still be a lack of orthodox consideration, but the facts would make out promissory estoppel. That is sufficient to make the promise enforceable.¹²⁶

In *Dreier v. Sherwood*,¹²⁷ for instance, a contract for the sale of land strongly provided that the buyer would forfeit his rights if he failed to make a \$10,000.00 payment at a specified time. In other words, it provided that payment on time was a condition precedent to the buyer's

123. 70 N.Y. 13 (1877). See also *Johnson v. Oppenheim*, 55 N.Y. 280, 291 (1873); *RESTATEMENT, CONTRACTS* § 304 (1932).

124. *O'Toole & Nedeau Co. v. Boelkins*, 254 Mich. 44, 235 N.W. 820 (1931); *RESTATEMENT, CONTRACTS* § 305 (1932).

125. *Low v. Pew*, 108 Mass. 347 (1871); *UNIFORM SALES ACT* § 5.

126. *RESTATEMENT, CONTRACTS* § 90 (1932).

127. 77 Colo. 539, 238 Pac. 38 (1925).

right of action against the vendor. Later the vendor consented that the buyer might delay making the payment. The buyer, in reliance on the vendor's permission, delayed making the payment. It was held that the vendor must perform, even though the buyer did not perform the condition precedent that was set up in the original contract.

Implied Contract to Excuse Non-Performance of Condition. An obligor's agreement that he will forgive the non-performance of a condition precedent is sometimes called a "waiver." That term, of uncertain meaning, is no help. The law of contracts, embodying as it does the doctrine of promissory estoppel, is a sound basis for the decisions.

The obligor's promise, plus action in reliance thereon, makes out a contract. That contract is easily and specifically enforced when the obligor is prevented from interposing what, without contract, would have been a valid excuse.

Since promissory estoppel constitutes, or takes the place of, consideration for the obligor's promise, it follows that if the other party takes no action in reliance on the promise it is not binding.¹²⁸ It follows, too, that the promise can be revoked if that is done before the other party has materially changed his position in reliance on the promise.¹²⁹

The promise of an obligor that he will forgive the non-performance of a condition need not be express. It can be implied in fact. In *Fox v. Orange*,¹³⁰ for instance, the repeated acceptances of late payments by a vendor of land amounted to a promise that the purchaser might be late in making future payments. The vendor was not allowed suddenly to reinstate prompt payments by the purchaser as conditions precedent to the vendor's liability.

Conditions Excused to Avoid Forfeiture. In most situations an obligee is not excused from satisfying a condition that is precedent to his right of action merely because it is impossible for him to perform the condition.¹³¹ He may be excused, however, in cases where he would suffer unjust forfeiture if he were held to a given condition. Suppose, for instance, that A has built a house for B and that B's obligation to pay for the house was on condition that architect X should certify that the house was well built. Suppose further that, after the house was built, architect X died without having given the certificate. It would involve a heavy forfeiture on the part of A if he were denied a right of action. He is accordingly allowed to recover even though he cannot furnish the certificate.¹³²

128. *Colbath v. Stebbins Lumber Co.*, 127 Me. 406, 144 Atl. 1 (1929).

129. RESTATEMENT, CONTRACTS § 297 (1932).

130. 261 Ill. 116, 103 N.E. 576 (1913). See also *General Motors Acceptance Corp. v. Hicks*, 189 Ark. 62, 70 S.W.2d 509 (1934).

131. RESTATEMENT, CONTRACTS § 301 (1932).

132. *Id.* §§ 302, 303(a).

Recoveries have, in some instances, been allowed on insurance policies even though conditions precedent were not performed. When a plaintiff is relieved in such a case from satisfying the condition, it is by reason of equitable considerations. How far a court should depart from the letter of a contract in the interest of justice is a matter of opinion. It is not surprising, therefore, that some courts have gone further than others in allowing recovery where the letter of the contract would dictate no recovery. Two cases will be cited by way of illustration.

In *Hanna v. Commercial Travelers' Mut. Accident Ass'n of America*¹³³ these were the facts: The insured drove away from home on a stormy rainy morning. Nothing was heard from or about him for four years. Then his automobile was dredged up from the bottom of the Delaware River. It was the plaintiff's theory that, on that stormy morning, when insured drove away he missed a turn that he should have made, and drove straight into the river. The jury took this view of the facts. The policy of the insured required that, in case of accident, immediate notice must be given to the company, and proof of the death or injury must be made in sixty days. These were conditions precedent and, of course, were not performed. It was held by a divided court that there could be no recovery on the policy. It was said by Finch, J., that the defendant's "promise cannot be enlarged by the court, so as to fasten a liability on the defendant, which the latter did not undertake."¹³⁴

In *Mutual Life Insurance Co. of New York v. Johnson*¹³⁵ it appeared that the company had issued a policy whereby they promised to pay to one Cooksey disability benefits and to waive premium payments on certain conditions. One condition was that "while no premium on the policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled." The insured became totally and permanently disabled shortly before he was in default on a premium payment. He was, therefore, unable to give the notice to the insurer in advance of the default. Recovery was allowed although timely notice had not been given. Judge Cardozo, in his opinion, notes the difference of authority on the point and then proceeds to say: "Without suggesting an independent preference . . . we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect."¹³⁶

Equitable considerations may also spare an obligee from losing his right of action through the operation of a condition subsequent. In

133. 204 App. Div. 258, 197 N.Y. Supp. 395 (1st Dep't 1922).

134. *Id.* at 397.

135. 293 U.S. 335 (1934). See also *Schlitz v. Equitable Life Assur. Soc. of United States*, 226 Wis. 255, 276 N.W. 336 (1937).

136. 293 U.S. 335, 339 (1934).

*Semmes v. Hartford Insurance Co.*¹³⁷ it appeared that the plaintiff, a resident of Mississippi, had a fire insurance policy issued by the defendant, a citizen of Connecticut. The policy provided that no suit could be brought on it "unless such suit should be commenced within the term of twelve months next after any loss." The plaintiff suffered a loss in 1860. He brought suit against the company in 1866, having been prevented by the Civil War from suing within the twelve-month period. The provision that suit must be brought within twelve months after suffering a loss, or not at all, was a condition subsequent. Failure to sue within that time would, if unexplained, take away the plaintiff's right of action. But plaintiff's inability to sue during the war relieved him from the normal operation of the condition. His delay did not bar him from recovering.

137. 13 Wall. 158 (U.S. 1871).