

THE DOCTRINE OF SUBSTANTIAL PERFORMANCE: CONDITIONS AND CONDITIONS PRECEDENT

THE concept of a condition precedent has become so decayed in the law of contract it is probably desirable to fix a definition for this discussion. The condition precedent was known to the common law, at least in Lord Mansfield's time,¹ as a term of a contract creating an obligation to be performed by one party to the contract, upon the performance of which a further obligation arises on the side of the other party. We will use the words only in this sense in this article.² The phrase "entire obligation" has also been used at common law with this meaning, and we will follow this usage by using the phrase synonymously with condition precedent. A contract containing such a term as the whole of one party's obligation has become known as an "entire contract."³ The obligation which comes into existence upon performance of the condition precedent will be called a dependent term. "Non-entire" seems preferable to divisible for other obligations and contracts, the point being that there is no dependent term, not necessarily that the consideration is divisible, pro rata by reference to the contract price.

Entire contracts gave birth, in *Dakin v. Lee*⁴ in 1915, to the modern doctrine of substantial performance, which it is submitted is the subject of considerable confusion. Even if the doctrine is clearly stated it appears to be illogical in itself, contrary to basic principles of contract law and may occasion injustice. We will proceed by illustrating the present confusion, seeing how it came about and making recommendations for reform.

¹ For earlier references see Glanville Williams, "Partial Performance of Entire Contracts," (1941) 57 L.Q.R. 373, 376.

² This was the meaning given in *Kingston v. Preston*, *infra*. Corbin calls this a "promissory condition," *Corbin on Contracts* (1951) s. 633. Where the condition is not the subject of a promise, as in *Pym v. Campbell* (1856) 6 E. & B. 370, English law might use the phrase "aleatory condition," see this U.S. usage, Corbin, *op. cit.*, s. 728, or "suspensory condition" offered by Anson, *Principles of the English Law of Contract* 5th ed. (1888), p. 301. The need for an expression was felt in the *Eagle Aviation* case, see note 27 *infra*. The distinction was crucial *e.g.* in *Kingston v. Ambrian Investment Co.* [1975] 1 W.L.R. 161.

³ *e.g.* so used *per* Ashurst J. in *Cutter v. Powell* (1795) 6 T.R. 320. Professor Williams uses entire contracts to include lump sum contracts: *op. cit.*, 373. This is unjustifiable and confusing, as is shown *infra*. This conflation discounts his criticism of the remarks of Greer L.J. in *Eshelby v. Federated European Bank Ltd.* *op. cit.*, 386, especially the curiously partial note 73. He himself protests against the conflation at p. 392 but it was not in the law before *Dakin v. Lee*, 1915, *infra*. He finds it in *Sumpter v. Hedges*, but appears not to have seen the full report in 67 L.J.Q.B. at p. 546 which refers only to an entire, not a lump sum contract. The report in [1898] 1 Q.B. 673 is much shorter, probably inaccurate, and has done harm.

⁴ *H. Dakin & Co. Ltd. v. Lee* [1916] 1 K.B. 566.

THE CONFUSION

The two leading students' text-books contradict each other in stating a doctrine of substantial performance: Cheshire and Fifoot,⁵ plainly refers the doctrine to the area of entire contracts, Treitel⁶ sets the doctrine among non-entire contracts. Both works derive their doctrine from Lord Mansfield's famous judgment in *Boone v. Eyre* (1777),⁷ though Treitel adds that it is later discussion of that judgment which has given rise to the doctrine rather than the actual words used by Lord Mansfield. In fact, both "doctrines" have been recognised by the courts. So far as the latter is concerned, it is historically part and parcel of the general doctrine of breach of condition or breach going to the root of the contract. On the other hand, in *Bolton v. Mahadeva*⁸ in 1972, the Court of Appeal were influenced by Cheshire and Fifoot's theory, and achieved it is submitted a climax of jurisprudential confusion and potential injustice by holding that a failure of substantial performance in a "lump sum" contract deprived the contractor of all relief. Logically, a condition is a contractual obligation any breach of which terminates all further obligations at the other party's positive election, while a condition precedent is an obligation which only requires another obligation to arise if the condition precedent is fulfilled. We will examine the alleged basis of a doctrine of substantial performance with respect to each kind of obligation. It appears that the doctrine as stated by the Court of Appeal in *Bolton v. Mahadeva* is unjustifiable as well as undesirable. Interestingly, the confusion has its roots deep in much of the nineteenth-century development of the modern law of contract, but we will touch only on such parts of it as are essential to our theme.

"SUBSTANTIAL PERFORMANCE" WITH REGARD TO ENTIRE
CONTRACTS

The early common law was that promises in a contract were independent, so that failure to perform his obligation by one party did not relieve the other party who was still obliged to carry out his obligation and could obtain damages for the non-performance. If both parties were in breach and one sued, the other could claim damages by a cross-action but had no defence to the principal action by reason of the plaintiff's breach of contract.⁹ Lord Mansfield was responsible for limiting this rule. The reason for the limitation was that a cross-action for damages might not prove adequate relief and the other

⁵ 8th ed. p. 524. See also *Smith's Leading Cases*, 13th ed. (1929), p. 16. The latter discussion is far from clear, but is surely eccentric and unjustified in distinguishing a dependent covenant situation from an entire obligation situation.

⁶ 3rd ed., p. 690. Corbin's treatment is similar, *op. cit.* s. 709 and s. 946 note 5.

⁷ There were two actions with similar facts between the two parties. The passage usually quoted is to be found in (1777) 1 H.Bl. 273n (K.B.). The later case is in (1779) 2 Wm. Black. 1312 (C.P.).

⁸ [1972] 1 W.L.R. 1009.

⁹ Selections from the Revised Edition of Williston, *Law of Contracts* (1938), s. 816.

party's breach should sometimes provide a defence. The way he went about developing the law was by distinguishing between dependent promises, which became obligations only upon performance of a condition precedent, and independent promises which did not depend upon a prior or concurrent performance of obligation. Only in the case of a dependent obligation, on this analysis, could the other party's non-performance constitute a defence: a logical development of the idea of contract, but limited to giving a defence where the obligation sued upon could be said to be dependent. In *Kingston v. Preston*¹⁰ in 1774 he defined three kinds of covenants:

- independent—where breach by one party did not destroy his right to claim in respect of breach by the other party;
- dependent— (which he here called “conditions”) where liability to perform only arose when a prior obligation had been performed;
- and that variety of the second sort where performance by both sides is to be at the same time—this concurrent obligation is essentially, of course, “dependent.”

The facts of the case are worth noting because of the material similarity with the facts of *Boone v. Eyre*. The case concerned an agreement to transfer a business. The price was to remain owing after conveyance but security was to be provided. Not surprisingly, the obligation to convey the business was held conditional or dependent upon the provision of the agreed security. Unless the security was tendered, there was no obligation to convey. In a sale situation the analysis of terms into dependent and independent seemed felicitous, at least so far as the obligation to pay was concerned. But in *Boone v. Eyre* the court had to look at the other side of the transaction, the obligation to convey the property. The contract was for transfer of the equity of redemption of a plantation together with its slaves. The court held that the obligation to transfer the slaves was not a condition precedent of the obligation to pay—the buyer's covenant to pay was not here a dependent one, or at least not dependent on transfer of all the slaves. We will never know how the situations in the two cases were distinguished. Lord Mansfield maintained the distinction of the covenant which was dependent upon a condition precedent, but his language as reported was clumsy and provided the opportunity for the ensuing confusion:

“The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one

¹⁰ (1773) 2 Doug. 689. Lord Kenyon was not therefore inventing a new principle in *Goodisson v. Nunn* (1792) 4 T.R. 761, as Corbin says, *op. cit.*, s. 656.

negro not being the property of the plaintiff would bar the action."¹¹

Why then was the obligation to pay an independent one? There is no significance in the word "mutual" because it was used in the earlier case for covenants of the first and the third sort. There are two possible interpretations. First, that the nature of an obligation, whether dependent or independent, was to be decided as a matter of construction of the intention of the parties at the time of contracting, regardless of what happened thereafter. Secondly, that the nature of the breach as a matter of law could alter what at the outset was intended to be a condition precedent. The test laid down in *Kingston v. Preston* was that it is a matter of construction, and as such to be collected from the "evident sense and meaning of the parties." It is likely therefore that Lord Mansfield was doing no more than offering a guide to construction. Possibly he meant no more than a guide, less even than a presumption.¹² The second interpretation would create a unique situation for the period in which the court could over-ride the intent of the parties. Unfortunately, a hardening and amplification of the judgment took place. Lord Loughborough, in 1789, took Lord Mansfield's words in a strict and rigorous way: "where a covenant went to the whole of the consideration on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent . . . and for this plain and obvious reason, because the damage might be unequal."¹³ Part of the trouble lay in the ambiguous use of the word "consideration" but most of the deceptiveness of this formula lay in supposing that a clear distinction could be made between a covenant going to the whole and a covenant going to part only of the consideration. The facts of the case illustrate the problem. The contract was for the sale of an estate comprising land and standing timber. The vendor cut down some of the trees before conveyance. Although the court adopted Lord Mansfield's words,¹⁴ it is hard to see how it applied them. It held that the obligation of the purchaser to pay was dependent on delivery of the estate with the timber intact. But the timber was not the whole of the consideration. Of course the distinction between whole and part consideration confused the nature of the contract with the nature of the breach, and was too crude to provide a general solu-

¹¹ See note 7 above. The meaning was and is controversial and the most clear-headed comment is surely Corbin's: "The words . . . are probably the words of the reporter or commentator and not the words of Lord Mansfield. To say that 'mutual covenants go to the whole of the consideration on both sides' is to be very obscure; and to say that 'they are mutual conditions, the one precedent to the other' is worse. It is the promised performance, and not the promise, that may be a condition precedent to the duty of the other promisor; and in no case will performance by each party be a condition precedent to the other's duty, although tender of such performance may be." *Op. cit.* s. 659 note 26 and see s. 627 note 11. His analysis of the case however is unconvincing, s. 659.

¹² In the second *Boone v. Eyre* the approach was explicitly based on construction. Anson is illuminating on niceties of construction and of pleading, *op. cit.* pp. 284-285.

¹³ *Duke of St. Albans v. Shore* (1789) 1 H.Bl. 270 (C.P.).

¹⁴ And did not literally criticize them, as Treitel suggests, *op. cit.* 690.

tion to the problem in the law of contract when breach by one party should discharge the other. The innate confusion was elevated to principle by becoming enshrined in Serjeant William's historic and influential note to *Pordage v. Cole*,¹⁵ which appeared first in 1798. In that case, decided before *Boone v. Eyre*, the contract was again for the sale of land. The vendor sued for the price and it was argued that he had not pleaded that he had conveyed or tendered conveyance of the land to the purchaser-defendant. The plaintiff was held entitled to enforce his claim, because the obligation to pay was an independent promise, and the plaintiff did not have to plead his own performance. When he came to write his note, this approach as we have seen had become obsolete, and Serjeant Williams faced up boldly to the new problem of distinguishing between independent and dependent promises. He expressly admitted how difficult it was to find any principle. However, he tried—and in seeking principles he obscured the difference between finding the answer by construction and by seeing what happened in the circumstances of the breach. Lord Mansfield's words are not crystal clear on this, as we have seen, and the problem is a perennial one as the modern law testifies. However, even making these allowances it is odd that Williams's words should have had so much influence. Given that the "inequality of the damages" was the rationale of making the distinction in favour of the party not in breach, yet it was clearly unfair for the party in breach to lose all relief. Therefore Williams advised his readers to plead some part performance when claiming a payment. This would encourage the court to hold that any breach on their part went only to a part of the consideration, on the pleadings at least. Taking Lord Mansfield's words as applying to performance (*i.e.* what we have treated as the second interpretation) then the part performance *ex post facto* turned the condition precedent into an independent covenant and freed the party in breach from the invidious position of having lost all rights by virtue of the non-performance of a condition precedent. Notwithstanding the recurrence of this advice in succeeding editions and the reprint in *Smith's Leading Cases*,¹⁶ the only reported leading case apparently to fall into the trap thus laid was the decision in *Ellen v. Topp* in 1851.¹⁷ The judgment was read by Pollock C.B. for an imposing Court of Exchequer: Parke B., Alderson B., and Platt B. They fell for Williams's heresy that the construction of a contract could be changed by post-contract events hook, line and sinker. Although the opportunity was swiftly taken to put the matter right, the decision in *Ellen v. Topp* has been highly influential and the subsequent recantation went unnoticed. In 1911, when Lord Shaw of Dunfermline expressed the opinion of the case that it "in my judgment, is no part of English law," he should have been stating a truism, but as the Court of Appeal's judgments before him then showed his words still

¹⁵ (1669) 1 Wm. Saund. 3191.

¹⁶ This point is made by Williston, *op. cit.* s. 819.

¹⁷ (1851) 6 Exch. 424.

needed to be said.¹⁸ Even Pollock C.B. was bewildered by his own words at the time of uttering them: "It is remarkable that, according to this rule, [*i.e.* Williams's gloss] the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less." The contract in the case was a deed of apprenticeship. The master had ceased to carry on one of the three trades in which he had agreed to instruct the apprentice. Obviously, the idea of a condition precedent was ill-fitted to a situation like this involving a continuing obligation. Nevertheless the court held that the duty to carry on all three trades during the apprenticeship was a condition precedent to the duty to serve. So when the lad left before his term was up, the master could not sue: it could not be said that there was such part performance as transformed the condition precedent into an independent obligation. So although the *ex post facto* doctrine was here recognised it was not applied and Pollock C.B. himself recanted in *Graves v. Legg* in 1851¹⁹: the *ex post facto* doctrine was to be regarded simply as a form of waiver by act of parties, not as an independent rule of law. He said, "when [it appears that a condition precedent has been partly performed] it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all." The *acceptance* of a benefit by the innocent party could be treated as waiving the condition precedent so that he could not thereafter rely upon non-performance for arguing that his own obligation had never arisen. This too was the explanation offered for the *ex post facto* doctrine in *White v. Beeton* (1861).²⁰ The judgment of Bramwell B. gave the quietus to the heresy of Serjeant Williams, briefly received by *Ellen v. Topp*. Bramwell B. acknowledged that "a thing may at one time be a condition precedent and not at another" but, he emphasised, partial performance did not of itself work the change. He rejected in effect Williams's gloss on *Boone v. Eyre*. Only the acceptance of performance reduced a condition precedent to an independent term. Channell B. made the same point. Pollock C.B. in that case preferred to say that there never had been a condition precedent in the contract before the court, the details of which we need not examine.

Plainly some fairly substantial performance and acceptance of benefit would go far to establish waiver; conversely, a grave failure to perform the condition precedent would make it harder for the party

¹⁸ *Wallis, Son and Wells v. Pratt and Haynes* [1911] A.C. 394. Chalmers accepted *Ellen v. Topp* as good law, *The Sale of Goods* (1890), p. 95, as did, with embarrassment, Benjamin *On Sale*, 2nd ed. (1893), p. 452, and Anson *op. cit.* pp. 312-313, so does a recent writer, Professor D. W. Greig, 89 L.Q.R. 93, 100—and so does Corbin treating it as the legitimate birth of the doctrine of substantial performance as applied to non-entire obligations, *op. cit.* s. 660.

¹⁹ (1854) 9 Exch. 709. Smith's L.C. accepts that *Ellen v. Topp* must be treated as a case of waiver, 1929 ed., p. 14.

²⁰ Applied, in 1875, in *Carter v. Scargill* (1875) L.R. 1 Q.B. 568.

in breach to show waiver. That is all the courts had recognised prior to *Dakin v. Lee* as a doctrine of "substantial performance" so far as the condition precedent is concerned.

In other reported cases in the nineteenth century, the court was simply concerned to decide purely as a matter of construction whether the term broken was a condition precedent—if so, the other party's obligation simply did not arise.²¹

Finally, reference should be made to *Glazebrook v. Woodrow*.²² Treitel refers to the case as a source for his statement of the doctrine of substantial performance. In fact, it supports and illuminates what is said here as to the common law on conditions precedent. The case was decided in the King's Bench in 1799. It was an agreement under seal for the sale of a school. The purchaser having been put in possession, the vendor sued for the price. The purchaser's defence was that the vendor had failed to convey the land. Lord Kenyon held, without difficulty, that the covenant to convey and the covenant to pay were dependent. It was a matter of construction. Interestingly, his brother Grose J. foresaw the confusion which later arose from Lord Mansfield's words, saying: "The question is, whether these covenants be dependent or independent? And that must be collected from the apparent intention of the parties to the contract . . . How far the determination in *Boone v. Eyre* militates against the principles I have laid down, may be a matter of doubt; but the intention of the parties is, or is assumed to be, the governing principle of all the determinations." Lawrence J. actually rejected the suggestion that part performance of a condition precedent would found an action for the (dependent) payment of the price. His difficulty, of course, lay in distinguishing the contract in *Boone v. Eyre* which Lord Mansfield held to be composed of independent obligations, from the one before him, which though also a contract for the conveyance of an interest in land, was to his mind plainly composed of dependent ones. On the rule applicable to entire obligations he was clear and adamant: "nothing short of the whole" performance would sustain an action for the price.

Thus the question was settled by 1875, that a condition precedent ceased to be such, ceased that is to be a term of the contract which must be fully performed before the dependent obligation arose, only if the party not in breach had accepted the performance offered so as to waive the requirement of entire performance: "This doctrine is well and firmly established."²³ It was a doctrine of waiver. There was no other doctrine of "substantial performance" relaxing the requirement of entire performance of entire contracts.

²¹ e.g. *Ritchie v. Atkinson* (1808) 10 East 295, 308; *Tarrabochia v. Hickie* (1856) 1 H. & N. 183 (Ex.); *MacAndrew and Ors. v. Chapple and Anr.* (1866) L.R. 1 C.P. 643 and see *Jackson v. The Union Marine Insurance Co. Ltd.* (1874) L.R. 10 C.P. 125 (Ex.Ch.) at 143, 144.

²² (1799) 8 T.R. 366.

²³ Per Field J. in *Carter v. Scargill*, *supra*, note 20

“SUBSTANTIAL PERFORMANCE” WITH REGARD TO NON-ENTIRE
CONTRACTS

At the same time as the developments referred to above were taking place with regard to entire contracts, the courts were developing the concept of a breach of a non-entire contract such as to discharge the other party at his election. The two main doctrines related to a breach going to the root and a failure of consideration. The modern distinction between breach of warranty and breach of condition was only established in the later part of the nineteenth century, by being enshrined in the Sale of Goods Act 1893. Chalmers indeed in drafting that Act appears personally to have severed the Gordian knot of decades of confusion by his simple device of dividing contract terms into conditions and warranties. As it was put in 1873:

“The rules of law on the subject of conditions in contracts are very subtle and perplexing. Whether a promise made or an obligation assumed by one party to a contract is dependent on, or independent of, the promise made by the other; whether it be a condition to be performed before or concurrently with any demand on the other party for a compliance with his promise; or whether it may be neglected, at the peril indeed of a cross-action, but without affecting the right to sue the other party, are questions on which the decisions have been so numerous (and in many instances so contradictory), and the distinctions so refined, that no attempt can here be made to do more than enunciate a few general principles.”²⁴

To use “warranty” for an independent or collateral term of a contract was of course established in Lord Abinger’s famous judgment in *Chanter v. Hopkins* in 1838,²⁵ but to use condition as a general alternative to warranty was Chalmers’s device. The text of his pre-Act work *The Sale of Goods*, published in 1890, uses “condition” and “condition precedent” interchangeably with respect to contract in general, and only “condition” appears in the index (referring to both in the text) but none of the authorities he relied on anticipated the identification of condition and condition precedent in section 11 (1) (b).²⁶ This solution for the sale of goods has easily been treated as applying to contracts generally and has left us problems. Prior thereto, the common law courts (leaving sale of goods aside) were concerned to define the situation in a non-entire contract when breach by one party entitled the other to elect to treat the contract as at an end quite separately from the situation of breach of an entire obligation. A variety of statements were made describing what constituted

²⁴ Benjamin, *op. cit.* p. 448.

²⁵ (1838) 4 M. & W. 399. Though Anson was hesitant to use the word thus: *op. cit.* p. 298.

²⁶ See however at note 21, *supra*, for signs of the pressure in that direction. It is highly likely that to speak of condition precedent as condition was common in Chalmers’s time. It happened in *Behn v. Burness* (1863) 3 B. & S. 751 and though the case was, fairly clearly, concerned with the question of condition precedent Anson made it the basis of his definition of a “condition,” *op. cit.* p. 146, and possibly Chalmers adopted this interpretation.

the former breach, and they leave their mark on the modern law, which is, of course, still in a state of evolution on the point. One of the early phrases used was whether the breach deprived the other party "of the benefit of the contract into which he had entered."²⁷ By 1836, in the Common Pleas court at least, Willes J. was able to define three situations which were to be classed as such a breach:

1. breach which "goes to the whole root of the matter";
2. breach which "deprives the charterer of the benefit of the contract" (the facts before him like many of the cases on this point happen to concern charterparties, but the principles were not regarded as special to such contracts); or
3. breach which "entirely frustrates the object of the charter."²⁸

In addition, there grew up the doctrine of a total failure of consideration which has parallels with the above descriptions and also with the breach of a condition precedent, and was influenced too by *Boone v. Eyre*.²⁹ By the end of the century, there was the danger of a confusion of breach of condition precedent and breach of condition in the above senses. There was no separate doctrine of substantial performance as regards the latter—lack of such performance was merely one way of establishing what we today call a breach of condition. The similarity of the phrase "condition precedent" to Chalmers's coinage "condition," the similarity of the practical result of a breach of either a condition precedent or one depriving a party of the substantial benefit, and finally, the artificiality of construing a contract so as to identify a condition precedent,³⁰ all tended towards the conflation which have subsequently taken place. The result is that today logic and basic principles have been lost sight of—and the text-books, and, it will be submitted, some recent judgments are in a muddle: the result has not only been confusion and illogicality, but more seriously an extension of injustice. To sum up the pathology of the present state of affairs before examining its last stages:

(i) A doctrine of substantial performance of entire contracts is

²⁷ *Freeman v. Taylor* (1831) 8 Bing. 124. The phrase was adopted in Lord Diplock's judgment in the *Hong Kong Fir Shipping* case [1962] 2 Q.B. 26, the wheel having turned full circle—see per Lord Denning in *U.D.T. (Commercial) Ltd. v. Eagle Aviation Ltd.* [1968] 1 W.L.R. 74, 80 and per Devlin J. in *Universal Cargo Carriers Corporation v. Citati* [1957] 2 Q.B. 401.

²⁸ *MacAndrew and Ors. v. Chapple and Anr.*, see note 21, *supra*. Willes J. derived the rule from *Boone v. Eyre*. On this view, the doctrine as to condition precedent and that as to breach going to the root of the contract (as well as the concept of total failure of consideration—see *infra*, note 30) can be traced to the one source though developing independently. See too Corbin, s. 946, note 5.

²⁹ See Anson, *op. cit.* p. 304; Glanville Williams, *op. cit.* p. 490 and Benjamin, *op. cit.* pp. 331–333.

³⁰ *e.g.* in *Bettini v. Gye* (1876) 1 Q.B.D. 183 Blackburn J. treated the importance of the breach as a retroactive guide to the intention of the parties in creating a condition precedent which was the crucial question. Cheshire and Fifoot, *op. cit.* p. 119, confusingly give this case as an example of a breach of a term not amounting to a "condition" (contrasting it with *Poussard v. Spiers and Pond* (1876) 1 Q.B.D. 410, as a case of breach of "condition"—when in fact, there was, there, no breach at all. Anson seems to have anticipated their approach, *op. cit.* p. 298.)

recognised contrary to authority and principle, quite apart from waiver.

- (ii) A doctrine of substantial performance of non-entire contracts is also spoken of.
- (iii) Failure to distinguish the two sorts of contract has resulted in the vaguely conceived "lump sum" contract being treated *ipso facto* as entire.
- (iv) The exclusion of *quantum meruit* relief from entire contracts, itself doubtful in principle, has been applied to lump sum contracts.

THE CONFLATIONS

The potential muddle between breach of condition and breach of condition precedent which has now come about is part of a long process which was apparent as early as 1810, in the words of Lord Ellenborough in *Davidson v. Gwynne*.³¹ He then said "unless the nonperformance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent." The language of breach going to the root was confused with breach of condition precedent as well as the ground being laid for the *ex post facto* doctrine which we have examined. Yet exactly what constitutes such a breach of a condition precedent so that the condition precedent is not performed has never become settled.³² Logically the answer is such performance as on construction the parties must be taken to have intended as constituting such breach. But by 1872 the substance of the merits of the matter began to triumph over any feeling for the logic of it. In that year, the court of Exchequer for the first time attempted to dispose of the condition precedent completely and in effect to dispose of *Boone v. Eyre* as a guide to construction:

"Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words 'condition precedent' unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract. And it seems to me that here, under the circumstances alleged, and having reference to the nature of the charterparty, the defendant was entitled to declare the contract at an end. . . . No cross-action for damages would have fully compensated him, and that being so, he was justified in his refusal to work any longer under the charterparty."³³

³¹ (1810) 12 East. 381, 389.

³² See *per* Somervell L.J. in *Hoentig v. Isaacs*, note 9, *supra*. Professor Williams, *op. cit.* p. 385, Corbin, *op. cit.* s. 1254 (but see s. 653) and Smith's L.C., 1929 ed., p. 16, think that mere "substantial performance" is not a breach of an *express* condition precedent—without authority or argument. However, the two last-named works conflate condition and condition precedent.

³³ *Bradford v. Williams* (1872) L.R. 7 Ex. 259 *per* Martin B. The confusion of condition and condition precedent was made by Judge Cardozo in *Jacob & Youngs v. Kent* (1921) 129 N.E. 889 quoted by Corbin, *op. cit.* s. 704, note 11.

Regardless of the nature of the breach, in a jurisprudential sense, the question to be resolved was simply whether damages constituted an adequate remedy—if they did not, the contract should be treated as at an end, discharged by the breach. At this point, it may be worth stressing that there is of course this similarity between a breach of condition in the modern law and breach of condition precedent—both put an end to further obligations by the innocent party. The essential difference is discharge takes place generally only if the “innocent” party so elects in the case of a breach of condition.³⁴ There is no rescission (*i.e.* ending of further obligation to perform the contract) possible or necessary by reason of breach of a condition precedent. A breach of condition furthermore may be created by the context of the breach if the term broken was not identified as a condition or warranty by the parties.³⁵ As we have seen, a condition precedent could only be created by intention of the parties and only a temporary heresy ever suggested that subsequent events could destroy one except by a waiver. These important differences were implicitly obliterated by the next stage in the story, the judgments delivered in *Dakin v. Lee* in 1915.

DAKIN v. LEE

The case was an appeal from a referee concerning disputed repairs to a house in Wandsworth. The customer complained about the work in defence to an action for the price. The Divisional Court held that there were only three situations with respect to a building or repairing contract which completely discharge the customer from paying anything:

- (i) where he receives no benefit (though the court did not look at basic principles explicitly this must be correct: if the contract is entire no obligation to pay has arisen, if it is non-entire there will almost certainly have been a breach of condition entitling the customer to elect to treat the contract as discharged. No *quantum meruit* can lie for work done under an entire contract,³⁶ and even if one were available in respect of a non-entire contract, there would be no benefit to be compensated for.)
- (ii) where the work done is entirely different from that contracted for (again, by way of comment, on general principles work need only be paid for if it is referable to contract, here it would be outside any contract).
- (iii) where the builder deliberately abandons the job before completion (this would constitute non-performance of a condition

³⁴ See *per Coleridge J.* in *Franklin v. Miller* (1836) 4 Ad. & E. 599. The origin may be buried in the rules of *indebitatus assumpsit*, see Anson, *op. cit.* p. 285.

³⁵ See *Hong Kong Fir Shipping, supra*, note 27.

³⁶ *Cutter v. Powell, supra*, note 3. Professor Williams's selection of *Vigers v. Cook* (*infra* note 47) as an example of “No benefit” is not only mistaken but, with respect, misses the point, *op. cit.* p. 387.

precedent, so no obligation to pay would arise; if the contract were non-entire, it would possibly but not necessarily constitute a breach of condition so that the customer could elect to treat the contract as discharged. Apart from these considerations, this suggestion, made perhaps *obiter*, was doubtful).

The Divisional Court and on appeal the Court of Appeal, which adopted the former's reasoning, did not discuss general principles of the law of contract. It is significant that Sankey J. gave as authorities for the third and wholly dubious discharge situation *Cutter v. Powell* and *Sumpter v. Hedges*, both of them cases of entire contracts where the condition precedent was not performed! Of this ground of abandonment, Lord Cozens-Hardy M.R. said of it cautiously that it "prevents the builder . . . from making any claim, unless there be some other circumstances leading to a different conclusion." He at least thus left it open to be argued for example that *quantum meruit* should lie if the circumstances justified such a claim. Pickford L.J. stated that the reasoning did not "interfere with any of the lump sum cases." He recognised that bad performance did not necessarily constitute failure to perform a condition precedent. The Court of Appeal seem to have taken for granted that the contract was entire, and performance so long as it was not vitiated by omission to perform a contract stipulation satisfied the condition precedent, and the customer had to pay the price less a deduction for negligent workmanship. The distinction between omission and negligent workmanship is of course highly artificial. The question we have already suggested should be—has the performance satisfied what was intended by the parties as giving rise to the obligation to pay, if such was the intention of the parties: if there was no such intention the question is merely has there been a breach of condition, *i.e.* a breach depriving the other party of the benefit of the contract which he has elected to accept as discharging the contract. The principal damage done by the case however was the failure clearly to distinguish entire contracts, in which performance was a condition precedent of the obligation to pay, and non-entire contracts. It treated building and repairing contracts as something special. The case is defensible on authority and in principle if it is taken as an example of an entire contract in which on construction there was fulfilment of the condition precedent term by performance, but there was a breach of another term of the contract, remediable by damages. Of course, there is nothing to prevent parties making any form of performance a condition precedent to payment—it has always been treated as a matter of construction, save for the interlude provoked by Serjeant Williams's note. The danger created by the case of *Dakin v. Lee* in the treatment of building and repairing or lump sum contracts as constituting a special category in the law of contract could fairly easily have been overcome. They were overcome by Lord Denning in *Hoening v. Isaacs*, in 1952, but not, it is respectfully submitted, by Somervell and Romer L.JJ.

HOENIG v. ISAACS³⁷

The contract concerned work of construction and decoration to a flat for an agreed sum. Lord Denning held: "It was a lump sum contract, but it does not mean that entire performance was a condition precedent to payment"—thus avoiding the fallacy that a lump sum contract is necessarily an entire contract. He treated the contract as non-entire on construction. As such, there was no breach of condition because it was "substantially performed." Alternatively if there were a condition precedent it had been waived. This immaculate analysis did not, unhappily, prevail. Somervell L.J. held that "each case turns on the construction of the contract" but at one point applies *Dakin v. Lee* as if he were dealing with an entire contract, at another applies the analogy of a buyer of goods who "by accepting them elects to treat a breach of condition as a breach of warranty." The confusion between condition and condition precedent was complete when his lordship said: "*Quoad* stipulations which are conditions, the *Cutter v. Powell* principle is applicable." Though inelegant, this judgment could of course be understood in exactly the same sense as Lord Denning's more felicitous formulation. Romer L.J. treated "lump sum" contract as meaning "entire" and went further. He contemplated the situation where so little of the work contracted for had been done that the customer should not have to pay anything, saying: ". . . for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay £x for it, it would not be right that he should be held liable for any part of the contract price if the contractor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden [*i.e.* roughly following the three "discharge situations" in *Dakin v. Lee*]. The work contracted for has not been done and *the corresponding obligation to pay subsequently never arises* [our italics]. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in his judgment, far more equitable to apply *Dakin v. Lee* than to deprive him of his contract rights and relegate him to such remedy (if any) as he may have on a *quantum meruit*." This reasoning interpreted the three discharge situations in *Dakin v. Lee* not as a mixture of principles about entire and non-entire contracts but as about entire contracts and entailing a general rule that substantial performance of a condition precedent constitutes fulfilment of the condition precedent. Further, Romer L.J. could seem to be laying down this further rule for *lump sum* contracts, *i.e.* that nothing short of substantial performance would entitle the contractor to claim any part of the contract price (though leaving open the question as to a *quantum meruit* award). Strictly read, his words do

³⁷ [1952] 2 All E.R. 176.

not necessarily bear that interpretation though it was apparently given to them in the next case to be discussed. The statement that to apply *Dakin v. Lee* in this adapted sense *i.e.* applied to lump sum contracts as entire contracts, offered a more equitable solution than allowing *quantum meruit* was misleading—*quantum meruit* was simply not legally available if the contract was entire, a rule to which the judgment did not refer.³⁸ For non-entire contracts, though, the contractor could surely only be deprived of his contract price (less set-off) if he was in breach of condition and the other party elected to end the contract, or the breach frustrated the contract.³⁹

BOLTON v. MAHADEVA

The latest step, taken in 1972, is quite unequivocally to treat a lump sum contract as a special category, and to require substantial performance before the contractor has any remedy whatsoever—giving him the position under an entire contract, in effect, even if the contract was in intention non-entire, subject only to a doctrine of substantial performance. The case was a claim in respect of work and materials under a contract for plumbing and central heating installation. The test of a breach depriving the contractor of his price according to Cairns L.J. “is whether the defects . . . were of such a character and amount that the plaintiff could not be said to have substantially performed his contract.” He treated *Cutter v. Powell* as laying down a general rule for lump sum contracts, although the court in that case, of course, expressly emphasised that it was the large amount of the sum which concluded the point of construction, not the fact that it was a lump sum. He then found that there was no substantial performance and accordingly the contractor (who had received judgment for over £400 in the County Court below) was adjudged entitled to not one penny for his work or materials. Buckley L.J. agreed, and so did Sachs L.J. adopting a passage from Cheshire and Fifoot’s textbook and expanding it:

“ . . . the present rule is that so long as there is a substantial performance the contractor is entitled to the stipulated price, subject only to a cross-action or counter-claim for the omission or defects in execution; and to ‘cross-action or counterclaim,’ I would of course add ‘set-off.’ The converse, however, is equally correct—if there is not a substantial performance, the contractor cannot recover.”⁴⁰

³⁸ See note 46, *infra*.

³⁹ *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 (C.A.) and see *per* Devlin J. in the *Citati* case, note 27, *supra*.

⁴⁰ Now in 8th ed. at p. 524, actually a quotation from Smith’s L.C., 13th ed., p. 19. On the suggestion in the case that the contractor in breach should have an opportunity to make good if he wishes, see Lord Devlin, “The Treatment of Breach of Contract” [1966] C.L.J. 192, 194. Presumably an aleatory condition precedent cannot be waived by either party alone any more than a promissory condition can be waived by the promisor—the best key to a situation like that in *Heron Garage Properties v. Moss* [1974] 1 W.L.R. 148.

Thus, the judgment of Romer L.J. in *Hoenig v. Isaacs* became built upon so that the law is now to be stated:

- (i) lump sum contracts are entire contracts;
- (ii) substantial performance of a condition precedent amounts to entire performance;
- (iii) a contractor under a lump sum contract who has less than substantially performed the contract obtains no relief whatsoever.

CONCLUSION

It is submitted that this statement of law goes counter to long-established principles of the law of contract, introduces illogicality and adds to injustice. If it is accepted that the basis of contract has "the great object"⁴¹ of fulfilling the intention of the parties, so far as the public interest permits at least and so far that oppression and unfairness are not enforced by law, there can be no objection to enforcing a provision agreed by the parties that the obligation to pay shall only arise in defined circumstances of complete performance. If the parties have clearly agreed to such a term it is inconceivable that the court can act consistently with the great object without enforcing it. The role of the court should not be to define substantial performance but what performance in the intention of the parties was to constitute compliance with the condition precedent, if a condition precedent was in fact intended by them. It has been argued that to treat the matter as one of construction is to invite fictions,⁴² but this solution does avoid robbing the phrase condition precedent of its plain meaning, subject to well established approaches of construction which make the court unready to find that such a term was intended,⁴³ which should be supplemented by the use of quasi-contract to give such relief to the party in breach as is reasonable⁴⁴—unless it was also the intention of the parties that he should receive no relief in the events which have occurred, unless on equitable principles (like those applied to penalties) relief should nevertheless be granted. The law ideally should be stated in accordance with logic and fairness thus:

(A) Where A and B are parties to a contract, breach of obligation by party A discharges party B from performance of his contract obligations:

- (1) if A's broken obligation was a condition precedent (by the intention of the parties on construction) of B's

⁴¹ *Per* Lord Blackburn, *Taylor v. Caldwell* (1863) 3 B. & S. 826.

⁴² Williston, *op. cit.*, s. 828.

⁴³ *Per* Lord Denning in *Hoenig v. Isaacs* and note the approach to construction in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 (H.L.).

⁴⁴ Cogently argued for by Professor Williams, *op. cit.*, pp. 392-398, over 30 years ago. Some U.S. jurisdictions apparently have been progressive in this direction, see Corbin, *op. cit.*, s. 1125. There is greater reluctance here: *Warman v. Southern Countries Car Finance Co.* [1949] 2 K.B. 576. Relief for the party in breach is a neglected topic.

obligations and B does not waive the breach.⁴⁵ [This will be rare and only when clearly intended by the parties]; or

- (2) if A's broken obligation was of a fundamental term or condition of the contract [on construction] and B positively elects to treat the contract as discharged (or the breach frustrates the contract); or
- (3) if neither (1) nor (2) applies, but in the circumstances of A's breach B has been deprived of the substantial benefit of the contract and B positively elects to treat the contract as discharged (or the breach frustrates the contract).

- (B) In any event, A can recover a reasonable sum (if any sum is reasonable) for part performance of obligation prior to a breach of contract by him, unless (on construction and subject to equitable relief) the intention of the parties was that he should not be able to do so. [This would require express provision in the contract or special circumstances in the context of contracting requiring this construction of the intention of the parties.]⁴⁶

Clarity breeds clarity: with this reform by a strong minded Court of Appeal (going back to the genuine report of *Sumpter v. Hedges*) or by the House of Lords, the confusion between condition and condition precedent, and between lump sum and entire contracts can be ended.

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⁴⁵ Unless it was B's fault that the condition precedent was not performed, or the parties have entered into a fresh contract, *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

⁴⁶ As in *Cutter v. Powell* and arguably in *Vigers v. Cook* [1919] 2 K.B. 475.

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