1921

Forfeiture for Breach of Contract

Henry W. Ballantine

MINNESOTA
LAW REVIEW

VOL. V APRIL, 1921 No. 5

FORFEITURE FOR BREACH OF CONTRACT

BY HENRY W. BALLANTINE*

I. IMPLIED CONDITIONS; EFFECT OF BREACH AFTER PART PERFORMANCE.

AS Professor Williston points out,[1] few questions in the law are more difficult to solve than that concerning the right of one who has broken his contract to recover for such benefits as he may have conferred by part performance. No solution can be entirely satisfactory because two guiding principles of legal policy pull in different ways. On the one hand to allow a party to stop performance when he pleases and sell his part performance at a value fixed by the jury countenances unfaithfulness and may be regarded in effect as imposing a new contract on the defendant. On the other hand to deny the party in default any recovery will often give the defendant far more than fair compensation for the non-completion of the contract and impose on the plaintiff an unjust forfeiture.

It is the general American rule that a material breach of contract by the plaintiff will excuse the defendant from the duty of going forward with the executory portions of a contract. Should it also excuse the defendant from the duty of paying for the benefits received by part performance? If strict or complete performance is an *express condition* precedent to a party's right to the counter performance, he will generally be left entirely without remedy, contractual or quasi contractual. The same result is often supposed to follow from breach of an *implied condition,* though

* Professor of Law, University of Minnesota.

[1] 3 Williston, Contracts, Sec. 1473.

the other party may receive value from what he has done far greater than the damages caused by the breach. It is the purpose of this paper to discuss the question of the loss of the benefits of part performance, first as resulting from breach of implied conditions, and second, as resulting from express conditions.

In many jurisdictions the rigid rule has been announced, founded on the policy of securing the faithful performance of contracts, that no recovery whatever will be allowed to a party in serious default under an entire contract.[2] The mere fact that partial performance is beneficial to the other party is not ordinarily enough to raise an obligation to pay for it.[3] To allow recovery for partial performance, the circumstances must be such that a new contract may be implied. The right to recover depends on defendant's election to accept with knowledge of the default. Where there is no evidence of acceptance of partial performance such as to show a waiver of conditions or a new promise, the plaintiff who has failed in full and substantial performance of an entire contract cannot recover anything either on the contract itself or in quantum meruit.[4]

In the case of building contracts where the contractor has expended labor and material upon the land of another which cannot be returned to him, but which must necessarily be retained by the owner of the land, the rule is generally adopted that the owner must pay for substantial performance, and in some jurisdictions for partial performance, after full allowance for defects.[5] The doctrine of substantial performance has been stated to apply where a builder has in good faith substantially performed, but there are minor defects which may be so remedied that the owner will have in substance that for which he contracted. The builder may recover on the contract the agreed price less such deduction

---

[2] Smith v. Brady, (1858) 17 N. Y. 173, 72 Am. Dec. 442; 2 Williston, Sec. 841, 1475.

[3] Elliott v. Caldwell, (1890) 43 Minn. 357, 45 N. W. 845; Johnson v. Fehsefeldt, (1908) 106 Minn. 202, 118 N. W. 797; Hoglund v. Sortedahl, (1907) 101 Minn. 359, 112 N. W. 408; Anderson v. Pringle, (1900) 79 Minn. 433, 82 N. W. 682; Uldrickson v. Samdahl, (1904) 92 Minn. 297, 100 N. W. 5.

[4] Sumpter v. Hedges, L. R., [1898] 1 Q. B. 673, (Builder abandoned a lump sum contract); Taulbee v. McCarty, (1911) 144 Ky. 199, 137 S. W. 1045, 36 L. R. A. (N.S.) 143, Ann. Cas. 1913 A 456. See also Bentley v. Edwards, (1914) 125 Minn. 179; 146 N. W. 347, 51 L. R. A. (N.S.) 254; Ptacek v. Pisa, (1907) 231 Ill. 522, 83 N. E. 221; 6 R. C. L. 972, 973; Morrison, Rescission of Contracts, 107. Decennial Dig. secs. 297, 319, 320.

[5] Leeds v. Little, (1890) 42 Minn. 414, 418, 44 N. W. 309.

as will suffice to cure the defects.[6] In building and construction contracts very often slight omissions or defects may occur, notwithstanding the most honest, diligent, and competent effort to perform in every respect in accordance with the contract. Literal compliance in every detail cannot be required in practical affairs. Substantial performance is sufficient if it accomplishes all the purposes of the thing contracted for, so that an allowance out of the contract price will give full indemnity to the owner. This relief is given in view of the fact that the owner cannot restore the contractor to his former position, and the contractor would otherwise suffer great loss to the enrichment of the owner. According to the better view, the remedy is allowed on the express contract. According to other courts, the remedy is on quantum meruit even if performance is substantial.[7]

The doctrine of substantial performance, however, does not apply where omissions or departures from the contract are intentional, or so serious as not to be capable of remedy or of compensation by allowance from the contract price. The mere fact that partial performance is beneficial to a party is not enough to raise an obligation to pay for it, at least where he has no option to reject or return it.[8] The policy of securing full performance of contracts and of discouraging parties from abandoning their engagements or performing them as their interest or caprice may dictate, is felt to forbid a more liberal measure of relief. The severity of the rule as to entire contracts is relaxed only in cases of oversight, inadvertence, or excusable mistake, easily susceptible of remedy.

It is said that the purpose of the doctrine of substantial performance is to secure substantial justice between man and man by relaxing, in proper cases, the rigid and in practice, sometimes harsh rule of the common law as to the entirety of contracts.[9]. But the courts cannot extend it to enable parties to contracts to abandon them and recover on a quantum meruit whenever they may find it for their interest to do so.

It is sometimes assumed that the "original rule (of the common law) requires proof of exact and literal performance of all

[6] Snider v. Peters Home Bldg. Co., (1918) 139 Minn. 413, 167 N. W. 108.

[7] Foeller v. Heintz, (1908) 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N.S.) 327 n.

[8] Uldrickson v. Samdahl, (1904) 92 Minn. 297, 100 N. W. 5; Elliott v. Caldwell, (1890) 43 Minn. 357, 45 N. W. 845.

[9] Anderson v. Pringle, (1900) 79 Minn. 433, 435, 82 N. W. 682.

the terms and conditions of a contract as a condition precedent to the right of recovery by the contractor."[10] It is supposed that this "original rule" has been "relaxed" out of the "charity of the law" by the doctrine of substantial performance. But this is an error. The doctrine of substantial performance dates back at least to Lord Mansfield's judgment in *Boone v. Eyre* in 1777, and obtained in England for many years, although later the English courts held strict performance necessary and treated implied conditions in bilateral contracts like express conditions. They have now gone back to the doctrine of substantial performance. As Professor A. L. Corbin has pointed out:[11]

"If the defendant has not stipulated that performance by plaintiff shall be a condition precedent to his own active duty, but has merely caused the plaintiff to make a promise and thus undertake a duty on his own part, then the court need not require any performance at all by the plaintiff as a condition precedent to the defendant's duty, and if it requires any performance at all as a condition it is fair and just to require only substantial performance as such condition."

As Mitchell, J. said:[12]

"Substantial, and not exact performance, accompanied by entire good faith, is all that the law requires in the case of any contract to enable a party to recover on it."

This is particularly the case with reference to right to recover where the defective performance has been accepted, as contrasted with the right to continue with a contract and demand an acceptance of defective performance.[13] A buyer, for example, need not accept a larger or smaller quantity than that bargained for, nor need he accept goods of a different kind or of an inferior quality.[14] But one cannot "while he retains the benefits of a substantial performance, totally defeat an action for the price he has agreed to pay, or for specific performance of the contract on his part, on the ground that the plaintiff has not completed the performance required of him by the contract. He cannot at the same time affirm the contract by retaining its benefits and rescind

[10] Hoglund v. Sortedahl, (1907) 101 Minn. 359, 112 N. W. 408; 6 R. C. L. 966; 5 Page, Contracts, Sec. 2778.

[11] Conditions in the Law of Contracts, 28 Yale L. Jour. 739, 759. See Morrison, Rescission of Contracts, 115.

[12] Peterson v. Mayer, (1891) 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Brown v. Hall, (1913) 121 Minn. 61, 65, 140 N. W. 128.

[13] Compare Boone v. Eyre, (1777) 1 Henry Bl. 273 n. with Ellen v. Topp, (1851) 6 Exch. 424, Graves v. Legg, (1854) 9 Exch. 709, and Glazebrook v. Woodrow, (1799) 8 Term. Rep. 366.

[14] 5 Minn. Law Rev. 216; 2 Williston, Contracts, Secs. 844, 1009.

it by repudiating its burdens."[15] This rule applies to contracts of all kinds, to contracts for building and construction, for the sale of real estate, and for the manufacture and sale of goods.

Many cases of part performance, however, cannot be brought within the doctrine of substantial performance even if it is liberally applied.[16] An unjust forfeiture will often result from denying all recovery to a plaintiff even if he is materially in default. The weight of authority now allows a builder whose breach of contract is not willful, to recover the value of his work less the damages caused by his default.[17] The recovery is allowed not on the contract but in quasi contract, on the ground that it is not fair that the defendant should profit at the plaintiff's expense.

A few jurisdictions, including Minnesota, however, deny partial recovery where the builder has not substantially performed.[18] A failure of performance in any material or substantial respect will defeat any recovery on quantum meruit for the value of what has been done in partial performance.[19]

In case of willful abandonment or culpable departure from duty by the plaintiff, the fear of putting a premium upon deliberate breach of contract or giving it any indulgence, has led many courts to hold that sound public policy requires a forfeiture, a denial of all right of recovery in any form whatever.[20] A rule which would enable a party to abandon his contract and lose nothing thereby would have a tendency to encourage bad faith and lessen the binding force of contracts.[21] But can it be

[15] German Sav. Inst. v. De La Vergne R. M. Co., (1895) 70 Fed. 146; Rosenthal P. Co. v. National, etc., Co., (1919) 226 N. Y. 313, 123 N. E. 761; Kauffman v Raeder, (1901) 108 Fed. 171, 54 L. R. A. 247, 242; 5 Page, Contracts, Secs. 2785, 2786, 2788.

[16] 3 Williston, Contracts, Sec. 1475; Bentley v. Edwards, (1914) 125 Minn. 179, 146 N. W. 347, 51 L. R. A. (N.S.) 254.

[17] Dermott v. Jones, (1859) 23 How. (U.S.) 220, 16 L. Ed. 442; Pinches v. Swedish Church, (1887) 55 Conn. 183, 10 Atl. 264; Woodford v. Kelly, (1904) 18 S. Dak. 615, 101 N. W. 1069; Hayward v. Leonard, (1828) 7 Pick. (Mass.) 181, 19 Am. Dec. 68; Dakin v. Lee, [1916] 1 K. B. 566.

[18] Uldrickson v. Samdahl, (1904) 92 Minn. 297, 100 N. W. 5; see also, Johnson v. Fehsefeldt, (1908) 106 Minn. 202, 118 N. W. 797.

[19] Elliott v. Caldwell, (1890) 43 Minn. 357, 45 N. W. 845; Waite v. Shoemaker & Co., (1915) 50 Mont. 264, 146 Pac. 736; Riddell v. Peck-Williamson Co., (1902) 27 Mont. 44, 66 Pac. 241; Steel Storage Co. v. Stock, (1919) 225 N. Y. 173, 121 N. E. 786; C. B. Morrison, Rescission of Contracts, 121.

[20] Woodward, Quasi Contracts, Sec. 166.

[21] 6 R. C. L. 974; Elliott v. Caldwell, (1890) 43 Minn. 357, 45 N. W. 845.

laid down without qualification that any willful breach on plaintiff's part should prevent any recovery by him even for substantial performance? Such a rule seems altogether too severe. The law should consider the degree of moral delinquency, the extent of non-performance, and the ratio of damages to benefits received.[22] It should establish a rule "which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong."[23]

Some courts hold that even a party who willfully breaks a contract of employment may recover for the value of work done in excess of the damages caused by the breach. The leading authority on this point is the much mooted case of *Britton v. Turner*.[24] It was there held that one who voluntarily abandons a contract of employment after large part performance, may recover to the extent of benefits conferred on the employer, after deducting the damages resulting from his breach. But in Minnesota and a majority of the American jurisdictions, it is held that the employee can recover nothing for part performance of an entire contract in case of willful abandonment or discharge for good cause.[25] To punish a willful breach, exemplary damages might be allowed in the discretion of the court or jury. But to compel an arbitrary, mechanical, automatic forfeiture of all pay where the defendant has received and keeps the benefit of valuable services, especially where the contract is nearly completed, is crudely severe, like capital punishment for all felonies. There is no relation between the damage done to the defendant by the breach and the amount given to the employer by way of forfeiture. The longer the plaintiff serves, the more he is punished. Would it not be sufficient to prescribe attorneys' fees or a discretionary penalty? Even willful wrong-doing is not to be punished arbitrarily without regard to the degree of culpability or the loss or injury inflicted.[26]

---

[22] See Corbin, Conditions in the Law of Contracts, 28 Yale L. Jour. 739, 761.

[23] Cardozo, J., in Helgar Corp. v. Warner's Features, Inc., (1918) 222 N. Y. 449, 451, 119 N. E. 113.

[24] (1834) 6 N. H. 481, 26 Am. Dec. 713; 6 R. C. L. 975.

[25] Nelichka v. Esterley, (1882) 29 Minn. 145, 15 N. W. 668; Peterson v. Mayer (1891) 46 Minn. 468, 49 N. W. 245; Von Heyne v. Tompkins, (1903) 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N.S.) 524; Johnson v. Fehsefeldt, (1908) 106 Minn. 202, 118 N. W. 797; Sipley v. Stickney, (1906) 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N.S.) 469; 3 Williston, Contracts, Sec. 1477.

[26] 2 Williston, Contracts, Sec. 842; Ashley, 24 Yale Law Jour. 544.

A tendency may be noted in the more recent decisions to allow a servant discharged for cause to recover on quantum meruit for the value of the part performance, subject to an offset for damages caused by his misconduct. An employee may give good cause for discharge, for want of skill or strength, while honestly endeavoring to fulfill his contract. Consequently, recovery has been sometimes allowed to a discharged employee where it would be denied to one guilty of willful abandonment.[27] A dishonest servant who has stolen his employer's money may be promptly discharged and he will forfeit all rights to compensation for services during the period in which the dishonesty occurred. But if the employer keeps the plaintiff in his service after notice of his misconduct, he waives all right to forfeit his wages.[28]

Contracts for the sale of goods seem to afford an exception to the general rule that a quasi contractual claim will not be raised in favor of one who has willfully broken his contract. If the seller delivers to the buyer a less quantity of goods than he contracted to sell, he may recover, by the weight of authority, the reasonable value of the part delivered less the damages occasioned by his default in making complete performance.[29] The recovery is not allowed upon the express contract but upon quantum valebat,[30] to obviate the injustice of allowing the buyer to retain the benefit of the goods without paying for them.[31] Under the Uniform Sales Act,[32] if the buyer retains the goods delivered knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer will not be liable for more than the fair value to him of the goods so received.

A person may in part performance of a contract have given the other party land, goods, labor and materials, money or

[27] Hildebrand v. American Fine Arts Co., (1901) 109 Wis. 171, 85 N. W. 268.

[28] Person v. McCargar, (1904) 92 Minn. 294, 99 N. W. 885.

[29] Saunders v. Short, (1898) 86 Fed. 225, 30 C .C. A. 462; Mead v. Rat Portage Lumber Co., (1904) 93 Minn. 343, 101 N. W. 299.

[30] McCurry v. Purgason, (1915) 170 N. C. 463, 87 S. E. 244; Ann. Cas. 1918 A 907.

[31] Oxendale v. Wetherell, (1829) 2 Barn & C. 386, 109 Eng. Rep. 143; United States v. Molloy, (1906) 144 Fed. 321, 11 L. R. A. (N.S.) 487; 2 Am. L. Rep. 643, 663, 675 n.; Thurston, Cases on Quasi Contracts, 387, 390 n.

[32] Sec. 44.

services. Why should the rights of one in default be different as to one kind of part performance than another? Why should a seller who has willfully broken his contract, be allowed to recover the reasonable value of the portion of the goods delivered, while other persons who have broken a contract cannot sue for benefits conferred by them? Which is the correct rule? Some consistent principle should be adopted and followed.

It is generally held where a purchaser of land or goods enters upon the performance of his contract to purchase and makes default after paying part of the price, that he cannot recover the money so paid.[33] Thus in *Sanders v. Brock*,[34] is was held that the vendor of land was not liable to a defaulting purchaser to restore to him two thousand dollars paid as part of the purchase money, even though the vendor had resold the property for a price largely in excess of the sum agreed to be paid by the plaintiff and was not damaged by his default. In this case, however, the plaintiff had declined to complete his contract. If the purchaser had reconsidered his refusal and tendered payment to the vendor before resale, he might possibly have put him to his election to perform the contract or return the payments received.

The right to recover so much of the payments made as exceeds the damages suffered by the other party has been allowed in some cases.[35] Thus in *Michigan Yacht & Power Co. v. Busch*[36] it was held that a plaintiff may recover to the extent that he has benefitted the defendant by part performance of the contract which he has failed to carry out, his recovery being subject to recoupment of damages sustained by the defendant. As *Lurton*, J, says:[37]

"In justice defendants have no right to more of the money than will compensate them for loss by reason of plaintiff's refusal to carry out the contract."

But recovery would be denied in most jurisdictions, probably without regard to the reason why plaintiff made default, whether it was willful or through misfortune.[38]

---

[33] McManus v. Blackmarr, (1891) 47 Minn. 331, 50 N. W. 230.
[34] (1911) 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N.S.) 532.
[35] 3 Williston, Contracts, Sec. 1476.
[36] (1906) 143 Fed. 929.
[37] See also Cherry Valley Iron Co. v. Florence, etc., Co., (1894) 64 Fed. 569, 574, 12 C. C. A. 306; McDonough v. Evans M. Co., (1902) 112 Fed. 634, 637; 50 C. C. A. 403; Clark v. Moore, (1853) 3 Mich. 55, 58, 281; Wilson v. Wagar, (1873) 26 Mich. 452; Sabas v. Gregory, (1916) 91 Conn. 26, 98 Atl. 293; Hayes v. Jordan, (1890) 85 Ga. 741, 9 L. R. A. 378.
[38] 3 Williston, Contracts, Sec. 1476.

It is the general rule, as we have seen, in the case of an *entire* contract, that if one party stops without excuse before full performance, he cannot recover anything for the value of the services actually rendered.[39] If, on the other hand, the contract is *"divisible"* or *"severable,"* the court can allow recovery for the rateable portion of the work done or performance rendered less damages for the breach.[40] Thus, if the contract can be construed as divisible, exact justice may be achieved. The plaintiff will be paid for what he has done and the defendant can deduct damages for defects in the performance. As Mitchell, J., says in *McGrath v. Cannon*:[41]

"In view of the harshness of the rule which prevents one who has failed fully to perform his contract from recovering anything for past performance, the benefits of which the defendant has received, the courts are inclined, whenever they consistently can, to construe a contract as severable rather than entire. . . . This works out substantial justice and permits the one party to recover for what he has performed, but at the same time permits the other party to counter-claim or recoup whatever damages he has sustained by the non-performance of the other items of the contract."

If, on the other hand, the contract is entire, the defendant may retain the part performance without either paying or doing anything for it, though the value is out of all proportion to the damages he has suffered by non-completion. Thus in the case of *Johnson v. Fehsefeldt*,[42] the plaintiffs, the owners of a thresher, contracted to thresh all defendant's crop of grain at so much per bushel. Before the entire crop had been threshed, the plaintiffs hauled the machine away and refused to thresh more, for the reason that they were losing money. Three hundred acres of grain were left in shock. Plaintiffs sued for the work and threshing they had done at the agreed price per bushel. It was held that they could not recover here either on the contract itself or on quantum meruit for part performance. Where the plaintiff willfully and without just cause refuses to complete a contract, or there is a substantial departure from its terms, there can be no partial recovery. The contract was held to be entire, not divisible, in spite of the fact that compensation was fixed at

[39] National Knitting Co. v. Bouton & Co., (1909) 141 Wis. 63, 123 N. W. 624; Siegel, Cooper & Co. v. Eaton & Co., (1897) 165 Ill. 550, 46 N. E. 449.

[40] Stubbs v. Holywell Ry. Co., (1867) L. R. 2 Ex. 311.

[41] (1893) 55 Minn. 457, 56 N. W. 97.

[42] (1908) 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N.S.) 1069.

so much per bushel. In *Lynn v. Seby*,[43] and in *McMillan v. Malloy*,[44] however, which were also cases of threshing contracts, although the contracts were held to be "entire," yet recovery was allowed for the value of the work done, less damages.[45]

What is the test to distinguish entire and divisible contracts? Mitchell, J., says in *McGrath v. Cannon*:[46]

"Whether a contract is entire or severable, like all questions of construction, depends on the intention of the parties, and must be determined in each case by considering the language employed and the subject-matter of the contract, and how the parties themselves have treated it."

But it has been pointed out that courts ascribe to the parties an intention based on what a reasonable expectation as to their respective rights, duties, or remedies would be under the contingency which has happened, and determine the entirety or divisibility of a contract accordingly.[47] To discuss the matter in these "chameleonic" terms usually obscures the real issue. It would be preferable to deal with the question frankly in terms of rules based on fairness rather than of fictitiously imputed intentions.

A contract may be regarded as entire for one purpose and severable for another. This being so, the attempt to classify contracts as entire and divisible results in much bewilderment and confusion. Severable or divisible may be used simply as indicating that a portion of the price is, by the terms of the agreement, set off against a portion of the goods; or in general, that the consideration on each side is apportionable and that the price for any part performance may be ascertained by computation at a certain rate.[48] "Entire contract" is sometimes used in the sense that the seller is bound to furnish all the goods, or that the servant is bound to do all the work before demanding any pay, or in other words, that payment is to be made only after complete performance.[49] This is contrasted with a contract where a debt immediately arises when part of the performance has been rendered. "Entire" may, on the other hand, be used to indicate that the buyer must either take all of the goods or re-

[43] (1915) 29 N. Dak. 420, 151 N. W. 31.
[44] (1880) 10 Nebr. 228, 4 N. W. 1004.
[45] See also Riech v. Bolch, (1886) 68 Iowa 526, 27 N. W. 507.
[46] (1893) 55 Minn. 457, 57 N. W. 150.
[47] 2 Am. L. Rep. 643 n.; 2 Williston, Contracts, secs. 825, 1611.
[48] Williston, Sales, sec. 804; 2 Williston, Contracts, secs. 861, 1028.
[49] Baker v. Higgins, (1860) 21 N. Y. 397; Bentley v. Edwards, (1914) 125 Minn. 179, 146 N. W. 347, 51 L. R. A. (N.S.) 254.

ject them all, and cannot accept the portion which is of proper grade and reject the balance.[50]

The most common use of the terms "entire" and "divisible," however, especially in the present connection, is with reference to the question whether a breach as to one portion or installment of the contract is an excuse (1) from the duty to go on with the contract, and (2) from the duty to pay for what has been received.[51] Where goods are sold to be delivered in installments, it is in general presumed that the contract was made in contemplation of full performance. In a contract of employment by the year, to entitle the plaintiff to recover the specified wages for any one month, he must have substantially performed his duties for that month. But if the plaintiff, before the expiration of the year, abandons the service without excuse or by his own willful fault, can he recover nothing for the previous months which he has worked?[52]

It would seem that the courts are engaged in a fruitless effort in the attempt to classify contracts in and of themselves as entire or divisible. It is not the nature of the contract, but the nature and effect of the breach which controls the question. The terms used describe the result rather than the cause, the thing to be explained rather than the explanation.[53] The true test of the right to recover cannot be found in the unity of the performance or in the terms of the contract or the apportionment of the consideration or the intention of the parties, but only in the just effect of the breach under the circumstances. What, then, should be the effect of breach after part performance? Where a breach occurs at the outset, (in limine) a stricter rule obtains than after part performance. A proposition is laid down in the notes to *Pordage v. Cole*[54] as the reason of the decision in *Boone v. Eyre* and similar cases, as follows:

"Where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permit-

[50] 2 Am. L. Rep. 643, 655 n.
[51] 2 Am. L. Rep. 641 n.
[52] Peterson v. Mayer, (1891) 46 Minn. 468, 45 N. W. 245; Diefenback v. Starck, (1883) 56 Wis. 462, 14 N. W. 621; Johnson v. Fehsefeldt, (1908) 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N.S.) 1069; 2 Williston, Contracts, secs. 862, 872.
[53] See F. C. Woodward, Doctrine of Divisible Contracts, 39 Am. L. Reg. (N.S.) 1.
[54] 1 Williams' Saunders, 555.

ted to enjoy that part without either paying or doing anything for it.

"Therefore, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

This is true only of substantial performance. It is not true as this quotation seems to imply, that a partial performance will enable a party to enforce a contract, or that a material breach after part performance is not a ground of rescission. But there is no such dilemma, as seems to be implied, between permitting a party to retain all the benefits of part performance without compensation, or requiring him to perform the rest of the contract on his part. On the contrary, when the plaintiff is guilty of a material breach he cannot insist on further performance and compel the defendant to resort to an action for damages. The breach will operate to excuse the duty of the defendant to perform further, unless he elects to do so.[55] The injured party should be allowed to refuse to go on with the contract in so far as it is still wholly executory. But so long as he has received and retains a portion of the performance, he should ordinarily be bound to make compensation, after the manner of divisible contracts, in spite of the default as to the rest of the contract.[56]

As to the *executed* portions of the contract, the question should be whether the injured party has received substantial benefits from part performance over and above the damages caused by the breach, and whether the conduct of the plaintiff is so culpable that the policy of the law demands a denial of all relief by way of penalty. As to the *executory* portions of the contract, the other party may well be excused by any material breach.[57]

We may conclude, then, that on principle even so called entire contracts should be treated as "divisible," after part performance has been accepted, in the sense that the value of the portions received must be paid for, even though the rest of the contract is not performed, subject to the deduction of damages. Breach of

[55] H. D. Williams Cooperage Co. v. Scofield, (1902) 115 Fed. 119, 123, 53 C. C. A. 23; Clarke Contracting Co. v. City of New York, (N.Y. 1920) 128 N. E. 241.

[56] See 2 Williston, Contracts, sec. 872.

[57] 2 Am. L. Rep. 665-668; 1 Black, Rescission of Contracts, sec. 215; 24 R. C. L. 279; Auer v. Twitchell, Robinson P. Co., (Me. 1920) 111 Atl. 570.

a condition implied in law should not be permitted to defeat one's quasi contractual claim to recover compensation on quantum meruit or valebat for benefits conferred by part performance, unless possibly in case of bad faith or willful breach.[58] It is only by recognizing the distinction between the effect of breach as to the executed and executory portions of the contract that arbitrary and unjust forfeitures may be avoided. A material breach after part performance will excuse further performance by the injured party, but should not necessarily penalize the defaulting party by the forfeiture of all compensation for such part performance as he has rendered. The measure of damages for breach of contract should be the same in all cases.

II. Relief Against Express Stipulations.

The law, while looking with righteous abhorrence on forfeitures, and washing its hands of their enforcement, after the manner of Pontius Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which in their essence involve forfeiture. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself.[59]

It is an anomaly in the law that in some cases it will relieve from a forfeiture in the teeth of any provision which calls for one, and in other cases, similar in principle, it will meekly acquiesce while hard fisted creditors take advantage of the slips of the unfortunate. The vigorous policy of equity with reference to bonds and mortgages has not been carried out consistently in contracts generally. The maxim, "once a mortgage always a mortgage," expresses the principle that redemption will be allowed in spite of any agreement that the mortgaged property shall be forfeited. All clogs on the equity of redemption are futile.[60] But as Professor Williston points out in his recent noteworthy treatise,[61] the principle which prohibits the enforcement of forfeitures and penalties in mortgages and bonds has not been applied to situations similar in principle that arise from condi-

[58] Woodward, Quasi Contracts, 267; Keener, Quasi Contracts, 225; Dane v. Wood, (1905) 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133; Rosenthal P. Co. v. National, etc. Co., (1919) 226 N. Y. 313, 123 N. E. 766.

[59] Pence v. Tide Water T. Corp., (Va. 1920) 103 S. E. 694.

[60] 2 Williston, Contracts, sec. 771; 3 Story, Equity, 14th Ed., sec. 1728; Samuel v. Jarrah, etc., Corp., [1904] A. C. 323.

[61] 2 Williston, Contracts, Chap. XXV.

tions in other contracts. "Neither law nor equity has dealt adequately with oppressive installment contracts."[62] As Professor Williston says:[63]

"It should not be admitted that a court of equity today has an inferior instinct for natural justice or an inferior power to give effect to it, than Chancellors possessed three centuries ago."

The law carefully limits the remedies which the parties may provide for themselves by way of penalty, though called "liquidated damages."[64] But an express condition precedent may often involve a loss or forfeiture, "as penal in its effects as a promise to pay a penalty."[65] This is strikingly the case in instalment contracts where time is declared to be "of the essence," and the buyer of land or goods may be subjected to a forfeiture of all the payments he has made. Yet it is generally laid down that an express condition precedent must be literally and exactly performed and any breach will excuse the duty of performance by the other party.[66] Even impossibility will not ordinarily excuse breach of condition precedent, such as the payment of a life insurance premium by a certain day.[67] Here also a distinction may be drawn between what is executory and what is executed. It has been recognized where impossibility to comply with a condition precedent of an insurance policy was caused by war, and the insured would lose the benefit of the money previously paid for premiums without his fault, that in such a case the insured was entitled to relief from forfeiture. The United States Supreme Court enforced a quasi contractual right to the cash surrender value of the policy, though no such right was reserved, on the ground that it would not be just for the insurance company to retain the money received and forfeit the equitable value of the policy.[68]

The courts of law as well as courts of equity are at liberty to disregard express conditions where they are harsh and penal

---

[62] William H. Loyd, 29 Harv. L. Rev. 123.

[63] 2 Williston on Contracts, 1475, secs 791, 793.

[64] Quigley v. C. S. Bracket, (1914) 124 Minn. 366, 145 N. W. 29; 34 L. R. A. (N.S.) 4, 13.

[65] 2 Williston, Contracts, secs. 776, 793.

[66] Kelly v. Sun Fire Office, (1891) 141 Pa. St. 10, 21, 21 Atl. 447.

[67] Klein v. New York Life Ins. Co., (1881) 104 U. S. 88, 26 L. Ed. 662; 2 Williston, Contracts, secs. 808, 809.

[68] New York Life Ins. Co. v. Statham, (1876) 93 U. S. 24, 32, 23 L. Ed. 789.

in their effects and provide for a penalty or forfeiture.[69] As Professor Williston says:[70]

"The court often under the disguise of the construction is in fact giving relief from the terms of the contract on principles analogous to those which have influenced courts of equity in relieving from forfeiture."

Where a condition is inserted to enforce punctual performance of a duty it should be considered merely as remedial or accessory, and be relieved against upon payment of the damages actually incurred. The question should not turn on whether the condition is subsequent or precedent, as this is a matter of form, and the law should look at the substance and at the main object of the contract.[71]

It has been held in some cases that the doctrine of substantial performance of building contracts has no application to cases where an architect's certificate is made a condition precedent to the liability of the owner, and that the mere use of the building is not an acceptance of work or a waiver of the production of an architect's certificate.[72] But other courts refuse to enforce the express condition strictly, and adopt the rule of substantial performance from implied conditions to dispense with the express condition.[73] The presentation of the certificate is in itself of no value. The loss of the builder's labor and material for a slight default involves a forfeiture, and the owner cannot unjustly enrich himself by the enforcement of the condition. If no forfeiture would result, the condition will be strictly enforced.[74]

A provision forfeiting all wages which may be due at the time of leaving, if the employee leaves without certain notice, not confining the amount to any fixed sum or proportion of the wages for the year, or for any given time, is not reasonable and will not be enforced. It is a harsh and oppressive exaction where the forfeiture might cover a very long period.[75] The law will

[69] Ashley, Contracts, 170; 4 Columbia L. Rep. 423; 6 R. C. L. 906.

[70] 2 Williston, Contracts, sec. 806. See also A. L. Corbin, 28 Yale L. Jour. 753; Gates v. Parmley, (1896) 93 Wis. 294, 306, 307, 66 N. W. 253.

[71] Loyd Cases on Certain Equitable Doctrines, 14, 49 n.; 29 Harv. L. Rep. 123.

[72] Pope v. King, (1908) 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N.S.) 489.

[73] 2 Williston, Contracts, secs. 805, 842.

[74] Birch Cooley v. First National Bank, (1902) 86 Minn. 385, 90 N. W. 789.

[75] Richardson v. Woehler, (1872) 26 Mich. 90; Schrimpf v. Tenn. Mf. Co. (1887) 86 Tenn. 219, 6 S. W. 131.

not permit a party to stipulate for a remedy by way of self help by which the other will suffer an arbitrary loss, disproportionate to the injury, and by which he may enrich himself by the oppression of another. The English courts, however, in the famous old case of *Cutter v. Powell*,[76] decided in 1795, held that no wages could be recovered although the plaintiff had performed his duties as second mate until the day of his death and had completed two-thirds of the voyage, because of an express condition by which a lump sum was payable "provided he proceeds, continues and does his duty as second mate from hence to the port of Liverpool."

Very severe forfeitures are permitted by the law of most jurisdictions in contracts for the conditional sale of chattels, and the equitable principle which forbids a forfeiture is ignored. The seller is allowed to resume possession without rescinding the contract or returning the payments made, even though he may already have collected the major part of the contract price.[77] In some cases, however, it is held that even if there is an express provision for forfeiture upon default, the seller cannot have the property and the payments too, but must account for the excess of payments over the damages he has suffered.[78] It has been held in Minnesota that it is not a condition precedent to replevin that the seller return or tender back partial payments made or notes given.[79] Whether partial payments made by the buyer are forfeited, in the absence of a provision to that effect in the contract, was not decided.

Statutes have been enacted in several states to prevent the injustice to the buyer of permitting a forfeiture where most of the price has been paid.[80] Such protection should be afforded the buyer in spite of any attempt in the contract to surrender it.[81] The essential character of a conditional sale is that of a

---

[76] (1814) 6 T. R. 320.

[77] 2 Williston, Contracts, sec. 374; Clark v. Barnard, (1883) 108 U. S. 436, 27 L. Ed. 780, 2 S. C. R. 878.

[78] Preston v. Whitney, (1871) 23 Mich. 260; S. D. Puffer & Sons Co. v. Lucas, (1893) 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 681; Hays v. Jordan, (1890) 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Pierce v. Staub, (1906) 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N.S.) 785. Compare Pfeiffer v. Norman, (1911) 22 N. Dak. 168, 133 N. W. 97, 38 L. R. A. (N.S.) 891.

[79] Raymond Co. v. Kahn, (1914) 124 Minn. 426, 145 N. W. 164.

[80] 38 L. R. A. (N.S.) 899 n.

[81] 2 Williston, Contracts, sec. 738; Desseau v. Holmes, (1905) 187 Mass. 486, 73 N. E. 656, 105 A. S. R. 417.

sale with a mortgage back, and the danger of forfeiture is the same.[82]

In land contracts time is frequently declared to be of the essence of the contract, and it is provided that the failure of punctual payments of installments will be fatal. The vendor by the literal terms of the contract is armed with power to insist upon forfeiture upon failure of the buyer to pay a single dollar of the price at the exact time prescribed. Where time is of the essence, a clause providing that in case of default in payment of an installment when due, all payments shall be and remain the property of the seller is valid and binding. A failure to perform on the day stipulated ipso facto involves a forfeiture, without the necessity of notice or any affirmative act on the part of the vendor.[83] In some cases, however, it is held that a mere failure to pay the purchase money according to the terms of the agreement will not produce a forfeiture without the tender of a deed to put the purchaser in default.[84] By the great weight of American authority no relief can be afforded against express conditions precedent inflicting forfeiture where the contract makes time of the essence, although the delay may be very slight and although the buyer has paid a large part of the price and has greatly improved the land.[85] The vendor is entitled to the land, with all improvements, fixtures and growing crops, and in addition to the purchase money already paid.

In a recent Minnesota case[86] it was held that a vendee who defaults in payments due under a land contract and announces

[82] R. C. Bartley Co. v. Lee, (1915) 87 N. J. L. 19, 93 Atl. 78.

[83] But see 107 A. S. R. 726 n.; Waite v. Stanley, (1914) 88 Vt. 407, 92 Atl. 633, L. R. A. 1916C 886, 893; Vito v. Birkel, (1904) 209 Pa. St. 206, 58 Atl. 127.

[84] Frink v. Thomas, (1891) 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239; Wells-Fargo Co. v. Fage, (1905) 48 Ore. 74, 80, 83 Pac. 856, 3 L. R. A. (N.S.) 103; Reese v. Westfield, (1909) 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N.S.) 956; O'Connor v. Hughes, (1886) 35 Minn. 446, 29 N. W. 152.

[85] True v. Northern Pac. Ry. Co., (1914) 126 Minn. 72; 147 N. W. 948; Glock v. Howard, (1898) 123 Cal. 1, 55 Pac. 713; Pomeroy, Equity, 4th Ed., sec. 455, secs. 222, 228; Skookum Oil Co. v. Thomas, (1912) 162 Cal. 539, 123 Pac. 363, L. R. A. 1918B 551 n.; Heckard v. Sayre, (1864) 34 Ill. 142; Cheney v. Bilby, (1896) 74 Fed. 52, 20 C. C. A. 291; 2 Williston, Contracts, 1517; Hurley v. Anicker, (1915) 51 Okla. 97, 151 Pac. 593, L. R. A. 1918B 538, 540 n. On right of vendee to recover payments when in default; Ames, Cases on Equity, 341 n.; Eastern Oregon Land Co. v. Moody, (1912) 198 Fed. 7.

[86] Nelson Real Estate Agency v. Seeman, (Minn. 1920) 180 N. W. 227.

his inability to complete the contract, is not entitled to a return of the down payment made when the contract was signed; nor can the court in equity require a return of the money by the vendor as a condition of the cancellation of the contract. In this case the purchaser had been drafted into the United States army and was killed in action on the battlefields of France. He left no estate, and when the vendor sued for a specific performance or a cancellation against his administrator, the administrator pleaded inability to complete and asked the refundment of the advance payments; but relief was denied although the payments made exceeded the vendor's damages.

Suppose a purchaser has contracted for a house or a farm to be paid for by installments and no conveyance is to be made until all the installments are paid. It is declared to be a condition precedent that all payments must be punctually made on the very day they fall due, and on the failure to pay any installment when due, all obligations of the vendor shall be at an end and all previous payments forfeited as liquidated damages. Time is declared to be of the essence of the contract. Let us suppose that the purchaser under such a contract has been in possession for years, has paid a large portion of the purchase price and has expended thousands of dollars in improvements on the land, and then by forgetfulness, or some other accidental cause, omits to pay the last installment of one thousand dollars by the exact hour prescribed by the contract. He is ready with the money in his hands an hour or a day after the default, offers it to the vendor and implores him to take it; yet under the doctrine of many American courts, he may be doomed to see the whole of his estate, the reward of years of toil and effort, entirely swept away from him in a moment by the unbending rule of law as to forfeiture where time is made of the essence of the contract.[87]

In the leading case of *Glock v. Howard,*[88] Justice Henshaw, in speaking of the remedies open to the vendor under such a contract, says:

"Still resting upon the contract, he may remain inactive, and yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that

[87] See Edgerton v. Peckham, (1844) 11 Paige (N.Y.) 352; Cheney v. Bilby, (1896) 74 Fed. 52, 60.

[88] (1898) 123 Cal. 1, 55 Pac. 713.

such moneys shall upon breach be forfeited as liquidated damages.

"If his generosity prompts him to do so, he may agree with the vendee for a mutual abandonment and rescission, in which case the vendee in default would be entitled to a repayment of his money."

Even if specific performance must be denied, an equitable or a quasi contractual right to recover previous payments and the value of improvements, subject to deduction for any use and possession enjoyed and any damages caused, should surely be recognized to prevent a forfeiture.[89] Otherwise the law becomes the passive accessory of any Shylock who chooses to wrest from a purchaser an estate which he has almost paid for by reason of some minor default.

The relation of the vendor and purchaser of land, under a wholly executory contract, has been likened to the relation of mortgagor and mortgagee. The analogy is especially close when the buyer is given possession and enjoyment of the land. The vendor's true remedy is foreclosure, even where time is made of the essence.[90] But the right to relief from forfeiture is not dependent on the exactitude of this analogy, as there is no reason why such relief should be confined to bonds and mortgages.

In recent decisions the English Privy Council has held that while the purchaser in default may not be entitled to specific performance under a contract where time is made of the essence, nevertheless a return of the advance payments should be allowed.[91] This eminent court held that forfeiture of the money paid under the contract was a penalty from which relief might be granted on proper terms. It was pointed out that the penalty would become more and more severe as the performance approached completion, and the money liable to confiscation would become larger. If time is made of essence, the purchaser to secure his rights under the contract, must perform within the stipulated time. But equity in denying specific performance will require the seller to repay the portions of the price which he has received. The purchase money paid is to be regarded only as security for the true amount of damages which the vendor has

[89] See Bradley, J., in New York Life Ins. Co. v. Statham, (1876) 93 U. S. 24, 32, 23 L. Ed. 789; 2 Williston, Contracts, 1550 n.

[90] Lytle v. Scottish American Mortgage Co., (1905) 122 Ga. 458, 50 S. E. 402; 2 Williston, Contracts, sec. 791; 1 Pomeroy, Equity Jurisdiction, 4th Ed., sec. 368.

[91] Steedman v. Drinkle, [1916] 1 A. C. 275.

suffered by the purchaser's breach. This seems especially clear where the purchaser is ready and willing to pay the balance of the price and desires specific performance, but the vendor claims forfeiture of land and money on the basis of some slight delay.[92]

In some jurisdictions, particularly in the western provinces of Canada, provisions for forfeiture of payments in land contracts are held to be invalid, either at common law or by statute, and the court will order the defendant to restore what he has received in part payment less actual damages.[93] These courts will not permit the vendor to paralyze judicial power by the insertion of the magic phrase that "time is of the essence of the contract."

It is sometimes difficult to distinguish between a declaration of rescission and a declaration of termination or forfeiture. The serious breach by one party may be treated by the other as a ground of rescission, authorizing him to disaffirm the contract. If he rescinds, the contract is avoided ab initio, and the other party is entitled to be put in statu quo. The idea of rescission implies that what has been given shall be restored. Where the vendor, upon default, elects to rescind the contract, there is no forfeiture of payments made by the vendee.[94]

In *Pierce v. Staub*,[95] the vendor, with inordinate greed, claimed a forfeiture of sixty thousand dollars without any showing that he had lost a dollar by reason of the default of the vendee. It was held that a rescission had been effected by the notice of the termination of the contract. The notice of the termination was said to be equivalent to a formal or mutual rescission, and, therefore, the vendor could not retain advance payments, at least in the absence of a forfeiture clause.

According to many courts, however, mere notice of default or forfeiture, demand of possession, re-entry or even an action to cancel the contract and quiet title, do not constitute a rescission entitling the vendee to recover payments made.[96] It is

[92] 53 Can. L. Journal, 161, 166; Labelle v. O'Connor, (1908) 15 Ont. L. Rep. 519, 536.

[93] Brown v. Verzani, (1917) 181 Iowa 237, 244, 164 N. W. 601; Price v. Ruggles, (1917) 28 Manitoba L. Rep. 132; Brown v. Walsh, (1919) 45 Ont. L. Rep. 646; Moodie v. Young, (1908) 1 Alberta L. Rep. 337; Barnes v. Clement, (1896) 8 S. Dak. 421, 12 S. Dak. 270, 81 N. W. 30.

[94] Frink v. Thomas, (1891) 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239.

[95] (1906) 78 Conn. 459, 62 Atl. 760, 3 L. R. A. (N.S.) 785.

[96] List v. Moore, (1912) 20 Cal. App. 616, 129 Pac. 962; Newell v. Stone Co., (Cal. 1920) 184 Pac. 659, 9 Am. L. Rep. 993; Malloy v. Muir, (1901) 62 Nebr. 80, 86 N. W. 916.

well, however, for the vendor to be careful of the language he uses when he declares the contract terminated. In *Waters v. Pearson*,[97] on the other hand, it was held that if the seller elects to keep the land and to terminate the contract because of the buyer's default, he cannot withhold advance payments on the ground of forfeiture, although he may apply them to satisfaction of his actual damages.[98]

In *Lytle v. Scottish-American Mortgage Co.*[99] it was held that although the contract itself provides for the retaking of possession on default and the forfeiture of advance payments, nevertheless, when the vendor terminates the contract for default of the vendee, the latter is entitled to an accounting for payments and improvements made. If, on default, the vendor seeks to recover the land, he must account to the vendee for the purchase money. His action in retaking possession is a rescission.

The tendency of the law is to deny to a defaulting vendee reimbursement. But in this case Lamar, J., gives one of the best discussions on the subject of forfeiture to be found in the books. The court acutely summarizes and criticizes the view upholding a provision for forfeiture of the purchase money or improvements on termination of the contract. The court says:[100]

"Those holding this view insist that not to enforce a stipulation for forfeiture is to interfere with the right of contract; that to permit the vendee as plaintiff or defendant to recover the value of improvements made or to regain money previously paid, leaves the vendor where he cannot know whether the land is sold or not; forces him, during the credit period, to be ready at all times to refund the money paid; enables the vendee to take advantage of his own wrong, so that if the land increases in value, he can insist on performance, while if the market price declines, he will cease to make payments, and upon the exercise of the reserved right to rescind, the vendee will then demand the return of what has been previously lawfully paid, or seek reimbursement for improvements which have become a part of the real estate."

The court answers these contentions as follows:

"To the extent of the land sold, the improvements thereon, the money in the hands of the vendor received of the vendee, and also to the extent of the vendee's general estate, the law guar-

[97] (1914) 163 Iowa 391, 144 N. W. 1026.
[98] See L. R. A. 1918B 544 n; L. R. A. 1916C 893 n.
[99] (1905) 122 Ga. 458, 50 S. E. 402.
[100] (1905) 122 Ga. 458, 50 S. E. 402.

antees the vendor against loss if he sues to recover the purchase price. He is not obliged to rescind. But when he does exercise that right, he discharges the vendee from liability under the contract, sets aside the sale, and is entitled to a return of the property subject only to the condition that as his status has been restored, he must also restore the status of the vendee.[101] The vendee is not entitled to a return of his purchase money until he has allowed, as a deduction therefrom, all damages caused by his breach—one element of which will be the fair rental value of the property during the time he occupied it. But when he has done this, that is all that the law requires. Damages for the breach, payment of the rent, and a return of the land restore the vendor to his status.

"The prohibition against the exaction of penalty and enforcement of forfeiture is not alone for the benefit of those who have kept their contracts. They do not need it. The effort to enforce a penalty and forfeiture is generally against a party who is delinquent."[102]

It would seem equitable to hold that a party cannot treat a contract as terminated so as to resume the property which he has parted with and at the same time keep the money which he has received as the consideration for it. In like manner, the purchaser cannot retain possession of the land or other part performance which he has received and at the same time defend payment of his note for the purchase price on the ground of defective title. He must either rescind or rely on a cross action for damages.[103]

Statutory provisions are badly needed to give purchasers of land and chattels more effective protection against forfeiture. By Minnesota law,[104] thirty days' notice must be given of an intention to terminate a land contract for default. It is held that this proceeding is in effect a strict foreclosure of the contract and that a tender made after the expiration of thirty days is of no avail. The provision was enacted to prevent persons having rights under executory contracts for the purchase of lands from being cut off too abruptly upon failure to meet installments due

[101] Civil Code, secs. 3924, 3712.

[102] See also Lathan v. Davis, (1891) 44 Fed. 862; Compare Raymond Co. v. Kahn, (1914) 124 Minn. 426, 145 N. W. 164; See also Ann. Cas. 1917C 85 n.

[103] Daniels v. Englehart, (1910) 19 Ida. 548, 111 Pac. 3, 39 L. R. A. (N.S.) 938. Compare Lafferty v. Evans, (1906) 17 Okla. 247, 87 Pac. 304, 21 L. R. A. (N.S.) 363, 369; German Sav. Inst. v. De La Vergne Ref. Mach. Co., (1895) 70 Fed. 146, 17 C. C. A. 34; 5 Page, Contracts, secs. 2981-2984.

[104] G. S. 1913, sec. 8081.

thereon. It gives the vendee time within which to protect his rights.[105]

In *Waters v. Pearson,*[106] it is held that under the Iowa statute a forfeiture cannot become effective until written notice and the expiration of thirty days thereafter. "This is a merciful provision extending a little grace to a party in default who may be staggering under the load of his undertaking." The court further held in this case that a provision for forfeiture is invalid. "If the vendor's damages be less than the advance payments, we know of no sound reason of law or morals why the vendee should not recover the balance remaining." If the vendor elects to terminate the contract and keep the land instead of insisting on specific performance, he must account for advance payments in excess of the damages.

In California, Montana, North Dakota and South Dakota, there is a code provision that whenever by the terms of an obligation a party thereto incurs a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty. In *Clifton v. Wilson*[107] it is stated that this provision is consonant with the theory of compensation which prohibits parties to contracts from stipulating therein for forfeitures.[108] This provision does not seem to have been effective, however, to afford adequate protection against forfeiture.[109]

In Ontario, Manitoba, Alberta, British Columbia and Saskatchewan there are statutory provisions as to relief against penalties and forfeitures and the termination of land contracts. The courts may grant relief to a defaulting purchaser where the vendor is attempting to determine the contract and to enforce a forfeiture in various ways: (1) By rescinding the contract and directing the vendor to return all moneys paid less damages; (2) by decreeing specific performance with compensation; (3) by foreclosure, appointing a day for redemption, and in default either strict foreclosure or sale; or (4) granting an extension of

[105] International R. Co. v. Vanderpoel, (1914) 127 Minn. 89, 148 N. W. 895.

[106] (1914) 163 Iowa 391, 144 N. W. 1026.

[107] (1913) 47 Mont. 305, 132 Pac. 424.

[108] See Fratt v. Daniels-Jones Co., (1913) 47 Mont. 287, 133 Pac. 700; Cook-Reynolds Co. v. Chipman, (1913) 47 Mont. 289, 133 Pac. 694.

[109] Suburban Homes Co. v. North, (1914) 50 Mont. 108, 145 Pac. 2, Ann. Cas. 1917C 81; cf. Barnes v. Clement, (1899) 12 S. D. 270, 81 N. W. 301.

time to the purchaser to remedy his default.[110] The rights of the parties are being more and more worked out on the analogy of the mortgage relation, and the purchaser's right to claim relief against forfeiture has become generally recognized. American courts and legislatures have been left somewhat behind by our English and Canadian brethren.

Just as the law refuses to individuals the remedy of seeking redress by self help without resort to the courts, so it should regulate the remedies which they provide for themselves to enforce their contracts, not only by refusing to enforce them, but also by relieving against unconscionable, oppressive and ruinous exactions in the nature of penalties and forfeitures.

The traditional reluctance to relieve against conditions precedent as contrasted with conditions subsequent has no basis, it is submitted, except in so far as the condition may affect what is still executory as contrasted with what is executed. A distinction may be drawn between the loss of the right to go on with the contract or to demand specific performance, and the forfeiture of the benefits of what one has already given or done. The courts might well, in all cases of part performance, require a rescission upon just terms, as a condition of the right to terminate a contract and hold oneself excused from further duty under it.

[110] See McCaul, Remedies of Vendors and Purchasers, 2nd Ed., 119, 122, 136; Great W. L. Co. v. Wilkins, (1907) 1 Alberta 155, 167; Canadian Pacific Ry. Co. v. Meadows, (1908) 1 Alberta L. Rep. 344; Provincial S. Co. v. Gratias, (1919) 12 Sask. 155; Hall v. Turnbull, (1909) 2 Sask. L. R. 89.