THE RIGHTS OF THE DEFAULTING CONTRACTOR IN RESPECT OF SERVICES RENDERED AND GOODS SUPPLIED BEFORE BREACH*

Karl John Dore‡

Introduction

The common law[1] takes a dim view of the defaulting contractor. It gives him remedies grudgingly. In an action by the defaulter, emphasis is placed not on what the other party receives or suffers but rather on whether the plaintiff has performed his side of the bargain.[2] The defaulting contractor has an uphill battle, for the general rule of the common law is that the performance of a contract must be precise and exact.[3] Indeed, the rule of thumb used by the busy practitioner is that "no remedy is open to the partial performer".[4] The purpose of this paper is to test the reliability of that rule of thumb.

Both remedies on the contract and outside the contract will be discussed, although the discussion will be by no means exhaustive. Emphasis will be placed on the decisions of Canadian courts. Finally, as the title implies, this paper is concerned only with the rights of the defaulting contractor in respect of services rendered and goods supplied before breach.

Where the Defaulting Party Has a Remedy on the Contract

It is clear law that not every breach of contract disentitles the defaulting party to a remedy on the contract. Our problem is to

---

* This essay was prepared for the Seminar on Restitution.

‡ Karl John Dore, III Law, U.N.B. Mr. Dore is a Sir James Dunn Scholar in Law.

1 The expression "common law" is used here to mean the law that is not the result of legislation.

2 *Dussault and Pageau v. The King* (1917), 58 S.C.R. 1, per Sir Charles Fitzpatrick C.J., at p. 4: "The fallacy underlying the claim and partly adopted in the judgment appealed from consists in treating the case as if it were an action by the respondent for breach of the contract. The case is, however, quite different and the question of damages sustained does not enter into it at all. In an action for breach of contract the plaintiff must, of course, prove his damages and cannot recover if it is shewn that he has sustained none. It is, however, useless for the appellants to shew that the respondent suffered no damage, unless they can shew that this fact gives them a claim on the respondent. This is not done and the appellants can only claim, if at all, under the terms of the contract. They can only succeed if they are able to prove a claim regardless of whether or not the respondent suffered any loss by the breach of the contract."

3 G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (6th ed., 1964), pp. 458 ff.

4 *Ibid.*, at p. 459.

define the limits within which a party, though in breach of his contract, may recover upon it.

In attempting to define these limits, it is common practice to speak of contracts as being either entire or divisible. An entire contract has been defined as follows:[5]

> An entire contract is one in which it has been expressly or implicitly agreed that neither party shall be entitled to demand performance, either in whole or in part, until he himself has completely fulfilled, or is ready and willing to fulfil, his own promise. To put this in other language, a contract is entire if the promises are interdependent.

In contrast, a divisible contract is one where the promises are independent. Whether a contract is entire or divisible depends upon what the court finds to be the intention of the parties. But where the consideration is unapportioned, for example, a contract for a lump sum, the courts usually construe the contract to be entire.

Where the contract is entire, the position of the defaulting contractor has been summarized by Blackburn J. in the following words:[6]

> . . . the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendants' fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

To mitigate the harshness of this rule, the courts developed the doctrine of substantial performance.[7]

Other jurists have viewed dependent and independent promises in a slightly different light and say that even if the promises are dependent,[8]

> . . . in the absence of express words, *entire* performance by the plaintiff of the consideration is not a condition precedent to his right to demand performance by the defendant of his promise. If there has been substantial performance by the plaintiff, he is entitled to demand performance by the defendant; or, conversely, the defendant is only excused if he can show a breach or failure of performance by the plaintiff such as to go to the whole of the consideration.

Furthermore, they say,[9]

> The . . . cases where the plaintiff failed because entire performance was a condition precedent will be found on examination to be but

---

5 *Ibid.*, at p. 461.

6 *Appleby v. Myers* (1867), L.R. 2 C.P. 651 (Ex. Ch.), at p. 661.

7 The doctrine of substantial performance is discussed below.

8 J. W. Smith, *Leading Cases* (13th ed., 1929, by Sir T. W. Chitty and others), at p. 16.

9 *Ibid.*, at pp. 25, 26.

> illustrations of that wider principle of the law . . . that where there is a failure of performance by the plaintiff which goes to the whole of the consideration of the defendant's promise, the defendant is excused from performance of his promise; for where *entire* performance is a condition precedent, the whole and no less is the consideration for the defendant's promise . . .

The language of the parties must be very strong to make entire performance a condition precedent upon this view of the matter. Thus in *Boone v. Eyre* [10] a covenant by the defendant in a deed that ". . . the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity"[11] was held not to be sufficient to make entire performance by the plaintiff a condition precedent to a right of action on the defendant's covenant.

Whichever view one prefers, the practical result is usually the same,[12] because on either view complete performance and nothing less will be required if the parties expressly agree to make it a condition.[13] But where there has been substantial performance, the courts will lean against treating complete performance as a condition precedent to an action on the contract.

It is clear then, that where the defaulting party has substantially performed the contract, he is usually entitled to recover upon the contract, subject only to a cross-action or counterclaim for the defects or omissions in execution. Thus in *Dakin & Co. Ltd. v. Lee*[14] a building contractor who had substantially performed his contract was allowed to recover. In the words of Sankey J.:[15]

> Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.

---

10 (1777), 1 Hy. Bl. 273 n., 126 E.R. 160 n.(a) (K.B.).

11 *Ibid.*

12 There may be a conflict between the two views where the contract is wholly executory.

13 J. W. Smith, *Leading Cases* (13th ed., 1929, by Sir T. W. Chitty and others), at pp. 22, 26; Glanville L. Williams, *Partial Performance of Entire Contracts*, II (1941), 57 Law Q. Rev. 490, at p. 494.

14 [1916] 1 K.B. 566 (K.B.).

15 *Ibid.*, at p. 574.

The principle of *Dakin & Co. Ltd. v. Lee*[16] has been accepted both in England[17] and in Canada.[18] Indeed, as early as 1857, a New Brunswick court allowed recovery of a lump sum of £3,250 under a building contract, subject to a deduction of £83 for the value of work undone.[19] Where there has been substantial performance, the measure of recovery is the contract price less a deduction sufficient to remedy the defects or omissions.[20]

Furthermore, it is submitted, the doctrine of substantial performance is not limited to building contracts. In *McGregor and McIntyre Co. Ltd. v. Sterling Appraisal Co. Ltd.*,[21] the doctrine was applied to a contract to make an appraisal of buildings, machinery and plant. The appraisal turned out to be partially inaccurate, and it was argued that since this was a contract to do specific work for a lump sum, and since that work had not been completed, the defaulting party had no right to recover on the contract. The Ontario Court of Appeal rejected the submission and allowed recovery on the principle of *Dakin & Co. Ltd. v. Lee*.[22] Masten J.A. said:[23]

> The rule adopted in the Dakin case is not limited to building contracts, but has been applied in the case of architects, of solicitors, and of auctioneers.

The doctrine of substantial performance is of general application. Thus a servant who failed in his duty only a few times during a year would be entitled to rely on the doctrine of substantial performance.[24]

Whether there has been substantial performance of a contract is a question of fact.[25] Little guidance can be found in the cases,[26]

---

16 *Ibid.*

17 *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.).

18 *Inch v. Farmers' Co-Operative Dairy Co. Ltd.*, [1941] 2 D.L.R. 27 (N.B.C.A.); *Hulshan v. Nickling et al*, [1957] O.W.N. 587 (Ont. C.A.); *Webber v. Havill* (1964), 50 M.P.R. 172 (N.S. Sup. Ct. in banco); *Fairbanks Soap Co. Ltd. v. Sheppard*, [1953] 1 S.C.R. 314.

19 *Small v. McCullough* (1857), 8 N.B.R. 484.

20 *Inch v. Farmers' Co-Operative Dairy Co. Ltd.*, [1941] 2 D.L.R. 27 (N.B.C.A.).

21 (1925), 57 O.L.R. 485 (Ont. C.A.).

22 [1916] 1 K.B. 566 (K.B.).

23 (1925), 57 O.L.R. 485 (Ont. C.A.), at pp. 492, 493.

24 See *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.), per Somervell L.J., at p. 178.

25 *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.), per Romer L. J., at p. 182; *Downie & Hatt v. Norman* (1964), 50 M.P.R. 150 (N.S. Sup. Ct. in banco), at p. 157.

26 *Webber v. Havill* (1964), 50 M.P.R. 172 (N.S. Sup. Ct. in banco), per MacQuarrie J., at p. 181.

but it seems clear that where the work is only half done the defaulting party cannot be said to have substantially performed.[27] Furthermore, the courts have drawn a distinction between misfeasance (defects) and nonfeasance (abandonment). Recovery is allowed where there is misfeasance, but not where there is nonfeasance;[28] however, slight nonfeasance is treated as misfeasance.[29] The point made by the courts is that abandonment of the contract will disentitle the defaulting party to a remedy on the contract. But ". . . there cannot be an abandonment without an intention express or implied and carried into effect to throw up the contract, to quit and leave the job unfinished".[30]

Finally, to say that the doctrine of substantial performance is not limited to building contracts but is of general application is not to say that acts that amount to substantial performance in one type of contract will amount to substantial performance in another type. What amounts to substantial performance depends largely on the type of contract involved.

Rights of the Defaulting Contractor Arising from the Course of Action Taken by the Innocent Party

Until now we have focused attention on the acts of the defaulting contractor. But where the defaulting party has committed such a breach that he is unable to recover on the contract, the course of action taken by the innocent party is relevant to the defaulter's position. For the conduct that disentitles the defaulting party from recovering on the contract is the same conduct that entitles the innocent party to take one of several courses of action. The innocent party may waive the breach or accept it as discharging the contract. If he accepts the breach as discharging the contract, he is excused from further performance and may sue either for damages or in quasi-contract.[31] If the innocent party wants to sue in quasi-contract, he must first bring the contract to an end.

If the innocent party waives the breach, the defaulting party may recover on the contract, subject, of course, to a cross-action or counterclaim for damages. A recent and instructive decision

---

27 *Sumpter v. Hedges*, [1898] 1 Q.B. 673 (C.A.); *Bradley v. Horner* (1957), 10 D.L.R. (2d) 446 (Ont. C.A.).

28 *Webber v. Havill* (1964), 50 M.P.R. 172 (N.S. Sup. Ct. in banco).

29 *Dakin & Co. Ltd. v. Lee*, [1916] 1 K.B. 566 (K.B.).

30 *Hulshan v. Nickling et al*, [1957] O.W.N. 587 (Ont. C.A.), per Roach J.A., at p. 589.

31 The innocent party must elect to sue for damages or in quasi-contract, because he cannot do both: *Gregory v. Williams* (1916), 44 N.B.R. 204.

on the effect of waiver was given by the Ontario Court of Appeal in *Tanenbaum and Downsview Meadows Ltd. v. Wright-Winston Ltd.*[32] In that case there was a lump sum contract under which the plaintiff was to build a sewer main and pumping station for sewage disposal from the defendant's subdivision. After constructing the sewer main, the plaintiff abandoned the contract without good cause. The defendant, with full knowledge of the plaintiff's breach of contract, constructed the pumping station at his own expense and connected it to the sewer main that had been built by the plaintiff. A material fact was that the sewer main built by the plaintiff was not on the defendant's land.

The court found that the plaintiff was in substantial breach of the contract. He could not recover on a *quantum meruit* because he had not adduced evidence of the reasonable value of the sewer main. But the court held that by connecting the pumping station to the sewer main with knowledge of the plaintiffs breach, the defendant took advantage of the work done in partial compliance with the contract and thus waived the breach. The plaintiff was awarded the contract price less the cost of building the pumping station.[33]

The innocent party may not, however, waive the breach; he may accept it as a discharge of the contract and of his own duty to perform. In this case he may sue for damages or in quasi-contract. If he sues for damages, an allowance may be made to the defaulting party for the benefits he has conferred.[34]

Instead of claiming damages, the innocent party may sue in quasi-contract to recover back *money* paid by him under the contract, but this elective is open to him only if he has either suffered a total failure of consideration or is in a position to make restitution of benefits that have been conferred upon him by the defaulting party. In *Brazeau v. Wilson*,[35] the plaintiff contracted to install in the defendant's house a heating system. He failed to do this properly. In an action by the plaintiff to enforce a mechanic's lien, the defendant relied on the plaintiff's failure to perform the contract, and counterclaimed for the return of the money he had paid under the contract. The court held that the plaintiff could not recover on the contract because he was in substantial breach. The defendant's

---

32 (1965), 49 D.L.R. (2d) 386 (Ont. C.A.).

33 See also *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.), per Denning L.J., at p. 181.

34 *Charterhouse Credit Co. Ltd. v. Tolly*, [1963] 2 Q.B. 683 (C.A.).

35 (1916), 36 O.L.R. 396 (Ont. C.A.).

counterclaim was allowed subject to the condition that the plaintiff be allowed to take back the materials he had supplied. Meredith C.J.C.P. said:[36]

> The result is, that the plaintiff has not furnished that which he contracted to supply; he has not substantially fulfilled his contract, and so is not entitled to the price that was to be paid to him on fulfilment of the contract; and to that extent the judgment is right. But the defendant is not entitled to retain the boiler, radiator, pipes, etc., put in by the plaintiff. The defendant recovers, according to his defence on which the judgment in appeal is based, on the ground that the whole work is useless, and must be, as he terms it, scrapped, which means necessarily taking out and discarding these articles. When so taken out, they must be the property of the plaintiff, not of the defendant, and the plaintiff is not entitled to them. The principle applied in such a case as *Oldersh[illegible] v. Garner* (1876), 38 U.C.Q.B.R. 37, adopting and following the ruling in *Munro v. Butt* (1858), 8 E. & B. 738; 120 E.R. 275, is obviously not applicable to such a case as this, to fixtures which are to be unfixed and taken out, or, as I really think was intended by the defendant, not to be taken out, but to be utilised for his benefit under a new contract for the heating of his house.

If the innocent party has rendered services or supplied goods under a contract, he can, instead of suing for damages, proceed by way of *quantum meruit*.[37] But if he has received the benefit of a partial performance by the defaulting party, it is not clear whether he has a *quantum meruit* claim. If he does, presumably the defaulting party would be allowed to set off the value of his part performance.[38]

It might appear that the position of the defaulting contractor is not too precarious after all, but actually it is. In the waiver situations, but for the course of action taken by the innocent party the defaulting party would have no rights under the contract, and in the other situations the defaulting party is being sued. And the fact that the innocent party decides to sue, in the one case for damages and in the other in quasi-contract, indicates that the innocent party has suffered greater damage than the value of the benefits conferred upon him by the defaulting party. The crucial question is this: what is the position where the innocent party receives a benefit from the defaulting party's partial performance the value of which is greater than he can recover in a suit for damages or in quasi-contract? Can he keep the benefits? The answer of the common law is most unsatisfactory.

---

36 *Ibid.*, at pp. 397, 398.

37 *McHugh v. Murray* (1884), 24 N.B.R. 12; *Swim v. Amos* (1895), 33 N.B.R. 49; *Gregory v. Williams* (1916), 44 N.B.R. 204; *Jardine v. The Prescott Lumber Company Limited* (1917), 44 N.B.R. 505.

38 See Salmond and Williams, *Principles of the Law of Contracts* (2d ed., 1945), p. 563, n.(f).

Restitutionary Rights of the Defaulting Contractor

(a) General Rule

The result of the cases is that an innocent party must reject the partial performance by the defaulting party if he has an opportunity to do so. But the innocent party is not regarded as having an opportunity to reject the partial performance if its return *in specie* is not possible. Furthermore, return *in specie* is not regarded as being possible where the partial performance has been incorporated into the property of the innocent party. The position is well illustrated by *Sumpter v. Hedges*.[39] In that case the plaintiff entered into a building contract for a lump sum with the defendant. He did part of the work and then abandoned the contract because of financial difficulties. The defendant finished the building himself, using for that purpose certain building materials which the plaintiff had left lying on the defendant's land. It was held that the plaintiff could recover for the building materials so used, but he could not recover the value of the work he had done. In refusing the latter claim, Collins L.J. said:[40]

> There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land. I am therefore of opinion that the plaintiff was not entitled to recover for the work which he had done.

It is clear then, that unless the innocent party has freely accepted the benefits of the partial performance by the defaulting party, the latter is without a remedy. This is so because the courts have refused to impose on the innocent party any obligation by law where the partial performance cannot be returned *in specie*. Instead, in such a case, they require proof of acts from which a new contract can be implied in fact.

---

39 [1898] 1 Q.B. 673 (C.A.).

40 *Ibid.*, at pp. 676, 677.

(*b*) *Specific Applications of the Rule*

We will now examine some specific applications of the general rule discussed above.

(i) Master and Servant

The position of the defaulting servant at common law has been summarized as follows:[41]

> Where a servant is engaged at so much for a specified period (e.g. quarter or year), and for some reason (other than a breach of contract by the master) fails to complete the term, the rule at common law is that he can recover nothing.

Thus in *Knox v. Munro*[42] the plaintiff entered into a lump sum contract to work for the defendant for eight months. At the end of four months, the plaintiff left the defendant's service without good cause, and sued in *quantum meruit*. In dismissing the action, Bain J. said:[43]

> As no time was specified for the payment of the $130, under the special agreement, they would not become payable until the plaintiff had performed the work which was the consideration for the payment. Having left before the end of the eight months, he cannot, of course, be entitled to the $130; and as he left without any valid reason or excuse, it seems clear that he is not entitled to recover any portion of the $130 as wages for the part of the time that he worked . . .
>
> Then, when he quit work, the special agreement was still subsisting; and it is a proposition of law that cannot be disputed, that no new contract can be implied from acts done under an express contract which still subsists . . . He is not, therefore, entitled to recover anything on a *quantum meruit* for the work he actually did.

It is clear from the foregoing that the position of the defaulting servant at common law is not an enviable one. Where the servant has committed a fundamental breach, the master can dismiss him and refuse to pay for the value of the services rendered in partial performance. The servant cannot rely on a new contract to pay a reasonable amount for the partial performance because the master has not had an opportunity to accept or reject the services rendered. There is nothing the master can restore.[44] The servant therefore is without a remedy.[45]

---

41 Glanville L. Williams, *Partial Performance of Entire Contracts, I* (1941), 57 Law Q. Rev. 373, at p. 375.

42 (1900), 13 Man. L.R. 16 (Man. K.B.).

43 *Ibid.*, at p. 18.

44 *Trustees of School District No. 7½, Parish of Bright, York County v. Yerxa* (1910), 40 N.B.R. 351 (N.B.C.A.), per Barker C.J., at pp. 359, 360.

45 *Selig v. Arenburg* (1917), 51 N.S.R. 198 (N.S. Sup. Ct.); *Allcroft and Prescott v. Adams* (1906), 38 S.C.R. 365 (Can. Sup. Ct.); *Pimlott et al. v. Marbridge Investments Ltd.* (1967), 61 D.L.R. (2d) 309 (B.C.C.A.).

More promising to the defaulting servant is certain remedial legislation dealing with apportionment.[46] The New Brunswick Property Act,[47] for example, deals with apportionment in sections 3 through 7. Section 3 reads:[48]

> All rents, annuities, dividends and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

A number of things should be noted about this section and the others dealing with apportionment. First, section 3 applies only to periodic payments. Second, by section 6, "annuities" include salaries and pensions. Wages would probably be included either in "annuities" or in "other periodic payments". Third, by section 4, the apportioned part cannot be recovered until the entirety or next portion thereof is due. Finally, by section 7(2), the apportionment sections of the act "shall not extend to any case in which it is expressly stipulated that no apportionment shall take place".

There is English dictum to the effect that the defaulting servant might not be able to take advantage of the apportionment legislation. In considering a section in the English *Apportionment Act*, 1870, similar to section 3 of the New Brunswick Property Act,[49] Lush J. said that "if something has happened during the service which forfeits the right to the salary it may well be that the servant cannot take advantage of the Act and say: 'The salary has accrued from day to day and I am entitled to receive it'."[50] This view of the act should be contrasted with that of Dr. Glanville Williams:[51]

> It is submitted, however, that such an interpretation (as that of Lush J. above) would not only perpetuate the harshness of the old decisions but would be unsound in principle. The common-law rule is not based on the idea of forfeiture. The reason why the servant who is dismissed for misconduct cannot claim wages for the current period is because he has not completed the period. Thus the rule at common law against recovery by the servant seems to be exactly the same where the contract is terminated by the death of the master or servant, and here there is no question of forfeiture for misconduct. (My brackets)

---

46 Legislation dealing with frustrated contracts does not assist the defaulting contractor: *Tingley v. McKeen*, [1954] 4 D.L.R. 392 (N.B.C.A.).

47 R.S.N.B. 1952, c. 177.

48 *Ibid.*

49 *Ibid.*

50 *Moriarty v. Regent's Garage and Engineering Company Limited*, [1921] 1 K.B. 423, at p. 435, reversed on another ground, [1921] 2 K.B. 766 (C.A.).

51 Glanville L. Williams, *Partial Performance of Entire Contracts, I* (1941), 57 Law Q. Rev. 373, at p. 383.

The leading New Brunswick case[52] on apportionment dealt not with master and servant but with landlord and tenant. It was held in that case that if a landlord wrongfully evicted his tenant he could not take advantage of the apportionment sections of the *Property Act*[53] to recover rent. A new trial was ordered to determine whether there had been a wrongful eviction. It is interesting to note the words used by Baxter C.J.N.B.:[54]

> Suppose a landlord for no justifiable reason during the currency of a term, enters upon his tenant and turns him out of possession, is he to take advantage of his own wrong and be enabled to recover rent for the proportion of the tenancy up to his wrongful act? Is it enough to say that the tenant may counterclaim in damages? I hope not. The Act was never intended to deal with tortious interferences with the right of any person and to my mind does not do so. Of course there may be evictions where for breach of some condition the tenant has forfeited his term. But there the breach is the act of the tenant. He, by his act has put an end to the tenancy or given to his landlord an opportunity to do so. The condition was a matter of his contract. The distinction between a wrongful act of a landlord and a rightful one under the terms to which the tenant has assented is too obvious to require detailed discussion.

It will be noted that Baxter C.J.N.B. stressed the tortious aspect of the eviction. But enough has been said to throw some doubt on the right of the defaulting contractor to take advantage of the remedial legislation dealing with apportionment.[55]

(ii) Contracts for Work and Labour

The stumbling block for the defaulting servant in suing in *quantum meruit* is the lack of opportunity for the innocent master to accept or reject the services rendered in partial performance. This same difficulty arises in contracts for work and labour where the work is carried out on the defendant's property. As was stated by Henry J. in *Lakin v. Nuttal:*[56]

> It cannot be doubted that if, in the event of the failure to perform the whole of a contract, the party accepts and gets the benefit of a partial performance, the law renders him liable to pay pro rata or a quantum meruit therefor. Here, however, the work was done on the property of the respondents, and in that case an express acceptance was necessary to be shown; and it is to be distinguished from a case wherein a change of possession might be evidence of acceptance.

---

52 *Murphy v. Wood*, [1941] 4 D.L.R. 454 (N.B. Sup. Ct.).

53 R.S.N.B. 1952, c. 177.

54 *Murphy v. Wood*, [1941] 4 D.L.R. 454 (N.B. Sup. Ct.), at p. 457.

55 In *Fenety v. Fenety and Board of School Trustees of Fredericton* (1958), 13 D.L.R. (2d) 169, Dickson Co. Ct. J. held that a garnishor could not take advantage of the apportionment sections of the New Brunswick *Property Act* in respect of a salary payable monthly.

56 (1879), 3 S.C.R. 685 (Can. Sup. Ct.), at p. 696.

Thus in a New Brunswick case[57] concerning an action by a defaulting contractor who had installed mill machinery in the defendant's building in partial compliance with his contract, the direction of the trial judge that the defendant by keeping the machinery must pay the reasonable value was held on appeal to be wrong.[58] The same barrier has confronted the defaulting contractor in contracts for repairs to a car[59] and contracts for doing logging work on the innocent party's land.[60]

The task of raising an inference of a new contract in the circumstances outlined above, though extremely difficult, is not impossible. Thus where the innocent party promises to pay for the partial performance,[61] or where he makes some payments for the partial performance,[62] or does other acts tending to show acquiescence[63] as distinguished from the ordinary acts of an owner of his property, the partial performer may recover on a *quantum meruit*. Indeed, his acquiescence may be held to be a waiver of full performance as a condition precedent, thereby allowing the defaulting party to sue on the contract, subject of course to the innocent party's counterclaim or cross-action for damages.[64] Finally, where the contract for work and labour is not carried out on the innocent party's property, the defaulting party's task is less difficult because usually the innocent party will have an opportunity to accept or reject the partial performance.[65]

---

57 *Waterous et al. v. Morrow* (1878), 18 N.B.R. 11 (N.B.C.A.).

58 See also *Fairbanks Soap Co. Ltd. v. Sheppard*, [1953] 1 S.C.R. 314. But note that Cartwright J., who delivered the judgment of the court, said at p. 321: "From the evidence it seems probable that the machine in its present state has become part of the realty which belongs to the appellant. Assuming this to be so it is clear from the reasons in *Sumpter v. Hedges*, [1898] 1 Q.B. 673, that the mere fact of the appellant remaining in possession of his land is no evidence upon which an inference of a new contract can be founded . . . *In the case at bar the appellant has never elected to take any benefit available to him from the unfinished work and Mr. Williston stated that he was willing that, in the event of his appeal succeeding, a term should be inserted in the judgment permitting the respondent to remove the machine within a reasonable time.*" (My emphasis) The judgment so provided.

59 *Hyland v. Harrison* (1915), 49 N.S.R. 75 (N.S. Sup. Ct.).

60 *Tuhotte v. Jervis Inlet Lumber Co.* (1911), 18 W.L.R. 336 (B.C.C.A.).

61 *Mattinson v. Hewson* (1909), 43 N.S.R. 339 (N.S. Sup. Ct.).

62 *Foshay v. Baxter* (1849), 6 N.B.R. 335 (N.B. Sup. Ct.).

63 *Bain and Torrey v. Eagle* (1914), 6 W.W.R. 1551 (Sask. Sup. Ct. in banco).

64 *Tanenbaum and Downsview Meadows Ltd. v. Wright-Winston Ltd.* (1965), 49 D.L.R. (2d) 386 (Ont. C.A.); *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.), per Denning L.J., at p. 181. See footnotes 32 and 33 and discussion above.

65 See *Mattinson v. Hewson* (1909), 43 N.S.R. 339 (N.S. Sup. Ct.).

(iii) Contracts for the Sale of Goods

The common law allowed the defaulting seller to recover the value of the goods accepted by the purchaser on a *quantum meruit*.[66] Apparently, the buyer had to pay a reasonable price for a short delivery under an entire contract even when he had consumed the goods in the expectation of a complete delivery and thus had no choice whether to accept or reject the goods.[67] In any event, the New Brunswick *Sale of Goods Act*[68] provides:

> 28. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

It will be noted that the buyer must now pay for the goods he keeps at the contract rate. Similar legislation has been enacted in most common law jurisdictions.

(*c*) *Summary*

In summary, as a general rule, while the law obliges the innocent party to allow the defaulting party to recover back his partial performance (by requiring the innocent party to accept or reject the partial performance), this obligation is restricted to the situation where the partial performance can be returned *in specie*, and has not been used by or incorporated into the property of the innocent party before breach of the contract by the defaulting party. Where the partial performance cannot be returned *in specie*, the defaulting contractor is without a remedy unless he can show acquiescence or acts from which a new contract can be implied in fact. A new contract can be implied in fact only where the innocent party has a choice to accept or reject the partial performance after the breach. A new contract cannot be implied in fact where the innocent party has no such choice for the simple reason that acts done under an express contract cannot be used to imply in fact a new contract. The courts have refused to impose on the innocent party any obligation by law where the partial performance cannot be returned *in specie*.

Should the Defaulting Party be Given a Restitutionary Remedy?

The question remains whether an obligation should be imposed on the innocent party to pay for the net value of the benefits con-

---

66 *Emack v. Woods* (1908), 39 N.B.R. 111 (N.B.C.A.); *Roy v. J. & D. A. Harquail Company Ltd.* (1912), 41 N.B.R. 255 (N.B.C.A.).

67 Robert Goff and Gareth Jones, *The Law of Restitution* (1st ed., 1966), pp. 353, 354.

68 R.S.N.B. 1952, c. 199.

ferred upon him by the defaulting party.[69] Merely because the partial performance was rendered under a contract should not prevent the court from implying an obligation by law. The courts will do this in favour of the innocent party who chooses to rescind and sue in *quantum meruit*.[70] Furthermore, they will give a restitutionary remedy where benefits are conferred under an ineffective contract.[71] The true reason for the present position must be found elsewhere.

The argument in favour of not imposing an obligation on the innocent party is that to do so would be to reward the defaulting party for his breach of contract and impose in effect a new contract on the innocent party. On the other hand, the argument in favour of imposing an obligation on the innocent party is that not to do so will in many cases result in an unjust forfeiture for the defaulting party.[72] As was stated by Parker J. in the old New Hampshire case, *Britton v. Turner*:[73]

> By the operation of this rule (that the contract must be fully performed in order to recover any part of the consideration) . . . the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action. (My brackets)

The argument in favour of not imposing an obligation on the innocent party loses much of its force where the defaulting party's breach is not wilful. Furthermore, even where the defaulting party's breach is wilful, limitations could be imposed on his recovery so as to prevent him from making a profit from his wrong.[74] Recovery could be further limited to partial performance that was not substantially different from the kind contracted for. Finally, any resti-

---

69 See Samuel J. Stoljar, *The Great Case of Cutter v. Powell* (1956), 34 Can. Bar Rev. 288, where the view is advanced that the present state of the law is the result of a debt-contract fallacy and that to speak of giving a restitutionary remedy is merely to confuse the issue further.

70 *McHugh v. Murray* (1884), 24 N.B.R. 12; *Swim v. Amos* (1895), 33 N.B.R. 49; *Gregory v. Williams* (1916), 44 N.B.R. 204; *Jardine v. The Prescott Lumber Company Limited* (1917), 44 N.B.R. 505. See footnote 37 and discussion above.

71 *Deglman v. Guaranty Trust Company of Canada*, [1954] S.C.R. 725 (Can. Sup. Ct.).

72 This is the result of *Sumpter v. Hedges*, [1898] 1 Q.B. 673 (C.A.).

73 (1834), 6 N.H. 481; reprinted in Woodruff, *Cases on Quasi-Contracts* (3rd ed., 1933), p. 153, at p. 154.

74 Glanville L. Williams, *Partial Performance of Entire Contracts, I* (1941), 57 Law Q. Rev. 373, at pp. 395-398.

tutionary rights allowed the defaulting party would not affect the innocent party's right to sue for damages.[75]

The majority of American courts have allowed such restitutionary rights to the defaulting contractor where his breach of contract is not wilful. The *Restatement of Contracts* states:[76]

> S.357(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment, except as stated in Subsection (2), for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if
>
> (a) the plaintiff's breach or non-performance is not wilful and deliberate; or
>
> (b) the defendant with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.
>
> (2) The plaintiff has no right to compensation for his part performance if it is merely a payment of ernest money, or if the contract provides that it may be retained and it is not so greatly in excess of the defentant's harm that the provision is rejected as imposing a penalty.
>
> (3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in Subsection (1b), in which case it is the price fixed by the contract for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price.

It is regrettable that a similar approach has not been taken in Canada.

Conclusion

The result of the common law rules is that an injustice may be caused the defaulting contractor if his part performance exceeds the actual damage suffered by the innocent party. And where there is injustice there is need for reform. We have already seen that the reform legislation enacted so far has been extremely limited.

---

75 The defaulting party may recover back money paid in part payment of the purchase price: *Dies v. British and International Mining and Finance Corporation*, [1939] 1 K.B. 724 (K.B.). Why should the rule be different for other types of performance?

76 *Restatement of Contracts* #357 (1932).

The path is probably still open for the Supreme Court of Canada to allow a restitutionary remedy on the principle of the *Deglman* case,[77] but until it does or until remedial legislation is enacted, the injustice will continue, because at the present time the principle of *Sumpter v. Hedges*[78] is undoubtedly the law throughout the common law provinces of Canada.

77 *Deglman v. Guaranty Trust Company of Canada*, [1954] S.C.R. 725 (Can. Sup. Ct.).

78 [1898] 1 Q.B. 673 (C.A.).