SUBSTANTIAL PERFORMANCE IN BUILDING AND WORK CONTRACTS.

The so-called doctrine of substantial performance has three somewhat separate origins and applications. One doctrine of substantial performance applies to contracts for the sale of land and is of purely equitable creation.[1] Another doctrine of this name is often applied to adjust a promisor's delay or unpunctual performance and has its roots both in common law and equity.[2] A third doctrine of substantial performance is almost exclusively connected with contracts of building or work and labour; and indeed, whenever we think of "substantial performance" we first think of its applicability to a builder. In this paper I wish to deal with this last doctrine in order to elucidate its principal problems.[3] These problems may be thought to be "familiar",[4] but they still remain seriously unexplained and are apt to create confusion.

I.

To understand the basis and scope of our doctrine, we must trace its history, and especially the development that began with the important case of *Farnsworth v. Garrard*.[5] The plaintiff had rebuilt the front of a house for the defendant. When finished, the house (in the words of the declaration)[6] "was considerably out of the perpendicular, and, according to several of the witnesses, in great danger of tumbling down, though others said it might stand for many years."

1 Cf. my *Substantial Performance in Contracts of Sale,* (1954) 32 CAN. BAR REV. 251.

2 These problems are dealt with in *Untimely Performance in the Law of Contract,* to be published in the Law Quarterly Review (London).

3 See generally 3 CORBIN ON CONTRACTS, (1950) secs. 700-709; HUDSON ON BUILDING CONTRACTS (6th ed. 1933) 162 *et seq.;* and see also 3 HALSBURY'S LAWS OF ENGLAND (3rd ed. 1953) 437 *et seq.*

4 See, for example, *per* Denning L.J. in Hoenig v. Isaacs, [1952] 2 All E.R. 176, at 180.

5 (1807) 1 Camp. 38, 170 E.R. 867. See also the earlier case of Craven v. Tickell, (1789) 1 Ves. Jun. 60, 30 E.R. 230, where Lord Thurlow L.C. said (at 61) that "Small deviations from the plan would not affect it much; but if there is any obstinate or corrupt deviation, that would materially." In this case, however, the facts were most peculiar.

6 1 Camp. 38. The report occasionally confuses between the plaintiff-builder and the defendant-owner; e.g., it is stated that verdict went for the defendant which is clearly against the whole tenor of Lord Ellenborough's judgment.

Several previous cases[7] vaguely supported the builder's claim for remuneration, but the most telling argument in his favour was that it was "impossible that the defendant should be allowed to keep the bricks without paying for them."[8] While Lord Ellenborough recognised that there had formerly been "considerable doubt" concerning such an action, he had "since had a conference with the Judges on the subject."[9] He therefore proceeded to enunciate the "correct rule", to the effect that a builder's claim was to be co-extensive with the benefit he had given. Thus if the owner derived some benefit from the work, though not to the full or complete extent agreed on, this "shall go to the amount of the plaintiff's demand", leaving the defendant to his counterclaim for negligent performance. On the other hand, "if there has been no beneficial service, there shall be no pay." With "benefit" becoming the new operative concept, everything depended on the difference between beneficial and non-beneficial service. On this, Lord Ellenborough's explanation was both shrewd and specific; if the wall would not stand and had to be pulled down, the building owner, far from receiving a benefit, in fact suffered damage;[10] yet if, in spite of the deficiency, it would "cost (the owner) less to rebuild the wall, than it would have done without these materials, he has *some* benefit",[11] and for this benefit he must make reward in money.

7 Counsel for plaintiff relied on Duffit v. James (1788), Cormack v. Gillis (1788/1789) and Morgan v. Richardson, all cited in 7 East 479 at 480-2 (and 103 E.R. at 186); for Morgan v. Richardson see also note in 1 Camp. at 40. In none of these cases had the precise point previously occurred, although both Duffit v. James and Cormack v. Gillis showed that lack of quality of performance (i.e., misperformance) would not wholly defeat a plaintiff's claim. More directly in point was Basten v. Butter, (1806) 7 East 479, 103 E.R. 185 [wherein see also Broom v. Davis, (1794) *coram* Buller J., and King v. Boston (1789)], where a plaintiff was not entitled to recover more than the value of his work; but *cf.* Templer v. M'Lachlan, (1806) 2 Bos. & Pul. (N.R.) 136, 127 E.R. 576. In Broom v. Davis, (1794) 7 East 480n., 103 E.R. 186, n. (a) 1, where a booth was built for a lump sum and later it collapsed, Buller J. held that the plaintiff could claim the agreed sum, and that the defendant had a cross-action in damages. The point of this decision was, however, *procedural* (i.e., defendant was not permitted to give evidence in reduction in the same action); it was not an "extreme case" of the principle in H. Dakin & Co., Ltd. v. Lee, [1916] 1 K.B. 566; for the latter suggestion, see Somervell L.J. in Hoenig v. Isaacs, [1952] 2 All E.R. 176, at 179.

8 (1807) 1 Camp. 38, 170 E.R. 867. For an even stronger decision to the same effect, see Menetone v. Athawes, (1764) 3 Burr. 1592, 97 E.R. 998, but compare the latter with Appleby v. Myers, (1867) L.R. 2 C.P. 651.

9 1 Camp. 38, at 39; 170 E.R. 867, at 868.

10 The owner could, in fact, require the builder to remove the wall and the material: See 1 Camp. at 39, 170 E.R. at 868.

11 *Ibid.* (my italics in text).

This principle, albeit clear and simple, was also in certain respects profoundly novel. In the first place, contrary to what was previous law where a defaulting promisor could recover nothing if the contract was held "dependent", or could recover (i.e., recover provisionally)[12] the whole sum if the contract was held "independent", both positive and negative elements of the builder's performance could now be assessed in a single action; it was, in other words, thus made possible to measure the net difference between full performance and the existing deficiency as it affected both parties to the contract. In the second place, the principle also made for the establishment of a new type of *quantum meruit;* it was a new type because it was "implied" notwithstanding the express terms of the contract. This innovation, in particular, gave rise to certain difficulties, best illustrated in the following decision of *Ellis v. Hamlen.*[13] The plaintiff had deviated from specifications by omitting to put into the building certain joists and other materials prescribed in the contract. He first sued for a part of the contract price not yet paid and still outstanding (though he admitted that a deduction was to be "excepted thereout"), but he was non-suited. He thereupon claimed remuneration on a *quantum meruit,*[14] arguing that the owner "having the benefit of the houses, was bound at least to pay for them according to their value."[15] But Mansfield C.J. vigorously opposed this contention. The defendant, he protested, had agreed to pay for a house built in a certain manner, a manner the builder had not complied with. It may be hard, the learned judge admitted, for a builder to build houses without payment, but "the difficulty is to know where to draw the line: for if the Defendant is obliged to pay in a case where there is one deviation from his contract, he may be equally obliged to pay for any thing, how far soever distant from what the contract stipulated for."[16] Unlike Lord Ellenborough, Chief Justice Mansfield would not permit a "measure-and-value price"[17] to replace the express terms, including

12 Provisionally because the plaintiff, of course, remained subject to a cross-action; see note 7 *supra.* In the meantime, however, the defendant would have to part with a sum of money often far in excess of the benefit or performance he had received. These results were due to the doctrine of dependent and independent covenants which, after Boone v. Eyre, (1777) 1 H. Bl. 273n., 126 E.R. 160n., went through a particularly troublesome development in the early nineteenth century.

13 (1810) 3 Taunt. 52, 128 E.R. 21.

14 The report uses the expression *quantum valebant.*

15 3 Taunt. at 53, 128 E.R. at 22.

16 *Ibid.* For another argument about hardship, see note 65 *infra.*

17 *Ibid.* The builder, he said, "cannot now be permitted to turn round and say, I will be paid by a measure-and-value price."

the stipulated payment, provided in the original contract. Yet there is another remarkable aspect of this decision. It shows how easy it was to turn the whole argument just a little to arrive, and indeed arrive convincingly, at a result wholly unfavourable to the builder. In *Ellis v. Hamlen* the emphasis was on the express agreement which made *quantum meruit* inapplicable; in *Farnsworth v. Garrard,* the emphasis was on restitution for a benefit conferred which made the express terms adjustable. Thus began a dualism of legal standards, the effect of which was to render the builder's right to compensation somewhat vulnerable and uncertain. This dualism, however, became only troublesome much later,[18] for the next decisions followed the direction set by *Farnsworth v. Garrard.* Their contribution was to make the "measure-and-value" technique considerably more precise and explicit.

In *Burn v. Miller*[19] a lessee was to make certain improvements within two months after taking possession, and the lessor was to pay for these improvements at the end of the year. The lessee failed to finish the improvements within the stipulated time, although he subsequently completed after being duly encouraged by the lessor. When asked for the price, the lessor refused the price since the express condition precedent (i.e., completion within two months) had not been complied with. The contention was that since the lessee could not show performance of the stipulated condition, and since the lessor was anyhow entitled to take possession of fixtures on his freehold, the lessee could not recover even on the common counts for work and labour.[20] However, the court rejected this contention completely. "It is a settled rule" (it was said *per curiam*) "even in the case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an

18 See the discussion of Munro v. Butt, (1858) 8 El. & Bl. 738, 120 E.R. 275, *post.* It must be added, however, that on its facts alone, Ellis v. Hamlen could easily be reconciled with the present line of decisions. Since the builder had been paid "the principal part of the price", he had perhaps already been rewarded for the net benefit he had given. The strictures of Mansfield C.J. therefore might be interpreted as merely a refusal to reward a builder for all his work irrespective of any benefit to the owner. But there are other cases more directly in line with Ellis v. Hamlen: See Davis v. Nichols, (1814) 2 Chitty (K.B.) 320; Rees v. Lines, (1837) 8 C. & P. 126, 173 E.R. 427; Humphreys v. Jones, (1850) 5 Ex. 952, 155 E.R. 415. On the other hand, the oft-quoted case of Sinclair v. Bowles, (1829) 9 B. & C. 92, 109 E.R. 35, seems entirely distinguishable on its facts, since here no real benefit was given.

19 (1813) 4 Taunt. 745, 128 E.R. 523.

20 See Serjeant Best, *arguendo,* 4 Taunt. at 746, 128 E.R. at 524. It is significant that he relied on Ellis v. Hamlen; Farnsworth v. Garrard was not referred to.

implied assumpsit. Upon this ground it is that freight is daily recovered in actions of assumpsit on implied promises, substituted for the charter parties by deed."[21] As in this case the plaintiff's work conferred an undoubted benefit upon the lessor (the latter having in fact admitted it to be "very convenient"), he had to disgorge the price agreed in the contract.[22] The law, in short, returned to the principle laid down by Lord Ellenborough, a principle which Mansfield C.J. had just rejected.

Even more important is the next decision. In *Thornton v. Place*[23] the facts were of unusual interest. The plaintiffs who were slaters had failed to do their work according to the contract. Had they properly performed, their labour would have been worth £18, but the defendants were able to show that it would cost them between £10 and £11 to alter the work to make it conform to specifications, while the plaintiffs argued that £18 was a fair price for what they had actually done. These facts presented the issue at its neatest, for the court was compelled to evaluate the builders' demand as against the strong defence of the owners. Obviously the builders' claim could not be for the whole price stipulated in the contract, since that contract had not only been deviated from, but the deviation was apparently quite serious. Nor could the builders' claim be measured as if no express contract existed, in which case a builder would admittedly be entitled to the fair (market) price for his work and labour.[24] The only alternative was that the slaters were entitled to the stated price but subject to a deduction, and the "measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification."[25] The importance of this decision needs to be stated

21 4 Taunt. at 748, 128 E.R. at 525. The basis for this proposition was Ritchie v. Atkinson, (1808) 10 East 295, 103 E.R. 787.

22 The court, moreover, insisted that it did not put the lessor's duty to pay on the ground that he, after re-entry, had *adopted* the work; the reason was simply that there had been clear beneficial service. Nevertheless, and apparently for good measure, Ellis v. Hamlen was also distinguished on the ground that whereas in Ellis there had been no acquiescence by the owner, in this case there had, the lessor having encouraged the lessee to complete. This was, undoubtedly, an additional good reason to make the lessor pay, but it seems slightly inconsistent with the principal ground of the decision which required payment because of the benefit conferred and independently of adoption. Again, this talk of "acquiescence" seems the first intimation of the "consent-theory", of which more will be said later.

23 (1832) 1 M. & Rob. 218, 174 E.R. 74.

42 *Cf.* Roberts v. Havelock, (1832) 3 B. & Ad. 404, 110 E.R. 145.

25 1 M. & Rob. at 219, 174 E.R. at 75, *per* Parke J. The verdict, according to the report, went for the defendant, and the explanation of this can only be that the plaintiffs had sued for the full price of £18, not merely for payment for such benefit as they conferred on the owner. Whatever the verdict, the judgment clearly implies that the plaintiffs would have been successful in recovering payment to the extent of the net value they had given.

with particularity. For one thing, the plaintffs had not even "substantially" performed, for taking into account the owner's cost of alteration, the work actually amounted to less than half of the work agreed on; in other words, this was far from a case of substantial performance leaving only minor incompleteness.[26] For another thing, the decision clarifies the basis of *quantum meruit* that is applicable to these situations. Although the owner must pay for the benefit he gets, the benefit is calculated by an assessment of the owner's new financial position: What will it cost him to get the work he originally wanted? And this cost has to be deducted from the total price the builder was to receive had he performed completely. The practical result is that a builder would thus never recover the full benefit he conferred; what he could recover is the price of that benefit as adjusted by the loss caused by his breach of contract.

In the same year as *Thornton v. Place, Cutler v. Close*[27] was decided. The plaintiffs were to erect a warm-air stove in a chapel, and their price was £70 for the stove and its installing. The trustees complained that the work was imperfectly done, so that the stove did not spread the heat evenly over the whole chapel; and they refused to pay the price when demanded. In his summing up, Tindal C.J. put three possibilities before the jury; if they thought that the stove was of no use, then the defendants need not pay anything; if they believed the stove to be such as contracted for, its "imperfection" being due to the defendants' own mishandling, the plaintiffs were entitled to the full price; but, thirdly, if they regarded the stove to be "in the main substantial, but not quite so complete as it might be according to the contract", which incompleteness "can be made good at a reasonable expense", then the jury was to deduct the sum they thought right on that account. And the jury awarded the plaintiffs £60. It will be seen that *Cutler v. Close* appreciably restricts the principle behind *Farnsworth v. Garrard* and *Thornton v. Place*.[28] We are now told, and as far as can be ascertained told for the first time, that a promisor must do more, in order to succeed in *quantum meruit*, than confer a net benefit upon the promisee; he must confer a considerable benefit, something that can be regarded as substantial performance; so that only where the deficiency can be "made good at a reasonable expense", this expense presumably being minor, can the

[26] It will be later seen that the plaintiffs would be unable to recover anything under existing law.

[27] (1832) 5 C. & P. 337, 172 E.R. 1001. This case precedes Thornton v. Place, being decided in February and Thornton in August.

[28] In Cutler v. Close, however, no authorities were cited.

promisor claim his price minus the appropriate deductions. But suppose that in this case the stove, as installed by the plaintiffs, would have been worth at most (say) £30 instead of £60 as found by the jury. Does the decision commit us to hold that the plaintiffs could then not have recovered anything at all? And if, consistently with *Thornton v. Place,* such a result is not really acceptable, how is the divergence to be harmonized? Yet it is difficult to find a precise formula of reconciliation, unless we could suggest an explanation such as this: That the installing of a stove is to be treated differently from usual building work, and perhaps for two reasons. One is that whereas a stove could, as a last resort, be dismantled and returned to the promisor, the materials used in building are irretrievably lost. Another reason might be that the provision of a stove is more analogous to the sale of a chattel, so that the buyer may insist that, like every bought chattel, the article must fit his particular and declared purpose. The question then becomes "whether it was a stove calculated to answer the purpose intended, though it might not be altogether and completely sufficient."[29] However this may be, *Cutler v. Close* introduced into building contracts a requirement of *substantial* performance, and this requirement has become part of the conception of the doctrine as it is currently applied.[30]

The last case of our present chronology is *Chapel v. Hickes,*[31] which came in the following year. The problem was again what a builder was entitled to in payment, not having complied with specifications. At trial, the plaintiff had been awarded the full contract price by a jury,[32] but the defendant obtained a rule to set aside this verdict which was eventually made absolute. Although, as Lord Lyndhurst C.B. said, it "cannot be consistent with reason, that a party who has not performed his contract should recover the full amount for which he has stipulated",[33] it was admitted that the plaintiff could have

29 5 C. & P. at 339, 172 E.R. at 1002, *per* Tindal C.J. See also Duncan v. Blundell, (1820) 3 Stark. N.P. 6, 171 E.R. 749; Grounsell v. Lamb, (1836) 1 M. & W. 352, 150 E.R. 469; Hall v. Burke, (1886) 3 Times L.R. 165. In this respect, the doctrine of substantial performance fulfils the same function as the implied warranty of fitness of purpose in the sale of goods. In building contracts, this warranty is usually absent, the builder not being liable for any defect, etc., provided he complies with the specifications: See Jones v. Just, (1868) L.R. 3 Q.B. 197; Ripley v. Lordan, (1860) 2 L.T.N.S. 154; Hydraulic Co. v. Spencer, (1886) 2 Times L.R. 554. And see also Thorn v. London Corporation, (1876) 1 App. Cas. 120.

30 *Cf.* H. Dakin & Co., Ltd. v. Lee, [1916] 1 K.B. 566; and see *post.*

31 (1833) 2 C. & M. 214, 149 E.R. 738.

32 The explanation for this extreme award must lie in the fact that defendant had allowed judgment to go by default.

33 *Ibid., per* Lord Lyndhurst C.B.

recovered on the common counts for work, labour, and materials. This decision therefore returns to the principle of *Thornton v. Place;* a defaulting builder, in summary, cannot claim the full price when he has failed in performance; what he can claim is pecuniary restitution for the net value he has given; "the claim shall be co-extensive with the benefit."[34] *Cutler v. Close,* as we have seen, left some doubt how co-extensive this claim was; but it was perhaps a solitary doubt as compared with the weight of the other authority.

II.

Our second stage of inquiry reverses the previous direction, and the arguments noted in connection with *Ellis v. Hamlen*[35] come again to the fore. The most important landmark now is *Munro v. Butt,*[36] a decision requiring detailed examination. The facts were as follows:— Munro agreed with Butt on 21 December 1855 to finish and complete two houses by 21 January 1856; these buildings had been left unfinished by a previous building lessee. Munro was to receive for his work £240, subject to Butt's surveyor certifying his approval. As it happened, Munro did not complete within the month, but only completed on 26 January 1856, and he then asked to be paid. Butt refused payment without the approval of his surveyor who, after having examined the houses, declared the work to be incomplete. At that time the previous lessee was in occupation of the houses, but in March 1856 Butt apparently took over possession. Munro then sued both on the special contract and in *quantum meruit* for work and materials supplied. Butt resisted the action on three grounds:—(i) that the contract was not completed in time;[37] (ii) that the surveyor had not certified his approval;[38] and (iii) that because the "special" or express contract remained "open", no *quantum meruit* could be implied.[39]

34 Cf. Farnsworth v. Garrard, (1807) 1 Camp. 38, 170 E.R. 867, *per* Lord Ellenborough C.J.

35 (1810) 3 Taunt. 52, 128 E.R. 21.

36 (1858) 8 El. & Bl. 738, 120 E.R. 275.

37 For a discussion of delay, etc., see my article referred to in note 2 *supra.* Indeed, in Burn v. Miller, (1813) 4 Taunt. 745, 128 E.R. 523, the court said that "there are many contracts made with relation to time, upon which, although the works are not finished when the time is expired, the work and labour or other beneficial matter may nevertheless be recovered for." See also Wimshurst v. Deeley, (1845) 2 C.B. 253, 135 E.R. 942.

38 Some of these problems are discussed in *Prevention and Co-operation in the Law of Contract,* (1953) 31 CAN. BAR REV. 231 at 242-3; and see also HUDSON, *op.cit.,* 243 *et seq.*

39 The principle that *quantum meruit* was inapplicable if the express contract remained "open" began with Cutter v. Powell, (1795) 6 T.R. 320, 101 E.R. 573, strongly approved in Munro v. Butt. A striking illustration is Rees v. Lines, (1837) 8 C. & P. 126, 173 E.R. 427, where a defaulting builder was

Grounds (i) and (ii) need not here be discussed any further, though (ii) especially must have strongly influenced the decision. Our present concern is with ground (iii), as to which the more detailed arguments were that *quantum meruit* was inapplicable, (a) because there was no evidence that the defendant had derived any benefit; (b) even if the defendant did take possession, this could not be taken as acceptance of the work since, unlike the case of a chattel, he could not reject it; and (c) if the plaintiff were allowed to recover according to measure-and-value, the plaintiff could recover more than the contract price.[40] In his judgment, Lord Campbell C.J. vigorously approved of these arguments for Butt, particularly stressing the point that the defendant had no option but to take possession. His words on this are important:—"But, using the term (i.e., taking possession) in a popular sense, what is he (the defendant), under the supposed circumstances, to do? The contractor leaves an unfinished or ill constructed building on his land; he cannot, without expensive, it may be tedious, litigation, compel him to complete it according to the terms of his contract; . . . yet it may be essential to the owner to occupy the residence, if it be only to pull down and replace all that has been done before. How then does mere possession raise any inference of a waiver of the conditions precedent of the special contract, or of the entering into a new one?"[41]

We can see that this new principle marks a very new approach. For it delineates a different basis of *quantum meruit*, that is, a basis wholly divorced from the idea of "benefit" previously discussed. According to *Munro v. Butt*, what matters is not that the builder, in doing what he did, conferred a benefit upon the owner; what matters is that the owner must "accept" the benefit, and indeed accept it in such a way as to enable a new agreement to be inferred. But if the test is agreement or consent (or, more technically, "waiver", "election", or "acceptance") the question is no longer whether or to what extent the builder deserves payment for his beneficial service; the question now is whether the parties have made a new contract replacing the original one. Moreover, *Munro v. Butt* not only announced a new

denied *quantum meruit* with regard to his work under the contract, but was held entitled to it as regards extras. This principle was later expressed by way of the proposition that where the contract is "entire" or for a lump sum, the builder cannot recover unless he fully completes; perhaps the first clear statement of this is Appleby v. Myers, (1867) L.R. 1 C.P. 615; see also Sumpter v. Hedges, [1898] 1 Q.B. 673, especially at 674.

40 This argument was obviously mistaken, and had already been taken care of in Thornton v. Place, (1832) 1 M. & Rob. 218, 174 E.R. 74.

41 8 El. & Bl. at 753, 120 E.R. at 280.

principle, but did so without mentioning, or even discussing, the relevant previous authorities quite incompatible with this approach.

There is a further unsatisfactory aspect of *Munro v. Butt*. While the report spends much time on the prior history of the case, we are given no information at all as to how much or how little Munro had actually performed, or what objective reasons there were to justify the surveyor's withholding his approval. More particularly, we are not told whether Munro's work did confer a benefit on Butt, or whether the work was, in fact, so negligible that it could never be described as beneficial, let alone as substantial. Nevertheless, a legitimate supposition would be that Munro's work fell far short of considerable performance, a supposition perhaps strengthened by Lord Campbell's remark that had Munro's failure to complete been "very slight", "the case would have been very different." But what, then, would have been this difference? Because, apparently, in such a case Butt's "acceptance" of Munro's work might have been presumed or inferred more readily.[42] Indeed, this particular remark exposes the whole artificiality of the new principle if it is to be based on the owner's agreement or consent. For the principle makes this agreement dependent not on genuine expressions of consent, but on the amount of work actually performed.[43]

Nevertheless this consent-theory of *Munro v. Butt* was directly applied and approved in *Sumpter v. Hedges*.[44] A builder had con-

42 8 El. & Bl. at 754, 120 E.R. at 280.

43 In another passage Lord Campbell also drew a false analogy from the sale of chattels to building contracts. Thus "in the case of an independent chattel, a piece of furniture for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or on an implied contract to pay for it according to its value." While this explains admirably the basis of *quantum valebat* in sale, the same sort of voluntary acceptance is hardly relevant to contracts of building, the two situations being entirely different. It is unfortunately just this notion of "acceptance" which gave rise to the consent-theory and continued to be repeated: See also text at note 46 *infra*.

44 [1898] 1 Q.B. 673. Munro v. Butt had already been followed in Whitaker v. Dunn, (1887) 3 Times L.R. 602. Sumpter v. Hedges was followed in Forman & Co. Ltd. v. The Liddlesdale, [1900] A.C. 190, and Wheeler v. Stratton, (1911) 105 L.T. 786. Nevertheless, as regards the decision in Forman, this can also be put on another ground, i.e., a ground very similar to Lovelock v. King, (1831) 1 M. & Rob. 60, 174 E.R. 21, where a carpenter did additional work visibly exceeding the contract price, and although the defendant knew of these additions, he was left completely unaware of their increasing cost. In some cases a defendant will immediately know that the new work is going to cost more, but where this is not the case, the principle should be,

tracted to erect two houses on the defendant's land for £565. He did part of the work amounting in value to (about) £333, and had received payment of part of the price; but because of lack of money he could not go on with the work. The defendant thereupon finished the building on his own account, using for that purpose some materials which the plaintiff had left on the land. Bruce J. gave judgment for the value of the materials so used,[45] but rejected the plaintiff's claim in *quantum meruit* for the value of work he had done, as he regarded the builder's failure to complete as an abandonment of the contract. The Court of Appeal followed this judgment. There "was no evidence", said A. L. Smith L.J.,[46] "of a fresh contract to pay for the work already done." For what was "the building owner to do? He cannot keep the buildings on his land in an unfinished state for ever." In addition, there was much judicial ado about the so-called abandonment of the contract. "If the plaintiff", argued Collins L.J.,[47] "had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract, and the defendant had then proceeded to finish the work himself, the plaintiff might perhaps have been entitled to sue on a *quantum meruit* on the ground that the defendant had taken the benefit of the work done." Yet it may be asked why the "abandoning" of the contract was regarded as of such vital importance? Surely where a builder deviates or departs from the specifications, he always "abandons" the contract in some respect. But such abandonments have, as we saw in the earlier decisions, been kept distinct from the fact that the owner received a benefit up to the point of, and notwithstanding, the deviations. Again, "abandonment" and "benefit" raise different issues. "Benefit" raises the question whether it is the *owner's* duty to pay for it; on the other hand, abandonment or any other breach of contract makes the *builder* liable in damages. Now there may be a case for treating an intentional breach as more serious than mere (negligent) misperformance (even assuming that stoppage for lack of money ought to be treated as wilful

said Lord Tenterden C.J., "that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent that the effect of the alteration will be to increase the expense of the work" (1 M. & Rob. at 61, 174 E.R. at 22).

45 See also Williams v. Fitzmaurice, (1858) 3 H. & N. 844, 157 E.R. 709, where a builder succeeded in trover for the value of materials similarly abandoned. (Observe that the headnote in that case is slightly incomplete and misleading).

46 [1898] 1 Q.B. at 674.

47 *Ibid.*, at 676.

breach);[48] but the problem still remains whether in these situations nothing is to be recoverable by the builder for the net benefit he has bestowed, where that benefit greatly exceeds any possible loss resulting to the owner from the failure to complete.[49]

And there is a further problem. What is the import of the distinction between the abandonment of a contract and the breach of a contract "in some way or so"? Does this mean that where a builder negligently completes the contract, departing from specifications, he can recover the price minus the appropriate deductions, but where he stops or omits performance, being more than half-way through, he can recover nothing?[50] If such be the law, suppose that in *Sumpter v. Hedges* the builder, instead of faithfully doing the work as long as he could, had carefully husbanded his meagre financial resources (by using inferior material and so on) and had thus succeeded in superficially "completing" the houses. The distinction, upon which our decision is based, is then reducible to this absurb result, that a misperformer cleverly doing shoddy work will fare better regarding payment than a builder doing honest and substantial work but unable to complete because of lack of finance.[51]

Or take another example. Suppose that in our case the builder had done work not amounting to only £333, but had, before abandoning the contract, done work to the value of (say) £500 (a figure still falling short of the agreed value of £565). However, even after such considerable performance the builder would, on the reasoning in *Sumpter v. Hedges,* be entitled to nothing; he would still be an intentional contract-breaker; and the owner could still be said neither to have "agreed" to the builder's abandoning the work nor to have "accepted" the substantial performance. For, as Collins L.J. explained, "to raise the inference of a new contract", "the circum-

48 In Ambrose v. Dunmow Union, (1846) 9 Beav. 508, 50 E.R. 440, a bankrupt builder failed to complete, and a bill in equity for the taking of an account of what he had done was dismissed. But the decision only covers a procedural point, i.e., how evidence was to be obtained in the earlier equity courts; the decision did not mean that a defaulting builder could not recover at law.

49 Indeed, in the unreported case of Lysaght v. Pearson, The Times (London) 3 March 1879 (and cited in Sumpter v. Hedges), the Court of Appeal had held that a plaintiff, having contracted to erect two iron roofs and failed to erect one of them, could recover for the work of the other. This case was now distinguished on the ground that the plaintiff had not *said* that he abandoned the contract but merely refused to go on without first being paid for the first roof.

50 See on this distinction, Glanville L. Williams, *Partial Performance of Entire Contracts,* (1941) 57 L.Q. REV. 373, at 385.

51 There are some American decisions which do not regard financial inability as a wilful or deliberate breach: See 3 CORBIN ON CONTRACTS, sec. 707.

stances 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."[52] But if this is the only evidence, cannot an owner always forestall any possibility of "option" by simply declaring that he does not "accept" or "consent to" any deficiency in the builder's performance? And can he not do this however small, slight or unimportant the deficiency may be? We can see therefore that the consent-theory not only prevents us from operating a doctrine of benefit, but can also prevent us from applying any doctrine of substantial performance. For, in whatever way the matter is put, the owner can always insist that, by making his contract, the only thing he consented to pay for is full and complete performance—that he did not consent to anything less.[53]

III.

The third and final stage of development is basically an attempt to get away from the consent-theory just described, without however returning to the criterion of benefit which characterized our first stage. In this sense, the modern doctrine of substantial performance can be traced back to the ideas enunciated in *Cutler v. Close*[54] rather than to those of *Farnsworth v. Garrard*[55] and *Thornton v. Place*.[56] Moreover our modern doctrine, while trying to overcome the more obvious disadvantages of "acceptance" or "consent", does not try to eliminate these requirements;[57] the doctrine merely states that where a builder "substantially" or "practically" or "nearly" performs he is entitled to payment subject to appropriate deductions. All this is clearly expressed

52 [1898] 1 Q.B. 673, at 676. The apparent analogy was again with sale of goods; see, in particular, the approval of Chitty L.J. (*ibid.*, at 675) of the remarks by Bramwell B. in Pattinson v. Luckley, (1875) L.R. 10 Ex. 330.

53 A very similar point, though stated differently, is made by Greer L.J. in Eshelby v. Federated European Bank, Ltd., [1932] 1 K.B. 423, at 431, when he said that "if H. Dakin & Co., Ltd. v. Lee lays down a principle of law it seems to be contrary to a long series of cases ever since Cutter v. Powell . . . " See also note 39 *supra*.

54 (1832) 5 C. & P. 337, 172 E.R. 1001. The exposition of the law in that case was held "exactly applicable" in H. Dakin & Co., Ltd. v. Lee, [1916] 1 K.B. 566, at 573 per Ridley J. For a similar idea, see also Wilkinson v. Clements, (1872) L.R. 8 Ch. App. 96, at 106.

55 (1807) 1 Camp. 38, 170 E.R. 867.

56 (1832) 1 M. & Rob. 218, 174 E.R. 74.

57 See next note.

in *H. Dakin & Co., Ltd. v. Lee,*[58] and also finds striking support in several American cases.[59] Thus, in *H. Dakin & Co., Ltd. v. Lee,* the builders contracted to carry out a large number of repairs and alterations to a house in accordance with specifications for a lump sum of £264. The official referee held the builders not entitled to anything since they had departed from specifications (a) in underpinning the wall with 2-inch concrete instead of the required 4-inch, (b) in not cleating or bolting certain joists at the top, and (c) in putting 4-inch solid columns for the 5-inch hollow columns specified. However, both the Divisional Court and the Court of Appeal regarded these omissions as negligible and decided that the plaintiffs had substantially performed. The builders were therefore entitled to the contract price less the amount necessary to make the work accord with the specification. Similarly, in the more recent case of *Hoenig v. Isaacs,*[60] an interior decorator was employed to furnish the defendant's flat for £750. The defendant paid £400, occupied the flat and used the furniture but refused to pay the balance of the price, alleging that certain pieces of furniture were defective. The official referee found, as a matter of fact, that these defects amounted to £55, but that in other respects the plaintiff had substantially performed. And the Court of Appeal, following *H. Dakin & Co., Ltd. v. Lee,* held the plaintiff entitled to his price less a deduction for the defects. Nevertheless, two further points arise from *Hoenig v. Isaacs.* On the one hand, the decorator's position was made easier by the fact that the defendant could be said to have accepted the furniture, for he "could have refused to accept it until the defects were made good."[61] On the other hand, however, it was said that this case was "near the border line";[62] in other words, a slightly greater deviation or defect would not have amounted to substantial performance. But this last point brings back our fundamental difficulty. For supposing that in this case the defendant could not have returned the articles supplied (if, for example, they had become fixtures) and the defects had only slightly exceeded the previous amount (i.e., £55), the defendant would apparently have been

58 [1916] 1 K.B. 566; at 574, Sankey J. stated a synthesis both of the old principles and the new. While this met the immediate requirements, this statement of the law left many problems unresolved (see, for example, the remarks of Greer L.J. cited in note 53 *supra*). It is significant that the learned judge entirely omitted to deal with Munro v. Butt, (1858) 8 El. & Bl. 738, 120 E.R. 275. For other comments, see also Vigers v. Cook, [1919] 2 K.B. 475.

59 See (1953) 31 CAN. BAR REV. 231, at 242, note 47.

60 [1952] 2 All E.R. 176.

61 See especially *per* Denning L.J., *ibid.* at 181.

62 *Per* Somervell L.J., *ibid.,* at 179. For a case not amounting to substantial performance, see Connor v. Stainton, (1924) 27 West. Aust. L.R. 72.

entitled to enjoy the value of the work worth (let us say) £600 without having to pay a penny for it.[63]

This result also exhibits the central disadvantage of the doctrine of substantial performance as it is presently applied. Its theory seems to be that a builder can be excused from his failure to complete as if substantial performance were in itself a sufficient justification for making this excuse. Now it is agreed that a builder should more readily recover where he nearly completes than where he does little; but it is submitted that the true reason for his recovery is that the builder, by substantially performing, also confers the substantial benefit for which the owner has bargained. For if we deduct from the contract price the cost of final completion, the owner would still be considerably better off than if the builder had done nothing. The test, then, lies in the deficit of non-completion as measured against the credit of the given value. And applying this test to the situation where a builder does little, the deficit arising from his non- (or mis-) performance would usually be greater than the credit of the benefit he has conferred. In short, the one justification for the doctrine of substantial performance is not that it is of itself an answer for the failure to complete, but that the builder, in spite of his breach of contract, has given considerable value to the owner which, if it went unrewarded, would amount to unjust enrichment.[64] It is unfortunate that in our present application of the doctrine the builder is only entitled to recovery where his given benefit is "substantial" or very great. For this not only creates purely technical difficulties in deciding what is "substantial" and what is not, but the doctrine thus also excludes from its purview all those intermediate situations where the owner, though not receiving "substantial" value, is still left with an appreciable economic advantage. It would certainly make for neater theory as well as more consistent results if the law could return to the original principles from which it started. Indeed, these principles indicate the best practical method for dealing with the recurring dilemma of either party's hard-

[63] Compare, for example, the facts in Eshelby v. Federated European Bank, Ltd., [1932] 1 K.B. 423, where the appellant was engaged to design and execute work to make a night club out of what had been an old pickle factory. Failing to complete by an amount assessed at £80 out of work worth (about) £400, he was held (*inter alia*) not to be entitled to anything for what he had done.

[64] See also article referred to in note 2 *supra*.

ship with which these situations are perplexed.[65] In sum, the criterion of net benefit provides the one simple and satisfactory means of adjusting the demands of a defaulting builder as against the protests of an often too grasping owner.

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65 Although, as Lord Campbell C.J. said in Munro v. Butt, (1858) 8 El. & Bl. 739 at 754, 120 E.R. 275 at 280, "the argument of hardship . . . is always a dangerous one to listen to", it recurs as the major theme in all these cases with regard to the builder and owner alike. Even Lord Campbell was at pains to demonstrate that his decision was neither hard nor unjust; but if judged by the standards of other judicial remarks his decision was, perhaps, exactly that (see, for example, the text at note 33 *supra*).

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