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## DEPENDENT AND INDEPENDENT PROMISES

A STUDY IN THE HISTORY OF CONTRACT

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1. *Foreword*—The doctrine of the dependency and independency of promises has been a principal theme in the history of the law of contract. From the sixteenth century to the nineteenth, it moulded the basic structure of the parties' performatory relations, as it was the main conceptual prop for the construction of conditions in a covenant or agreement. But the doctrine has been seriously misunderstood and much neglected, and despite the pioneering work of Langdell<sup>1</sup> and Street,<sup>2</sup> Costigan<sup>3</sup> and Williston,<sup>4</sup> it has in many ways remained where Serjeant Williams left it more than 150 years ago.<sup>5</sup> Nor is it enough merely to deplore its technicalities<sup>6</sup> or to sweep it into "the

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<sup>1</sup> *Summary of the Law of Contracts* (1880), 31ff, 134ff, 205ff. Langdell was certainly the first among modern contract lawyers to see the great importance of the doctrine, certainly the first to see its major importance. His treatment of the subject was not altogether happy, and he appears to have been somewhat baffled by the seeming insolubility of the relevant cases. Is there not here some deeper explanation for Langdell's almost coincidental discovery of the case-method? Perplexed by the task of re-organising the decisions, the simpler alternative was to let the cases speak for themselves; and if their voices were discordant, precisely this discordance provided further room and challenge for the ultimate "inductive" generalisation. It is perhaps not too much to say that our doctrine was at least one great congener in the Langdellian revolution of American law teaching.

<sup>2</sup> *Foundations of Legal Liability* (1906), 132ff. For a briefer account, see 8 Holdsworth, *History of English Law*, 71ff.; Ashley, *Conditions in Contract* (1905) 14 *Yale L.J.* 424.

<sup>3</sup> *The Performance of Contracts* (1927) 33, 95 and *passim*.

<sup>4</sup> 3 Williston on *Contracts*, (Rev. ed. 1936), §§816-824. For a more eclectic discussion, see 3 Corbin on *Contracts* (1950) §§654-660. And consult Patterson, "Constructive Conditions in Contract" (1942) 42 *Col. L. R.* 903, 907ff.

<sup>5</sup> Serjeant Williams' synthesis of the doctrine first appeared in 1798 in his note to *Pordage v. Cole* (1669) 1 Wms. Saund. 319 at 320n. It is fully discussed in 10 *infra*.

<sup>6</sup> 8 Holdsworth, *op. cit.*, 73: Holdsworth repeated Serjeant Williams' original complaint that the cases were "decided upon distinctions so nice and technical that it is very difficult, if not impossible, to deduce from them any certain rule or principle": *Pordage v. Cole* (1669) 1 Wms. Saund. 319 at 320n. To same effect, *Bank of Columbia v. Hagner* (1828) 1 Pet. 455, 7 L. Ed. 219.

limbo of futile and embarrassing anachronisms".<sup>7</sup> For enforced oblivion would neither be practicable nor expedient. As long as lawyers need sometimes look to earlier precedents, it is essential that they not only "digest", but fully understand them;<sup>8</sup> moreover, even if the doctrine no longer occupies its former central position, its vitality is not yet exhausted.<sup>9</sup> Above all, the progress of the doctrine reveals several major difficulties in the evolution of contract: we may learn much from a critical assessment of how, and how well or ill, these difficulties were met and finally disposed of.

2. *The Overall Problem*—But to pilot our search, we must first delineate the main questions of inquiry. By mid-sixteenth century the common law had two main tools for making bargains: the simple contract only recently developed through assumpsit, and the covenant or deed of much earlier existence.<sup>10</sup> Both instruments, however, still suffered from a common disadvantage. While the law now had specific rules for the valid formation of contracts, it was by no means clear how a bargain was to be carried to fulfilment. Since the parties would not usually specify the precise steps by which their exchange was to be effected, it was left to the courts to work out the order and manner of the parties' performance to each other. This task was certainly not easy. As regards the order of performance, the question was which of the two parties was to perform, or at least begin performance, prior to the other. If, to give one example, a vendor had promised to sell his house to a purchaser, had V to make conveyance before payment, or P to pay before conveyance? Without settled modern notions, it is not easily appreciated that this performatory priority posed an awkward problem. The difficulty was the credit which either party might have to give to the other, a somewhat risky credit seeing the distinct danger of financial loss if (say) V could pocket the price without having made conveyance.<sup>11</sup> It took, as we shall see, two centuries of struggle to make payment and conveyance concurrent operations. Secondly, there was the question of V's manner of performance: what had V to give to be able to claim the promised money? Before this problem could arise the question of performatory order had first to be determined, for unless the order of exchange-

<sup>7</sup> Recently suggested by Cheshire and Fifoot, *Law of Contract* (3rd. ed. 1952) 484. For the classical expositions of the doctrine, see 2 Addison, *Law of Contracts* (3rd ed. 1853) 990ff. 2 Smith's *Leading Cases* (13th ed. 1929) 10ff.; Norton on *Deeds* (2nd ed. 1928) 577ff. A more ambitious attempt is Morison, *Rescission of Contracts* (1916) 40ff., but this work is misleading.

<sup>8</sup> It is obviously not always true that only the most recent cases are important. It is in this sense that legal history can fulfil an eminently practical function by helping to clarify the origins and stages of earlier and still relevant legal principles. This task becomes the more important, if only because the "modern" or "practical" lawyer will not do it. For the wider aspects of legal historicism, see Maitland, *Why the History of English Law is not Written*, Collected Papers, i, 480; Plucknett, "Maitland's View of Law and History", (1951) 67 *Law Q. R.* 179 at 181.

<sup>9</sup> The best illustration is *Huntoon Co. v. Kolynos Inc.* (1930) 1 Ch. 528. For many other modern applications, see 2 Smith's *Lead. Cas.*, 10ff.; 3 Williston, *op. cit.*, §§818, 822. And see Professor Goble's comment (1927) 22 *Illin. L. R.* 299.

<sup>10</sup> Cf. Ames, "History of Assumpsit", (1888), 2 *Harv. L. R.* 1, 53, 377; (reprinted with additions 3 *Select Essays in Anglo-American Legal History* (1909) 259); 3 Holdsworth, *op. cit.*, 428ff.; Plucknett, *Concise History of the Common Law* (1949) 399. A third contractual instrument was the bond which, though in form a variety of deed, was in effect a very different contract. The "obligor" not only undertook some performance, but also undertook to pay an often disproportionate penalty for non-performance. This made the bond a somewhat stringent medium for ordinary contractual dealings. Moreover, early in the seventeenth century Equity began to interfere with its policy against forfeiture, the broad effect of which was to assimilate the bond more closely to the covenant. Cf. Loyd, "Penalties and Forfeitures", (1915) 29 *Harv. L. R.* 117; 3 Williston, *op. cit.*, §775.

<sup>11</sup> The point was well made by Saunders, *arguendo*, in *Peeters v. Opie* (1671) 2 Wms. Saund. 350 at 351: "The party who is to pay the money does not intend to pay it unless the work be performed; and he does not mean to pay his money, and then to bring an action for not performing against the one who perhaps is not responsible, or after he has got the money, will run away". See further *Kingston v. Preston* (1773) 2 Doug. 689 at 690; 3 Corbin, *op. cit.*, §656.

ing a thing for a price was settled, the "quality" of performance could not be directly in issue; and as a matter of historical fact this problem did not become urgent until a relatively late stage of development.<sup>12</sup> Of greater immediate importance was a third question, connected with a varied group of situations. Their main feature was that the contract was no longer executory, but was executed or in the course of performance with one party having broken a term in the agreement. Here the concrete problem was to hold the injured party to his return-promise, even though the other might have failed to do everything agreed on. From the very beginning, vigorous attempts were made to adjust, in one way or another, such broken or collapsed bargains, the purpose being to avoid the undesirable consequence of disproportionate loss between the respective parties.<sup>13</sup>

There are then two principal *motifs* in the history of our doctrine. One was the struggle towards concurrent performance in executory exchanges, and the other the adjustment of broken, yet partly executed, contracts. But because these threads developed contrapuntally they also confusingly intermingled. To a great extent the many difficulties were due to a failure to understand that the problems of performance and breach of contract threw up situations of different functional type requiring different results and solutions. If we must not belittle the difficulties inherent in a system in which rules had to evolve in interstitial bursts and without a secure model, the fact remains that development was very slow and often painfully laborious. I shall now try to trace the evolutionary stages; in doing this, however, one needs to strike some balance between chronological sequence and analytical coherence.

3. *The Beginnings*—It is a common view that the origins of the doctrine of dependency and independency reach back far into the middle ages.<sup>14</sup> Although the precise evidence of Norman lineage is very sparing,<sup>15</sup> the doctrine was firmly established in the sixteenth century. The rule then was that covenants were treated as independent except where linked by a verbal formula making one covenant expressly dependent upon the other.<sup>16</sup> Practically this meant that a vendor could sue for his price without tendering conveyance, and that a servant could sue for the agreed wages without giving (even partly) performed service, unless both price and wages were specifically stated to be conditional on prior performance. One authority is Chief Justice Fineux:<sup>17</sup>

If one covenant with me to serve me for a year, and I covenant with him to give him £20, if I do not say for said cause, he shall have an

<sup>12</sup> This is more fully explained, text at note 208 *infra*.

<sup>13</sup> Professor Williston enumerated several separate theories for dealing with this problem: 3 Williston, *op. cit.*, §813. This is not the place to criticise these theories in detail, but it is important to point out that these theories are perhaps much less distinctive or separate from each other than Williston would have them. Indeed, all the theories underlying the adjustment of broken contracts are, historically, intimately connected with, and are the products of, the dependent-independent doctrine. In other words, and whatever the modern position, it would be wrong to distinguish too sharply between our doctrine on the one hand and theories such as materiality of breach and failure of consideration on the other. All this will become much clearer in the course of this discussion.

<sup>14</sup> "It was settled law for centuries that mutual promises unless containing express conditions were independent"; 3 Williston, *op. cit.* §816. See also Langdell, *op. cit.*, 184.

<sup>15</sup> Indeed, only one pertinent case seems discoverable: *Pole v. Tochesser* (1374) Y. B. 48 Edw. 3, folio 2, pl. 6. This was, moreover, the only medieval case that was known or referred to: see *Ughtred's Case* (1591) 7 Co. Rep. 7a at 10a, Note (A); *Pordage v. Cole* (1669) 1 Wms. Saund. 319; *Thorp v. Thorp* (1701) 12 Mod. 455 at 461. *Pole v. Tochesser* is fully discussed at note 231 *infra*.

<sup>16</sup> 3 Williston, *op. cit.*, §816. Another view is that the dependent-independent doctrine remained virtually unchanged from the sixteenth century until the time of Lord Mansfield. The subsequent developments abundantly prove that this view is quite seriously mistaken.

<sup>17</sup> *Anon.* (1500) Y. B. 15 Hen. VII fo. 10b pl. 7.

action for the £20 although he never serves me; otherwise, if I say he shall have £20 for said cause.<sup>18</sup>

Another authority, stating the reverse position, is *Broccus's Case*.<sup>19</sup> A manorial lord had covenanted to enfranchise the copyhold, and the copyholder had covenanted to pay him "in consideration of the same performed". The copyholder being sued for the money before being enfranchised, it

was the opinion of the whole Court that the said copyholder is not tyed to pay the said sum, before the assurance made, and the covenant performed: but if the words had been, In consideration of the said covenant to be performed, then he is bounden to pay the mony presently; and to have his remedy over by covenant.<sup>20</sup>

These fine distinctions were not purely verbal. For starting with a principle that mutual covenants were independent unless express words of condition made one covenanted performance dependent upon, or prior to, the other, the courts had no other method of construction. Nor was the basic principle entirely irrational once we consider its wider setting. For example, in the usual case of a servant claiming wages, his claim would be in debt and not in covenant, and a servant would use the action of debt simply because in the countless number of employment-contracts the agreement would be informal and not by seal.<sup>21</sup> But a servant suing in debt had first to render his agreed service since he had to show his *quid pro quo*,<sup>22</sup> and this basic requirement of the "real" contract automatically established the parties' order of performance. However, in a covenant to serve for so long a period as a year, the future performance-order was left entirely undetermined. If it was said that a servant could not possibly wait twelve months for his wages, the master could easily reply that a year's payment in advance was much too great a credit-risk in the light of social experience.<sup>23</sup> Confronted by these contrary intentions and the parties' equal merits, the courts were driven to formal and

<sup>18</sup> Fineux, C.J. continued (Rede, J. concurring): "So if I covenant with a man that will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him, to compel him to make this estate; but if the covenant be that he will make the estate to us for said cause, then he shall not make the estate until we are married". Langdell, *op. cit.*, 162, 171, gave a curious explanation why in the first example the covenants could not be mutually dependent: "The estate tail could be created only by livery of seisin, and it could scarcely be contemplated that the marriage should be solemnized at the same time and place". But how, it must be asked, does this square with the dependent construction where the same covenants are expressed "for said cause"? Were in this case livery and marriage to take place more or less simultaneously? And if they were, why not in the first example? The true answer has nothing to do with concurrent performance. All that Fineux, C. J. was saying was that in the one ("independent") case the money was recoverable irrespective of the marriage, while in the other ("dependent") case recovery was conditional upon the specified marriage.

<sup>19</sup> (1588) 2 Leon. 211 (C.P.); *sub. nom. Brocas's Case*, (1588) 3 Leon. 219 (K.B.). The case affords a good illustration that proceedings at common law were not always lengthy or delayed. First heard in C.P. in Trinity term 30 Eliz. it went to K.B. on error in Michaelmas term of the same year (1588). For the jurisdiction in error, see 1 Holdsworth, *op. cit.*, 215-17, 222-24; 3 Blackstone's *Commentaries* (23rd ed. 1854), 512ff.

<sup>20</sup> 3 Leon. 219. For other difficulties connected with the surrender of copyholds, see *Froswell v. Welch* (1617) 1 Rolle's Rep. 415.

<sup>21</sup> The main evidence for this otherwise obvious proposition is the striking dearth of employment-agreements made by seal. Indeed, if covenants to serve a year had been at all common, the reports too would have been much more occupied with the contractual relationship between the master and servant, for there would inevitably have been many instances of legal intervention in cases of death, impossibility, wrongful dismissal and so on. In short, long-term employment covenants would have produced a situation similar to that in leases about which litigation was profuse.

<sup>22</sup> Plucknett, *op. cit.*, 598, 3 Holdsworth, *op. cit.*, 421; Fifoot, *History and Sources of the Common Law* (1949) 229-30; Fuller, *Basic Contract Law* (1947) 762ff.

<sup>23</sup> See on this, Putnam, *The Enforcement of the Statute of Labourers* (1908) 189-90 and *passim*. (*Studies in History, Economics and Public Law*, Columbia University, vol. xxxii).

somewhat arbitrary rules. In other words, the doctrine of independency as combined with a search for verbal dependency, seemed the only possible approach; it was also a "just" solution in the sense of being a strictly impartial one.<sup>24</sup>

But these principles, though valid for long contracts of service, were out of place in contracts of sale. Even in medieval conveyancing, where sale was controlled by mutual grants rather than by executory agreements,<sup>25</sup> transfer by vendor and payment by buyer became inevitably contemporaneous operations. A vendor would not ceremoniously part with his seisin, unless he was either paid immediately or he definitely consented to postpone payment. With the exchanger-order thus completely pre-arranged, no dispute could arise as to which party should perform first. Indeed, such priority-disputes were only possible if the sale was not by grant but was made by executory agreement. Obviously, executory agreements would be confined to more exceptional circumstances where, as in *Broccus's Case*,<sup>26</sup> the purchaser was already in possession and could therefore contract for the assurance of the freehold. Yet even in executory sales the performatory order could be concurrent, that is, payment could take place together with a simultaneous assurance, release or surrender.<sup>27</sup> The law, however, took as its model not the sale by mutual grants where concurrency was the natural solution, but the mutual covenants for service where concurrent performance was impossible; the law followed the latter analogy because, executory agreements being by covenant, "covenant" thus appeared to map out the area of relevant precedent. The result was that sale was not seen as a physical exchange, but as two separate obligations, each party having to "do" something in the future. Such being the erroneous starting-point, the stage was set for much obtuse legal thinking before the natural concurrency of sale could eventually be disentangled.

Far greater ingenuity was shown where the question was not who should perform first, but where it related to the legal consequences of a breach of contract. Already in the sixteenth century the courts began to adjust agreements to balance one party's claim for part performance against the other's insistence on repudiation and forfeiture. The outstanding example is *Ughtred's Case*<sup>28</sup> which, though technically an action on an annuity, had deep contractual implications.<sup>29</sup> Ughtred complained that the defendant's father had granted him an annuity in 1574, which the defendant had failed to pay for eleven years. The grant was *pro consideratione* that the annuitant would maintain a castle as well as appoint a master gunner and six soldiers for its protection.

<sup>24</sup> The same considerations justify the distinction in the marriage-covenants, note 18 *supra*.

<sup>25</sup> Cf. 3 Holdsworth, *op. cit.*, 221ff.; Holdsworth, *Historical Introduction to the Land Law*, (1927) 112ff.; Williams on *Real Property*, (23rd ed. 1920) 31. Properly considered, conveyancing by grant was a somewhat disguised and specialised extension of the law of contract. For a sale by grant was, in substance, an agreement by parties *inter praesentes*, followed by execution there and then; in short, a cash-sale. Perhaps the fact that so a substantial part of medieval buying and selling was done in this manner provides some explanation why the law of contract could for so long remain in primitive condition.

<sup>26</sup> See note 19 *supra*.

<sup>27</sup> This was also the position in sale of goods. Thus it was said in *Anon.* (1537) 1 Dyer 30a, "If a man buy of a draper twenty yards of cloth the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue". See *Cowper v. Andrews* (1615) Hob. 39 at 41-2; 2 Williston on *Sales* (Rev. ed. 1948) §342.

<sup>28</sup> (1691) 7 Co. Rep. 9b (K.B. on error). (The paging of 7 Co. Rep. is confusing, there being two pages 9b; see 77 E.R. 388 and *ibid.* 425, the reference here being to the latter). For a briefer report, see Jenk. 260 (145 E.R. 186).

<sup>29</sup> The case was much relied on in subsequent cases, sometimes even for contrary propositions. Compare, for example, *Clarke v. Gurnell* (1611) 1 Bulst. 167, with *Constable v. Clobberie* (1627) Palm. 397. *Ughtred's Case* also exercised great influence in *Pordage v. Cole* (1669) 1 Wms. Saund. 319, and see §5 *infra*.

The defendant resisted payment, arguing that the plaintiff had averred neither the exercise of his office nor the making of the required appointments. On error from Common Pleas (where judgment went for Ughtred), the King's Bench entertained "many arguments and considerations of all the books, in which (as it seems *prima facie*) there is a diversity of opinions".<sup>30</sup> It was nevertheless resolved that the lacking averment was not essential, for the exercise of the office (including the appointments) was held not a condition precedent but a condition subsequent in defeasance of the grant, namely, a condition whose non-fulfilment did not itself vitiate a cause of action but was pleadable in defence only. This transfer of the burden of proof was much more than a purely procedural decision. Not only was it insisted that it was "by matter in law" to say whether an action shall or "shall not be maintainable without shewing the performance of the condition or consideration",<sup>31</sup> which allowed considerable freedom of construction, but the court must have been influenced by some of the following factors. Since a plaintiff could not then simply amend his pleadings and substitute a more complete averment, judgment against him would halt any future action on the ground of *res judicata* or estoppel by record.<sup>32</sup> Again, the plaintiff might not have been able to show a technically complete performance (he might, for example, for good practical reasons only have appointed five soldiers instead of the six required), so that to construe his annuity as subject to a precedent condition would have meant to deprive him of every remuneration for what was certainly long and might also have been most satisfactory service. So in spite of the fact that the words "*pro consideratione*" made the defendant's duty to pay expressly dependent or conditional, the court removed this express dependency through the distinction between conditions precedent and subsequent. If not in name clearly in effect, the payer's covenant thus became independent. However, independency now also acquired a dual function, achieving opposite, though not contradictory results according to whether a contract was executed or executory.<sup>33</sup>

Of similar functional import was the approach to certain covenants in leases. Suppose a lessee had covenanted not to underlet, or not to assign, or to do or not to do any other act stipulated by the lessor. If the lessee broke his undertaking, the question was whether this breach forfeited his estate or tenancy or whether it merely "abridged the contract".<sup>34</sup> Between these two remedies the gap was, however, very wide, particularly since apart from forfeiture the lessor's alternative right was more apparent than real: he might have a remedy in damages, but his direct financial loss could be insignificant compared with the overriding, though less calculable, disadvantage of being burdened with what now proved an undesirable tenant.<sup>35</sup> To overcome this

<sup>30</sup> 7 Co. Rep. at 10a. For the contemporaneous law of conditions, see especially *Colthirst v. Bejushin* (1550) Plowden's Rep. 21 at 25, 29ff.; and *Say v. Smith* (1563) *ibid.* 269 at 272-3. The bulk of this law came from property where conditions defined the events for the vesting or divesting of estates. As applied to contracts these ideas produced a curious mixture not easily sorted out: see Stoljar, "The Contractual Concept of Condition" (1953) 69 *Law Q.R.* 485 at 510-11.

<sup>31</sup> 7 Co. Rep. at 10b.

<sup>32</sup> Once the pleadings were entered on the record, their amendment was not allowed except for relatively minor faults covered by the Statutes of Jeofails. Indeed, the amendment of pleadings is a modern (nineteenth century) innovation: see Smith, *Action at Law* (11th ed. 1873) 82-3; Sutton, *Personal Actions* (1929) 117.

<sup>33</sup> On this basis *Ughtred's Case* is both rational and simple. On the other hand, it is not easy to harmonise it with the wider doctrine, stated as early as *Rogers v. Snow* (1572) Dalison 94, that express conditions precedent were to be strictly construed. I shall, however, later explain that no real inconsistency was here involved: see §10 *infra*.

<sup>34</sup> *Scot v. Scot* (1587) Cro. Eliz. 73.

<sup>35</sup> *Simpson v. Titterell*, (1591) Cro. Eliz. 242; *sub. nom. Sympson v. Titterel*, 1 And. 267; *Pembroke v. Barkley* (1601) Cro. Eliz. 384, 560, Gouldsb. 130, Poph. 116.

awkward problem the solution was sought in the wording of the lease and, especially, in the literal interpretation of the "proviso" where the lessee's covenant appeared. Hence emerged the learning of "conditions" and "covenants", a learning which seemingly complex, can easily be summarized in three main points. If no penalty at all was annexed to the proviso, the breach was construed as a defaulting condition, the idea being that otherwise the proviso would be robbed of any effect.<sup>36</sup> The same result obtained where the proviso contained express words of forfeiture, since "the intent of them is to defeat the estate, which cannot be by covenant but by condition".<sup>37</sup> Apart from this, a breach was treated as a breach of covenant, giving no right of total repudiation.<sup>38</sup> These technicalities should not conceal their considerable sophistication. For the distinction between "covenant" and "condition" was but the manifestation of a policy that not all express conditions should have their usual conditional effect which in these cases resulted in the lessee's severe forfeiture. Some conditional words were therefore treated as more "conditional" than others, in rough harmony with the intention that seemed inferable from the language of the parties.

4. *From Covenant to Contract*—When mutual promises became enforceable in the latter sixteenth century,<sup>39</sup> the concomitant shift of emphasis from formal covenants to informal agreements brought forward a whole range of simple and indeed the most ordinary types of bargains. Yet there were no precise rules to meet and resolve the disputes arising from them. Left to improvisation, the courts transferred to mutual promises the ideas applied to covenants.<sup>40</sup> This was to create incredible confusion. For mutual promises began to be treated as presumptively independent; like covenants they were seen as two separate undertakings. But since mutual promises were enforceable because they were consideration "for" each other, a promise "for" a promise was much more similar to mutual covenants linked by words of dependency or condition.<sup>41</sup> The courts, in other words, turned our doctrine upside-down, with results that were correspondingly peculiar. Although this worked satisfactorily with regard to executed contracts, it produced nonsensical results in contracts of sale still unperformed by either party. While, more precisely, an approach through independency facilitated the adjustment of broken bargains, it effectively hindered the establishing of a sensible performatory order in purely executory agreements.

The story begins with *Gower v. Capper*,<sup>42</sup> a case of an executed contract. The facts were somewhat complex. Defendant owed plaintiff £20 on a bill which plaintiff promised to deliver up to defendant if the latter would procure two sufficient sureties to be bound to the plaintiff for the payment of this debt. Defendant procured two sureties who were however worthless. Plaintiff thereupon sued defendant for the return of the loan. Defendant demurred

<sup>36</sup> *Simpson v. Titterell*, see previous note; *Huntington & Mountjoy's Case* (1589) 4 Leon. 147, Moore K.B. 174, Godb. 17, 5 Co. Rep. 3b, 1 And. 307.

<sup>37</sup> *Thomas v. Ward* (1590) Cro. Eliz. 202. Similarly the words "provided" and "it is agreed" were held to be conditional, *Geery v. Reason* (1628) Cro. Car. 128.

<sup>38</sup> *Archdeacon v. Jenner* (1598) Cro. Eliz. 604; *Cromwell's Case* (1601) 2 Co. Rep. 69b, Jenk. 252, Moore K.B. 471.

<sup>39</sup> *Andrew v. Boughy* (1552) 1 Dyer 75a; *Pecke v. Redman* (1555) 2 Dyer 113a; *Joscelin v. Shelton* (1557) 3 Leon. 4; *Strangborough v. Warner* (1589) 4 Leon. 3.

<sup>40</sup> Cf. 8 Holdsworth, *op. cit.*, 72; Patterson, *loc. cit.*, 908.

<sup>41</sup> Cf. Langdell, *op. cit.*, 180; Street, *op. cit.*, 134ff.; in *Thorp v. Thorp* (1701) 12 Mod. 455 at 464, Holt, C.J. gave a curious explanation of the "reason that mutual promises shall bear an action without performance. . . . One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault".

<sup>42</sup> (1596) Cro. Eliz. 543. See also *Wichals v. Johns* (1599) Cro. Eliz. 703, and note 51 *infra*.

on the sole ground that plaintiff had not delivered the bill to him. The court ("without argument") held for the plaintiff: "for the alledging that he had delivered the bill was but surplusage; for the consideration was the promise to deliver it; and therefore he needed not have alledged that he delivered it. But a promise against a promise is a sufficient ground for an action. And although it be alledged that he found sureties, yet when it is alledged that they are insufficient (which is allowed by the defendant's plea and demurrer) it is all one as if he never found sureties".<sup>43</sup> To construe, on such facts, the promises as independent was perhaps the easiest solution. Nevertheless, it has to be seen that precisely the same result could have been achieved even if the mutual promises had been held dependent. Although the plaintiff could not have recovered the loan, had the defendant supplied reliable sureties,<sup>44</sup> yet once this was not done the agreement collapsed with the debt still owing to the plaintiff. Moreover, the condition qualifying the defendant's promise would have been excusable since he himself had prevented its fulfilment. The court, however, did not adopt this explanation by way of the excusability of conditions; it preferred, or probably only could think of what was a short-cut to the same result through a rule of independency.<sup>45</sup>

Different problems arose in other executed contracts. In *Bettisworth v. Campion*,<sup>46</sup> A agreed to buy all the iron made in B's furnace, paying 40s. per ton. Having received large quantities, A only made part payments, and B's executor now claimed the balance. A objected that B had not shown "the consideration was performed on his part, for the defendant was induced to make the promise in hopes and in consideration that he should have all the iron made there, and the plaintiff has not averr'd, that the iron delivered was all".<sup>47</sup> This argument was pushed aside, for the consideration was not, "that defendant should have all the iron; but that the [plaintiff] promised that the defendant should have all the iron; so that the consideration on each part was the mutual promise the one to the other".<sup>48</sup> More significant still was *Spanish Ambassador v. Gifford*,<sup>49</sup> where the ambassador promised and paid Gifford "so many duckets", if Gifford would organise a voyage before a certain day and Gifford promised to repay should he fail to go accordingly. The ambassador, alleging that Gifford had neither gone as promised nor had repaid the duckets, brought action for the return of the money.<sup>50</sup> Gifford

<sup>43</sup> *Ibid.* For the rule that a demurrer implied a confession that the plaintiff's alleged facts were true, see also *Dalby v. Cook* (1610) Yelv. 171; *Tatem and Poulter v. Perient* (1610) Yelv. 195.

<sup>44</sup> This aspect is stressed in Rolle's *Abridgement*, *sub. tit.* Baile.

<sup>45</sup> It may be noted that the doctrine of the prevention of conditions, first adumbrated in relation to bonds, had not yet made its way into the law of covenants. Even in building contracts, the most natural field for the application of prevention, difficulties were to arise as late as *Terry v. Duntze* (1795) 2 H. Bl. 389; see at note 210 *infra*.

<sup>46</sup> (1608) Yelv. 133. The first example of an "output contract" made by mutual promises.

<sup>47</sup> *Id.* at 134.

<sup>48</sup> *Ibid.* The buyer also objected that since he had promised to pay for every ton, the plaintiff could not ask payment "for pounds and sows of iron, which is not within the promise". But the court said that since the defendant had agreed to pay *secundum ratam*, he had to pay "for pounds and sows according to the rate, computing how many pounds and sows will make a ton". So on similar facts in *Lastlow v. Thomlinson* (1614) Hob. 88, the court said that it was impossible "to mince the measure so, as it shall hit the just sum, as the odd hours in a year".

<sup>49</sup> (1615) 1 Rolle's Rep. 336.

<sup>50</sup> That this was an action for the return of the money, rather than an action in damages for Gifford's non-performance, is emphasised by the fact that the report speaks twice of "repaier". See on this point Langdell, *op. cit.*, 162. In essence, therefore, this was an action for the return of money as on a failure of consideration; and there is no doubt that at that time failure of consideration was thought of as a contractual remedy. Its quasi-contractual character was discovered at a later stage, after *indebitatus assumpsit* had developed a separate action for money had and received.



resisted this claim on the specific ground that plaintiff had not averred the delivery of the duckets, but Coke C.J. thought the action good because the promises were mutual and (as in the two preceding cases) independent of each other. Nevertheless, Gifford's "special" pleading did raise a point of substance; it drew attention to an emerging inconsistency between the action of debt and the newer action of mutual promises. For Gifford contended that since the ambassador's claim would be unmaintainable if no money was delivered, he had to aver the monetary transfer whether he sued in debt or in assumpsit; and this necessity for an averment made the defendant's promise to repay to that extent dependent. Clearly, if pleading was not to defeat substance (for Gifford did not deny his breach of promise or his having received the money), Coke C.J. had to dispose of Gifford's technical objection. All mutual promises, he therefore explained, were independent, except "where someone in consideration of a future thing to be done by the plaintiff undertakes to do a thing, there in an action on the case performance of it ought to be averred, because there is no remedy for it".<sup>51</sup> More simply, an averment of performance was necessary in executory bargains, but not necessary where plaintiff's performance was executed and no longer future. This explanation certainly served its immediate purpose of answering Gifford, but it created some difficulty from a wider perspective. For one thing, it added as regards executed contracts yet another barrier between debt and assumpsit, the former still needed proof of a *causa debendi*, the latter now dispensed with this requirement.<sup>52</sup> For another, the distinction transposed the averment-requirement germane to debt to the domain of purely executory contracts. Here, indeed, lay the germs of one of the most difficult and troublesome ideas in the law of contract, that is, the idea that since a plaintiff must needs aver performance, a defendant's return-promise was necessarily and strictly conditional on nothing less than complete performance. This problem must however be postponed until later.<sup>53</sup>

But executed contracts were not invariably treated as independent. Even in this groping stage, the courts were sufficiently acute in preventing the payment or repayment of money where this appeared against the intention of the bargain. *Towlcarne v. Wright*<sup>54</sup> is admittedly a lonely, but still an excellent illustration. Defendant in consideration of £40 paid to him by plaintiff, promised to take the plaintiff's son as an apprentice, to teach him his trade and to give him food and drink during the apprenticeship. The plaintiff, in action for breach of contract, complained that the defendant had failed to provide the food and drink agreed on. This was true, but the explanation was that the son had never come to the master, so that the latter was unable to

<sup>51</sup> 1 Rolle's Rep. 336. For similar ideas see *Everard v. Hopkins* (1613) 2 Bulst. 332 at 333-4; *Lampleigh v. Brathwait* (1615) Hob. 105 at 106. In *Wichals v. Johns* (1599) Cro. Eliz. 703, a similar problem had arisen. A (defendant) asked B (plaintiff) to pay C £120 (A being indebted in that sum to C), and A promised to repay B when so required. After B had paid C, he sued A for repayment. A objected that (i) he had received no benefit from B paying C, (ii) B had not alleged that he paid C, nor (iii) had B made a promise to C. Only (i) gave difficulty, but A's and B's mutual promises were held reciprocally enforceable: "so that if (B) doth not pay it to (C), (A) may have his action against (B); and a promise against a promise is good consideration". In short, the promises being independent, plaintiff could recover, "although he did not allege payment of the money". For the last point, see *sub. nom. Whitcalfe v. Jones* (1599) Moore (K.B.) 574.

<sup>52</sup> Cf. Fifoot, *op. cit.*, 400. The corollary of the rule that in (executed) assumpsit plaintiff did not have to aver performance, was that the plaintiff did not have to make a prior request or demand for payment. Coke, C.J. added: "I have been aware at various times of a rule to the effect that where someone promises to pay so much when J. S. returns from Rome this must be paid within a reasonable time after his return:" 1 Rolle's Rep. 336.

<sup>53</sup> See §10 *infra*.

<sup>54</sup> (1616) 1 Rolle's Rep. 414.

fulfil his part of the bargain. In these circumstances, not only was the master held not liable in breach, but also held not bound to return the pre-paid sum. It was easily held that the giving of food and drink "depended" upon the son's "retainer",<sup>55</sup> since the contractual terms implied that the defendant had merely promised to accept the son but not to find him. An analogy was drawn from a lessee's position: where the latter had covenanted to repair, the lessor could not succeed in an action for non-repair without showing that the lease had been demised to the lessee.<sup>56</sup> The decision was the first significant attempt to establish an implied condition in qualification of a defendant's promise.<sup>57</sup> Indeed, the King's Bench held against the plaintiff, although he had already obtained a verdict. Yet, because of the implied condition, the court refused to permit a verdict to cure an originally faulty declaration.<sup>58</sup>

Turning to executory bargains, the doctrine of independency produced results both absurd and unpractical. The tale is briefly told by tracing a line of cases that began with *Nichols v. Raynbred*.<sup>59</sup> A seller sued buyer for the price (50s.) of a cow, which he had neither delivered nor offered to deliver. The report is cryptic: "adjudged for the plaintiff in both courts, that the plaintiff need not aver the delivery of the cow, because it is promise for promise".<sup>60</sup> Again, in *Thorps' Case*<sup>61</sup> it was said that it "was idle, and more than the plaintiff was compelled to do, to show that [he is prepared] to do the thing which he promised".<sup>62</sup> The plaintiff, in short, did not have to show his own readiness to perform the bargain, the defendant "ought to bring his action for it".<sup>63</sup> The basis of this position was more fully elaborated upon in *Gibbons v. Prewd*.<sup>64</sup> Anne Gibbons agreed to convey her real estate to Anne Prewd, for which the latter promised to pay the former £25 in cash and to grant an annuity and enter a bond for £2,000. Anne Prewd, it was decided, had to perform first: she had to pay the cash as well as grant the annuity and the bond before Anne Gibbons had so much as to tender conveyance on her part. To think "that the defendant's part of the agreement was promised to be performed in consideration of the plaintiff's performing her part of the agreement",<sup>65</sup> was regarded as a "mistake, for the defendant's agreement does

<sup>55</sup> "Depended" was here used in a factual as well as a legal sense. The master could not give food and drink to an absent apprentice, and because he could not, he did not have to. Dodderidge, J. made the point by saying that the master's promise of food and drink "implied" the father's offering the son to the master. This was both a factual and legal implication. For another sense of "depends", meaning "pending" or "sub judice", see *Pincombe v. Rudge* (1608) Yelv. 139.

<sup>56</sup> 1 Rolle's Rep. 414. A further analogy with an action for debt by pledges upon a retainer was however less telling.

<sup>57</sup> It is submitted that it can make no difference whether this was, according to the modern classification, an implied-in-fact rather than an implied-by-law condition. No such distinction existed in the seventeenth century; and the point is anyhow that an implication was made to qualify the master's promise. Even to-day it is not always easy to say what is an implied-by-law condition and what an implied-in-fact one: 3 Corbin, *op. cit.*, §653; Restatement of *Contracts*, §267, Comment *a*.

<sup>58</sup> The rule that a faulty declaration cannot be cured by verdict was subsequently changed in part: see *Peeters v. Opie* (1671) 2 Wms. Saund. 350; and see at note 106 *infra*.

<sup>59</sup> (1615) Hob. 88. See also *Chawner and Bowes' Case* (1613) Godb. 78.

<sup>60</sup> *Ibid.* The report concludes: "nota here the promises must be at one instant, for else they will be both *nuda pacta*". As Langdell has said, *op. cit.*, 179: "As to mutual promises it was no sooner decided that such promises were a sufficient consideration for each other, than it was held to follow as a consequence that they were independent of each other."

<sup>61</sup> (1639) March N. R. 75.

<sup>62</sup> *Ibid.* The facts of the case are not very clear. The action could have been by seller for non-payment or by buyer for non-delivery. Nor did this matter very much, once the rule here was adopted that the promises were independent.

<sup>63</sup> *Ibid.* "And the difference was taken by Bramston, where the promise is conditional, and where absolute, as in our case. And agreeing with this difference, it was said at the Bench and Bar, that it was adjudged".

<sup>64</sup> (1655) Hard. 102.

<sup>65</sup> *Id.* at 103.

not depend upon the plaintiff's performing of any act, but . . . the consideration is no other than the reciprocal promise of one to the other, which is executory, and upon which the parties have mutual remedies; and it is a general rule, that when the defendant has a remedy for the consideration of a promise, that consideration needs not be averred to be performed, which is our case."<sup>66</sup> This reasoning was far from convincing. The facts clearly indicated the possibility of simultaneous performance, i.e. payment against tender; nor was there anything to justify the granting of so considerable and one-sided a credit. On a purely technical level the court also left much unanswered. For the present reasoning did not at all agree with a previous rule, that where the consideration is executory its performance has to be averred by plaintiff.<sup>67</sup>

How can we explain this judicial inability to resolve the performatory problem in contracts of sale? And putting aside the possibility of concurrent performance, why did the courts show this preference for independency when a rule of dependency could at any rate in some cases have yielded better results?<sup>68</sup> In the first place, to hold mutual promises independent may have appeared like a powerful re-affirmation of the enforceability of the bilateral "consensual" contract: to say that both parties had separate "remedies over" was, in a sense, to confirm the perhaps still unsettling truth that mutual consideration had an effect equal to that of mutual and sealed covenants. This led, particularly in the case of simple contracts, to great confusion between contractual formation and contractual performance, or rather between those rules making promises enforceable or irrevocable and those rules becoming increasingly necessary to guide the parties' performatory relations.<sup>69</sup> It also led to the idea that all mutual promises had to be treated in the same manner, whether they covered situations of sale or of service; it was not realised that sale and service posed different performatory problems.<sup>70</sup> Since, secondly, independency had worked entirely satisfactorily in executed contracts, this again strengthened the belief that it was uniformly valid. So in *Beany v. Turner*,<sup>71</sup> plaintiff had promised to surrender certain copyholds; he did so by a method which was unorthodox, but was according to custom. Defendant refused payment for the surrender on the ground that it was not a good performance. To the King's Bench, independency must have appeared as the only answer: "here being mutual promises, there needs no averment at all of the performance, and therefore an ill averment of that which needs no averment, shall not hurt; and thereupon they all affirmed the judgment."<sup>72</sup> In the third place, it was also clear that as regards property-exchanges not only independency, but also dependency could have equally unhappy consequences. A telling example is *Lea v. Exelby*,<sup>73</sup> where a lessee promised to surrender his term to the lessor, and the latter promised to pay for it. The surrender was to take place on a certain day and place, at which

<sup>66</sup> *Ibid.* The rule became settled that "On a promise against a promise there needs no averment": *Anon.* (1662) 1 Lev. 87; and see also *Oliver v. Yeames* (1662) 1 Keb. 333, 342.

<sup>67</sup> *Spanish Ambassador v. Gifford* (1615) 1 Rolle's Rep. 336; see text at note 51.

<sup>68</sup> Dependency would obviously have been the preferable solution in *Gibbons v. Prewd*, see at note 64 *supra*. On the other hand, dependency could often prove equally inconvenient: see, e.g., *Lea v. Exelby*, note 73 *infra*.

<sup>69</sup> The confusion has had wider ramifications which still exist in even our most modern law of contract. See, for example, Stoljar, "The False Distinction Between Bilateral and Unilateral Contracts" (1955) 64 *Yale L.J.* at 521 and *passim*.

<sup>70</sup> For a similar mistake in covenants, see text at note 27 *supra*.

<sup>71</sup> (1670) 1 Lev. 293; *sub. nom.* *Turner v. Benny*, 1 Mod. 61; *Turnor v. Benson*, 2 Keb. 666.

<sup>72</sup> 1 Lev. 293; 2 Keb. 666. And cp. *Gower v. Capper* (1596) Cro. Eliz. 543, at note 42 *supra*, where independency seemed the easiest solution. In *Lampligh v. Brathwait* (1615) Hob. 105, this approach was summarised in the statement that "it is sufficient title pro plaintiff without any averment".

<sup>73</sup> (1602) Cr. Eliz. 888.

time the lessor duly tendered payment, but the lessee did not surrender. The lessee pleaded *non assumpsit* and, in arrest of judgment, the King's Bench upheld him. The lessee, the court thought, had made his surrender expressly dependent upon payment ("*super solutionem inde*") and "would not trust to [the lessor's] promise";<sup>74</sup> the lessor had therefore first to hand over the money. This obviously defeated the original intention of the parties who had indicated (as clearly as perhaps they knew) that surrender and payment were to occur at the same time, i.e., were to be concurrent. We can see that a rule of independency or an unqualified rule of dependency could, paradoxically, make for very similar decisions, at least to this extent that either approach could compel a party to part with his property or payment without getting his return simultaneously from the other. This put the law of sale or exchange between two undesirable choices. The way this deadlock was overcome belongs to a later stage of evolution.<sup>75</sup>

5. *Pordage v. Cole and after*—So far the development of our doctrine had created rules which, if cumbersome and often unrealistic, were not between them inconsistent. In covenant alike simple contracts, the position was, speaking broadly, that mutual undertakings were usually construed as independent unless linked by express conditional words stipulating their dependence. With the celebrated case of *Pordage v. Cole*<sup>76</sup> there now appeared a latent clash in the principal rules hitherto existing. Pordage covenanted with Cole that he would pay *on a particular day* an agreed price for a house to be conveyed to him. When Cole sued for the price, declaring that Pordage had refused to pay though often requested, the defendant's "great exception" was that Cole had neither conveyed the house nor tendered a conveyance;<sup>77</sup> moreover, since, in the technical phrase, "the word 'for' (*pro*) made a condition in things executory",<sup>78</sup> Pordage's promise to pay was clearly dependent upon Cole's prior conveyance. The conflict, in other words, was between one rule which assumed that covenants were independent where a certain day was named for payment,<sup>79</sup> and a second rule, long since established, that the word "*pro*" made covenants dependent. What was therefore Pordage's (the purchaser's) covenant to be: was the word "*pro*" or the *day named* to be the deciding feature? Although it was held that Pordage was to pay on the fixed date even without

<sup>74</sup> *Id.* at 889. The court further held that lessor could not complain about lessee's obstruction, since the declaration did not show that he had actually refused tender of the money or had not been present at the appointed place to receive it. Even Coke, who as Attorney-General had argued for plaintiff, now admitted that tender without alleging refusal was a bad averment.

<sup>75</sup> See §7 *infra*.

<sup>76</sup> (1669) 1 Wms. Saunders 319, 1 Lev. 274, Sir. T. Raym. 183, 2 Keb. 533, 542, 1 Sid. 423. These reports complement each other. (For an interesting sidelight, see 1 Mod. 23, 2 Keb. 578). Because Serjeant Williams annexed his famous note to this case, the decision gained enormous prominence, though its precise historical significance remained misunderstood. For general discussion, see 3 Williston, *op. cit.*, §819; 3 Corbin, *op. cit.*, §656; Langdell, *op. cit.*, 187-8.

<sup>77</sup> 1 Wms. Saund. at 320. The defendant's other "exceptions" to the declaration are also interesting: (i) the plaintiff had only claimed £744.15s. instead of £775 (the original contract-price) the argument being that the 5s. paid in earnest shall not be taken as part of the whole price; and (ii) that the plaintiff's word "except" (by which latter had excepted all those movables which were not to be conveyed with the house) was "not good for want of sense". It was held as regards (i) that the earnest was part of the price; but we can see that the consideration had become less "divisible" or "apportionable" than previously: cp. note 48 *supra*. As regards (ii) that "except" was sensible enough: even "an insensible word does not make the rest of the deed vitious (sic) which is sensible in itself". For the latter, see also *Crowley v. Swindles* (1671) Sir P. Vaugh 173; *Hilton v. Smith* (1690) 1 Lutw. 493 at 496.

<sup>78</sup> This phrase, which became somewhat of a cliché, seems to have originated in the sixteenth century: Co. Litt. 204a; *Andrew v. Boughey*, (1552) Dyer, 75a at 76a, pl. 29; see also *Clarke v. Gurnell* (1611) 1 Bulst. 167. Not until *Thorp v. Thorp* (1701) 12 Mod. 455 did the rule also apply to simple contracts.

<sup>79</sup> For further discussion of this, see §10 *infra*.

tender of conveyance, the precise ground for this decision was not clearly stated.<sup>80</sup> The court, apparently, followed a fourteenth-century decision which, if superficially to the same effect, involved different circumstances.<sup>81</sup> Only one report suggests a functionally better reason, namely, that Pordage had to pay on the named day and before conveyance, because "perhaps the conveyance cannot be made by that day".<sup>82</sup> This was not only something of an afterthought, it was also irrelevant to this situation; for there was no real evidence to presume that Pordage had agreed to an advance payment. The reference to the date was probably, as it usually is, intended to prevent undue delay by the vendor, not to impose a credit-burden on the purchaser. From this perspective, the decision obviously belongs to that earlier group of cases which exhibited the persistent inability to make sale-performances concurrent.

But if *Pordage v. Cole* was in itself disappointing, it contained an element of great importance. In defeating an express dependency and making the covenants independent, the decision upset the basic legal tenets which had been current for over a century. As we have seen, the courts had previously worked through to similar results, though somewhat indirectly and through the device of *ab extra* distinctions such as that of precedent and subsequent conditions or of conditions and covenants.<sup>83</sup> *Pordage v. Cole*, however, was a more direct innovation and as such can be regarded as a turning-point in contractual history. For if the sacred word "pro" could be trifled with and its expressly conditional effects amended, the whole dependent-independent dichotomy returned, as it were, to the melting-pot since its logical unity had now been demolished. The law, it is true, was to continue with the old terminology, as if it was still applying the classical doctrine. Nevertheless, the previous rules no longer predetermined results, and they increasingly became merely a way of describing results more freely arrived at. It is time to deal with these developments in greater detail.

Consider, to begin with, the novel set of facts in *Hunlocke v. Blacklowe*.<sup>84</sup> By covenant, A, a tailor, agreed in July not to compete with B and to avoid certain specified customers. "In consideration of the performance thereof", B covenanted to pay A £100 a year by quarterly payments. But in August, A "exercised the art and mystery of a taylor" with one of the forbidden customers. B was quick to argue that since his payments were expressly dependent upon A's compliance, the duty to pay any quarterly instalment lapsed with A's breach of contract. The court dealt with this argument with great acuteness. A's covenant not to compete was "in the nature of a negative covenant",<sup>85</sup> as such it could not be performed in the same way as a positive covenant was performable, so that "if the words *in consideration of the performance thereof*, should amount to a condition precedent, the plaintiff would never have the £100 a year during his life, because it is not possible for the plaintiff to perform his covenant during his life-time; for at any time during his life he

<sup>80</sup> Thus the reason advanced in Saunders' report was that either party would still have a remedy against the other. Again even though, in this case, the covenants were not separate, but were contained in one deed, they nevertheless became mutual covenants because sealed by both parties. For this aspect, see also *Lock v. Wright* (1723) 1 Str. 569; *Collins v. Gibbs* (1759) 2 Burr. 899.

<sup>81</sup> *Pole v. Tochesser* (1374) Y.B. 48 Edw. 3, fo. 3, pl. 6, and see note 15 *supra*. Neither this decision, nor *Ughtred's Case* (1591) 7 Co. Rep. 9b on which *Pordage v. Cole* relied were contracts of sale. Nor is it certain that *Pole v. Tochesser* actually laid down what it was credited with. For full discussion, see at note 231 *infra*.

<sup>82</sup> See counsel's suggestion in Sir T. Raym. 183.

<sup>83</sup> See §3 *supra*.

<sup>84</sup> (1670) 2 Wms. Saund. 156, *sub. nom. Humlock v. Blacklow*, 1 Mod. 64, *Humlock v. Blacklaw*, 1 Sid. 464, *Hunlock v. Blacklaw*, 2 Keb. 674.

<sup>85</sup> 2 Wms. Saund. 156.

may break it, and a negative covenant is not said to be performed until it becomes impossible to break it; which impossibility can only happen here by the plaintiff's death".<sup>86</sup> To construe the covenants as dependent would therefore "entirely defeat the intention of the parties; for it plainly appears that their intent was that the plaintiff should have the £100 a year during his life, and therefore it is not a *condition*".<sup>87</sup> If B had therefore to pay the instalment, A also became separately liable for breach of his undertaking. The adjustment thus adopted was designed to save the transaction as well as allow both parties to balance their respective gains and losses; and the adjustment was very simply made by holding the covenants independent despite their being linked by express words of condition until recently acknowledged as creating a dependency.<sup>88</sup>

Similarly in *Hayes v. Bickerstaff*,<sup>89</sup> where a lessor agreed that the lessee, "paying and performing all rents and covenants, shall quietly enjoy without any disturbance". When disturbed, the lessee complained of breach of covenant, but the lessor objected that the covenant of quiet enjoyment was conditional upon the lessee's observance of his own duties and that he had not paid his rent as agreed. The problem, in short, was whether "paying and performing did make a condition".<sup>90</sup> In the Common Pleas, North, C.J. put the matter on its broadest basis. If the covenant, he said, "should be construed conditionally: then if the lessee broke a covenant of the value of a penny, it would excuse the lessor of the breach of a covenant of £1000 value".<sup>91</sup> Not only was an express dependency again turned into independency, the move indeed also deprived the lessor of his major protection should the lessee fail to make punctual payment.<sup>92</sup> It is, however, easy to see in which direction the law was going. Rather than give the contract a classically "dependent" construction, the court was trying to gauge the materiality of the lessee's breach and its effect on either party. So if the lessee was not to be penalised unduly (for without the right to quiet enjoyment his lease was practically worthless), there was no other choice except a rule of independency. Moreover, the present solution was technically very different from that adopted in the sixteenth century. Then, as has been shown, a "condition" could be abridged to a "covenant" only after careful scrutiny of the proviso;<sup>93</sup> now the court could estimate the breach in question, and thereupon manipulate the dependent-independent dichotomy in accordance with the result that was thought expedient.<sup>94</sup>

If independency could be pushed to such lengths the following situations

<sup>86</sup> *Id.* at 156-7. Italics in report.

<sup>87</sup> *Id.* at 157. Italics in report.

<sup>88</sup> There can be little doubt that had the plaintiff's failure not to compete been more substantial, instead of being relatively minor, the decision would probably have gone against him. In choosing therefore an "independent", as distinct from a "dependent" construction, the court was obviously gauging the materiality of the plaintiff's breach or (alternatively) the true extent of the defendant's failure of consideration. We can now see how close was the connection between the theories of "independency", materiality and failure of consideration. See also note 13 *supra*.

<sup>89</sup> (1675) 1 Freem. 194, 2 Mod. 34, Vaugh. 118.

<sup>90</sup> 1 Freem. 194.

<sup>91</sup> At 194-5, North, C.J. gave another explanation for the decision which is an interesting fore-runner of the modern distinction between integrated and non-integrated contracts. Cf. Restatement on *Contracts*, §228. "Paying and performing" had, in his view, become "but *clausula clericorum*", i.e. a clause so usual to be mere form; so that being purely formal or clerical, the contractual term did not have to be given a strictly conditional (or integrated) effect.

<sup>92</sup> Lessor's counsel rightly pointed out that if "paying and performing" were not construed as a condition, then "the words are actually void." *Id.* at 194. But cp. *Smith v. Shelbury* (1675) 1 Freem. 195, 2 Mod. 33; and at note 108 *infra*.

<sup>93</sup> See at note 34 *supra*.

<sup>94</sup> For a survey of subsequent development, see *Bastin v. Bidwell* (1881) 18 Ch. D. 238.

made its application even easier. *Cole v. Shallet*<sup>95</sup> presents a typical problem in charterparties. A master covenanted to sail and return with the first wind, carrying goods for the defendant. In an action for freight, the defendant pleaded that the ship did not return directly and "made divers deviations, by which the goods were spoiled".<sup>96</sup> The whole court gave judgment for the plaintiff: for "perhaps the damage of the one side and the other was not equal", so that "each party is to recover against the other the certain damage he sustained".<sup>97</sup> So also in *Shower v. Cudmore*<sup>98</sup> a shipowner was awarded his freight, these being "reciprocal covenants, and each party has a remedy for non-performance",<sup>99</sup> even though the charterer had pleaded that the ship had not been ready on the exact day, a delay which he alleged had wiped out his profits. Indeed, this theory of adjustment was extended to employment contracts. Thus in *Guy v. Nichols*,<sup>100</sup> Holt, C.J. said concerning a servant's claim for wages: "One covenants to serve him, the other covenants to pay him so much *for his service*, this is mutual, and not upon a condition precedent; one covenant cannot be pleaded in bar of another; if he serves one month, and then runs away, the first month's wages is due".<sup>101</sup> Nothing can better express the full measure of the change that had occurred since the days of Fineux, C.J.<sup>102</sup> Clearly, the developments after *Pordage v. Cole* had brought a complete reversal of the legal attitude to conditional words in relation to part-performed contracts. In view of this, it must remain a mystery why *Guy v. Nichols* was later to have no influence at all on agreements between master and servant and why employment contracts were to follow a different path from that now taken by contracts of sea-carriage.<sup>103</sup>

In harmony with these events was another innovation introduced by *Peeters v. Opie*.<sup>104</sup> A builder who was to pull down three houses and to erect two others in their place, the defendant agreeing to pay him £8 for his labour, averred that he had always been ready and willing to perform, but that the defendant had not paid the money. The latter's defence was that the builder was only to be paid *for his labour*, a defence which the court agreed was "a condition precedent, so that the plaintiff ought of necessity to have shown the

<sup>95</sup> (1681) 3 Lev. 41. The headnote states the ground of decision that "one covenant is not pleadable in bar of another covenant in the same deed". The case, however, did not proceed at all on this basis; it was an example of a straightforward adjustment of a contract.

<sup>96</sup> *Id.* at 42.

<sup>97</sup> *Ibid.* A similar result had in charterparties already been achieved in *Constance v. Cloberie* (1627) Palm. 397; Poph. 161; Latch 12, 49; *sub. nom. Conustable v. Clowbury*, Noy 75, where the facts were substantially the same. Again, in *Tompson v. Noel* (1661) 1 Lev. 16, where plaintiff transported 180 men from Ireland to Jamaica instead of the 280 agreed on, there was judgment for plaintiff on demurrer because defendant had not pleaded to the whole of plaintiff's claim for payment, but had only pleaded to the carrying of 180 men. The effect was to hold the contract independent, though the principle was expressed in the language of pleading. Yet contrast with this *Clarke v. Gurnell* (1611) 1 Bulst. 167, where the ship was to sail with the first wind, the defendant to pay *pro tota transference*. Having delayed, plaintiff recovered freight in the Common Pleas, but judgment was reversed in the King's Bench, because the word "Pro", as was said, "makes a condition and is matter precedent, the performance of which ought first to be laid down". This case had some influence later (e.g. in *Thorp v. Thorp* (1702) 12 Mod. 455 at 463), but its effect as regards the construction of charterparties was definitely superseded.

<sup>98</sup> (1682) T. Jones 216.

<sup>99</sup> *Ibid.*

<sup>100</sup> (1694) Comb. 265.

<sup>101</sup> *Ibid.* My italics.

<sup>102</sup> See at note 18 *supra*.

<sup>103</sup> Although this divergent development is very difficult to explain, part of the explanation must be that *Guy v. Nichols* remained a virtually unknown decision. Moreover, it became completely submerged by the famous case of *Cutter v. Powell* (1795) 6 T.R. 320; 2 Smith's *Leading Cases* 1, where *Guy v. Nichols* was not cited and which strongly reinforced a strictly dependent construction in relation to employment contracts.

<sup>104</sup> (1671) 2 Wms. Saund. 350.

work done, or at least that he was hindered from doing it by the defendant, before he can demand the money".<sup>105</sup> Although this admission looked like the undoing of the previous achievements, the court still managed to turn defeat into victory. For they decided that, if the declaration was originally deficient, it was cured after verdict. This gave prominence to an additional method of avoiding an express dependency, and indeed a method that had previously been rejected.<sup>106</sup> Provided then a plaintiff could succeed on his merits at trial, the King's Bench would not hold against him on error. And if the principle of cure after verdict was merely procedural, its practical effect was substantive and substantial.

6. *The Period of Total Confusion*—A by-product of the developments after *Portage v. Cole*<sup>107</sup> was considerable confusion. These developments, though they simplified the legal approach to executed bargains, did nothing to bring general clarification. With the classical dependent-independent doctrine upset, and older ideas mingling with new ones, the courts moved from one extreme to another. As before, the confusion was most noticeable in the case of executory contracts. For example, in *Smith v. Shelbury*,<sup>108</sup> the parties had agreed for the assignment of a lease, the defendant promising to pay £10 *proinde*. Sued for the price, the defendant objected that no assignment had been made to him; but it was held that "*proinde* made no condition precedent, but only specified the consideration".<sup>109</sup> In spite of this obvious disregard for the conditional meaning of "*pro*" and its even stronger synonym "*proinde*",<sup>110</sup> the courts could, a generation later, still adhere to earlier ideas. Thus in *Shales v. Seignoret*,<sup>111</sup> a seller was to transfer bank-stock which the buyer was to accept and pay for upon being given three days' notice. On the day so appointed, the seller attended the whole day in the offices of the Bank of England (since by law no bank-stock was transferable except in the Bank and in the presence of both parties),<sup>112</sup> but the buyer did not come to accept it. Was the seller entitled to the price, as the defendant had not received the stock and had refused to take it? The decision now was that the buyer having undertaken to pay only on transfer, "therefore no transfer, no money".<sup>113</sup> The court purported to return to the old rule of dependency, but they went beyond its previous limits. For whereas before even an express dependency had generally been thought to be excusable by a buyer's own obstruction,<sup>114</sup> the present dependency gave the buyer almost complete freedom to thwart the completion of the contract.<sup>115</sup>

Yet the existing state of conceptual disorganization is best exemplified

<sup>105</sup> *Id.* at 352.

<sup>106</sup> See, for example, *Clark v. Gurnell* (1611) 1 Bulst. 167; *Austin v. Jervoyse* (1615) Hob. 69, 77; *Towlcarne v. Wright* (1616) 1 Rolle's Rep. 414. The principle of cure after verdict could only then apply if the covenants were to be held independent and particularly so in executed contracts. There could be no cure if the covenants were to be dependent.

<sup>107</sup> (1669) 1 Wms. Saund. 319.

<sup>108</sup> (1675) 1 Freem. 195, 2 Mod. 33. See also *Samways v. Eldsly* (1676) 2 Mod. 73.

<sup>109</sup> 1 Freem. 195, 2 Mod. at 34. The court not only followed *Portage v. Cole*, note 107 *supra*, but also thought *Ware v. Chapple* (1649) Sty. 186 to be conclusive. The latter raises peculiar difficulties to be discussed later: see at note 234 *infra*.

<sup>110</sup> See counsel's comprehensive recital of precedents to contrary effect, 2 Mod. at 33-4.

<sup>111</sup> (1699) 1 Ld. Raym. 440.

<sup>112</sup> *Id.* at 441. The court curiously insisted that his patient attendance at the bank should have been specially pleaded by plaintiff, for "otherwise the court cannot take notice of it".

<sup>113</sup> *Id.* at 440. It was suggested that the plaintiff should have sued the buyer for damages for non-acceptance, a suggestion which remarkably resembled what was to become the modern solution. This was however scant relief for the seller in the present situation. He had done all he practically could to make transfer, only to be denied by a defendant without any real merit.

<sup>114</sup> See also note 129 *infra*.

<sup>115</sup> But *cp. Lea v. Exelby* (1602) Cro. Eliz. 888, and see at note 73 *supra*.



in *Thorp v. Thorp*<sup>116</sup> in 1701. A had mortgaged land to B; later A promised to release his equity of redemption to B for £7. A then made the release, though B did not pay his sum which A now claimed in *assumpsit*. In defence B "principally urged" a puzzling argument which was that since A's and B's mutual promises were independent inasmuch as A's promise to release was the consideration of B's promise of payment, A could originally have sued B on that promise; but as A had already released to B, "Ergo the release comes after the cause of action, and consequently destroys it".<sup>117</sup> In other words, the argument was that A could sue B on mutual promises only where these promises were both independent and unperformed, but that A could not perform his promise and still claim that the promises were independent. Once A's promise was performed he could only recover provided he fully averred performance in the same way as if the mutual promises had originally been dependent. The remarkable ingenuity of this argument was only matched by the absurdity the law was finally reduced to. Nor was this seen by the most distinguished contemporary lawyer. In fact Holt, C.J. conceded the defendant's point as "very true and necessary";<sup>118</sup> and he therefore addressed himself to the question whether the mutual promises were independent as alleged or were rather dependent. Holt saw that there was "a variance in the books upon this learning", but he hoped "on this occasion to settle it".<sup>119</sup> After much discussion, however, he finally came back to the old rule that "when one promises, agrees, or covenants, to do one thing *for* another, there is no reason he should be obliged to do it till that thing *for* which he promised to do it be done".<sup>120</sup> Holt, in short, merely re-validated the conditional effect of "for", not only because "there is no reason that [a party] should be compelled to give credit, where he did not intend it", but also "to the end that the Court might judge, whether [performance] was done according to the agreement".<sup>121</sup> Furthermore, it is by no means obvious what exactly Lord Holt was after. If he believed that the "reason of the thing"<sup>122</sup> required that the mutual promises were originally dependent, his demonstration to this end was somewhat pointless. The precedents supporting dependency were not now issue, simply because A's performance was complete, his release being executed. Again, dependency could in this situation be of no real help since B's precise objection was that A had only generally averred performance, i.e. had omitted to aver specifically his execution. If so, dependency would operate as a complete bar, even though A had in fact performed every tittle of his promise. Fortunately, Lord Holt was not prepared to arrive at this conclusion. Although, as he finally argued, A had made an insufficient averment, so that his declaration was faulty, yet B by "pleading over" (that is, by pleading the release rather than taking his stand on the faulty declaration) had in fact admitted A's satisfactory performance and had thus aided the defect in the declaration.<sup>123</sup> In the end,

<sup>116</sup> 12 Mod. 455, *sub. nom. Thorpe v. Thorpe*, 1 Ld. Raym. 662, 1 Salk. 171, 1 Comb. 98.

<sup>117</sup> 12 Mod. at 456.

<sup>118</sup> *Id.* at 459.

<sup>119</sup> *Id.* at 460.

<sup>120</sup> *Ibid.*

<sup>121</sup> 1 Ld. Raym. at 665. In greater detail, Holt, C.J. actually laid down two rules, later to be adopted by Serjeant Williams: (i) if a day be appointed for payment, and the day comes before the thing, for which the money is to be paid, can be done, the promises are independent even if payment is said to be "for" performance; (ii) but payment is dependent upon performance, if payment is to "incur after the time, in which the consideration ought to be performed". *Ibid.* These rules had been foreshadowed in *Oliver v. Yeames* (1662) 1 Keb. 342, and tentatively suggested by Hale, C.J. in *Peeters v. Opie* (1671) 2 Wms. Saund. 350 at 352. For fuller discussion of these rules, see §10 *infra*.

<sup>122</sup> 12 Mod. at 464.

<sup>123</sup> 1 Ld. Raym. at 667; 12 Mod. at 466. *Cf. Vivian v. Shipping* (1634) Cro. Car. 384; *Barnard v. Michel* (1670) 1 Vent. 114, 126, 2 Keb. 754, 766.

therefore, the plaintiff succeeded in his claim for payment, and all that was added was just another procedural variation. For, in addition to the rule that a faulty declaration was curable by verdict, a defendant's "plea over" was given the same power for healing. These difficulties, it needs to be seen, did not come from the law of pleading; they were rather the confused products of the confusion in the law of contract. If (as Maine and Maitland have observed)<sup>124</sup> substantive law was at one time secreted in the interstices of procedure, we now had a case of substantive law muddling through, and muddling up, the rules of pleading.

But *Thorp v. Thorp* was not a complete failure. Indeed, the remarkable paradox of this decision is that, notwithstanding all its shortcomings, it fulfilled an important historical purpose. For by vindicating the dependency-approach, it re-opened the way for the creation of concurrent conditions in contracts of sale and similar property-exchanges. The explanation is that before such concurrency could be established, the law had to return to a basic rule of dependency and, starting from it, adapt it; concurrent conditions were not possible in the climate and context of mutual promises treated each as absolute or independent. The specific contribution of *Thorp v. Thorp* was then to deflect the "independent" developments after *Pordage v. Cole*, and thereby to facilitate a new attack on executory agreements. From dependency to concurrency much transformation was still needed; the eighteenth century was to be mainly occupied with this effort.

7. *The Struggle towards Concurrency*—The task began with *Lancashire v. Killingworth*<sup>125</sup> in 1700. Here, and hereafter, the law was much concerned with purchases of stock and shares, which coincided with the contemporaneous growth of the business corporation.<sup>126</sup> The buyer agreed to accept and pay for the transfer of Hudson's Bay Stock upon two days' notice. The seller, having given the necessary notice, was ready on the appointed day to make the transfer, but the buyer did not come to take it. The defendant demurred, and his demurrer was successful. The reason, given by Holt, C.J., was simply that the seller, while averring tender, had not averred the buyer's refusal.<sup>127</sup> Short of refusing, the plaintiff should have averred that he was ready to transfer not only on the day of the transfer, but at the specific time so appointed.<sup>128</sup> All he had done was to aver that he tendered there at the day, and that the defendant did not come to accept; he had not said that the buyer had either obstructed a transfer or that he had waited with his tender at the company's office until it was too late to transact business. This infusion of ideas of "tender" had great significance. The law, it is true, was still wedded to very strict notions of what was tender on the one hand and refusal and obstruction on the other (notions which were principally derived from an older learning relating to bonds<sup>129</sup> and grants<sup>130</sup>). At the same time, the law now had also a more convenient concept at its disposal. It could qualify and adapt the operation

<sup>124</sup> Maine, *Early Law and Customs* (1883) 389; Maitland, *The Forms of Action at Common Law* (1936 ed.) 1.

<sup>125</sup> (1700) 12 Mod. 529, 1 Ld. Raym. 686, 2 Salk. 623, 3 Salk. 342, 1 Comb. 116. Cp. *Shales v. Signoret* (1699) 1 Ld. Raym. 440, at note 111 *supra*; and *Smith v. Shelbury* (1675) 1 Freem. 195, 2 Mod. 33, at note 108 *supra*.

<sup>126</sup> Cf. Williston, "The History of the Law of Business Corporations Before 1800" (1888) 2 *Harv. L.R.* 105, 149 (Repr. 3 *Select Essays in Anglo-American Legal History* 195).

<sup>127</sup> 12 Mod. at 532.

<sup>128</sup> *Id.* at 531, 1 Ld. Raym. at 688, 3 Salk. at 343.

of dependency through the idea of tender; it could say that, even if a buyer's or payor's duty was dependent, the dependency was limited to the extent that provided that a seller had done everything to comply with his agreed transfer, the purchaser or payor could no longer rely on a condition whose non-fulfilment was his own fault and due to his own prevention. These ideas were soon to become more secure and explicit.

In *Callonel v. Briggs*,<sup>131</sup> transfer of stock and payment for it were to take place six months after the agreement. Having held that the seller could not claim the price without a tender, Lord Holt stated: "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer *or a tender*, and the other a payment *or a tender*, though there be mutual promises. If I sell you my horse for £10, if you will have the horse, I must have the money, or if I will have the money, you must have the horse".<sup>132</sup> It will be seen that this emphasis on the sufficiency of tender, together with the emphasis on the *mutual* dependency of a seller-buyer relation, furnished ample foundation for concurrent conditions, simply because the principal elements of concurrent performance were contained in the emerging requirements of mutual and simultaneous tenders.<sup>133</sup> To say this, however, is to apply a retrospective standard, for at that time the courts were not yet completely aware of what exactly they were doing. For example, in *Blackwell v. Nash*,<sup>134</sup> another agreement for stock-purchase, the seller was on the specified day ready to transfer but the defendant refused to accept or make payment. In an action for the price, the buyer objected that he had only agreed to pay "*in consideratione praemissorum*", i.e. in consideration of the stock actually transferred and not merely for the promise of the transfer. This objection had already been met by the principles of tender and refusal enunciated in the two previous cases.<sup>135</sup> But the court mistakenly thought that in order to defeat the buyer's objection, the words "*in consideratione praemissorum*" had to be given an "independent" inter-

<sup>130</sup> Thus, in 12 Mod. at 532, Holt C.J. relied on the "remarkable case" of *Blandford v. Andrews* (1600) Cro. Eliz. 694, where the obligor was to procure a marriage, and having failed because of the obligee's own hindrance, it was held against the obligor because he had not done everything possible to bring off the marriage. Again, in *Anon.* (1622) 2 Rolle's Rep. 238, the obligor was to make a release; he had fully prepared it, even fixed the wax to the label, but had not yet sealed it, and the obligee refused to accept it when tendered. Chamberlaine, J. made the distinction between a tender where obligor had done everything in his power and where, as here, tender though substantial was still incomplete. And to same effect: *Austin v. Jervoyse* (1624) Hob. 69, 77, judgment given against plaintiff, because he did not offer a bond ready sealed. For more general discussion, see *Jones v. Barklay* (1781) 2 Doug. 684 at 692-4; and Stoljar, "Prevention and Co-Operation in the Law of Contract" (1953) 31 *Can. B.R.* 231 at 234-6. Yet there were some earlier instances of successful pleas of tender and refusal. For example in *Anon.* (1424) Y.B. 3 Hen. 6, pl. 37, Roll. Abr. 453, N, pl. 5, the obligor was to erect a mill, and he came to the obligee saying he was ready to start the building, and the obligee said he would not have it, the obligor was held excused from performance. Another instance is an apprentice-case, *Anon.* (1482) Y.B. 22 Edw. 4, pl. 26; Roll. Abr., 455, P, Q, pl. 1, where the son of the obligor was to serve obligee, when latter refused to teach the son after tender, the bond was not forfeited.

<sup>130</sup> See, for example, *Fraunces' Case*, (1609) 8 Co. Rep. 89b at 92a.

<sup>131</sup> (1703) 1 Salk. 112, Holt K.B. 663.

<sup>132</sup> 1 Salk. 112. My italics.

<sup>133</sup> This was later recognised by Lord Kenyon, C.J.: "The case decided by Lord Holt in Salk. 112, if indeed so plain a case wanted that authority to support it, shews that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract". *Morton v. Lamb* (1797) 7 T.R. 125 at 129.

<sup>134</sup> (1722) 1 Str. 535, 8 Mod. 105. And see on this case *Goodisson v. Nunn* (1792) 4 T.R. 761 at 764.

<sup>135</sup> See at notes 125 and 131 *supra*.

pretation, and they did this on the extraordinary ground that "when the transfer is to be upon payment, there is no colour to make the transfer a condition precedent".<sup>136</sup> Although independency proved to be still a viable concept, yet it was no longer the concept of the old complexion. Thus, in *Lock v. Wright*,<sup>137</sup> the buyer having agreed to pay for stock on a day certain, the seller asked for the price independently of his own transfer or tender. There was some inclination to countenance this demand: "if the defendant has made a foolish bargain in undertaking to pay the money on [a specified date], whether he had the [transfer] or not, we cannot help him".<sup>138</sup> It was, moreover, a claim which was directly supported by *Pordage v. Cole*<sup>139</sup> and which had been approved of in *Thorp v. Thorp*.<sup>140</sup> However, despite much stress on these authorities,<sup>141</sup> the court finally gave judgment against the plaintiff. It was said that the "word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties: in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect".<sup>142</sup> Again, in *Wyvil v. Stapleton*,<sup>143</sup> the parties having agreed to transfer South-Sea stock and to pay "on or before the day of shutting of the books", the seller averred that he was at the South-Sea House on the day required, and that the defendant had not appeared; the seller thereupon sold the stock to a third party, as the contract entitled him to do, and now brought this action for his deficiency or loss of profit. Minute argument was still possible as to whether or not the promises were dependent, whether the buyer had to accept tender or whether "acceptance" meant a duty to pay only after transfer, both sides insisting that the other had to do the first act. But it was seen that it "could never be the intention" of the parties "to make the payment depend upon the [buyer's] own acceptance",<sup>144</sup> and "since everybody knows . . . the nature of these agreements",<sup>145</sup> allowing a buyer to plead lack of transfer would be tantamount to allowing him to plead his own fault: "it is true, says he, I did not accept the stock as I ought to have done, and I therefore am discharged from the payment of the money".<sup>146</sup> This case is instructive in another respect. For it shows how once the requirement of mutual tenders was established, the parties were to begin a controversy as to who was to tender first, who was to do the "first act".

As a matter of historical fact, this controversy had had several antecedents; indeed, there had been somewhat of a parallel development concerning concurrent conditions beginning in 1714 with *Turner v. Goodwin*.<sup>147</sup> A third party (Dibble)

<sup>136</sup> 1 Str. 535. It was, however, also held that a definite refusal to accept the tender "would amount to performance": *ibid.*

<sup>137</sup> (1723) 1 Str. 569, 8 Mod. 40. The case was apparently first heard in Hilary 1721 and argued a second time in Easter term, 1722. Final judgment was given in Trinity 1723.

<sup>138</sup> 1 Str. at 570.

<sup>139</sup> (1669) 1 Wms. Saund. 319.

<sup>140</sup> (1702) 12 Mod. 455. As we have seen, Holt, C.J. had in fact made this his first rule of independent covenants: see note 121 *supra*.

<sup>141</sup> See 1 Str. at 570-1, 8 Mod. at 41-2.

<sup>142</sup> 1 Str. 571-2, per Pratt, C.J.

<sup>143</sup> (1724) 1 Str. 615; later affirmed by the House of Lords. See the discussion in *Dawson v. Myer* (1725) 2 Str. at 713.

<sup>144</sup> 1 Str. at 617.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Id.* at 615.

<sup>147</sup> (1714) 10 Mod. 153, 189, 222, Fort. 145, *sub. nom.* *Turnor v. Goodwin*, Gilb. Cas. 40, *Viner's Abridgement*, Vol. 20, 183 pl. 9. First argued in Easter term, 1714, it was "to be spoken to again" in Michaelmas of the same year. When adjourned to following Easter judgment was given in the next term. There was some discussion in *Jones v. Barkley* (1781) 2 Doug. 684 at 689, on the relative merits of the reports, and 10 Modern was described as possibly "not a book of authority". Nevertheless all the reports agree on the result reached in *Turner v. Goodwin*, and there is perhaps little doubt that this result, and above all its simplicity, seemed rather surprising. See on this 2 Street, *op. cit.*, 137.

was indebted to Turner in a bond of £3000, who had recovered judgment. In consideration that Turner would forbear suing out execution against Dibble, Goodwin undertook by bond to pay the debt to Turner when so requested, when Turner was also to assign over to him his judgment against Dibble. Turner sued Goodwin for the money, and Goodwin pleaded that the plaintiff had not assigned over the judgment. Turner replied that he had been ready to assign, which replication was held good on demurrer. The practical result was that Goodwin was made immediately liable on his promise of payment, although one might have expected that, as in transfer of stock, it was the plaintiff's duty to do the first act by tendering the assignment,<sup>148</sup> and not the defendant's duty to take the first step by making an offer to pay the money. Nevertheless, it was generally conceded that payment and assignment were "concomitant acts in the execution";<sup>149</sup> whoever was to take the first step, actual performance, execution or completion of the exchange had to be concurrent. For as it was put in *Anvert v. Ennover*,<sup>150</sup> "where there are no words to determine the priority of acts [meaning "execution"], a middle way is to be chosen".<sup>151</sup> In this case a vendor covenanted to convey a tavern on a day certain, for which the purchaser was to pay on the same day, and the latter resisted a claim for payment because the plaintiff had not even offered to convey. But again the decision was that the first act was the payor's: while he did not have to make an "absolute tender" of the money, he had to indicate his readiness "by such words as these, I tender you the money, so as you make an assignment".<sup>152</sup> It will be clear that this rule requiring the payor or purchaser to do the first act was an inconvenient, as it was an unintelligent, imposition. It meant that a plaintiff, be he seller or assignor, could rush in with a claim for payment without any tender or offer of performance on his own part; it meant that despite the language of "concomitant acts" or concurrent performance, in practice the two parties were not given equal treatment, since the advantage was with the plaintiff as against the defendant-payor. Fortunately, this rule was only transitional and temporary, and was to receive considerable rectification.<sup>153</sup>

8. *The Consolidation of Concurrent Conditions*—Although concurrency had gained a firm foothold much consolidatory work was still needed. What, in particular, was necessary was to remove some lingering doubts,<sup>154</sup> and to make concurrent conditions more precise in several details. On the threshold

<sup>148</sup> All the orthodox arguments were in defendant's favour. Not only were the words "assigning over the judgment" in the nature of a condition precedent, which in a bond were always interpreted for the obligor's protection, but there was also the substantial ground that once the obligor had paid, he was without any remedy at law for the assignment of the judgment, since only the obligee could sue upon the bond. This circumstance could not affect the assignor because, as obligee, he could still put the bond in suit for his money. See 10 Mod. 153 at 154-5. Indeed, in a somewhat similar case the decision had been for the defendant: see *Large v. Cheshire* (1671) 1 Vent. 147; 2 Keb. 801, where in covenant the plaintiff was to convey land, the defendant to pay. Plaintiff averred that he had sealed the feoffment and was ready to convey, but it was held against him as he had not notified the purchaser when and how he was going to make execution.

<sup>149</sup> 10 Mod. 189 at 190. *Turner v. Goodwin* was followed in *Merritt v. Rane* (1721) 1 Stra. 458, where the payment of money was described as "not a condition precedent, but a concurrent act", and a strong judgment for seller was affirmed by the Exchequer Chamber and the House of Lords. But the continuing impact these decisions might have had was largely swamped by *Blackwell v. Nash* (1722) 8 Mod. 105, note 134 *supra*, and decisions following latter: *Wilkinson v. Myer* (1723) 8 Mod. 173, 1 Str. 585, 2 Ld. Raym. 1350; and *Dawson v. Myer* (1725) 2 Str. 712.

<sup>150</sup> (1733) 2 Barn. K.B. 308; *sub. nom. Amcock v. Ennover*, 2 Barn. K.B. 337.

<sup>151</sup> The statement was attributed to Lord Macclesfield (as he became), who as Serjeant Pratt had argued the case for Turner.

<sup>152</sup> 2 Barn. K.B. 308. At another sitting, judgment went against defendant he being absent: 2 Barn. K.B. 337.

<sup>153</sup> See cases at notes 164, 174, 178 *infra*.

<sup>154</sup> See, e.g. *Martindale v. Fisher* (1745) 1 Wils. K.B. 88; and Langdell, *op. cit.*, 181.

of this period of consolidation stands the famous case of *Kingston v. Preston*,<sup>155</sup> a case often believed to be the chief climacteric in the history of concurrent conditions.<sup>156</sup> This is, however, a belief, which in view of what has already been said and as we shall further see, is a gross oversimplification. The brief facts were that the defendant was to give up his business to the plaintiff who covenanted to advance immediate security, though full payment was to be made later. The plaintiff having averred his readiness to perform, the defendant pleaded that he had not offered to give the security. For, as he argued, "the covenants were dependant (*sic*) in their nature . . . the security to be given for the [deferred payment], was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement, so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security, (who might, and, indeed, was admitted to be worth nothing)".<sup>157</sup> Lord Mansfield, C.J., adopted this reasoning; in his view the giving of the security was "necessarily" a condition precedent, so that plaintiff had first to hand over the security before he could ask for the conveyance of the business.<sup>158</sup> As in the course of his judgment, Lord Mansfield also distinguished between three kinds of covenants, i.e. between dependent, independent and concurrent covenants,<sup>159</sup> his decision far from being authority for simultaneous performance, in fact reaffirmed the old principle of dependency.<sup>160</sup> It is true that plaintiff could not have succeeded, even if the covenants had been held concurrent, since he had not even offered the security. Why, then, was his performance held dependent instead of concurrent? Was this transaction different from any other sale to require more of the buyer than a tender or offer of the money?<sup>161</sup> In other respects, Lord Mansfield proved more helpful. His distinction between three kinds of covenants, (a distinction to be "collected from the evident sense and meaning of the parties"<sup>162</sup> rather than

<sup>155</sup> (1773) 2 Doug. 684, 689; Lofft. 194.

<sup>156</sup> The notion that *Kingston v. Preston* was the "first strong authority" relating to concurrent conditions originated with Grose and Le Blanc, JJ. in *Glazebrook v. Woodrow* (1799) 8 T.R. 366 at 371, 374, (Grose had been counsel for defendant in *Kingston v. Preston*). See also Buller, J. in *Goodisson v. Nunn* (1792) 4 T.R. 761 at 765. Similarly, Langdell, *op. cit.*, 184-5, Costigan, *op. cit.*, 34; 3 Williston, *op. cit.*, §§816-7. Greater insight was shown by 2 Street, *op. cit.*, 137-8, where Mansfield is credited with giving "shape and consistency to the law" rather than with the creation of new law. Serjeant Williams, too, regarded *Kingston v. Preston* as only one of many cases; see citations to his fifth rule, 1 Wms. Saund. at 320n. Indeed, Lord Mansfield had already said in *Collins v. Gibbs* (1759) 2 Burr. 899 at 900 that a plaintiff must either aver performance of what he has done or show that he was ready and willing to perform it.

<sup>157</sup> 2 Doug. at 690.

<sup>158</sup> *Id.* at 691; 3 Williston, *op. cit.* §817.

<sup>159</sup> *Id.* at 690-1. The three covenants were (i) such "as are called mutual and independent" (*sic*), (ii) which are "conditions and dependant", and (iii) such which are "mutual conditions to be performed at the same time". Sometimes, (ii) is called a "general dependency" and (iii) a "mutual dependency" see Langdell, *op. cit.*, 184; Costigan, *op. cit.*, 13.

<sup>160</sup> *Cf.* also Patterson, *loc. cit.*, at 910.

<sup>161</sup> In view of its actual decision, it is curious why *Kingston v. Preston* should have been credited with a revolutionary innovation. Both Langdell (*op. cit.*, 184) and Williston (*op. cit.*, §817) have asserted, that in holding one covenant as impliedly dependent upon the other, Mansfield "was deciding contrary to what had been held for law from time immemorial" (Langdell) or "in spite of three centuries of opposing precedents" (Williston). These assertions disregard a decision such as *Toulcarne v. Wright* (1616) 1 Rolle's Rep. 414, see at note 54 *supra*; nor do they take account of the fact that in making these covenants dependent, Mansfield went much further than he needed. And see notes 162 and 163 below.

<sup>162</sup> 2 Doug. at 690-1. Nor was Mansfield the first to underline the "intent" of the transaction. See *Hunlocke v. Blacklowe* (1670) 2 Wms. Saund. 156 at 157, and at note 87 *supra*. Again, in *Thorp v. Thorp* (1701) 12 Mod. 455 at 460, Lord Holt had spoken of "the nature of the agreement"; and in *Russen v. Coleby* (1733) 7 Mod. 236, Lord Hardwicke, C.J. had said that "these cases do not so much depend on the manner of penning the covenants as to the nature of them".

from the technical words they had used), gave special emphasis not only to the separate status of concurrent conditions, but thereby also to the special performatory problem in contracts of sale as distinct from that in other contracts. Furthermore, Mansfield drew attention to the central question still left open in relation to concurrent performance where "it is not certain [which party] is to do the first act".<sup>163</sup> It largely fell to *Jones v. Barkley*<sup>164</sup> to make this question clearer.

In an agreement to release and assign an equity of redemption upon payment by assignee, the assignor was ready to make the assignment on the required day and "did, then and there, offer to execute and deliver, and would, then and there, have executed and delivered, to the said defendant, such assignment and release".<sup>165</sup> Never before had the issue been so neatly presented; and if there was perhaps little doubt about the outcome, the plaintiff thought it wise to make his case in great detail.<sup>166</sup> The defendant, on his part, replied with weapons which, though obsolescent, were not yet buried. The covenants, he said, were strictly dependent, there being no "more emphatical term to express priority of performance, than the word 'upon'",<sup>167</sup> nor had the plaintiff done everything he could, because instead of executing a release he had merely tendered a draft of one; his tender should have been more "compleat" even granting the defendant's subsequent refusal.<sup>168</sup> But as far as sale and similar exchanges were concerned, this was the swan song of these old, "dependent" arguments. "If ever there was a clear case, I think the present is," said Lord Mansfield.<sup>169</sup> The point about the draft was laughed out of court: admittedly, the "party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shewn to the defendant for his approbation of the form, but he would not read it".<sup>170</sup> Buller, J. was even more perceptive. He deprecated the learning about tenders, derived from bond, since those "questions on tenders are very different from this. They have

<sup>163</sup> *Ibid.* This and other aspects of *Kingston v. Preston* are, however, very puzzling. As the plaintiff had not even tendered performance, Mansfield omitted to say whether, in this case, dependency meant actual (prior) transfer of the security or whether it only meant sufficient tender. But since it now was clear that plaintiff had to make at least a tender, why was it then not clear whose was the "first act". Moreover, the agreement itself provided that the plaintiff was to procure sufficient security "at and before" conveyance by defendant, so that the contract almost expressly indicated the order of exchange. So while true that defendant could not be asked to convey without the security, a tender of sufficient security was surely enough to protect him. All in all, *Kingston v. Preston* has far less analytical merit than has been believed.

<sup>164</sup> (1781) 2 Doug. 684.

<sup>165</sup> *Id.* at 685.

<sup>166</sup> More particularly, he first held forth on the "general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance which he had occasioned", *id.* at 686. Hence his "readiness" was a sufficient averment as in the circumstances it was "equivalent to an averment of performance", *id.* at 685-6. Furthermore, the defendant's non-performance had "discharged" the plaintiff, i.e., had waived further performance, thus amounting to a refusal however incomplete the plaintiff's tender, *id.* at 687-8. More interestingly, plaintiff insisted that this was not a case of ordinary dependency, but "one of those middle agreements in which what each has undertaken to do, is to be performed at the same time". *Id.* at 688. For the latter point, *Turner v. Goodwin*, see note 147 *supra*, was relied on: and thereupon Le Blanc, counsel for plaintiffs, produced a MS. report of *Kingston v. Preston*, note 155 *supra*.

<sup>167</sup> 2 Doug. at 691.

<sup>168</sup> *Id.* at 692.

<sup>169</sup> *Id.* at 694.

<sup>170</sup> *Ibid.* On this point, however, the previous cases were clearly in defendant's favour: see, especially, *Austin v. Jervoyse* (1624) Hob. 69, 77, where the plaintiff-buyer was to give vendor a writing obligatory for part of the purchase-price to be paid later. In an action for non-delivery against the vendor, judgment went against plaintiff because he had not offered a bond ready sealed. And see also *Anon.* (1622) 2 Rolle's Rep. 238 (note 129 *supra*); and *Large v. Cheshire* (1671) 1 Vent. 147 (note 148 *supra*). The effect of *Jones v. Barkley* was to over-rule these cases.

arisen, not upon what shall excuse, but upon what is, a tender".<sup>171</sup> Clearly, the earlier notions about tender had now been modernized and trimmed to suit the new "middle agreements".<sup>172</sup> The upshot was that concurrent conditions were recognised for what they were, as the occasion on which a party could initiate the process of mutual and simultaneous performance; the occasion, in short, when one party's first act demanded the other's appropriate response.<sup>173</sup>

All this seemed so simple and sensible that nothing could any more militate against it. Thus in *Goodisson v. Nunn*,<sup>174</sup> another claim of the purchase-price before conveyance, vendor and purchaser having agreed on the exchange on the same day, the case against the vendor was "extremely clear, whether considered in principles of strict law or of common justice".<sup>175</sup> Lord Kenyon, C.J., slashed the old cases, and "the determinations in them [which] outrage common sense".<sup>176</sup> For "notwithstanding some of the old authorities", there "is so much good sense in the later decision, that it is too much to say that they are now law".<sup>177</sup> Lastly, in *Glazebrook v. Woodrow*,<sup>178</sup> where again a vendor demanded the price without tendering conveyance, the court enumerated three specific merits favouring the buyer. Were he compelled to pay before obtaining title, he might be evicted by ejectment, and he would have no remedy at law but be "driven to his remedy in a Court of Equity", that is, an injunction to stay the ejectment.<sup>179</sup> Moreover, should the vendor become bankrupt before final execution, "the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid. The injustice of such a procedure is too manifest to be insisted upon further".<sup>180</sup> A further "injurious tendency" would be to deny "the real intention of the parties" and therewith render unattainable "the true justice of the case".<sup>181</sup>

One final detail remained to be settled. Whereas the position was clear when a seller sued a buyer, the ambiguity of "readiness and willingness" caused some difficulty where their roles were reversed.<sup>182</sup> In *Morton v. Lamb*,<sup>183</sup> plaintiff bought a quantity of wheat from the defendant, to be delivered and paid for within one month from the sale. The buyer now declared that he was "ready and willing to receive said corn" at his place of business, but that the defendant "not regarding his said promise" did not deliver. But the buyer lost his action. As Lord Kenyon explained, the seller could say "I did not deliver the corn to you [the plaintiff], because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the

<sup>171</sup> 2 Doug. at 695.

<sup>172</sup> For this expression, see *id.* at 688.

<sup>173</sup> All this is concisely summarised in the rule: *Pacta reciproca vel utrumque ligant vel neutrum*, cited Lofft 194 at 198. On concurrent conditions generally, see 3 Williston, *op. cit.*, §832; 3 Corbin, *op. cit.*, §629.

<sup>174</sup> (1792) 4 T.R. 761.

<sup>175</sup> *Id.* at 764. For similar expressions, see *Porter v. Shephard* (1796) 6 T.R. 665 at 669.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Id.* at 765-6, per Grose, J.

<sup>178</sup> (1799) 8 T.R. 366.

<sup>179</sup> *Id.* at 369.

<sup>180</sup> *Id.* at 370-1.

<sup>181</sup> *Id.* at 372. The court also disposed of the further argument that "partial performance . . . is sufficient to found an action for the money", the partial performance being that the defendant had already been let into possession a year before. For it was "plain that the defendant did not intend to part with his money till his title was secure": *id.* at 373.

<sup>182</sup> The present difficulty about "ready and willing" was the direct counterpart of the previous controversy about the "first act". But the allegation of "ready and willing" has also had a difficult history, starting with *Vivian v. Shipping* (1634) Cro. Car. 384. For some discussion, see the Serjeant Williams' notes to *Peeters v. Opie* (1621) 2 Wms. Saund. 350.

<sup>183</sup> (1797) 7 T.R. 125.



corn".<sup>184</sup> In practical terms, the decision meant that a buyer could not merely assert that he was ready and willing; he had to make it clear to the seller that he was ready and willing to take delivery and pay the price. There was more discussion of this in *Rawson v. Johnson*,<sup>185</sup> where the facts were nearly identical except that delivery was to be requested which the buyer had done. The buyer, having averred this request as well as his readiness to accept the goods, the seller objected that it "is not enough to be ready and willing to pay unless that be made known to the other party; this may be done without actually parting with the money, which is not necessary . . . unless the defendant had been ready to deliver the malt at the same time".<sup>186</sup> Although judgment went for plaintiff, the judges were in a keen dilemma because of what looked like a contrary decision in *Morton v. Lamb*. Yet Le Blanc, J. blandly asserted that a mere averment of "ready and willing" was enough.<sup>187</sup> The law was thus left in considerable difficulty, which was never satisfactorily resolved. It was, however, an unnecessary difficulty if the true distinction between *Morton* and *Rawson* had been fully understood. In *Rawson*, the buyer by especially requesting delivery had shown his readiness to take and thereby also to pay for the goods; in *Morton*, the buyer only complained by action that the seller had not delivered. So combined, the two decisions indeed produce a sound and convenient rule. Obviously, a party should not be able to protest *ex post facto* that he was ready to perform or pay; he should give a clear indication of his readiness at the appropriate time and place.<sup>188</sup>

9. *The Principle of Boone v. Eyre*<sup>189</sup>—The positive contribution of the eighteenth century was to build an adequate basis for executory sales and similar exchanges such as surrenders and releases; the century also made a more mixed contribution to the field of executed contracts. There recurred, to begin with, two difficult problems as regards leases. In *Mucklestone v. Thomas*,<sup>190</sup> a lessee had covenanted to repair, yet had suffered the message "to be very ruinous".<sup>191</sup> When sued for breach of covenant, his defense was that his repairs depended on 5000 slates "being found and delivered" by the lessor which he had not done. Considerable argument centred on the precise meaning of "being"; was it like the words "yielding and paying" or "provided" a strict condition precedent or not? The answer was that "being" was "a middle word, which might admit of [alternative] significations",<sup>192</sup> and it was the only answer to avoid a purely verbal construction. It could consequently be held that the delivery of the slates was not a condition precedent, since the lessee's

<sup>184</sup> *Id.* at 129. Or as Lawrence, J. put it: "The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title": *id.* at 131.

<sup>185</sup> (1801) 1 East. 203.

<sup>186</sup> *Id.* at 207.

<sup>187</sup> *Id.* at 212: "Then if they shew that they were ready to pay the price, provided the defendant were ready to deliver the malt, that is all that was necessary for them to do, and consequently their pleading a readiness to perform is equivalent to everything that they were bound to perform where the defendant refused to perform his part". Lord Kenyon and Lawrence, J. were much more cautious and resorted to somewhat extraneous grounds, the former to the principle of cure after verdict (*id.* at 209), while the latter (*id.* at 211) tried to find support in the earlier, though not entirely relevant, decision of *Norwood v. Norwood and Read* (1557) Plowd. 180.

<sup>188</sup> The uncertainty, however, continued to trouble nineteenth-century law. But this story cannot now be traced in detail. See notes to *Peeters v. Opie* (1671) 2 Wms. Saund. 350; and more generally 2 Williston on *Sale*, §445.

<sup>189</sup> (1777) 1 H. Bl. 273n; 2 W. Bl. 1314n.

<sup>190</sup> (1739) Willes 146.

<sup>191</sup> *Id.* at 147.

<sup>192</sup> *Id.* at 149. Similar non-conditional significations had previously been found for the words "provided" and "paying": see *Clapham v. Moyle* (1664) 1 Lev. 155, 1 Keb. 842, 860, *Allen v. Babington* (1666) 1 Sid. 280, 2 Keb. 9, 23.

non-repair was not principally attributable to the lessor's non-delivery. Even without the slates, the lessee could have done some repairs instead of doing nothing.<sup>193</sup> A little later, similar facts occurred in *Thomas v. Cadwallader*.<sup>194</sup> The lessee had covenanted to repair with the lessor "finding and allowing timber". In an action for non-repair, the lessor could not aver that he had actually found and allowed the timber, and the reason was, as transpired, that the lessor hoped to be informed as to what, when and how much timber was required, so that his duty to supply depended on prior and specific requests to be submitted by the lessee.<sup>195</sup> But so impressed was the court with the phrase "finding and allowing", words which were believed to have always been eminently conditional, that they regarded the lessee's covenant to repair as strictly qualified so long as the lessor had not found and allowed the timber and the lessee had not even asked for it. This result was extremely unfortunate.<sup>196</sup> It is true that Willes, J. deplored the previous cases which were however "too many to be over-ruled".<sup>197</sup> Even so, the decisions after *Portage v. Cole*<sup>198</sup> had opened enough room for a different conclusion. Instead of affixing, in the abstract, a conditional meaning to "finding and allowing", the covenants could easily have been held independent, if only to permit the lessor some compensation for the damage the lessee's non-repair had occasioned.<sup>199</sup>

This resurgence of the dependency-approach, with its literal adherence to words of condition, came too late to halt or to influence the main course of

<sup>193</sup> As the court said, *id.* at 149: "the defendant ought to have pleaded specially that she did not put them in repair by reason that the plaintiff did not find the slates". My italics.

<sup>194</sup> (1744) Willes 496.

<sup>195</sup> *Id.* at 498. Such a duty to give notice had in effect already been established by *Holder v. Tayloe* (or *Taylor*), (1613) Hob. 12, 1 Brownl. 23, Rolfe's *Abridgement*, 465 pl. 28. Unfortunately this case also became involved in another distinction, see Rolfe's *Abr.*, 518 pl. 2 and 3. The distinction was that a lessee's covenant to repair was (i) conditional and qualified by the lessor's prior "finding" if the covenant was "provided that the lessor shall find timber", but (ii) that it was unconditional of such finding if the terms were "provided and it is agreed that the lessor shall find timber". This distinction was not entirely verbal. Since in (ii) the wording also stated a covenant by the lessor to supply timber, the lessee had his remedy over so that the covenants could be held independent; not so in (i) where a lessee, if he had repaired without the lessor's timber, would have no remedy against the latter. The whole purpose of the distinction between "provided" and other words was therefore to protect the lessee from a disbursement of money, for which he might have no remedy. But this distinction was only valid so long as in (i) no covenant would be implied on the part of the lessor, i.e. a covenant similar to the express covenant in (ii). That this implication could be made is clear from Sheppard's *Touchstone*, 162 where it is specifically stated that "if these words be inserted in a deed . . . that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessee shall skowre ditches, provided always that the lessor do carry away the earth; these are good covenants on both sides".

<sup>196</sup> The major reason why the court adopted this construction was that they thought "finding" a stronger conditional word than "provided". Not only did they misunderstand the precise meaning of "provided" (see previous note), but they also misapplied another case cited from 2 D'Anvers' *Abridgement* 229, *sub. tit.* Covenant (C) 2 and 3, to the following effect: where A covenants to go to York, the covenantee "finding" him a horse, A need not go unless the other provides the horse. It can be seen that this "finding" deals with a situation very different from the lessor's and does not therefore require the same result. Indeed, in *Ware v. Chappell* (1649) Sty. 186, "finding" had been given a non-conditional interpretation.

<sup>197</sup> Willes at 499-500. Although this judge can be credited with the first outspoken criticism of the old law, some suspicion remains whether he knew exactly what he was about. He suggested a rule of dependency even for executed situations, and he deplored the "independent" construction which was "plainly tending to make two actions instead of one, and to a circuitry of action and multiplying actions, both which the law so much abhors". *Ibid.* Surely the suggested remedy was worse than the disease. A rule of independence was clearly the only way of adjusting executed bargains, and its circuitry was curable not by returning to dependency but by allowing a counter-claim in the same action.

<sup>198</sup> (1669) 1 Wms. Saund. 319. And see §5 *supra*.

<sup>199</sup> It is doubtful whether the decision is still good law: cf. *Westlake v. Hahn* (1918) 1 K.B. 495. A by-product of this abstract interpretation was a strange hierarchy of conditional words, between which no difference was *a priori* discernible. Thus "finding" was

events. Indeed, the set-back of *Thomas v. Cadwallader* was soon overshadowed by the capital decision of *Boone v. Eyre*.<sup>200</sup> The plaintiff had conveyed to defendant the equity of redemption of a West Indies plantation, together with its stock of negroes; the vendor further covenanted that he had a good title both to the plantation and the negroes. The defendant, in return, agreed to pay £500 as well as an annuity of £160 during the vendor's lifetime. In an action for non-payment of the annuity, defendant pleaded that at the time of his covenant the plaintiff had not been legally possessed of the negroes and so had never had full title. On demurrer, the King's Bench gave judgment for the plaintiff, a judgment which Lord Mansfield explained in famous words as follows: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action."<sup>201</sup> The objective could not be more obvious. Rather than permit a purchaser to avoid his price for property he had received (and his received benefit was apparently considerable), he had to make full payment; but he also had a separate action to recover for any deficiency arising from the vendor's breach of contract. Moreover, Mansfield's words, though sounding somewhat novel, essentially restated a rationale which had already been implicit in *Ughtred's Case*<sup>202</sup> and which had become more explicit in many seventeenth-century decisions previously considered.<sup>203</sup> But the expressive facts of the case as well as the renown of Mansfield, gave to *Boone v. Eyre* outstanding weight and prominence.<sup>204</sup> Its very success also falsified its true place in the historical picture; however important the decision, it was part and parcel of a continuing development, it was not (as seems sometimes thought) a suddenly inspired creation.

Although Lord Mansfield had clearly intended to cope with a difficulty in executed bargains, his actual words were vague enough to allow wider uses.<sup>205</sup> An immediate example of this was *Duke of St Albans v. Shore*,<sup>206</sup> where, very briefly, the duke was to convey land to Shore and the latter to prepare the necessary conveyances. Shore eventually repudiated this agreement on the ground that the duke had, some time before the date of completion, cut timber on the land which was included in the sale. This, as Shore successfully maintained, had seriously diminished the value of the property; and the court added that "to change the nature of it" went not to "part" of the consideration but went to the "whole"; it was "the chief inducement to a purchase of that

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now regarded even stronger than "provided", although "pro" and "proinde" were weaker still (see at note 110 *supra*). If so, was "being" closer to "provided" or "pro"? The word "paying" had a history of its own, reviewed in *Bastin v. Bidwell* (1881) 18 Ch. D. 238 at 244.

<sup>200</sup> (1777) 1 H. Bl. 273n.; 2 W. Bl. 1313 at 1314n. See generally 3 Williston, *op. cit.*, §818; 3 Corbin, *op. cit.*, §659.

<sup>201</sup> *Ibid.*

<sup>202</sup> (1591) 7 Co. Rep. 9b; see at note 28 *supra*.

<sup>203</sup> See §5 *supra*.

<sup>204</sup> Thus Dallas, C. J. observed in *Fothergill v. Walton* (1818) 8 Taunt. 576 at 583 that Mansfield's doctrine had "all the weight which some of the greatest names in Westminster Hall can give it", that it was "sanctioned by Lord Kenyon and the rest of the court of K.B." in *Campbell v. Jones* (1796) 6 T.R. 570, and that it was "afterwards eulogized by Lord Ellenborough" in *Havelock v. Geddes* (1809) 10 East 555. The many cases following and applying *Boone v. Eyre* are collected in 12 *English and Empire Digest* 415-6.

<sup>205</sup> See §10 *infra*.

<sup>206</sup> (1789) 1 H. Bl. 270.

estate".<sup>207</sup> We can see that this raised an entirely new problem, something the doctrine of dependency or independency never before had to deal with. The question now was what kind of performance the seller had to give to hold the buyer to the agreement. Nor could this problem have occurred before the performatory exchange-order had become established; for not unless and until the buyer's duty to pay or accept had become settled as either dependent or concurrent, was it possible to advance the further objection that what the seller had tendered was not what the buyer had bought.<sup>208</sup> Be this as it may, the extension of *Boone v. Eyre* to executory sales added a further element of confusion. For since *Albans v. Shore* technically followed *Boone*, its direct effect was to perplex still further the dependent-independent classification. More precisely, if in *Boone* the vendee's covenant was independent, did not the same apply to *Shore*? And if the latter's covenant was held dependent, how was the distinction to be made? The answer to this was basically simple, though it has never really been seen.<sup>209</sup> Promises or covenants had become dependent or independent in various senses according to the type of situation that was involved. Indeed, the underlying pattern was amazingly coherent, and can succinctly be stated in three rules: (1) executory sales and similar exchanges were dependent, i.e. concurrent, from the viewpoint of performatory order, and (2) were also dependent, i.e. strictly conditional, if judged by the complete or "whole" performance the seller had to give; but (3) promises were treated as independent where the contract was executed and no longer executory. In this manner, the dependent-independent dichotomy had come to express three different results in three distinctive situations, not alternative results for one particular situation alone.

Unfortunately, the doctrinal confusion was further deepened by the later case of *Terry v. Duntze*.<sup>210</sup> In a building deed the plaintiffs were to erect a manufactory to be completed by a stated date. The defendants were to pay in three equal instalments both during and after the completion of the work. It so happened that the plaintiffs completed without any money being advanced to them, but since many alterations and much "extraordinary work" had been required they also failed to finish in time. Because of this, the defendants refused all payment, as the plaintiffs had "positively agreed" to complete by the specified date.<sup>211</sup> And even if, as they argued, the additional work had prevented punctual completion, this could be no excuse; for since the original contract was by deed no oral agreement could alter any of its terms.<sup>212</sup> Within this legal compass, what was the court to do? Ingeniously, Buller, J. fell back on *Pordage v. Cole*,<sup>213</sup> that is, on the principle that covenants are independent if a day be named for payment which day comes before performance. This

<sup>207</sup> *Id.* at 279. Counsel well explained the commercial aspects of the removal of the timber: "Small timber growing is of great value which if cut, would be worth nothing. Thriving timber will pay 10 or 15 per cent for the purchase-money, and without it the land may be of no value": *id.* at 276.

<sup>208</sup> But cf. the development of the warranty of quality in sale of goods. Cf. 1 Williston on *Sale*, §§195-198. It will be seen that the warranty first evolved in a setting of cash-sales and not in one of properly executory agreements. And the advent of the executory sale of goods indeed caused much complexity; see Stoljar, "Conditions, Warranties and Descriptions of Quality in Sale of Goods (1952) 15 *Modern L.R.* 445; (1953) 16 *Modern L.R.* 174.

<sup>209</sup> See, for example, Serjeant Williams' misconception at note 260 *infra*.

<sup>210</sup> (1795) 2 H. Bl. 389.

<sup>211</sup> *Id.* at 390-1. Although it was true that the builders had positively agreed to complete on time, there had been no agreement what was to happen if alterations should inevitably cause a delay. Again even if the builders had agreed to do "extraordinary work" this was still a matter of degree; for some alterations were perhaps still manageable within the time of completion, though more "extraordinary work" was not.

<sup>212</sup> *Id.* at 392.

<sup>213</sup> See at note 198 *supra*.

enabled the builders to recover the two instalments that were payable before completion; and it enabled recovery without the plaintiffs having to aver performance, an averment which their delay had made impossible. Although this recourse to independency was a justified contrivance to help the plaintiff's case, it also added more trouble to the dependent-independent dichotomy. For how, again, was this result to be reconciled with *Albans v. Shore*, where it was insisted that "the party bringing the action . . . ought punctually, exactly and literally, to complete his part".<sup>214</sup> No sound reconciliation was in fact possible, unless such conduct as prevention was recognised as a separate and additional excuse.<sup>215</sup> Such, then, was the confusing state of our doctrine when, at the end of the eighteenth century, Serjeant Williams turned his attention to it. The confusion was however mainly linguistic rather than substantive; the eighteenth century provided, apart from one exception, no deeper logical inconsistency among the actual results achieved.<sup>216</sup>

10. *The Final Synthesis and Conclusion*—The task that Serjeant Williams set himself was to "deduce . . . any certain rule or principle by which it can be ascertained, what covenants are *independent* and what *dependent*."<sup>217</sup> But whereas he saw that his aim was practical, i.e. to find "when it is necessary to aver performance in the declaration, and when not",<sup>218</sup> his approach was scholastic and pedantic and insensitive both to the historical changes our doctrine had undergone and to the specific issues the doctrine had to solve. What Williams did was to catechise five rules, rules which were intended (and were subsequently also generally accepted) as a definite synthesis of the preceding law.<sup>219</sup> But not only had these rules little or no originality about them, they were also functionally misleading guides; indeed, it is largely because of the presence of these rules that later contractual developments followed grooves that were cramping and confined. So it is of the greatest importance to understand exactly where and how Williams went wrong. In brief outline his five rules were (1) that if the day of payment is to, or may, happen before the other's performance, the payor's promise is independent, i.e. actor can claim payment without having to aver performance;<sup>220</sup> (2) if such payment is appointed after performance, the payor's promise is subject to a condition whose fulfilment actor has to aver; (3) if a covenant goes only to part of the

<sup>214</sup> (1789) 1 H. Bl. 270 at 279.

<sup>215</sup> Since the development of a separate doctrine of prevention applicable to building contracts did not really begin until the early nineteenth century, the device of independency was for the time being the only solution available to the court. For this reason, *Terry v. Duntze* has been unfairly criticised mainly because the historical justification for independency has not been seen. Moreover, the point about this decision is not that the builders recovered payment merely because of the fixed date, irrespective of whether or not they had performed, but because of their inability to aver their actual performance because of their otherwise excusable delay. For the criticisms of *Terry v. Duntze*, see Langdell, *op. cit.*, 168. For the nineteenth century developments of prevention, see 3 Williston, *op. cit.*, §676; 3 Corbin *op. cit.*, §767; Stoljar, "Prevention and Co-operation in the Law of Contract" (1953) 31 *Can. B.R.* 231 at 237ff.

<sup>216</sup> The one exception was *Thomas v. Cadwallader* (1744) Willes 496; and see at notes 194ff. *supra*.

<sup>217</sup> Consult his note to *Pordage v. Cole* (1669) 1 Wms. Saund 319 at 320n. See generally 3 Williston, *op. cit.*, §§819-23; 3 Corbin, *op. cit.*, §657; Langdell, *op. cit.*, 187ff.; Costigan, *op. cit.*, 97-8; 2 Smith's *Lead. Cas.* 11ff.; Morison, *Rescission of Contracts* (1916) 98 and *passim*; and notes 220-223 *infra*.

<sup>218</sup> 1 Wms. Saund. 319 at 320n.

<sup>219</sup> These rules were accepted as orthodox not only in England and the dominions but also in the U.S.: see Patterson, *loc. cit.*, 909 note 29; 3 Williston, *op. cit.*, §819.

<sup>220</sup> This and the next rule had already been enunciated by Holt, C.J. in *Thorp v. Thorp* (1701) 12 Mod. 455 at 461; 1 Ld. Raym. 662 at 665; and see note 121 *supra*. The first rule was mainly based on *Pordage v. Cole* itself as well as *Terry v. Duntze*, note 210 *supra*. It also had some superficial support from *Pole v. Tochesser* (1374) Y.B. 48 Edw. 3, fo. 2, pl. 6, which is fully discussed at note 231 *infra*.

consideration, it is independent so that plaintiff may maintain an action without averring performance;<sup>221</sup> but (4) if mutual covenants go to the whole consideration, they are mutual conditions and must be averred;<sup>222</sup> and (5) if two acts are to be done at the same time, neither party can maintain an action without showing performance or an offer to perform.<sup>223</sup>

Now the first rule was most misleading. For Williams was not presently making the obvious point that a payment agreed to be in advance meant what it said, so that a payor who had consented to extend credit had to pay before the other's performance. Serjeant Williams was doing a different thing: he was codifying within the ambit of one rule such different decisions as, mainly, *Portage v. Cole* and *Terry v. Duntze*.<sup>224</sup> Of these the latter was (as we have seen) properly explicable only on the ground of prevention,<sup>225</sup> whereas the former decision had become effectively superseded by the evolution of concurrent conditions. Nor was it easy to connect Williams' interpretation of *Portage v. Cole* (where "the money being appointed to be paid on a *fixed day*, which might happen *before* the lands were, or could be, conveyed"<sup>226</sup>) with his statement in the fifth rule, namely that conditions are concurrent where performance is to be at the "*same time*" which "particularly applies to all cases of sale".<sup>227</sup> Of course, if the property could not in fact be conveyed on or before the fixed date, and such was the understanding of the parties, a purchaser would be in the same position as one who had agreed to give credit. But what if conveyance and payment *could* be made at the same time, although the parties had only named a day for payment? Was in this situation rule (1) to over-ride rule (5)? The very purpose of concurrent conditions was to permit and provide for simultaneous performance, precisely because the possibility of a concurrent give and take was the main feature in all usual cases of sale. Unfortunately, the distinction which Williams had thus introduced,<sup>228</sup> continued

<sup>221</sup> This and the following rule were principally derived from *Boone v. Eyre* (1777) 1 H. Bl 273n. Williams also placed much reliance on *Campbell v. Jones* (1796), 6 T.R. 570, where (briefly) C. was to permit and to teach D. the use of a patent of bleaching materials for making paper; C. sued for the agreed payment, but D. demurred that C. had not averred the teaching. It was held, that since the *whole* consideration consisted of permitting the use of the patent (which patent C. had already transferred to D.) as well as the teaching, the covenant to teach formed only *part* of the consideration, so that the covenants were independent. D.'s demurrer was therefore over-ruled: C. could recover payment, whereas D. had a separate remedy in damages for C.'s failure to teach. But cf. *Ellen v. Topp* (1851) 6 Exch. 424.

<sup>222</sup> Professor Costigan, *op. cit.*, 96-8n., suggested that the third and fourth rules can no longer be valid or acceptable, since their formulation is most misleading (see also at notes 255-58 *infra*). But this does not affect their basic rationale. For these rules, as Professor Williston, *op. cit.* 818, has said, "became the basis of the doctrine that after part performance by the plaintiff, a subsequent failure to perform on his part might not preclude his recovery on the defendant's counter-promise". Nor is it at all clear why Professor Costigan (*ibid.*) said that rules (3) and (4), in order to remain valid, "must be modified to provide for concurrent conditions". Apart from the point (made earlier in relation to *Albans v. Shore*, see at notes 206-8 *supra*) that a seller had to give full performance before buyer had to take and pay for it, there seems to be no other connection between rules (3) and (4) and concurrent performance. Not only do they express principles of very different functional type and purpose, but concurrent conditions were separately provided for in rule (5).

<sup>223</sup> Serjeant Williams cited many authorities for this rule, but his main precedent was *Kingston v. Preston* (1773) 2 Dougl. 684, 689. Williams also added Lord Mansfield's remark that "it is not certain which party is to do the first act". This lack of originality combined with a misunderstanding; for precisely this problem had been substantially resolved in the cases after *Jones v. Barkley* (1781), 2 Dougl. 684; and see §8 *supra*. It is therefore somewhat difficult to understand why Williston should have regarded "the fourth rule" (an obvious misprint for "fifth") as an "accurate statement of the law of concurrent conditions": 3 Williston, *op. cit.*, §822.

<sup>224</sup> See note 220 *supra*.

<sup>225</sup> See at note 216 *supra*.

<sup>226</sup> 1 Wms. Saund. 319 at 320n.

<sup>227</sup> *Ibid.*

<sup>228</sup> It may be argued that, on a strictly technical level, Williams' distinction between rules (1) and (5) deserves more respect. The argument would, briefly, be that concurrent

to give trouble for the next fifty years.<sup>229</sup> And if subsequently his emphasis on the "fixed date" was forgotten and practically disappeared, this happened not so much because Williams's precise error was perceived, but because of another phenomenon in nineteenth-century law, which was the growing separation of the principles relating to sale (land or goods) from the remaining body of other types of bargain. Just this specialisation of sale permitted concurrent conditions to gain progressively firmer ground.<sup>230</sup>

However, there exist two peculiar situations which accord a limited validity to the Serjeant's first rule. The first situation is presented by *Pole v. Tochesser*,<sup>231</sup> the earliest case in the history of our doctrine. Pole covenanted with Tochesser to serve him with three knights in the wars of France, and Tochesser covenanted to pay Pole twenty marks in England at a day certain before going to France and the rest by quarterly instalments which might likewise incur before the military service. Pole brought action for the money; and although Tochesser objected that the services were not done the money was held payable. But how is this decision to be explained? Was it, as Williams and others have believed,<sup>232</sup> respectful homage to the "day certain", whether or not Pole's covenant was performed? Surely a totally different explanation is possible, and it is this. Tochesser could not know at what point he might need Pole (wars are proverbially unpredictable), though he wished to secure his service should the appropriate contingency arise. To use modern language, he took an "option" on Pole or (what comes to the same thing) made a "requirement-contract" with him. Pole was prepared to serve whenever needed, but also insisted on being paid in the meantime. It is to this situation that Williams's first rule applies: payment has to be made at the fixed time simply because the payee is contractually committed, though as yet he may have no work to do.<sup>233</sup> A second situation where the first rule may apply is suggested by *Ware v. Chappell*,<sup>234</sup> the facts of which are not entirely clear but which will bear the following interpretation. Ware covenanted to raise 500 soldiers and

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conditions began to evolve within a context of the parties having agreed to perform "at the same time" rather than providing a "day fixed for payment". Nevertheless this distinction became blurred as early as *Lock v. Wright* (1723) 1 Str. 569, see at note 138 *supra*, and became even less important after *Kingston v. Preston* (1773) 2 Doug. 684, 689. Indeed, Serjeant Williams would perhaps have admitted as much, had he not also tried to include within his first rule *Terry v. Duntze*, (1795) 2 H. Bl. 389. See also Langdell, *op. cit.*, 191.

<sup>229</sup> *Matlock v. Kinglake* (1839) 10 Ad. & El. 50; *Wilks v. Smith* (1842) 10 M. & W. 355; *Sibthorp v. Brunel* (1849) 3 Exch. 826; *Yates v. Gardiner* (1851) 20 L.J. Ex. 327; *Anderson v. Baignet* (1856) 26 L.T.O.S. 237; *Dunham v. Pettee* 4 Seld. 508. The turning-points were *Marsden v. Moore* (1859) 4 H. & N. 500; *Bankart v. Bowers* (1866) L.R. 1 C.P. 484; and *cp. Paynter v. James* (1867) L.R. 2 C.P. 348. See Langdell, *op. cit.*, 192.

<sup>230</sup> As compared with sale of land (see previous note), in sale of goods the impact of *Pordage v. Cole* was less severe: see *Waterhouse v. Skinner* (1801) 2 B. & P. 447; *Wilks v. Atkinson* (1815) 1 Marsh 412; *Bloxam v. Sanders* (1825) 4 B. & C. 941, *per* Bayley, J. at 948; *Parker v. Rawlings* (1827) 4 Bing. 280; *Withers v. Reynolds* (1831) 2 B. & Ad. 882. Even though concurrency was easily established, there remained considerable uncertainty how "ready and willing" a party had to be. See 2 Williston on *Sale* (Rev. Ed. 1948) §448; Benjamin on *Sale* (8th ed. 1950) 599ff.

<sup>231</sup> (1374) Y.B. 48 Edw. 3, fo. 2, pl. 6. In later references, the names are variously spelt (Pool, Tolcelser, Tolchester, etc.), but the facts agree. See also note 15 *supra*.

<sup>232</sup> 1 Wms. Saund. 319 at 320n.; Langdell, *op. cit.*, 190-1.

<sup>233</sup> Such contracts are of course extremely rare, and like other requirement or option contracts they have a highly aleatory or contingent quality unusual for most contracts of employment. It is amusing to reflect that the contracts made by medieval knights are to-day mainly emulated by film-stars.

<sup>234</sup> (1649) Sty. 186. Sir William Holdsworth used this to illustrate the usual independence of covenants: 8 Holdsworth, *op. cit.*, 72. But *Ware v. Chappell* was hardly a very typical case. Its facts being most peculiar the judges were much divided. Rolle, C. J. thought these covenants independent, but "Ierman and Nicholas Iustices, held against Rolle, that there is a condition precedent. Ask Iustice was of Rolle the Chief Iustices opinion, Nicholas changed his opinion, and so judgment was given for plaintiff, except better matter were shewn": Sty. at 187. Clearly the case was "adjudged upon great debate": *Samways v.*

to bring them to a certain part for transport to Galicia. For this Chappell was to pay Ware £50 on the day the soldiers arrived for shipment. When Ware sued for this money, the main argument against him was that he had neither raised all 500 soldiers nor given notice of their arrival.<sup>235</sup> After considerable disagreement, the covenants were held independent, which permitted Ware to recover on his claim and gave Chappell his separate action over.<sup>236</sup> We can see that this situation does not fit any orthodox category of contract: it was not a contract of sale, though Ware had to supply soldiers; it was not a contract of service because Ware was to be paid for his supply not his labour. But if Ware was to be paid at all for having supplied (say) 400 soldiers, Chappell would have to pay on the fixed day, i.e. on the day of the soldiers' arrival. In other words, Chappell would not be able to postpone payment until the arrival of all 500 men, if only because to raise the full number might have become impracticable or impossible. In this restricted sense, therefore, a rule requiring payment on the day named would be preferable to a rule postponing payment to a time or event which may never happen.<sup>237</sup>

The analysis of rule (1) reveals another error whose impact has been durable and pervasive. Once Serjeant Williams had formulated his first rule, it seemed that it had to be accompanied and followed by a second and, as it were, obverse rule to the effect that performance had to precede payment if payment was postponed.<sup>238</sup> Rule (2), however, posed an awkward problem: how did it harmonise with what (as we have seen) was the position in executed bargains.<sup>239</sup> It simply was untrue that in executed situations payment depended on performance, if performance, as the second rule implied, meant full, complete or entire performance. Even if the second rule was qualifiable by the third (re-stating the principle in *Boone v. Eyre*)<sup>240</sup> the inconsistency only deepened the puzzle. For the question then arose which agreements were adjustable under rule (3) and which remained caught by rule (2); a question which acquired special urgency in contracts *faciendo* such as employment, building or sea-carriage, where payment is usually postponed until after performance. For example, if the payor's duty to reward was held conditional or dependent (and, indeed, strictly dependent because in Williams's hypothesis such was "the intention and meaning of the parties"<sup>241</sup>), adjustment became

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*Eldsty* (1676) 2 Mod. 73 at 77.

<sup>235</sup> The report states that both parties covenanted to do certain things, i.e. that W. covenanted to raise the 500 soldiers and that C. covenanted to find victuals and shipping for them for the transport to Galicia. But why should C. covenant with W. to do this? How was this relevant to W.? Was not the latter only interested in being paid once he had found the soldiers, Ware thus acting as a sub-contractor for C.? A slightly alternative interpretation is that W. and C. were partners, the former's duty being to find the soldiers, the latter's to feed and carry them. Yet even in this case the relation as between W. and C. was (i) either as before (W. having to supply the soldiers to C. who was to pay W.), or (ii) W. and C.'s payment was to come from a third party for whom the soldiers were to be supplied in Galicia, when W. would however have no action against C. pending completion of the transport and final payment being received. As possibility (ii) was neither mentioned nor mooted in the report, the explanation of the facts must remain that given in the text.

<sup>236</sup> The failure to provide the soldiers was held not to be a condition precedent, but "distinct and mutual covenants"; the failure to give notice of arrival was regarded as immaterial since "the time for the shipping . . . is also known by the covenants". 1 Sty. 186.

<sup>237</sup> This interpretation of *Ware v. Chappell* and Williams' first rule ties up with the modern legal construction of another type of contract, i.e. the instalment contract. Here the similar problem was to protect a seller's part performance which did not actually "benefit" the buyer, but was often important enough not to preclude the buyer's rejection, even though performance was incomplete. See note 262 *infra*.

<sup>238</sup> "Serjeant Williams' second rule follows as a necessary corollary from his first": 3 Williston, *op. cit.*, 821. The idea originated with Lord Holt, see note 121 *supra*.

<sup>239</sup> See notes 5 and 9 *supra*.

<sup>240</sup> (1777) 1 H. Bl. 273n.

<sup>241</sup> 1 Wms. Saund. 319 at 320n. Indeed, all of the five rules were to Serjeant Williams



impossible, although the plaintiff's breach only went to "part of the consideration". More precisely, if a servant, builder or carrier only gave incomplete performance, was his right to be paid dependent and conditional, or was it independent? Serjeant Williams gave no hint of this problem, let alone of its solution; nor was the problem satisfactorily resolved in the later law of contract. Instead, the gap between rules (2) and (3) was concealed by several glosses, which under different names are all well-known and therefore need but brief mention. Thus a servant who had part-performed had to find new remedies in *quantum meruit*,<sup>242</sup> or through a theory of divisible contracts;<sup>243</sup> while for the incomplete builder a doctrine of substantial performance was created.<sup>244</sup> In the case of charterparties, the gap was even more revealing: a ship-owner could under rule (3) claim freight-money where his carriage had been delayed or was of insufficient quantity;<sup>245</sup> on the other hand, rule (2) intervened to prevent any payment where delivery was made at an earlier port than the agreed destination.<sup>246</sup> Moreover, the gap together with its glosses became enshrined in a basic principle of pleading. That principle, speaking broadly, was that where the rendered performance was merely bad or faulty, the plaintiff could still aver performance and thus recover payment, although his deficiency gave rise to an action or counter-claim against him; but where his performance was short, i.e. terminated prematurely, he was unable to aver performance and therefore remained without a contractual action.<sup>247</sup> The distinction was most peculiar: a qualitatively faulty performance appeared, in a sense, still as a whole performance, even if it was not wholesome; quantitative incompleteness, on the other hand, seemed to lack even this superficial wholeness; it was not merely defective, it was mutilated-performance. Precisely such ideas lie behind the theoretical difficulties still existing in the law of performance and breach of contracts; they are difficulties ultimately deriving from the unresolved conflict between rule (2) that denies a claim without full performance, and rule (3) which grants a claim in spite of a partial incompleteness.<sup>248</sup>

All this brings us to a problem which was adverted to much earlier.<sup>249</sup> As we have seen, an old doctrine was to the effect that if in mutual promises the consideration was future, plaintiff had to aver performance of the consideration to maintain a successful claim for the promisee's return performance. Already in *Rogers v. Snow*<sup>250</sup> it was said that "if I promise a man 20s. should

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just a more detailed manifestation of what the parties had intended: cf. 3 Williston *op. cit.*, §823.

<sup>242</sup> Cf. 5 Williston, *op. cit.*, §1477.

<sup>243</sup> Cf. 3 Williston, *op. cit.*, §§860A-802; Ballantine, "Forfeiture for Breach of Contract" (1921) 5 *Minn. L.R.* 329, *Selected Readings*, 943.

<sup>244</sup> 3 Corbin, *op. cit.*, §§700 et seq., 5 Williston, *op. cit.*, §1475; and see note 248 *infra*.

<sup>245</sup> See, e.g., *Hall v. Cazenove* (1804) 4 East 477; *Ritchie v. Atkinson* (1808) 10 East 295; *Havelock v. Geddes* (1809) 10 East 555; *Davidson v. Gwynne* (1810) 12 East 381.

<sup>246</sup> *Cook v. Jennings* (1797) 7 T.R. 381; *Christy v. Row* (1808) 1 Taunt. 300; *Metcalfe v. Britannia Iron Works Co.* (1876) 1 Q.B.D. 613.

<sup>247</sup> Bullen and Leake, *Precedents of Pleading* (4th ed. 1882) 158, 351-2; Stephen on *Pleading*.

<sup>248</sup> The conflict became particularly acute when the principle in rule (2) began more and more to be followed, although the plaintiff (servant or builder) had partly performed. This development had started with *Cutter v. Powell* (1795) 6 T.R. 320, but its culmination was *Munro v. Butt* (1858) 8 El. & Bl 738. To reconcile the conflict it was suggested that although rule (2) usually applied, a substantial performance would make the case fall under rule (3). This transformed *Boone v. Eyre* (1777) 1 H. Bl. 273n. into a precedent for the doctrine of substantial performance, though this had certainly not been Williams' understanding of that case. See 2 Smith's *Lead. Cas.*, 12, 16ff.; Morison, *op. cit.*, 124 and *passim*.

<sup>249</sup> See at notes 33 and 53 *supra*.

<sup>250</sup> (1572) Dalison 94. Similarly, *Ughtred's Case* (1591) 7 Co. Rep. 9b at 10a, b; *Dorington v. East* (1606) Yelv. 87; *Lea v. Adams* (1615) 3 Bulstr. 35; *Cowper v.*

he go to York on my behalf . . . he must lay the performance on his part". This doctrine is, obviously, very similar to the principle in rule (2), for there is no real difference between saying that a future consideration is to be averred or saying that performance must precede payment.<sup>251</sup> In this sense Williams's second rule contains an old idea which, in one way or another, found continuing expression. Do then the criticisms relating to rule (2) apply to the doctrine concerning future consideration? Or, more precisely, how do the ideas contained in rule (2) as well as the old doctrine square with the ideas governing rule (3) which negatives the necessity for an averment? The law has never answered this question, although the answer is relatively simple. It is best explained by means of two examples. Suppose (i) that A promises B to go to York, B promising to pay for the journey; and suppose (ii) that A promises B to work for a year, B agreeing to pay wages at the end of the annual period.<sup>252</sup> In both cases, A cannot recover any money before having given any service, and in this sense B's promise has always been dependent. But the examples diverge profoundly, as soon as the question is not one of executory order, but one of adjusting a partly executed contract. For it will be seen that the problem of adjustment can, truly and typically, only arise in the case of long-term service, it cannot arise in the same manner where A's performance is to go to York, or to do other things which are either single acts or of very short duration; it cannot so arise because in cases of single, short acts there would be no problem of part-execution.<sup>253</sup> In other words, whereas in example (i) A would have to aver his consideration since B's promise would always be dependent, in example (ii) B's promise could be either dependent or independent according to whether A's service is totally executory or is partly completed.

Rules (3) and (4) urge further criticism. Taken separately, each rule merely recapitulated the words used in *Boone v. Eyre*;<sup>254</sup> but taken together they created several difficulties. In the first place, the phrase "part (or whole) of the consideration", though in some respects a flexible and convenient calculus, suffered from a central vagueness.<sup>255</sup> For Williams did not say how great or small a part of the contract the plaintiff could break without disabling his recovery for part performance; indeed, from his words it could easily be inferred that only where the plaintiff had failed to give or do anything at all had he also failed to give his "whole" consideration.<sup>256</sup> In the second place, rules (3) and (4) furthered a serious misuse of language. So where the breach went to the whole, this began to be called the breach of a condition; on the

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*Andrews* (1615) Hob. 39 at 41-2; *Spanish Ambassador v. Gifford* (1615) 1 Rolle's Rep. 336; *Russell v. Warde* (1629) W. Jones 218; *Brockham's Case* (1628) Litt. 128 at 131, (where the failure to observe "les parols del condicion" was likened to the case of "le 5 foolish Virgins [qui] fueront exclude sur leur voluntary negligence del possession de Heaven"); *Crawley v. Fenn* (1665) Hard. 9 at 10.

<sup>251</sup> Moreover, both these statements are the same thing as saying that a condition precedent must be strictly complied with. For it is precisely because performance before payment and future consideration are construed as conditions that they need to be strictly and entirely averred.

<sup>252</sup> Cp. a somewhat analogous problem, note 196 *supra*.

<sup>253</sup> Cf. Stoljar, "The False Distinction Between Bilateral and Unilateral Contracts" (1955) 64 *Yale L. J.* 515 at 525 note 45.

<sup>254</sup> (1777) 1 H. Bl. 273n.; and see note 221 *supra*.

<sup>255</sup> For a full discussion, see Williston, *op. cit.*, §822; 3 Corbin, *op. cit.*, §659.

<sup>256</sup> Cf. *Chanter v. Leese* (1838) 4 M. & W. 295, 5 M. & W. 698; *Ellen v. Topp* (1851) 6 Exch. 424; *Graves v. Legg* (1854) 9 Ex. 709. But this distinction between "whole" and "part" was later telescoped into the distinction between material, (important, vital) breach on the one hand and immaterial (etc.) breach on the other. See Cheshire and Fifoot, *op. cit.*, 481. For an early beginning of this, see *Glazebrook v. Woodrow* (1799) 8 T.R. 366 at 375.

other hand, where the breach went to "part", it was said that the plaintiff had broken a (mere) stipulation, term, warranty or other lesser term of a contract.<sup>257</sup> This terminological misuse caused at least one deeper misunderstanding: it obscured the fact that while all contractual terms qualifying a promise were conditional, some conditions required strict fulfilment whereas others could legally be excused and their effects adjusted.<sup>258</sup> In the third place, rules (3) and (4) involved as between them a curious contrast. Although Serjeant Williams himself remarked that the third rule applies to executed situations,<sup>259</sup> he gave as his illustration of rule (4) the case of *Albans v. Shore*<sup>260</sup> where however the contract was executory, not executed. Yet so conjoined, the connection between rules (3) and (4) became remote to the point of vacuity, since it was not made apparent at all how a rule relating to executory situations was also relevant to executed contracts.<sup>261</sup>

Nevertheless, the fact that the two rules had been stated in this way made possible the last important development of the independency doctrine. It allowed the doctrine to be extended to purely executory situations and in particular, to certain types of instalment and employment contracts. Of this extension *Bettini v. Gye*<sup>262</sup> ranks as the best-known illustration. A tenor's default in arriving late for rehearsals was held to go only to part and not to the whole of the consideration, and despite his having agreed to be on time his employer was held unable to dismiss him. The precise significance of this decision has escaped full notice, perhaps because the action was for wrongful dismissal rather than for payment, but more importantly because the result looked like a direct application of rules (3) and (4) which (applying the part-whole distinction) made the promise to employ either independent or dependent. Yet it is clear that this was a new concept of independency which went beyond the protection of executed part performance (as in *Boone v. Eyre*),<sup>263</sup> or the protection of a continuing relationship (as in leases);<sup>264</sup> the function of the new independency was wholly executory, that is, to safeguard the servant's interest in his future earnings by keeping open his opportunity to earn.<sup>265</sup> The interesting aspect of this development is not only the result itself, but also the manner of its achievement. For it is difficult to see how the extension could have been worked without recourse to a doctrine as ambiguous and confused as it had become in Serjeant Williams's rules. More often than not, confusion obscures ideas and principles and makes them more elusive than they need be; but occasionally confusion has a way of being fertile, it invites and even justifies new experiments and new departures. With this last episode the story of dependency and independency must then be concluded. The story was long and slow and circuitous, but its outcome was respectable, for it managed to evolve a convenient body of rules regulating the parties' performatory relations.

<sup>257</sup> Costigan, *op. cit.*, 97n.; 2 Parsons on *Contract* (9th ed.), 682; Morison, *op. cit.*, 79-80; Cheshire and Fifoot, *op. cit.*, 112.

<sup>258</sup> Cf. 3 Williston, *op. cit.*, §823; Stoljar, "Untimely Performance in the Law of Contract" (1955) 71 *Law Q. R.* 527 at 530-1.

<sup>259</sup> 1 Wms. Saund. 319 at 320n.

<sup>260</sup> (1789) 1 H. Bl. 270.

<sup>261</sup> See further note 222 *supra*.

<sup>262</sup> (1876) 1 Q.B.D. 183. As to instalment contracts, see *Hoare v. Rennie* (1859) 5 H. & N. 19; *Jonassohn v. Young* (1863) 4 B. & S. 296; *Simpson v. Crippin* (1872) L.R. 8 Q.B. 14; *Honck v. Muller* (1881) 7 Q.B.D. 92. For a full discussion of these cases, see Stoljar, *loc. cit.* note 258 *supra*, at 541-44.

<sup>263</sup> (1777) 1 H. Bl. 273n.

<sup>264</sup> *Hays v. Bickerstaff* (1675) 1 Freem. 194; see at note 89 *supra*.

<sup>265</sup> Cf. Stoljar, *loc. cit.* note 258 *supra*, at 544-46.

Further problems were to occur and to be worked on in the nineteenth century as also in the twentieth, but their tale rather belongs to the modern law than it does to history.