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THE SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACTS IN ILLINOIS

SIDNEY SHIMEL

The doctrine of substantial performance arose in Equity in bills for specific performance. It stems from the equitable rule that where a promisor has breached his contract but the breach "does not go to the essence of the contract, a court of equity if it takes jurisdiction of the case, may decree specific performance [by the promisee] with compensation [to the promisee] for the breach." 

Its more immediate parent is the principle of "part performance" which was engendered in the Law courts as a sympathetic reaction to Equity's liberal attitude toward the performance of covenants and conditions. The doctrine of "part performance" took firm root in the Law courts in the soil of the famous case of Boone v. Eyre. It was formulated in its quoted traditional form by the learned Serjeant Williams in his note to the case of Pordage v. Cole. His formulation was based openly upon Lord Mansfield's decision in Boone v. Eyre.

At its inception, the concept of part performance as the basis for a recovery was supposed to apply only to the cases wherein the conditions precedent to, or concurrent with, the defendant's duty to pay or perform were implied in law. In

2 Harriman, Contracts (2d ed. 1901) § 340. To the same effect, see 5 Page, Contracts § 2778 (1920).
3 Williston, Contracts (Rev. ed.) § 805.
4 Langdell, A Summary of the Law of Contracts (2d ed. 1880) pp. 207, 210. Therein it is said (p. 207): "courts of equity . . . enforce the performance of a covenant or promise, notwithstanding the breach of an implied condition by the plaintiff, unless the breach is one which goes to the essence of the defendant's covenant or promise . . . ." It is further said (p. 210): "courts of law have adopted the principles of courts of equity . . . in respect to breaches of implied conditions after part-performance . . . ." It should be noted that when Langdell wrote about "implied conditions," he was referring to conditions implied in law. See pp. 206, 210. See also Costigan, The Performance of Contracts (1911), p. 37.
6 1 Wms. Saund. 319, 85 Eng. Rep. 449 (1668). The note was published originally in 1799. See Costigan, op. cit. supra note 4, p. 73.
7 See Williston, Contracts (Rev. Ed.) III, 2307, § 822 for comment on Serjeant Williams' Rules.
those cases, the defendant was held liable for the non-performance of his duty to pay or perform if the plaintiff had rendered a substantial performance. Those instances in which the conditions were express or the consequence of a necessary inference of fact were not supposed to be subject to the part-performance rule.\(^8\)

In the following discussion, conditions implied in law will be referred to as "constructive," while express or necessarily implied conditions will be called "express."

Several statements of the concept of part performance have been found in the Illinois cases.

Evidencing marked similarity in wording to Serjeant Williams' formulation of the part-performance doctrine,\(^9\) an Illinois Supreme Court case has said:

Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenants can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment, or in a separate action.\(^10\)

In other words, those covenants which have been complied with are deemed conditions precedent to the defendant's duty to pay, while those covenants which have been broken but whose breach can be "compensated in damages" are called "independent"\(^11\) and are not conditions precedent to the defendant's duty to pay.

\(^8\) Ibid., § 805; Langdell, op. cit. supra note 4, pp. 207, 210; Costigan, op. cit. supra note 4, pp. 37, 39; note 21 Col. L. Rev. 582, 583.


\(^11\) In his note (see note 6 supra) Serjeant Williams stated: "Where the covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant and an action may be maintained for a breach of covenant on the part of the defendant without averring performance in the declaration." Phrasing which is obviously based upon Serjeant Williams' note is to be seen in some of the Illinois cases which set forth the part performance rule. Nelson v. Oren, 41 Ill. 18 (1866); White v. Gillman, 43 Ill. 502 (1857). The use of the term "independent covenant" as it is employed in the note is to be deplored. An "independent covenant" in the usual sense is one which is not qualified by any condition. As utilized in the part performance rule, it denotes a covenant the performance of which is not a condition qualifying another covenant. The use of the phrase in other than the ordinary sense is likely to prove misleading. Note, 22 Ill. L. Rev. 299, 301.
The judicial statements of the part-performance doctrine are very general in character and likely to prove misleading. From the statements, the erroneous notion might be fostered that any part performance, however immaterial, would ground a recovery. It might also be mistakenly supposed that the performances of the breached "independent" covenants are disregarded when the contractor's general performance is being evaluated in the light of substantiality.

Moreover, since building contracts often involve express conditions, the part-performance theory which was limited to constructive conditions seems an anomaly when applied to building contracts.

In reality, not any part performance suffices. The English cases which interpreted Boone v. Eyre recognized this fact, asserting that the plaintiff must have completed the "substantial part of [his] contract" and that the unperformed or defectively performed portion of the contract must not go "to the whole root and consideration" of the agreement.

In Illinois, the same attitude is bared in the requirement of a "substantial performance" by the contractor before he may recover on his contract. Like the classical English doctrine and unlike the present English law, no remedy, quasi contractual or otherwise, is afforded for less than

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12 In Ellen v. Topp, 6 Exch. 424, 442, 155 Eng. Rep. 609 (1851), Pollock, C. B., said with regard to Boone v. Eyre: "It cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract. . . ."

13 In Davidson v. Gwynne, 12 East 381, 389, 104 Eng. Rep. 149 (1810), Lord Ellenborough said: "The principle laid down in Boone v. Eyre has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages."


15 Williston, Contracts (Rev. Ed.) V, 4123, § 1475. The classical English doctrine which denied recovery altogether where there had been a material breach has been abandoned by the English courts. A builder may now recover for any part performance "unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished."

16 For cases refusing any recovery to the contractor when he has sued in quasi contract, see Serber v. McLaughlin, 97 Ill. App. 104 (1901); Simpson Construction
such a degree and quality of execution, unless the defendant-owner has accepted the finished portion and has prevented or waived further performance by the contractor.

Because of the misleading implications which would arise out of the use of the part-performance doctrine to settle building disputes, it seems fortunate that in Illinois the concept has not been used to evaluate contractors' performances of building covenants.\textsuperscript{17}

Nevertheless, to the part-performance theory there must be attributed some significance in the development of the substantial performance rule. To it must be accredited the immediate germ of the thought that a performance need not be exactly as promised to merit compensation. Of course not any performance is sufficient. The early English cases required that the performance be "substantial" before the part-performance doctrine could be invoked.\textsuperscript{18} Illinois exacts the same requirement as to performance before permitting a recovery.\textsuperscript{19}

There is definite reason for extending to the field of building contracts the view that a substantial performance merits compensation. It is due to the fact that "in building

\textsuperscript{17} Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N.E. 247 (1901) is the only case found which contained a discussion of both the part-performance and substantial-performance doctrines. In that case the contract embodied several covenants in addition to the one covering the construction work. The court spoke of "covenants to erect a building, to keep it insured," etc. (p. 522). When it applied the part performance rule, the court considered whether the contract in the aggregate, composed of both building and nonbuilding covenants, had been substantially performed. But when judging the performance of the building covenant, no reference was made to the part-performance doctrine.

In New York, however, part-performance language may still be found in cases which consider the performance of building contracts. In Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 120 N.E. 889 (1921), Judge, later Mr. Justice, Cardozo, said that promises "though dependent and thus conditions when there is departure in point of substance will be viewed as independent and collateral when the departure is insignificant."

The close relation between Illinois and New York law, discussed post, makes possible the reflection that the part-performance doctrine may not be entirely a thing of the past in Illinois.

\textsuperscript{18} See supra notes 12 and 13.  \textsuperscript{19} See supra note 14.
and construction contracts very often slight omissions or defects may occur, notwithstanding the most honest, diligent, and competent effort to perform in every respect in accordance with the contract." If the ordinary rule were invoked that performances precedent to payment must be in exact compliance with the contract, the contractor could rarely sue on his contract. With probably some loss, he would have to pursue a quasi contractual or other remedy if the law provides such remedy.

Illinois gives no relief to a builder who has rendered an unsubstantial performance unless the owner has accepted the part performance or has prevented completion. No quasi contractual or statutory remedy is granted. Illinois, therefore, has special reason for adopting the doctrine of substantial performance and interpreting it liberally. Without such a principle, there would be frequent forfeitures of the builders' labor and materials. Attempts by a contractor for specific restitution are likely to fail. There would be involved an invasion of the owner's possessory rights (and attendant liability) and the usually futile task of detaching from the owner's property, labor and materials that are inseparably annexed to it.

With the importance of the substantial performance concept in mind, we shall examine its application to two situations: first, that in which the covenant to build stands alone or is joined with a "satisfaction-to-the-owner" covenant; second, that in which the covenant to build is coupled with a covenant which requires that the work be approved by an architect, engineer, or other third party arbiter.

20 Henry W. Ballantine, "Forfeiture for Breach of Contract," 5 Minn. L. Rev. 329, 331. See also Shepard v. Mills, 70 Ill. App. 72, 74 (1897), aff'd, 173 Ill. 223, 50 N.E. 709 (1898).

21 Williston, op. cit. § 675 wherein it is stated that such conditions "As a general rule ... must be exactly fulfilled or no liability can arise on the promise which such conditions qualify."

22 See supra note 16. According to Williston, op. cit. supra note 1, § 724, "... where the work in question results in attaching the property to the employer's real estate, as in case of a building contract, the law is clear that the occupancy and use of the building or other attached property does not of itself indicate assent to relieve the builder from liability or entitle him to sue upon the contract." To the same effect see: Eldridge v. Rowe, 2 Gilm. (7 Ill.) 91, 96 (1845).

**SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACTS**

**SITUATION I**

The consideration as one situation of the building covenant alone or the same covenant joined with a satisfaction-to-the-owner clause is justified by the fact that the courts treat them the same. A substantial performance in good faith by the builder entitles him to a recovery in both instances. The addition of the satisfaction clause makes no difference because it is construed to call for a "reasonable" satisfaction, and the standard of what is a reasonable satisfaction is a substantial performance in good faith.\(^{24}\)

The attitude of the courts regarding what is a "full" or "substantial" performance of the building covenant when it is considered alone does not change if there are concomitant covenants.

Several statements of the doctrine of substantial performance are to be found in the cases. In the leading case of *Keeler v. Herr*,\(^ {25}\) it is said:

In contracts . . . sometimes called "building contracts," a literal compliance with the specifications is not necessary to a recovery by the contractor. A substantial performance in good faith is sufficient . . . "slight defects, caused by inadvertence or unintentional omissions are not necessarily in the way of recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted."

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\(^{24}\) Nicholas, "Validity of a Defense That the Defendant Was Not Satisfied, in Cases of Contract Wherein It Was Specified That the Stipulations of the Other Party Should Be Performed To His Satisfaction," (1899) 9 Yale L. J. 114, 118, 119.

In *Erikson v. Ward*, 266 Ill. 259, 107 N.E. 593 (1915), it was said (p. 265):

"There is no reason why the doctrine of substantial performance should not apply where the contract is to be performed to the satisfaction of the owner, according to the usual meaning of the expression as applied to contracts of this kind, namely to his satisfaction so far as he is acting reasonably in considering the work in connection with the contract."

In *Keeler v. Clifford*, 165 Ill. 544, 46 N.E. 248 (1897), it was said (p. 549): "... where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man. . . ."

As indicated in *Erickson v. Ward*, supra, the performance which should satisfy a reasonable man is one which is substantial. In the text and the cases, post, it will appear that no recovery is allowed for a substantial performance if the departure from literal performance was made in bad faith.

\(^{25}\) 157 Ill. 57, 60, 41 N.E. 750, 751 (1895). In *Peterson v. Pusey*, 237 Ill. 204, 209, 86 N.E. 692 (1908), the court stated with reference to the rule announced in *Keeler v. Herr*, supra, that it "... has been so repeatedly sanctioned by this court that it must now be held to be the settled law of the State."
It has also been said:

It will be sufficient that there has been an honest and faithful performance of the contract in all its material and substantial particulars, and no omission in essential points, or willful departure from the contract; and mere technical and unimportant omissions will not defeat a recovery of the contract price, less any damages, however, requisite to indemnify the owner.26

From these statements, it would appear that the substantial-performance doctrine is composed of three elements: first, the substantiality of the performance; second, good faith; and third, the rules for measuring the amount of recovery by the contractor and the allowance to the owner for the defects and omissions. It is planned to consider these factors in their respective order.

A. The Substantiality of a Performance

The Illinois courts have propounded two tests, both of which must ordinarily be used in judging the substantiality of any given performance. In the present discussion, they have been styled the "cost-of-completion" and the "purpose" tests.

(1) The Cost-of-Completion Test

The "cost-of-completion" test requires that a substantial sum be unnecessary to complete the work.27 For example, if two pillars of a house have been omitted, the contractor can recover only if the cost of erecting them is not substantial. If the cost would be substantial, then the builder has not substantially performed.

What is a "substantial" sum? This, of course, will vary in proportion to the contract price for the entire building. A $100 omission in a small contract will seem more substantial than the same omission in a large contract.

To arrive at a basis for predicting what sums the courts will deem substantial, the writer has made a study of the percentage ratio between the contract price and the cost of completion in the substantial performance cases. With the collated percentages which appear when the contractor

27 This test is presented in Errant v. Columbia Western Mills, 195 Ill. App. 14 (1915), and Edward Edinger Co. v. Willis, 260 Ill. App. 106, 132 (1931), cert. den. 260 Ill. App. xiii.
recovers and the percentages present when he is denied compensation, it is possible to reduce a new case to its percentage ratio, compare this ratio to those in the decided cases and prophesy with some accuracy whether it will pass the cost of completion test. In the results\(^2\) of the study

\(^2\) The cases found useful in this study are the following:

**A. Permissible Percentages.**

1. In the Illinois Supreme Court:

   (a) Erikson v. Ward, 266 Ill. 259, 107 N.E. 593 (1915), 7.2%.
   
   Contract price—$4,800. The owner had paid $2,500, thus reducing the limit of contractor's claim to $2,300. The jury awarded the sum of $1,955. The owner had thus been allowed the sum of $345 with which to remedy the defects and omissions.

   (b) Mason v. Griffith, 281 Ill. 246, 118 N.E. 18 (1917), 5%.
   
   Plaintiff sued to foreclose two purchase money mortgages. Defendant cross-billed for rescission on the ground of fraud. Defendant had agreed to buy a house from the plaintiff, the plaintiff having stipulated that the building would be equipped with a refrigerator, lights in the basement, screens and an adequate heating plant. The defendant proved that it would require the sum of $350 to remedy the defects in construction. The court awarded the plaintiff the value of the mortgages less $350.

   In this case, the contract price included the cost of the lot, so that the construction work itself cost less than $7,000. However, the court treated the contract as a whole in discussing the substantiality of the defects.

   (c) Keeler v. Herr, 157 Ill. 57, 41 N.E. 750 (1895), 4.4%.
   
   Contract price—$11,962.50. The owner had paid $2,000. Suit was brought for the balance of $9,962.50 plus interest, causing the total sued for to be $11,354.76. Plaintiff recovered $10,835.20. The cost of remedying the defects must therefore have been $519.56, i.e., $11,354.76 less $10,835.20.

   (d) Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 N.E. 714 (1907), 1.4%.
   
   Original contract price—$129,000. Plus the extras the final price was $140,135.15. The court allowed the owner $1,942 with which to remedy the defects in the work. This sum was arrived at as follows: $455 to furnish a third coat of paint which had been omitted; $1,000 to fix up the poor finishing of the interior; and $487 with which to eliminate defects in the floors of the two toilet rooms.

   It is significant that the court found for the plaintiff-contractor despite the fact that the contract called for a "complete and finished" job.

2. In the Illinois Appellate Court:

   (a) Healy Ice Machine Co. v. Parke, 155 App. 232 (1910), 12.6%.
   
   The contract required the defendant-owner to pay $20,000 for an installed ice-making system. However, defendant was credited for $5,000 for his machinery. This limited the amount sued for by the contractor to $15,000. The decision allowed the sum of $2,522.50 to the owner for defects and omissions.

   The sales aspect of this case was not considered by the court, which classed it as a building contract case, citing in support of the substantial performance doctrine Keeler v. Herr, supra note 25, and Concord Apart. House v. O'Brien, 228 Ill. App. 360, 81 N.E. 1038 (1907).

   (b) Krumholz v. Tobias, 167 Ill. App. 553 (1912), 9.1%.
   
   Contract price for installing a steam-heating plant—$750. The performance was held to be substantial. Judgment was granted in favor of the plaintiff-contractor for $822.40. The owner must have therefore been allowed the sum of $67.60 to remedy the defects.

   (c) Kleinschnittger v. Dorsey, 152 Ill. App. 598 (1910), 5.9%.
   
   Contract price for building a house—$23,235.20. Deductions for defective
work and for the delay in completion amounted to $1,386.50.

The judgment in favor of the plaintiff-contractor was reversed on appeal and the case remanded on account of misjoinder of parties. However, in its decision, the Appellate court approved of the monetary award in the court below.

B. Forbidden Percentages.

1. In the Illinois Supreme Court:
   (a) Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 96 N.E. 1063 (1911), 23.5%.
   Contract price for the construction and installation of a refrigerating plant—$21,300. The owner set up the defense that the steam engine was defective and unable to perform the work required of it. The owner further claimed that it would cost $5,000 to right the defects. Plaintiff-contractor asserted successfully that the owner by acceptance had waived the substantiality of the defects. It seems implied in this case that the performance was not substantial. Under the contract defendant had the option to reject the plant if it did not substantially conform to the contract specifications; it thus being implied that he had to accept a substantial performance. The court said (p. 506): “It [the defendant] declined to accept the engine and left the appellee to take such course as it chose. If the matter had rested there a different case would, perhaps, have been presented. . . .”

2. In the Illinois Appellate Court:
   (a) Errant v. Columbia Western Mills, 195 Ill. App. 14 (1915), 23.2%.
   Contract price for constructing a large concrete tunnel designed to carry pipes and cable—$8,000. At the time when plaintiff-contractor claimed that he had completed the work and was entitled to the balance of the contract price, he had been paid $6,000. But various defects existed. The back filling was unfinished and the fences had to be replaced. Subsequently, part of the tunnel caved in and required repairs. Defendant owner expended $1,860.04 to remedy the defects, this sum being allocated as follows: $177.71 to fix up the back tunnel. The Appellate Court reversed the lower court's judgment in favor of the plaintiff-contractor.
   (b) Brenton v. Newlin, 161 Ill. App. 168 (1911), 28.5%.
   The owner had contracted to pay for levee construction at the rate of 10 cents per cubic yard. The contractor covenanted to build 1,000 linear feet of levee. Plaintiff-contractor built 715 linear feet which the court computed was equal to 7,490 cubic yards of levee. This proportion of linear feet to cubic yards of levee indicated that the original contract called for the construction of 10,475 cubic yards. Thus 2,945 yards had not been constructed. Assuming that the cost of completion would be at the original contract rate, namely, 10 cents per cubic yard, the sum of $298.50 would be required to finish the job. At the same rate, the whole contract price would be $1,047.50.
   Plaintiff as a matter of law was not permitted to recover. The jury verdict for plaintiff was set aside on appeal and the case was remanded to give the plaintiff an opportunity to prove that his failure to complete was excused by the defendant's acceptance of the part performance.

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Thus a sum necessary to complete a building would not be considered substantial in the Supreme Court if it were equal to or less than 7.2 percent of the contract price.\(^9\) It would probably be regarded similarly in the Appellate Court if equal to or less than 12.6 percent of the contract price.\(^30\)

It would be held substantial in the Supreme Court if it were 23.5 percent or more.\(^31\) If 23.2 percent or more, it would be deemed substantial in the Appellate Court.\(^32\) As shown by the "doubtful percentage" part of the table, the "forbidden" or "substantial" sum percentages may start at the 7.2 percent and 12.6 percent level in the respective courts. The doubtful-percentage line shows what terrain has been uncharted by decisions.

In the absence of contrary percentages in the Supreme Court cases, the larger permissible percentages in the Appellate Court is significant. It reveals the liberality with which the Illinois courts regard builders' performances.

The table should be of assistance in judging the value of a proposed appeal.

(2) The Purpose Test

The "purpose" test is used by the Illinois courts to complement the cost of completion criterion. It has been said:

Where a contractor contends that a building contract was substantially completed, the importance of the uncompleted work is not to be tested by the proportion of its cost to the full contract price when, considered by itself, it was a material and substantial part of the work the contractor agreed to perform.\(^33\)

Some cases have stated that there must not be a "material" part uncompleted, nor any "omission in essential points."\(^34\) The structure, according to one decision, must "be reasonably fit for the purpose for which it was intended."\(^35\)

The standard which has been set up may be conveniently called the "purpose" one. It is apparent that a contractor who has failed to fulfill the purpose of a contract, has not substantially complied with the contract.

\(^31\) Fred W. Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491, 96 N.E. 1063 (1911).
\(^33\) Ibid., at p. 15.
\(^34\) Evans v. Howell, 211 Ill. 85, 71 N.E. 854 (1904).
\(^35\) Adkins v. Lee, 138 Ill. App. 8, 11 (1907).
Why should two tests be necessary? Why should the courts apply both the "purpose" and the "cost-of-completion" criteria? Doesn't it seem that, if the owner is allowed the cost of completion, he can then finish the job and carry out the purpose of the contract?

One reason for the purpose test is that the contracts are generally interpreted to require that performance precede payment. If the contractor could claim payment on the basis of completion by the owner, then he would not be furnishing performance prior to payment in accordance with his contract.

A second reason for the purpose test is that there are often instances in which, although the cost of completion is reasonable, performance subsequent to the due date may be of little or no value to the owner. Patently, an owner should not have to pay for unreceived benefits.

The words, "purpose," "material," "essential" and others of that ilk which are used by the courts in discussing whether the purpose of the contract has been accomplished are ambiguous and indefinite, just as was the word "substantial" in the cost-of-completion test. However, their meaning has been elucidated to some extent by the cases.

It has been said that "where there are deviations of so essential a character that they cannot be remedied without partially reconstructing the building, they do not come within the rule of substantial performance." Therefore, when a contractor, after removing the old shingles, was to roof a building with new asphalt shingles, and he placed the new shingles over the old, the performance was held to be unsubstantial. The same result was reached in another case. Therein, although he had agreed to erect a basement which was eight feet clear of stone and brick and to build windows with an opening of ten percent of the floor area (such opening being demanded by the city ordinance), the contractor constructed, instead, a basement about six feet clear and windows with approximately a two percent opening.

There are of course cases which clearly illustrate con-

37 Ibid.
38 Koski v. Finder, 176 Ill. App. 284 (1913).
tractors' failures to accomplish and fulfill contractual purposes. In one instance, an ordinance stated that unless property owners built sidewalks which were twelve inches thick, special assessments would be made to cover the cost of building such walks. When a contractor who knew that he had been engaged by the owner to enable the owner to escape an assessment constructed a walk only seven to nine inches thick, the court found for the defendant-owner. In another case, the plaintiff-contractor agreed to install a furnace having the capacity to "heat the rooms in which registers were placed to seventy degrees Fahrenheit at the breathing line in the coldest weather." The contractor installed a furnace which omitted to heat one room and which emitted offensive gases, both of which defects the court considered to be substantial. To be contrasted is a dictum which implies that to install radiation facilities in such a way that the radiation is a few feet less than that contracted for does not create a substantial defect. Moreover, the court in the former heating case opines that the omission of one furnace register would not constitute a substantial deviation.

Both the "purpose" and the "cost-of-completion" tests are valuable in the measurement of performances. If one test has been passed unquestionably by a contractor it is unclear whether the courts will favor him despite his failure to meet the other standard. It seems probable that if a court did lean toward him, it would attempt to justify its position by arguing that both tests had been complied with.

In Mason v. Griffith, the builder had without doubt satisfied the cost-of-completion test. However, the facts appear not to show a fulfillment of the contractual purpose. A heating plant did not create a proper warmth in the upper part of the house. The roof leaked. Eight screens were missing. Electric light fixtures had not been furnished for the basement nor drainage pipes connected to the icebox. The

court, leaning toward one standard, namely the cost-of-completion one, found for the contractor. The cost of remedi

dying the defects was quite reasonable, being about 5 per
cent of the contract price. The strictness exhibited in the

Appellate Court case of Adkins v. Lee is to be contrasted.
Although the trial court therein, sitting without a jury, had
allowed about 4 percent of the contract price to the owner,
the Appellate Court decided that a furnace which omitted
to heat one room and which emitted gases did not "reason-
ably fit . . . the purpose for which it was intended" and it
rendered a judgment in favor of the owner.

But in one situation the purpose criterion predominates.
Therein, the cost of completion would be too great accord-
ing to the percentage evaluation. Yet, because the purpose
of the contract has been accomplished and because the
cost of completion would be greatly disproportionate to the
good of the owner to be derived from completion, the court
would find that the contractor had given a substantial per-
formance. For example, plumbing pipes of equal calibre to,
but of a make different from, the type of pipes specified in
the contract may have been installed in the heart of a build-
ing. To replace the pipes would involve a reconstruction of
the structure at a large cost. The benefit resulting to the
owner would not be at all proportionate to the expenditure
required.

The prediction as to the way the Illinois courts would
find if confronted with this situation is not based on direct
Illinois authorities because no Illinois case discusses the
situation. It is based on the belief that Illinois would follow
the New York view which favors the contractor. New York,
in a decision by the late Judge Cardozo, in which the factual
background was like that in the example just given, bowed
to the purpose test and held for the contractor. The close

45 Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921). This should
be contrasted with the case of Alton, Mt. C. & N. A. R.R. Co. v. Northcott, 15 Ill.
49, 51 (1853). In the latter case, plaintiff had contracted to lay cross ties of
certain measurements for the defendant. The ties that were laid did not conform
to the specifications. The court said, "The real inquiry was, did the ties in question
answer the description; not whether they were equivalent in value or as suitable
for the purpose intended." This case was apparently treated as one involving a
sale rather than a construction contract. This is evidenced by the court's citation
of Taylor v. Beck, 13 Ill. 376 (1851), which involved a sales problem. Since the
relation between the New York and Illinois cases, the significant fact that the Illinois decisions have displayed an even greater liberality than the New York ones, and the special measure of recovery which holds sway in this situation are discussed later herein.

The contractual language of the parties is of the utmost importance in the determination of whether the purpose criterion has been satisfied by the contractor. "In construing a building contract the court cannot ignore its express provisions." The intention of the parties has always been stressed in the construction of covenants.

The courts however do not strictly observe the intention of the parties as set forth in their agreements. One bench held for the builder who had performed only substantially under a contract which called for a "complete and finished job." Similar effect was given to the following contractual provision:

The contract when awarded will be for a complete and perfect job, even though every item required to make it such is not specially noted in the drawings or specifications . . . [The] contractor . . . shall perform his work in a true workmanlike manner in every particular and thus provide the building with a durable and mechanically perfect system.

In this case the Illinois Appellate Court said:

We are of the opinion that the law [referring to the substantial performance concept] . . . entered into and formed a part of this contract, and that, notwithstanding the language above quoted from the specifications, appellee could recover upon establishing a substantial compliance with the contract, though he had not in every particular complied exactly therewith.

Contract interpretations which favor the builder are also to be found in those cases which hold that a clause requiring "completion to the satisfaction of the owner" cannot

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47 In Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N.E. 247 (1901), the court said (p. 521): "In construing covenants in an agreement, such covenants will be regarded as conditions precedent, or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words give way to such intention."
48 Bloomington Hotel Co. v. Garthwait, supra note 28.
49 Ruddy v. McDonald, 149 Ill. App. 111 (1909). The contract called for the installation of plumbing and heating facilities.
50 Ibid. at p. 115-16.
prevent recovery by a contractor who has rendered a substantial performance in good faith.\textsuperscript{51} This clause is interpreted to call for a reasonable rather than an honest, subjective satisfaction. Moreover, a substantial performance in good faith is deemed sufficient to cause a reasonable satisfaction.

In theory it is possible to word a building contract so unequivocally that a court will not misconstrue the intent of the parties. It has been said that the adherence by the courts to the intent of the parties is not "unjust" if their intent is clear.\textsuperscript{52} This opinion was given in a case involving a building contract. No decision has been found which states that the parties may not contract for perfect performance, although the courts seem to tend toward that conclusion. It is improbable that such a statement will be made.

Contractual language, to command respect, must concern itself with the dependence of covenants and the quality and extent of the desired performance. It should also negate the possibility that the substantial performance doctrine will be applied to the contract.

The contractual language must overcome the presumption that covenants are independent.\textsuperscript{53} The courts which have said that there is such a presumption have called independent those covenants which are not conditions precedent to other covenants.\textsuperscript{54} This appears to be an erroneous use of language, for, ordinarily, an independent covenant, in the sense in which it may be contrasted to a dependent covenant, is one which is not itself qualified by a condition precedent.

Some courts seem unaware that forfeitures may be avoided on the theory that conditions need be only substantially performed. Apparently still believing that there must be an exact compliance with conditions, they have tried to avert forfeitures by construing that the covenant governing the incomplete performance is independent, that is, that it is not a condition precedent to payment. The

\textsuperscript{51} See supra note 24.
\textsuperscript{53} Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1905); Foreman State Trust & Savings Bank v. Tauber, 348 Ill. 280, 180 N.E. 827 (1932).
\textsuperscript{54} Note, 22 Ill. L. Rev. 299.
theory of the substantial performance of conditions is considered hereafter.

Elucidation of the quality and extent of the work which is required is also important. The intent must be so clear that no court, in good conscience, can contend that the parties did not contemplate the contingency of an incomplete, substantial performance, and that because the parties failed to provide for such a performance, the court may rightfully impress its views of justice upon the litigants and grant a recovery to the contractor.55

Professor Williston has said that if a contract contains the following clause, most courts would be indisposed to set any limits to the defenses of the owner in spite of any forfeiture which may be involved: "I promise to pay if the house is completed exactly in every respect according to plans and specifications, and if it is not so completed it is understood that I am to pay nothing at all."56 To this language, the present writer would add: "The legal doctrine that a contractor may recover for a substantial performance of a building contract is to have no application to this contract." It is desirable even to amplify these provisions. It cannot be too strongly emphasized that the intent of the parties must be worded with such clarity as will subvert the courts' tendency to find that a substantial performance entitles the contractor to some payment.

(3) Arbiters of Substantiality

It is clear that whether defects and omissions are substantial is a matter of degree.57 This conclusion is inherent in the flexibility of the words used to phrase the two tests of substantiality.

The provinces of the court and jury in building contract cases have been theoretically well defined. The duty of the court is to construe and explain the provisions of the contract, and to instruct the jury with regard to what would be a substantial performance.58

55 See Williston, op. cit. supra note 1, § 825.
56 Williston, op. cit. supra note 1, § 675, p. 1942.
58 Keller v. Herr, 54 Ill. App. 468 (1894), aff'd 157 Ill. 57, 60, 41 N.E. 750 (1895); Peterson v. Pusey, 237 Ill. 204, 209, 86 N.E. 692 (1908); Estep v. Fenton, 66 Ill. 467 (1873).
Where the facts concerning the performance are in "doubt," it is the function of the jury to sift the facts and to determine whether, having in mind the judge's instructions, there has been a substantial compliance with the contract.\textsuperscript{59} However, if the fact "inferences are certain," it is the duty of the court to decide whether the performance is substantial.\textsuperscript{60}

B. The Meaning of Good Faith

Even if the contractor satisfies the two tests of substantial performance, he may not recover if his departure from literal performance was made in bad faith. He must have acted in good faith, that is, given an "honest and faithful performance" and made no "willful departure from the contract performance."\textsuperscript{61}

Do the courts employ an objective or a subjective standard of good faith? Perhaps except for \textit{de minimis} deviations, it is the inference from one Appellate Court case that the courts use an objective approach. The court there said that "an intentional departure from a substantial provision of a building contract will bar a recovery regardless of the presence or absence of an intent to gain some advantage thereby."\textsuperscript{63}

Would there be a change in the standard if the deviation or defect is unsubstantial? In the Appellate Court case which adopted an objective approach, the performance was unsubstantial. It fails to indicate what treatment would be accorded to an unsubstantial deviation made in bad faith.

The issue of good or bad faith seems to be important only when there has been a substantial performance. If the performance is unsubstantial, this fact alone is sufficient to defeat any recovery by the contractor without consideration of his good or bad faith being necessary.


\textsuperscript{60} Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 243, 129 N.E. 889 (1921); Errant v. Columbia Western Mills, 195 Ill. App. 14 (1915).

\textsuperscript{61} Keesler v. Herr, 157 Ill. 57, 41 N.E. 750 (1895); supra note 25 at p. 60.

\textsuperscript{62} Art Craft Re-Roofing Co. v. Williams, 264 Ill. App. 477 (1932), wherein the contractor who was to reroof a building with asphalt shingles after first having removed the old shingles, put the new shingles on top of the old ones.

\textsuperscript{63} Ibid.
In a fairly recent Appellate Court case, the issue of whether an objective or a subjective standard of good faith was to be used was before the court. The performance had been substantial. The defense claimed that the defects and omissions existed by reason of the contractor's bad faith. The court, applying a subjective test of bad faith, found for the contractor. There was a vehement denunciation of the injustice of leaving without a remedy a contractor who had abandoned his work due to an honest misconception. In an ill-founded dictum, the court goes so far as to imply that a recovery might lie for less than a substantial performance if the part performance has been executed in good faith, even though there has not been a legally recognized prevention of performance nor any acceptance by the owner.  

In view of the conflict in the decisions, there is doubt as to whether an objective or a subjective standard prevails. To avoid a forfeiture, it is likely that the courts will favor the subjective approach.

64 Spiro v. Cable, 248 Ill. App. 343 (1928). Therein the plaintiff-contractor, after performing substantially, had abandoned the work. His reason for so doing was that he had not received progress payments that he claimed were due him in accordance with an alleged general usage in the Chicago building trades. Five or six days after the abandonment, at the request of defendant's attorney, plaintiff returned to the job. Upon such return, he was informed by the defendant that the defendant did not want the work to be completed.

During the progress of the work, defendant had made almost daily promises to make payments to the plaintiff.

The court held that the plaintiff had been justified in abandoning the work under these circumstances. The trial court's verdict for the defendant was reversed.

In its decision, the court, in regard to a plaintiff who had acted in good faith, said (p. 349): "... if ... the work was about complete, [and] through some misconception of his legal rights he temporarily abandoned [his] ... work, still the law is not so unjust as to permit the defendant to obtain the benefit of the labor and material furnished by the plaintiff under the contract without payment therefor."

The court furthermore stated (p. 348): "Where a party has in good faith partially [italics supplied] performed the terms and conditions of a contract on his part, and the other party has received the benefit of such partial performance, and does not and cannot restore to the other the fruits of such partial performance and place him in statu quo, then the consideration of the contract must be paid, less any damages suffered by reason of the failure to perform the contract."

This dictum seems to be contra to the decisions cited supra note 16, which deny a quasi-contractual remedy where the contractor's performance is unsubstantial and the owner has not accepted the part performance. Most defaulting contractors who have performed only in part can show subjective good faith and the receipt of benefits by the owner. In a quasi-contractual recovery, the standard of damages awarded is generally the amount of benefit received. Since the contract price is deemed presumptive evidence of value or benefit received, this dictum appears to indicate a trend by this court toward permitting quasi-contractual relief.
Decisions are scarce which penalize the contractor for lack of good faith. The courts are probably confronted with an unsubstantial performance in those cases in which they are inclined to punish a defaulting builder. In view of the general American rule that bad faith causes a denial of relief in spite of the achievement of a substantial performance, it is probable that the bad faith aspect of the doctrine of substantial performance will remain in force in Illinois.

C. The Measure of Recovery

A victorious contractor, according to the well-settled rule, recovers the contract price less the owner's cost to complete the specified construction. It is arguable that, when a particular set of circumstances exists, another measure of recovery is given, namely, the contract price minus the difference in value between the contemplated and the existent structures.

The circumstances invoking the latter rule have been reviewed in an earlier part of the text. To repeat, the rule applies if the purpose of the contract has been accomplished and if the cost of completion would be grossly disproportionate to the benefit that the owner would derive from completion. In these cases, the cost of completion would be too great to pass the cost-of-completion test. To escape the forfeiture ordinarily attendant upon the failure to pass the test, or the unjustly small award if an exception to the test were established and the contract price minus the great cost of completion was allowed, this special rule of compensation was applied in New York.

The writer has indicated that he presumes that this measure of recovery will be adopted in Illinois because of manifold likenesses between the New York and the Illinois interpretations of the substantial performance doctrine and because of the great respect that Illinois decisions display.

65 Only one case has been found which denies a recovery because of the plaintiff's bad faith. See: Art Craft Re-Roofing Co. v. Williams, supra note 36.

66 Even in the Art Craft case cited supra notes 65 and 36, a substantial performance was lacking.

67 Williston, op. cit. supra note 1, § 805.


for New York opinions in this field. Both states allow no quasi-contractual relief to a defaulting builder. They both use the purpose and cost tests. They are similar in requiring a reasonable satisfaction when an owner’s satisfaction clause is in the contract. New York is liberal in its holding for the contractor when the cost-of-completion ratio is equal to or less than 6 percent; Illinois, it has been shown, is even more liberal. With regard to the Illinois respect for New York decisions, it should be noted that the Illinois conception of the doctrine of substantial performance originated late in the nineteenth century and that it was based upon New York precedents.

D. The Burden of Proof

The burden of proving a substantial compliance with the covenant to build rests upon the contractor.

Doubt reigns, however, with regard to the one on whom rests the burden of establishing the cost of completion. In 1901, the Supreme Court ruled that the burden was on the owner. In 1910, and 1931, two Appellate Court cases ruled the same way when the suit was under the Mechanic’s Lien

70 5 Williston, Contracts (Rev. ed.), § 1475 (n. 5), citing Steel Storage etc. Co. v. Stock, 225 N.Y. 173, 121 N.E. 786 (1919) and Simpson Construction Co. v. Stenberg, 124 Ill. App. 322 (1906).

71 See McKinney, supra note 1 at p. 63, with regard to the purpose test in New York. See the text accompanying notes 33 et seq. supra with regard to the same test in Illinois.

For a discussion of the cost-of-completion test in Illinois refer to text accompanying notes 27 et seq. supra.

72 Nicholas, supra note 24 at pp. 114, 118, 119. This sets forth both the New York and the Illinois law.

73 McKinney, supra note 1 at p. 66; note, 31 Col. L. Rev. 307, 311, supra note 1.


76 Art Craft Re-Roofing Co. v. Williams, 264 Ill. App. 477, 479 (1932); City of Peoria v. Fruin-Bambrick Construction Co., 169 Ill. 36, 39, 48 N.E. 435 (1897).

77 Palmer v. Meriden Britannia Co., 188 Ill. 508, 524, 59 N.E. 247 (1901). The court said: "...appellant [owner] introduced no evidence to show what damages, if any, he suffered by reason of the alleged failure to comply with these conditions of the lease. [The lease provided for the erection of a building by the lessee.] In the absence of such evidence, the trial court could make no allowance for such damages, and did not err in not making such allowance."
Act. But, in 1932 another Appellate Court bench completely disregarded these precedents and clearly placed the burden upon the contractor, as is done in New York. It said that “a contractor suing to recover for substantial performance of his contract must furnish the evidence properly to measure the deductions necessary to remedy the defects and omissions.”

It is submitted that this decision should be adhered to. The distinction between the proof of a substantial performance and of the cost of remedying the defects appears to be too subtle and fine to be the springboard for two opposing burdens of proof. The contractor must ordinarily produce the same factual evidence to prove the substantiality of his performance that the owner would have to summon to demonstrate the cost of completion. Since the contractor is probably more familiar with the work and its cost, and since he is at fault in not having performed literally, the burden of proving both the substantiality of the performance and the cost to remedy should be placed upon him.

Some doubt exists as to whether the contractor, as part of his affirmative case, must prove his good faith, or whether the owner must first introduce evidence of bad faith. There is again a divergence of authority in Illinois, the Appellate Court having ruled unequivocally in 1932 that the contractor must show his good faith, although in 1875 the Supreme Court placed the onus of proving bad faith on the owner. It would appear proper to require the contractor to prove his good faith rather than place the burden of proof of bad faith on the owner. The contractor is not only at fault, but he is also in the best position to explain his own actions.

78 In Kleinschnittger v. Dorsey, 152 Ill. App. 598, 606 (1910), the court said: “Under the Mechanic’s Lien Act the burden of proof is upon the owner of establishing what damages, if any, should be allowed in mitigation of the amount claimed by way of lien.” To the same effect, see: Edward Edinger Co. v. Willis, 260 Ill. App. 106, 125 (1931), which states that the rule is based on the theory that the owner in bringing his counterclaim (which may include a recoupment or set-off) is acting affirmatively as a plaintiff.


81 Art Craft Re-Roofing Co. v. Williams, 264 Ill. App. 477 (1932); Taylor v. Renn, 79 Ill. 181 (1875).
E. The Practical Results to the Contractor of the Substantial Performance Doctrine

In jurisdictions such as Illinois and New York which do not permit a quasi-contractual recovery for part performance, the theory of substantial performance has been very valuable to contractors. First, it enables them to avoid almost complete forfeiture of the labor and materials put into buildings. This counteracts in great degree the inability of the contractor to retrieve the results of his labor and materials, that is, his inability to achieve specific restitution.\(^{82}\)

Second, the amount paid to the contractor is satisfactory. It may be said that the doctrine of substantial performance generally causes him to receive all of his expenditures plus some of his anticipated profits. This effect is probable in those cases (and they are in the vast majority) in which the measure of recovery is the contract price less the cost of completion.

The work to be completed ordinarily composes 5 percent or less of the entire work.\(^{83}\) It is probable that a contractor's profit is 5 percent or more of the contract price. Consequently, one may state that after the owner's cost of completion is deducted from the contract price, the remainder will usually be at least equal to the builder's expenditures. Generally only his profits would be affected.

Even the reduction in profits is likely to be small. Although the owner's cost of completion will probably be more than that of the contractor whose overhead expenditures might not increase over the completion period, nevertheless, the difference in their costs should be little because of the small proportion of the work which remains to be completed. The variance in costs being minor, the difference in profits will likewise be comparatively insignificant. A defaulting builder thus has little to bemoan.

If the measure of recovery is the contract price less


\(^{83}\) Among the cases considered in note 28, supra, some show ratios under 5 per cent and others ratios in excess of 5 per cent. Only a few cases could be analyzed mathematically. It is reasonable to believe that in most instances defects and omissions tend to be insignificant. Consequently, it may be concluded that the scarcity of cases with ratios over 5 per cent is due to the fact that such cases are unusual.
the difference in value between the contemplated and the existent structures, a prediction, in most cases, as to whether the contractor will recover his expenses and his profits, is impossible. In each case the difference in value will be unique and will greatly affect the ultimate award to the builder.

F. The Substantial Performance Doctrine and the Substantial Performance of Conditions

Before proceeding to consider the counterclaim or set-off of the owner, it is advisable to analyze the contractor's ability to sue successfully under his contract.

Generally, a judgment for the contractor denotes that the express conditions precedent to the owner's duty to pay have been "exactly fulfilled" (except for de minimis variations).\(^{84}\) Unless such conditions are so carried out, "no liability can arise on the promise which such conditions qualify."\(^{85}\)

This retroactive approach, however, is fallacious in the field of building contracts. Several writers have recognized that at least in some jurisdictions, express and constructive conditions in building contracts are being only substantially performed.\(^{86}\) Illinois, in its decisions, has shown itself to be one of these jurisdictions.\(^{87}\)

Illinois has thus kept itself consistent with the criterion which it uses for the discovery of conditions precedent. This "intention" standard has been announced in many cases.

In construing covenants in an agreement, such covenants will be regarded as conditions precedent, or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words given way to such intention.\(^{88}\)

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84 Williston, op. cit. supra note 1, § 675.
85 Ibid.
86 Williston, op. cit. supra note 1, § 805; Harriman, op. cit. supra note 2, § 501; Costigan, supra note 4, pp. 37, 41, 42, referring particularly to New York.
87 In City of Peoria v. Construction Co., 169 Ill. 36, 39, 48 N.E. 435 (1897) the court said that a contractor may claim payment "when he has . . . substantially performed the conditions precedent to his right of recovery as stated in the contract . . ." (italics mine). This statement is repeated in Hart v. Carsley Manufacturing Co., 221 Ill. 444, 447, 77 N.E. 897 (1906); Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284, 287, 84 N.E. 275 (1908) and in Brenton v. Newlin, supra note 28 at p. 171. The same view has been expressed in an insurance case. Feder v. Midland Casualty Co., 316 Ill. 552, 560, 147 N.E. 468 (1925).
In other words, giving to the ideas of dependence and independence of covenants their proper meaning of being modes for restating respectively that certain covenants are qualified by conditions precedent and that others are not so qualified, it can be said that dependence and independence are to be ascertained by reference to the intention of the parties.

Undoubtedly, the intention of the parties is manifest in many building cases. In these, then, express conditions precedent are likely to be present. Since the builder may sue with success in all or most of these cases on the basis of a substantial performance, it is clear that the conditions do not have to be literally executed. The award to the contractor must signify that a substantial performance of the conditions precedent is sufficient, the condition precedent character of the building covenant being co-extensive in scope with that covenant.

The Supreme Court of Illinois faced this fact when it declared that a contractor may receive payment "when he has substantially performed the conditions precedent to his right of recovery as stated in his contract." Originally, this view appeared only in those cases which involved an architect's approval clause, that is, Situation II, hereafter discussed. The theory was used to solve difficulties connected with the preparation of architect's certificates and the necessity that the contractor produce such certificates as a condition precedent to payment. It has been extended to a building contract case wherein an ap-

89 Note, 22 Ill. L. Rev. 299-301. In Illinois, a state of dependency is indicated by calling a provision a "condition precedent," and a state of nondependency by terming a provision an "independent covenant or agreement." See: Freet v. American Electrical Supply Co., 152 Ill. App. 205, 208 (1909) p. 208, and Rubens v. Hill, 213 Ill. 523, 533, 534, 72 N.E. 1127 (1905). As has been pointed out, supra note 11, confusion is likely unless it is clear that a court in calling a provision an "independent covenant or agreement" merely means that it is not a condition precedent to another clause or provision.

90 See supra note 8.

91 Michaelis v. Wolf, 136 Ill. 68, 74, 26 N.E. 384 (1891) states that "an architect's certificate under a building contract must be substantially such as is required by the contract," (italics mine). This case and those cited in note 87, supra, are dicta cases in respect to such statements. However, Arnold v. Bournique, 144 Ill. 132, 33 N.E. 530 (1893) is a holding to the same effect. Therein, although the contract required that there be a "presentation" of the architect's certificate to the owner before payment would be due, the contractor, who had obtained the certificate, was allowed to recover without presenting it.
proval clause did not figure\textsuperscript{92} and to an insurance case.\textsuperscript{93}

This lax theory of conditions clearly arose out of the desire of the courts to avoid the forfeiture which would follow the enforcement of the doctrine that conditions must be exactly performed. It has been stated that "the law . . . enforces no such penalty."\textsuperscript{94}

A summary analysis of the rights, duties, covenants, and conditions in the field of building contracts would seem to reveal the following. In the large majority of cases, the performance and payment covenants are dependent, performance in accordance with the actual or presumable intention of the parties being precedent to payment.

Considering Situation I, it is clear that a substantial performance of the contractor's covenant to build makes the owner's duty to pay unconditional.

Since performance is generally precedent to payment, the contractor's covenant defines and is co-extensive with the condition precedent to payment. A substantial performance of the condition precedent is sufficient to make the owner's duty to pay become legally enforceable by the contractor.

The contractor's covenant also defines his duty. It would thus seem that a substantial performance of his duty (which is at the same time a substantial performance of the co-extensive condition precedent) makes the owner's duty to pay unqualified and enables the contractor to sue for a breach of the owner's duty.

For the breach of the contractor's duty, that is, his promise to build in literal conformity to the specifications, the owner is compensated in the form of a subtraction from the contract price.\textsuperscript{95} In effect, without the need for a formal counterclaim, the owner is given the benefit of one. "The courts never say that one who makes a contract fills the measure of his duty by less than full performance."\textsuperscript{96}

In some cases, the owner has paid the contractor before discovering the defects or omissions. He may then

\textsuperscript{92} Brenton v. Newlin, supra note 28.
\textsuperscript{93} Feder v. Midland Casualty Co., 316 Ill. 552, 560, 147 N.E. 468 (1925).
\textsuperscript{94} Shepard v. Mills, 70 Ill. App. 72, 74, (1897).
\textsuperscript{95} Note, 21 Col. L. Rev. 582.
\textsuperscript{96} Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889, 890 (1921).
start an action against the contractor to recover damages for the breach of the contractor's duty, that duty having been performed only substantially.

SITUATION II

Frequently, parties agree that a third person, who is generally an architect or engineer, is to judge the conformity of the work to the contract. The arbiter renders either oral or written decisions. The written decision is ordinarily in the form of a certificate.

The doctrine of substantial performance has also affected such agreements. The extent of its influence varies according to whether the oral or written decision, by arrangement of the parties, is or is not to be final and conclusive.

If by covenant the certificate or oral decision is to be final and conclusive (and parties must use plain language to make it so), the courts state that the parties are bound by the arbiter's determination, except if the arbiter is guilty of fraud or such gross mistakes as would necessarily imply bad faith or his failure to exercise an honest judgment.

It has been succinctly stated, "It is the architect's judgment, not his arbitrary will, that the contract makes conclusive on the question submitted to his decision."

To impeach the arbiter's decision, it must thus be shown that he failed to exercise his honest judgment. It must be proven that in accepting or rejecting the work, he disregarded what he knew or should have known were the terms of the contract. It is not sufficient to demonstrate that others would not have judged the work in the same way. Evidence must be directed toward "the [particular] architect himself, to show that he did not exercise his real judgment." [Italics supplied.]

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98 Davis v. Gibson, 70 Ill. App. 273 (1897); Snell v. Brown, 71 Ill. 133 (1873); Gilmore v. Courtney, 158 Ill. 432, 41 N.E. 1023 (1895).
100 See the discussion infra about the prima facie presumption of willfulness and capriciousness which arises if the architect or engineer has disregarded obvious facts. Also see Snell v. Brown, 71 Ill. 133, 134 (1873).
Although the ultimate inquiry is as to the honest judgment of the particular architect or engineer, the opinions of reasonable men about the conformity of the work to the contract are significant. This is so because a prima facie presumption exists that the arbiter acted capriciously and willfully, if it is proved that in making his decision he disregarded what reasonable men would consider “important, clearly established, or obvious facts.”\(^{102}\)

The concept of substantial performance is relevant to this presumption. If a performance is substantial, reasonable men will ordinarily be satisfied that the arbiter who accepts the work has not disregarded “important” facts.\(^{103}\) Consequently the presumption will not arise. If a performance is unsubstantial and the architect or engineer accepts the work as conforming to the contract, it is believed that the presumption that he acted capriciously will generally come into existence. Reasonable men are likely to require a substantial performance as the price for their belief that significant facts have not been overlooked.\(^{104}\)

It has been stated that building contracts generally contain a clause providing that “payments are to be made by the owner only on presentation of the certificate of a named architect, stating that the contract has been performed in whole or in part as agreed.”\(^{105}\)

The inclusion of such a clause in a contract is designed to achieve two objectives. One, the protection of the owner in that an expert in the building field is judging the work. Often, owners are laymen inexperienced in the field of building construction. Two, the avoidance of the expense of litigation since the architect or engineer is supposed to act as the final arbiter.

\(^{102}\) County of Cook v. Harms, 108 Ill. 151, 162 (1883), in which the court stated: “If it be shown that an architect in making his decision has disregarded important clearly established or obvious facts . . . the prima facie presumption is that he did so willfully.”

To assist in the determination of whether there has been an exercise of an honest judgment, “. . . evidence is admissible of the character of the work to be done, in the first instance, the quantity and character of the work actually done, and also of that undone.” Snell v. Brown, 71 Ill. 133, 143 (1873).

\(^{103}\) See cases supra note 24. Inherent in the idea of recovery for a substantial performance is the premise that important facts have not been slighted. Keeler v. Herr, 157 Ill. 57, 41 N.E. 750 (1895).

\(^{104}\) See cases supra note 24.

\(^{105}\) Note, 31 Col. L. Rev. 307, 314.
To permit a jury to determine the reasonableness of the expert’s opinion is to defeat both objectives. A lay body is not qualified to pass upon an expert’s opinion. The parties had the power to select an impartial and able arbiter. Their judgment in the choice of such a man should be respected.\(^\text{106}\)

Illinois has steered a commendable course in the espousal by its courts of an “honest” rather than a “reasonable” judgment test in cases where it has been provided that the third party’s decision is to be final and conclusive. In so doing it has diverged from the New York courts which have adopted the “reasonable” judgment criterion.\(^\text{107}\)

If a building contract provides for the certificate or decision of an architect or engineer but it is not plainly agreed that the certificate or decision is to be final, the provision means practically nothing. In essence there is a reiteration of Situation I. If the owner contests the arbiter’s rulings, the contractor, to recover, need prove only that the performance was substantial.\(^\text{108}\) The owner, in defense to a claim by a contractor based upon performance approved by the arbiter, may prove the violation of material parts of the contract.\(^\text{109}\)

**CONCLUSION**

The doctrine of substantial performance is still applied in Illinois in that spirit of liberality which marked its origin in the courts of equity.

It alleviates a serious situation, preventing, as it does, forfeitures due to defects and omissions.

Nevertheless, the doctrine results at times in the inequitable subordination of the contractual intent of the parties. As Professor Williston has said:

> It seems better, however, to avoid hardship of this sort [forfeiture for failure to comply literally with the contract] by allowing recovery on a quantum meruit on the theory of quasi contract than to set aside an agreement of the parties, since when confessedly enforcing an obligation imposed by law [rather than by contract], the court may fairly fix such boundaries as justice requires.\(^\text{110}\)

Statements of the substantial performance doctrine are, in the main, sweeping generalities which allow for only a

\(^{106}\) Cf. Kort v. Lull, 70 Ill. 420 (1873).

\(^{107}\) Note, 31 Col. L. Rev. 307, 313.

\(^{108}\) Salfisburg & Co. v. City of St. Charles, supra note 97, especially at p. 534.

\(^{109}\) Baylies v. Bent, supra note 97.

\(^{110}\) Williston, op. cit. supra note 1, § 805.
limited predictability of the way the courts will treat a particular fact situation. The restatement of these generalities into two specific tests, namely, the purpose and cost-of-completion ones, is not entirely satisfactory. There is still so much flexibility in their application that it is difficult to foresee the decisions of courts.

It would seem advisable for the courts to lay down specific rules with regard to permissible and forbidden percentage ratios between the contract price and the cost of remedying defects and omissions. However, it is difficult to define the purpose test more clearly in view of the different objects to be accomplished by different contracts.

The value of a quasi-contractual recovery is evident. Permitting such a recovery should be considered by the Legislature.