THE GREAT CASE OF CUTTER v. POWELL

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> So, therefore, this abstruse and unattractive process of analysis and definition turns out to be only a mode of describing the very practical and interesting things that we need to know in order to gain our ends in life.
>
> Corbin on Contracts (1950) § 628

Among the comparatively few cases which have cast their spell upon the law of contract, and contracts between master and servant in particular, *Cutter* v. *Powell*[1] must rank as a pre-eminent decision. Yet its impact was, and remains, peculiar. Although today of little or no immediate prominence,[2] the decision retains a supreme significance in our basic theory of contract. For not only does it represent a harsh principle of non-payment for a servant's incomplete performance; it also crystallized a deep antinomy between contractual notions that pertain to "debt" and more modern notions that must underlie the legal adjustment of collapsed bargains. The decision is, indeed, a microcosm of all the fundamental difficulties in this contractual area, and none has given rise to more discussion and difference of opinion.[3] To call *Cutter* v. *Powell*, then, a "great case", as Lord Esher called it,[4] is not mere literary epithet: it is good literal description.

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[1] (1795), 6 T.R. 320; 2 Smith's Leading Cases (13th ed., 1929) pp. 1 ff. Certainly much of the fame of *Cutter* v. *Powell* must directly be due to its becoming a major piece in John William Smith's renowned collection, the first edition of which appeared in 1837-1840 and which, throughout the nineteenth century, was a book of great influence and authority.

[2] The reasons for this eclipse will later be given: see text at footnote 69 *post*. But it must at once be stated that this decline (more severe in the United States than in England) has only been remedial; it has not affected the roots of the law as created by the decision.

[3] Cf. 5 Williston on Contracts (rev. ed., 1936) §§ 1473 *et seq.*; and see Ballantine, Forfeiture for Breach of Contract (1921), 5 Minn. L. Rev. 329, reprinted Selected Readings, p. 943. Apart from employment, *Cutter* v. *Powell* also caused considerable difficulty in incompletely executed building-contracts, thereby necessitating the creation of a special doctrine of substantial performance. For this point, see footnote 29 *post*.

[4] Who was Brett J. in *Button* v. *Thomson* (1869), L.R. 4 C.P. 330, at p. 348. In England, the "great case" has been applied or mentioned in

I

The details of our case need careful statement. Cutter agreed with Powell to "proceed, continue and do his duty as second mate" on a ship sailing from Jamaica to England. The vessel left Kingston on August 2nd, 1793, and arrived in Liverpool on October 9th. Cutter had come on board on July 31st, and thereafter satisfactorily performed his duties; but on September 20th he suddenly died, and his administratrix then claimed remuneration for his work and labour. For a homeward voyage a second mate's usual wage was £4 monthly, but on the run from Jamaica a gross or lump sum was normally agreed on. In this case the agreed sum was 30 guineas, at that time an unusually high figure. After the action had begun, the case was allowed to stand over, "that inquiries might be made relative to the usage in the commercial world on these kinds of agreements".[5] This usage, we are told, was found to be unsettled, although "several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part".[6] These instances had a positive significance, which the court however disregarded: at the very least, they revealed a commercial tendency to reward partial services given by a deceased sailor. And even if it were true that this usage was unsettled, it was also true that a more precise custom was then not extant.[7]

But this search for a custom also betrayed a deeper dilemma. For it is a curious historical fact that as late as the date of this ac-

some fifty decisions, most listed in 12 English and Empire Digest (1923) pp. 116, 406. And see Macdonnell, Law of Master and Servant (2nd ed., 1908) pp. 119-123; Diamond, Master and Servant (2nd ed., 1946) p. 92. In the United States, too, the rule of *Cutter* v. *Powell* has been much and sometimes drastically followed: see, *e.g.*, *Carney* v. *Havens* (1879), 23 Kan. 82; *Keane* v. *Liebler* (1907), 107 N.Y. Supp. 102; but some of its effects are today overshadowed by the availability of a quasi-contractual remedy in *quantum meruit*. See 6 Williston, *op. cit.*, § 1973; and see text at footnotes 41-42 *post*.

[5] 6 T.R. 320; 2 Sm. Lead. Cas. 1, at p. 2.

[6] *Ibid.*

[7] This indeed raises the further question what the court could have conceived of as a settled usage or custom. At common law, an operative custom had to be "perpetual" or "inveterate", *i.e.* derived from very ancient and consistent usage. See Allen, Law in the Making (5th ed., 1951) pp. 78 *passim*. As regards mercantile usage, however, antiquity could not at all be the relevant practical criterion, simply because such usage was then only in process of formation. And we may therefore remember that Lord Mansfield adopted the method of having commercial customs authoritatively declared by a special jury: see Fifoot, Lord Mansfield (Oxford, 1936) pp. 104-105. This, rather than the making of "inquiries", was certainly the only appropriate and practicable way of ascertaining the usage obtaining among merchants.

tion, 1795, the common law had as yet produced no clear or certain rule for this situation between master and servant.[8] The court had therefore to extract firm principles from the then available raw material. For the plaintiff it was argued that maritime law had always favoured compensation in mariners' contracts;[9] moreover, nothing in this contract prevented payment of, at any rate, proportionate remuneration; and that, independently of the contract, Cutter could recover on *quantum meruit* for the work he had actually rendered.[10] Against this, the defendant contended that, since the parties had clearly expressed their terms, the law could not imply another contract;[11] furthermore, Powell's duty to pay anything was conditional upon Cutter's complete performance of his express undertaking to continue until arrival in England;[12] and that the seaman, instead of the usual rate of pay (about £8 for a run of eight weeks), had "preferred taking the chance of

[8] The existing common-law position was certainly most confusing. On the one hand, there was a doctrine coming from Brooke's Abridgement, (*sub. tit.* Apportionment, pl. 13; Labourers, pl. 48; Contract, pl. 31), a doctrine which, providing for the "entirety" of consideration, operated severely against the servant. On the other hand, there were more recent decisions going in the opposite direction. For example, in *Worth* v. *Viner*, 3 Viner's Abr. 8-9 (1746 at Guildhall) a servant, though having given less service than agreed on, recovered wages for the service actually rendered; and to similar effect: *Guy* v. *Nichols* (1694), Comb. 265. For similar decisions in favour of seamen, see next footnote.

[9] As admiralty reports did not start until 1798, there was an unusual dearth of published material. However, in *Wiggins* v. *Ingleton* (1705), 2 Ld. Raym., Holt C.J. had held that a seaman who was impressed into the royal service before the ship's arrival at port of delivery could recover wages *pro tanto*. See also *Chandler* v. *Grieves* (1792), 2 H. Bl. 606n; *Clements* v. *Mayborn* (1784) and *Paul* v. *Eden* (1785) cited in Abbott on Shipping (14th ed., 1901) pp. 255 and 444n, respectively; and on English 18th century law, see generally Viner's Abridgement, *sub. tit.* Mariners. For a full account of the various maritime laws concerning wages in case of seamen's decease or sickness, see Abbott, *op. cit.*, pp. 258-261. Briefly, their effect was that wages were payable to the deceased's heirs, irrespective of the terms of the contract. It was not clear, however, whether the whole amount or merely a proportionate part was recoverable. The French maritime ordinance of 1681 was more specific, granting full pay if the hiring was for a month or a homeward voyage and half-pay on the voyage outward; and this has substantially been taken over by the French Commercial Code (art. 265). Abbott's preface to the first edition (reprinted in all subsequent editions) contains an excellent survey of the legal sources.

[10] 6 T.R. 320, at pp. 321-2; 2 Sm. Lead. Cas. 1, at pp. 3-4.

[11] This principle counsel stated with great clarity: "Nothing can be more clearly established than that where there is an express contract between the parties, they cannot resort to an implied one. It is only because the parties have not expressed what their agreement was that the law implies what they would have agreed to do had they entered into a precise treaty: but when once they have expressed what their agreement was, the law will not imply any agreement at all" (6 T.R. 320, at p. 322). Indeed, Lord Kenyon C.J. called this "an axiom in the law", *ibid.* at p. 324. For its more recent restatement, see Denning, *Quantum Meruit: Craven-Ellis* v. *Cannons* (1939), 55 L.Q. Rev. 56, at p. 60.

[12] 6 T.R. 320, at p. 323; 2 Sm. Lead. Cas. 1, at p. 4.

earning a large sum"[13] by promising to continue during the whole voyage, rather than "receiving a certain, but smaller, rate of wages for the time he should actually serve on board".[14]

On this material the court decided against the plaintiff, and it not only approved, but re-emphasized the principles in favour of the defendant. Thus Lord Kenyon C.J. was most impressed by the fact that Cutter was to receive almost four times the usual rate for his service: "it was a kind of insurance".[15] Ashhurst J. believed that the contract spoke for itself, making the defendant's payment expressly dependent or conditional upon complete performance.[16] Grose J., though admitting that the maritime law was "extremely favourable to the seaman", thought that Cutter had bargained to be entitled "either to 30 guineas or to nothing".[17] Finally, Lawrence J. derived support from an older doctrine according to which an "entire" consideration could not be apportioned.[18] Not, it would seem, that the judges thought that the claim was without merit, but they also believed that they were compelled to deny the claim as a matter of legal principle.[19] The decision is, indeed, a perfect illustration of strict principles being thought logically necessary in spite of their patently harsh consequences.[20] It now remains to be seen whether these principles

[13] *Ibid.* Counsel stressed this point so strongly that he was led to admit that, had the wages been reasonable, the seaman could have recovered his proportionate share, as in every "common case of service if a servant who is hired for a year dies in the middle of it, his executor may recover his wages in proportion to the time of service". This admission (later repeated by Lawrence J., *ibid.*, at p. 326) was however essentially inconsistent with his previous argument (see footnote 11 *ante*). Moreover, an annual hiring meant as much a duty to continue for a year as Cutter's duty was to continue to Liverpool. So seen, *Cutter* v. *Powell* could be authority for much more favourable rules applying at least to "common" servants; and see on this point, G. L. Williams, Partial Performance of Entire Contracts (1941), 57 L.Q. Rev. 373, at p. 379. The admission about the "common case of servant" was perhaps but a rationalization of the uncertain law shown in footnote 8 *ante*. Nevertheless a note (6 T.R. 320, at p. 323(a)) contradicts the admission, by stating that the "old law was otherwise".

[14] *Ibid.* at p. 323. Significantly, counsel here also relied on decisions laying down harsh effects in case of an act of God: see, in particular, *Belfour* v. *Weston* (1788), 1 T.R. 310, where the lessee was held liable to pay rent, though the house had burnt down. See on this Walford, Property Law and Impossibility (1941), 57 L.Q. Rev. 339, at p. 341.

[15] 6 T.R. 320, at p. 324.

[16] *Ibid.* at p. 325.

[17] *Ibid.* For maritime laws generally, see footnote 9 *ante*.

[18] 6 T.R. at 326. For this doctrine see text at footnote 43 *post*.

[19] This was recognized in *Jesse* v. *Roy* (1834), 1 Cr. M. & R. 316. At p. 334 it was said of *Cutter* v. *Powell* that if "ever there existed a case of hardship, it was this"; but the court (at p. 343) finally rejected "equitable principles — principles which have no application to decisions in Courts of law".

[20] "Hard cases make bad law" is still a somewhat perplexing maxim. It has never been explained why judicial legislation should underwrite

were really so compelling: whether, in short, even sound contract law must inevitably defeat admitted wage-justice.

II

But, to disentangle the various facets in *Cutter* v. *Powell*, a preliminary point must first be disposed of. The point is that Cutter's wage of 30 guineas appeared to be exorbitant and suspect. Was it the case that Cutter had struck not only a hard but also an oppressive bargain? Was Powell, perhaps desperately short-handed in Jamaica, virtually blackmailed by a shrewd and exacting sailor? There is, it may be added, some indirect evidence that at the time the West Indies were something of a trouble-spot where seamen showed little respect for their engagements.[21] And, seen from this perspective, the decision would assume very special colour. For its real explanation would then be that the court was merely grasping at any available excuse to avoid what seemed an unconscionable bargain. If such be in fact the explanation, the decision rather belongs to that special category of cases where seamen refuse to continue work without additional wages,[22] that is, those cases which also originated the troublesome doctrine of pre-existing duty in relation to sufficient consideration.[23] Even if the unusually high pay-rate was an undoubted element in the decision, we must yet deal with it on the assumption that the parties made a fair and not an oppressive bargain. Only on this assumption can we attack the deeper issues raised by *Cutter* v. *Powell*, since we are not now concerned with such problems as unequal bargaining position or the public policy against unfair or inadequate exchanges: we are concerned with the nature of the legal rules which govern the parties' rights and duties after their bargain has collapsed because of incomplete performance.

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results commonly agreed to be undesirable. Even a strict rule of *stare decisis* still provides room for re-analysis and, at least, qualification. Nor can, in the long run, the pressure of "hard cases" be withstood. For this aspect, see Corbin, Hard Cases Make Good Law (1923), 33 Yale L.J. 78.

[21] The evidence can be found in a contemporary statute: 37 Geo. 3, c. 73, ss. 3 & 7 (1798), significantly entitled "An Act for preventing the Desertion of Seamen from British Merchant ships trading to H.M. Colonies and Plantations in the West Indies". Cf. also 6 Geo. 4, c. 107, s. 15. See on this Lord Ellenborough's remarks in *Appleby* v. *Dods* (1807), 8 East 300, at p. 303.

[22] See in particular, *Harris* v. *Watson* (1791), Peake 102.

[23] Cf. *Stilk* v. *Myrick* (1809), 2 Camp. 317; *Jackson* v. *Cobbin* (1841), 8 M. & W. 790; but cp. *Hartley* v. *Ponsonby* (1857), 7 E. & B. 872. And see, generally, 1 Williston, *op. cit.*, §§ 130, 130A; 1 Corbin on Contracts (1950), §§ 128, 171-5; Kessler & Sharp, Contracts: Cases and Materials (1953) pp. 276 *passim*.

Of these latter principles, the first emanating from *Cutter* v. *Powell* is that the parties entered into what was, in substance, a somewhat fortuitous or aleatory arrangement. The servant was either to earn a high price or was to get nothing; or, alternatively, by promising high wages the master incurred a calculated risk to insure himself against the servant's possible defections. Although this insurance-view looks here most plausible, it requires emphatic explanation that it is a most artificial and untenable view if analyzed from a wider contractual standpoint. One reason is that every bargain, still executory and unperformed, involves certain risks by either party; and, especially, employment contracts involve risks of sickness, death, fidelity and other possibilities of non-completion. The protection against these risks lies precisely in the extent to which these bargains are given legal enforcement: in particular, in the remedies against the contract-breaker as qualified by the rules of impossibility of performance. Nor are these risks the same as in insurance contracts. To insure, for example, a vessel "lost or not lost" must involve a direct estimate of the probabilities of maritime disaster;[24] it can hardly be said that we pay higher or lower wages in proportional relation to the possibility of personal misfortune. In insurance, the disaster is the very (and the only) subject of the bargain; in an ordinary contract, the misfortune is an accidental contingency causing non-performance and therefore requiring legal adjustment. Furthermore, it is important to see where this insurance-view leads us. Its effect is to reduce a service-contract to a fortuitous transaction: what for one party is insurance against any kind of contingency becomes for the other a gamble. It is just because the reverse side of insurance constitutes a wager that the law created the doctrine of "insurable interest" to distinguish between legitimate and illegitimate gambles.[25] We can see that to say that a master can insure himself against a servant's non-completion means that a servant can wager his whole livelihood on all (complete payment) or on literally nothing. Not only would this be against the servant's usual intention, as obviously money to live on is the very purpose of his contract,[26] but, even if this were his deliberate wish, it would stand in complete violation of the policy against wagering contracts. It is clear, therefore, that employment-bargains cannot be given an aleatory interpretation; as we shall see later, however, a concealed

[24] Cf. *Sutherland* v. *Pratt* (1843), 11 M. & W. 312.

[25] Cf. MacGillivray on Insurance Law (4th ed., 1953) §§ 427 *et seq.*

[26] For a lucid exposition of a servant's contractual intention, see the judgment by Lord Stowell, *The Juliana* (1822), 2 Dods. 504, at pp. 507 ff.

element of such an interpretation lurks in the manner in which some conditions precedent have been treated in contracts.[27]

This takes us to the further two principles enunciated in *Cutter* v. *Powell*: one principle, namely, that full performance must constitute a condition precedent to the master's promised payment, so that if the condition is not complied with the master's duty to pay cannot possibly arise; and another principle, closely connected with the former, that where a servant fails to perform completely no compensation can be granted, not even for services actually rendered. Nor does this dual principle, which is the spectacular theme of *Cutter* v. *Powell*, depend upon the factual peculiarities in the decision.[28] Even if Cutter's pay-rate had been utterly fair and reasonable, the servant would still not have been entitled to any payment: not on the contract because of the premature termination, or to remuneration by way of *quantum meruit* because of the existence of the express agreement.[29] It is true that in American law, though not in English, these principles have been by-passed by granting a quasi-contractual recovery for work actually rendered.[30] But great theoretical difficulties still remain. What must now be shown is that the servant must in these cases obtain reward for his incomplete performance on the basis of, if not in accordance with, his contract.

Similarly in the American case of *Oliver* v. *McArthur* (1913), 158 App. Div. 241, it was said that a servant is "not a capitalist, and usually requires money from time to time".

[27] See especially text at footnotes 33-35 *post*.

[28] These principles, moreover, became soon entrenched in the relevant case-law. See *Hulle* v. *Heightman* (1802), 2 East 145; *Appleby* v. *Dods* (1807), 8 East 300; *Jesse* v. *Roy* (1834), 1 Cr.-M. & R. 316; *Rees* v. *Lines* (1837), 8 C. & P. 126. In *Stubbs* v. *Holywell Ry. Co.* (1867), L.R. 2 Ex. 311, at p. 314, Martin B. said that "the law is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, *not even if before his death he had done nine-tenths of it*" (my italics). For the later American cases, see 6 Williston, *op. cit.*, § 1973, n. 2.

[29] Not only were these principles to apply to employment, they were also extended to building: *Munro* v. *Butt* (1858), 8 E. & B. 738. Here, indeed, a consistent application of *Cutter* v. *Powell* would completely undermine the doctrine of substantial performance: see Greer L.J. in *Eshelby* v. *Federated European Bank, Ltd.*, [1923] 1 K.B. 423, at p. 431; and for a recent echo: *Hoenig* v. *Isaacs*, [1952] 2 All E.R. 179, at p. 181. See generally 5 Williston, *op. cit.*, § 1475. Obviously the foundations of this doctrine must remain insecure, so long as *Cutter* v. *Powell* is not eliminated. And, once eliminated, we shall find that we no longer need a special doctrine of substantial performance, but can grant appropriate compensation to a builder even without the further difficulty of deciding whether his work is "substantial" or not. For recovery in case of destroyed property, see footnote 41 *post*.

[30] Such has been the method in many American jurisdictions: see 5 Williston, *op. cit.*, §§ 1477-80; 6 Williston, *op. cit.*, §§ 1973-4; Restatements, Contracts, § 468, Restitution, § 108 (c).

III

Consider, to begin with, the relational frame-work of a simple employment contract. Where *S* (servant) agrees with *M* (master) to do paid work for *M*, we say that a bargain is established. Assuming that the agreement specifies the work and its length and remuneration, what are the precise legal features of this agreement? In the usual case, the contract merely means that *S* has a legal right against *M* for the agreed pay at the end of his complete labour. This, however, is the ideal, as it is (paradoxically) also the most primitive type of situation. For if this were the principal feature, the old action of debt would still be an adequate instrument for the enforcement of these contracts. But as many different events may occur until *S* can acquire a right of debt against *M*, these intermediate events need subsequent adjustment by further legal relations. It is important to see that it is precisely the creation of these additional legal relations for the intermediate events before completion which constitutes the sum and substance of the transition from a "primitive" law of debt to a "modern" law of contract. In other words, whereas in debt (and generally in "real" contracts), we are merely concerned with the tail-end of the parties' dealings, in modern contracts (and generally in "consensual" contracts) we are concerned with the whole course of the parties' relationship from its very beginning. This follows from the fact that we now enforce even executory transactions or purely "formed" agreements, as was not done in an earlier period when, broadly speaking, only contracts *re* received enforcement, that is, contracts completely executed by one party. Again, it is because we now have many additional rules for the parties' relationship from formation to fulfilment that we also have our modern and voluminous *law* of contract. For the purpose of the old action of debt no such voluminous law was necessary, since all that was required was a simple and single rule providing for the enforcement of the agreed return or restitution of the other party's performance already complete and given.[31] Whereas, in short, a debtor-creditor relation rests on the assumption that a creditor has completely performed his side of the agreement and only the debtor's promised payment remains outstanding, in our modern contractual relations this assumption is not present. The law must therefore

[31] This protection of debt and restitution is not only more primitive and simpler, it is also logically prior to the protection given to other contracts: Stoljar, The False Distinction Between Bilateral and Unilateral Contracts (1955), 64 Yale L.J. 515, at pp. 520-521.

intervene not merely to enforce a debt to a creditor, it must intervene to regulate and adjust the parties' duties one to the other when no debt has arisen or where, the bargain having collapsed, no specific debt can ever arise in the future.[32]

To go a step further, where, in our modern law, *M* and *S* make a contract by mutual promises (or by offer and acceptance) certain legal consequences immediately follow. *M* can no longer revoke his promise to employ *S*. Similarly, *S* cannot revoke his promise to work for *M*. Both these immunities from revocation are subject to certain limitations: so *M* has certain rights of dismissal and *S* need not "continue" work if *M* makes this impossible.[33] But, subject to these qualifications, the overriding point is that neither party can withdraw from, or repudiate, his respective promise. Other things being equal, neither party can therefore separately change the (mutually) promised course of conduct, since any such change would constitute a breach of his promise, a breach for which the remedy is damages. Indeed, all this is elementary, but there is here a difficulty now to be considered. Because of the parties' qualified duties, we usually describe their contractual relation through the language of (express or implied) conditions.[34] Thus we say that *S*'s promise to work is conditional upon *M*'s making it possible for him to do so; and we say that *M*'s promise to pay is conditional on *S*'s performance. Yet this last statement is most ambiguous. For it may mean, first, that *M*'s duty is conditional only in the sense (which, as will be argued, is its legitimate sense) that *M* need not pay until *after*, and not *before*, *S* has rendered some performance, so that if *S* refuses to work, insisting on advance payment, he (*S*) would break his promise. In this sense, the condition regulates the sequence of performance or exchange-order between the parties. In the second place, the condition may mean that *M*'s promise to pay cannot arise until *S* renders full performance, the corollary being that *S* can never become entitled to any payment unless he completes

[32] Too little attention has perhaps been paid to the different *types* of rules making up the law of contract, *e.g.* the difference between rules which enforce promises as such and those rules which have an adjusting function. To the first type belong the enforcement of debt as well as the law of formation, including problems of form, illegality, and the like. To the second type belong most of the remaining rules now forming the bulk of contract law.

[33] Elsewhere I have tried to show that these various relationships between master and servant might be grouped together under a broad head of mutual co-operation: Prevention and Co-operation in the Law of Contract (1953), 31 Can. Bar Rev. 231, at pp. 249-255.

[34] For a fuller analysis, see Stoljar, The Contractual Concept of Condition (1953), 69 L.Q. Rev. 487.

every tittle of his promise. In this sense, the condition does not specify the sequence of performance, but states the (complete) *amount* of work on which *M*'s promise to pay is made dependent.

The temptation has been to think that, because an employment contract is conditional in the first sense, it is equally conditional in the second: that because the servant must begin work before payment, he must do all the work before receiving any payment. And, once the matter is thought through, we can detect the reason behind this thinking. Its roots lie, clearly, in the confusion between "debt" and "bargain". While true that the master's promised debt is conditional upon complete performance, it is by no means true that this is the end of the matter. For to construe their relation as creative of a debt only means to transform the employment contract into a gamble: win, if complete performance; lose, if anything less than full completion. Thus the debt-approach directly leads to just that aleatory interpretation of the contract which has previously been shown to be both artificial and untenable.[35]

The same point can be made in another manner. Although, as we have seen, the parties cannot separately change their promised dealings, events may often happen which, like death or sickness, make *S*'s further performance manifestly impossible. Assuming that the contract contains no provisions for these events (for if it did the question could not in this form arise),[36] the express terms of the contract lose their immediate relevance: they simply do not refer to premature termination created by impossibility of performance. Thus, even if Powell's express promise to pay the stated wage was subject to Cutter's continuing till Liverpool, this did not mean that Powell had expressly refused to pay anything at all, if Cutter's failure should be due to physical incapacity. In other words, the collapse of the express terms did not automatically entail the further result that Cutter's service, up to his disability, was to go unpaid also. It follows that to say that the express terms alone must control the parties is a defective argument, for this argument would presently have to imply that the parties' relation is to be controlled by notions pertaining to debt, not by the rules available in the modern law of contract. Clearly, the major purpose of the modern rules is to intervene where agree-

[35] See also text at footnote 27 *ante*.

[36] Where a contract *expressly* provides for non-payment for past service in case of non-completion, the question to what extent such forfeiture-clauses should be allowed becomes openly one of public policy. See on this Ballantine, *loc. cit.*, Sel. Read., at pp. 952 ff.

ments have broken down for one reason or another; it is, indeed, the most significant function of these modern rules to provide for the adjustment of collapsed bargains. In our case, to give a simple example, the servant might have been held fully liable for breach of contract, since (whatever the cause) he failed to perform his express promise. But if the law would intervene to change a servant's liability in damages if sued for his inevitable stoppage of service,[37] so the law can change a master's express promise to pay in view of the unforeseen event of the servant's impossibility of performance. Yet while the law has been able to overcome the difficulty with regard to the servant's promise of service, it was strangely stumped by the nature of a master's promise of payment. The explanation for this, however, lies in the antinomy between "debt" and "contract" which *Cutter* v. *Powell* projected.

All this is reinforced by a further consideration. Although, as we have just seen, the parties' express terms become inapplicable on the happening of events not covered by the express agreement, the original bargain retains considerable relevance. The relevance is that the contract, contemplating work for payment, must be taken as evidence that *S* never intended his employment to be either gratuitous or to be a kind of gamble. Thus, in particular, the reason why Cutter made no provision for payment before death was that the contingency was unforeseen or unexpected, not because he intended to exert himself for Powell gratuitously or because he wagered his wages on survival. This may seem a trifling revelation, but its precise significance has remained unnoticed. For once we eliminate from this contract any gratuitous or aleatory interpretation, we are left with only one alternative interpretation, namely, that the servant bargained his work for money, and this in turn means that he bargained every unit of his work for corresponding payment. The fact, therefore, that Cutter was to be paid by lump sum at the end of the voyage, and not in divisible stages, can in this instance be regarded as nothing more than a convenient method of payment. It is true that Powell may have insisted on terminal payment to protect himself against Cutter's possible defection, yet this does not alter the present situation. For we are now dealing with remuneration for *past* service; we are not dealing with the "penalties" a master may impose for a servant's deliberate refusal to continue work in the future.[38]

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[37] Cf. *Poussard* v. *Spiers* (1876), 1 Q.B.D. 410; *Horlock* v. *Beal*, [1916] A.C. 486; Kessler and Sharp, *op. cit.*, pp. 424 *passim;* Fuller, Basic Contract Law (1947) p. 714.

[38] See footnote 36 *ante.*

Thus we reach the core of this contractual relation. From the central fact that the two parties made a bargain, the corollary is that the master can receive no benefit of the work except for payment. Moreover, this central bargain-relation also calls for its legal adjustment, an adjustment, that is, that makes for payment for past service even before the master becomes a debtor.[39] Once this is seen, another result is obvious. We no longer need to go to quasi-contract to give the servant appropriate reimbursement.[40] Indeed, resort to quasi-contract begs the entire question. Since the quasi-contractual remedy depends on unjust enrichment, the question whether the master is in fact unjustly enriched would again have to depend on whether there was a bargain or whether the transaction was a gift or a gamble. Quasi-contract thus directly enforces payment for a part-performed bargain, so that the here applicable quasi-contractual rule is essentially of the same legal type as those rules in contract which try to eke out broken-down contracts. In other words, to say that quasi-contract can do what is impossible in contract merely means to rubricate our rules and their policies into compartments between which the relevant difference is illusory. It means, moreover, to distribute conflicting results into (so-called) different legal categories without having resolved the content of the conflict. This may bridge certain remedial gaps in the law but it does not resolve its fundamental incoherence.[41] What therefore is needed is a consistent theory underlying the adjustment of bargains; and we have seen

[39] For the monetary calculation of what would be suitable remuneration see 5 Williston, *op. cit.*, §§ 1481-1843; Restatement, Contracts, § 468 (3) and comment *d*, illustr. 8.

[40] Yet it is often believed that only quasi-contract can save us: see McGowan, The Divisibility of Employment Contracts (1935), 21 Iowa L. Rev. 50, at pp. 54-5; G. L. Williams, *loc. cit.*, at pp. 393-4.

[41] Even from a purely remedial viewpoint quasi-contract is not always satisfactory, especially where the payor receives no actual benefit. One example is *Planché* v. *Coulburn* (1831), 5 C. & P. 58; 8 Bing. 14; 1 Moore & Scott 51, where an author's claim in *quantum meruit* was allowed, though his work was of no benefit to the publisher. See on this "difficult case", Cheshire and Fifoot, Law of Contract (3rd ed., 1952) p. 533. Another and even more telling example is the reward to a builder where his work is destroyed before completion. In *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, no reward was granted, the court applying *Cutter* v. *Powell*. But in many American jurisdictions a proportionate payment is allowed: see note, (1929), 14 Minn. L. Rev. 51, Sel. Readings 1038; 6 Williston, *op. cit.*, §§ 1975-77; and see on this also the conflicting views between Keener, Quasi-Contracts (1926) pp. 253-258, and Woodward, Quasi-Contracts (1913) pp. 182-184. There is, it is submitted, no basis for recovery except on the ground that the builder having bargained his work for money it is irrelevant whether the other derived a benefit therefrom: thus, even if recovery be granted, it must lie within the purview of contract. For the question whether the Law Reform (Frustrated Contracts) Act, 1943, now applies, see Cheshire and Fifoot, *op. cit.*, p. 473.

that such a theory is perfectly possible provided we remove the debt-fallacy in contract.[42]

IV

But the position here argued does not yet meet another challenge. This is the challenge presented by the famous common-law doctrine of the "entirety" of consideration, which was given renewed vitality by *Cutter* v. *Powell*.[43] Briefly, this doctrine is to the effect that, where a contract is "indivisible" or "entire", the payor's price or consideration cannot be apportioned.[44] So, where a contract names a specific sum for the completion of specific work, full or entire performance is inevitably a condition precedent to the payor's duty of payment, even if such a condition is not expressly stipulated by the parties.[45] This rule is, in one respect, another outcome of the action of debt, and especially of its limitation that a creditor could only recover the "sum certain" mentioned in the debtor's promise.[46] But, in a more important respect, the rule of "entirety" states a fundamental contractual idea, that is, the idea that a promisor must give what he promised and that he cannot, separately, alter the terms of his bargain. To give a few typical examples: a seller cannot supply less than the quantity of goods, or otherwise deliver goods different from those in the contract; a tailor cannot make half a suit and excuse himself from the

[42] In other systems, such as civil or continental law, where contract is entirely based upon a theory of "obligation" as between a debtor and a creditor, quasi-contract may be a legitimate auxiliary. But in Anglo-American law, contract developed differently, and its rules of adjustment not only include what might be called a quasi-contractual element, but sometimes (see examples in footnote 41 *ante*) go even beyond it. It would certainly have saved much confusion if, in our law, quasi-contract could have been confined to situations not involving bargains, *i.e.* to cases where the unjust enrichment is unconnected with the plaintiff's failure to complete his contract.

[43] See text at footnote 18 *ante*.

[44] First officially stated in Brooke's Abridgement (see footnote 8 *ante*), it had not one but three different applications: one now under discussion; a second and reverse application, for which see footnote 56 *post;* and a third best exemplified in *The Case of an Hostler* (1605), Yelv. 66. Here plaintiff sued to recover £20 for keeping a horse at sixpence for day and night. The point of the decision was that plaintiff was not forced to sue for every sixpence: "the promise is intire in itself, viz. to pay all that the horse shall take *secundum ratam* 6d. day and night".

[45] Ballantine, *loc. cit.*, Sel. Read. at p. 944.

[46] Cf. *Countess of Plymouth* v. *Throgmorton* (1687-8), 1 Salk. 65, 778; 3 Mod. 153, H. Bl. 249. A receiver of rents appointed for twelve months died after nine. In an action of debt, it was held that the receiver was entitled to nothing since "this was an entire agreement, and therefore the action was not well brought for three quarters salary" (3 Mod. at p. 154). But the King's Bench reversed (on error) the judgment of Common Pleas. See similarly *Needler* v. *Guest* (1647), Aleyn 9, Style 12.

trouble of completion;[47] nor can a doctor stop treatment in the middle and leave his patient to other mercies.[48] But what is the reason for saying that these contracts are entire and therefore require entire performance? The reason is, clearly, that anything less than a total product (or, at any rate, a substantially total product) would completely disappoint the promisee's bargain-expectations. Take again the illustration of the doctor. In one sense, the patient receives a "benefit" by getting some treatment, but, in another sense, he gets no benefit at all, for without complete treatment the patient may be in a much worse position than before the cure started. To this extent, then, the entirety-rule must, however expressed, form part of every contractual system, if that system is to protect bargains for total, or finished, or "entire" benefits, cures or products.[49]

But there are, in addition, other situations which differ significantly from those just considered. An agreement may be for producing rather than for a total product (as the usual employment contract); or an agreement, though it certainly contemplates a finished object, need not result in something useless to the promisee even if the contract remains uncompleted (as usually happens in building). It is, obviously, one thing to say that a contract is entire, in the sense that an artist cannot tender half a portrait, and it is another thing to say that a painter's job is equally entire if, having painted a whole house, he has omitted to "do" one ceiling; it is one thing to say that a tailor must tender an entire suit, and quite another that a labourer must work for (say) an entire week before he can recover anything for the satisfactory work he may have rendered.[50] Hence it is mere confusion to as-

[47] Cf. *Warren* v. *Perkins* (*The Taylor's Case*) (1621), Palmer 223.

[48] Cp. *Bates* v. *Hudson* (1825), 6 Dow. & Ry. 3. Cp. also *Sinclair* v. *Bowles* (1829), 9 B. & C. 92, the stock illustration of an "entire" contract. Plaintiff was to repair some chandeliers, though he broke one of the arms and several spangles which were previously undamaged. Suing for payment for his work done in other respects, he was non-suited on the brief ground that the contract was entire. Its more rational ground was that the defendant was in effect in no better position than before the "repair", even though the plaintiff had expended some labour.

[49] Only this meaning of "entirety" may perhaps justify the following dramatic words: "To permit a man to recover for part performance of an entire contract, or to permit him to recover on his agreement where he has failed to perform, would tend to demoralize the whole country", *Martin* v. *Schoenberger*, 8 Watts & S. (Pa.) 367, at p. 368.

[50] Usually no difficulty will arise as to what is, or is not, to be regarded as a finished product. The reason is that most things have a conventional economic identity or a "complete" price, so that the incompleteness of a thing can be quantified or measured. This is not true of situations where a total product or service depends on standards which are not usual or conventional. To what extent, for example, must a funeral

sume that because a contract is "entire" in the one case (the artist or the tailor) it also needs to be entire, with identical legal consequences, in the case of the house-painter and the worker. The confusion is, in other words, between economic uselessness and beneficial performance, between an "entirety" of product and an incompleteness still leaving the other party with a definite advantage, an advantage because it satisfies a part, even if a small part, of his bargain. The mistake is, in short, the failure to distinguish between "unit" and "volume". Unfortunately, neither English nor American courts seem to have perceived this distinction. They transferred the entirety-rule from situations where it rationally applied to situations where the criterion of entirety had no equal application: and they held that, because we stipulate for specific or lump sums with (say) our tailor, every other contractual reference to a lump sum had to have the same "entire" construction. It was, apparently, not seen that the price payable to a tailor was specific precisely because his product or unit was entire, whereas a servant's wage covered many units of production. To make his wage payable by a lump sum (weekly, monthly or annual) was merely a convenient expression for a number of tasks to be paid for in volume.[51] In an attempt to avoid the results of the entirety-rule, the courts soon began to fasten on some contractual expression in order to construe the contract as "divisible", for if divisible the servant could be paid for his severable units of service.[52] Yet these efforts to classify contracts as either entire or divisible were never consistently successful;[53] moreover, they only

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be "complete" to be of "real" benefit. The question was discussed in the "unpleasant case" of *Vigers* v. *Cook*, [1919] 2 K.B. 475, at pp. 478-479.

[51] In some cases, however, an employee's payment may be calculated on an aggregate rather than a more "unitary" basis, to take account of seasonal differences, *e.g.* periods of slackness in farm-work and so on. Here the courts have refused to divide the aggregate sum on the ground that the value of the services can vary from month to month: see *Davis* v. *Maxwell* (1847), 53 Mass. 286; *Diefenback* v. *Starck* (1883), 56 Wisc. 462, 14 N.W. 621. This may have justified a reduction in the proportionate wages, not their complete denial. Indeed, contracts have been held to be entire even where agricultural employees were to earn not a specific salary, but a share of the profits: see *Carney* v. *Havens* (1879), 23 Kan. 82; *Von Keyne* v. *Tompkins* (1903), 29 Minn. 77. In these cases there could not be any difficulty about the value of the seasonal work: its worth was shown by the profits earned up to the time of the breach of contract.

[52] See generally 3 Williston, *op. cit.*, §§ 860A-862; 3 Corbin on Contracts, §§ 690-692; Restatement, Contracts, § 266, comment (e); note (1928), 37 Yale L.J. 634; and see *McGrath* v. *Cannon* (1893), 55 Minn. 457, 56 N.W. 97.

[53] Compare, for example, the conflicting results in the "threshing contracts": *McMillan* v. *Malloy* (1880), 10 Nebr. 228, 4 N.W. 1004; *Johnson* v. *Fehsefeldt* (1908), 106 Minn. 202, 118 N.W. 797, 20 L.R.A. (N.S.) 1069; *Lynn* v. *Seby* (1915), 29 N. Dak. 420, 151 N.W. 31. As regards or-

described results rather than reasons, "the thing to be explained rather than the explanation".[54]

To this analytical criticism a historical one deserves to be added. The rule that an entire consideration cannot be apportioned seems to have been of far less firm or uniform application than it became after the decision in *Cutter* v. *Powell*.[55] There is little doubt that the rule did not apply to seamen,[56] and it is equally questionable whether a sick or dead servant would have been denied past wages though failing to give "entire" service.[57] The relation between a master and his servant was then admittedly paternalistic, but it was a paternalism tempered by certain ideas of welfare.[58] Yet, whatever its earlier antecedents, a new develop-

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dinary employment-contracts, it at least is certain that such words as "at the rate of" make a contract divisible. This has been established since *Hartley* v. *Harman* (1840), 11 Ad. & E. 798. Cf. *Taylor* v. *Laird* (1856), 1 H. & N. 266; *Stubbs* v. *Holywell Ry. Co.* (1867), L.R. 2 Ex. 311. The relevant cases are collected in 3 Williston, *op. cit.*, § 862. Also, contracts of long duration are increasingly construed as divisible: cf. *Stone* v. *Bancroft* (1902), 139 Cal. 78; McGowan, *loc. cit.*, pp. 64ff.

[54] Ballantine, *loc. cit.*, Sel Read. at p. 951. Moreover, where "entirety" erred on the side of severity, a contract held divisible could prove overgenerous. As McGowan has explained, *loc. cit.*, at p. 57: "Once divisibility is established, no heed need be taken of the distinctions between the causes of termination; at least for the purpose of giving the employee a right to recover compensation earned and due. . . . It cuts through the complexities in which the courts became entangled in their attempts to distinguish the deserving from the undeserving employee, in the cases where recovery was sought in *quantum meruit*."

[55] See the confused common-law position, footnotes 8 and 13 *ante*.

[56] The strongest example is *Chandler* v. *Grieves* (1792), 2 H. Bl. 606n, where a seaman was put ashore because of a broken leg, and was awarded wages for the whole voyage, it being conceded that he was at any rate entitled for the time he served. As regards this, Grose J. (in *Cutter* v. *Powell*, 6 T.R. 320, at p. 325) could not understand the "precise grounds upon which the Court proceeded". It must be added that in *Chandler* v. *Grieves* the court was completely aware of the entirety-rule, but applied it in a reverse manner, by holding that, since the consideration could not be apportioned, the seaman had to get the entire sum having earned part of it. This later led to the doctrine of constructive service in *Gandell* v. *Pontigny* (1816), 4 Camp. 375, as well as to the rule that a servant can claim wages for an intermittent period of sickness: *Cuckson* v. *Stones* (1859), 1 El. & El. 248. And see generally Schwarzer, Wages During Temporary Impossibility (1952), 5 Stanford L. Rev. 30.

[57] The evidence for this is however circumstantial. Since there must have been many cases of a servant's death or sickness, at least in the course of the customary annual hiring, their comparative absence from the earlier law reports partly indicates that their position was not unsatisfactory. Similarly, Lord Mansfield said: "If the servant is taken ill, by the visitation of God, it is a condition incident to humanity, and is implied in all contracts": *R.* v. *Christchurch* (1760), Burr. Sess. Cas. 494. Even *Plymouth* v. *Throgmorton*, footnote 46 *ante*, can perhaps be dismissed as a special case where the action was in debt, not in assumpsit, and not brought by a "common" servant but by a professional agent.

[58] See, for example, Dalton's Justices (1742 ed.) pp. 141 *passim*, and the discussion in *Wennall* v. *Adney* (1802), 5 Bos. & P. 247. And see on this, Comyn, The Law of Contracts (2nd ed., 1824) p. 531.

ment began in 1776 with *Boone* v. *Eyre*.[59] Stripped of technical detail, the practical effect of this decision was to make possible payment to a party having partly, though not completely, performed a contract, especially where that performance was conferred upon, and was materially beneficial to, the payor.[60] This new principle proved most fruitful in many situations, but it had practically no influence on employment contracts; and it had no influence because its applicability was barred by the entirety-rule adopted against Cutter. Thus, throughout the nineteenth century, one principle relating to part-performance and the other relating to entire consideration developed separately, each creating its own cluster of case-law. Indeed, so separate was their respective progress that the considerable policy-conflict between them remained largely hidden.[61]

V

Consider, finally and very briefly, the difficulty where a servant wilfully refuses to complete performance. This difficulty did not occur in *Cutter* v. *Powell*, but it is one intimately connected with the general problem. In fact, most of the troublesome cases in this area are cases of deliberate breach rather than of impossibility of performance.[62] And, obviously, if payment was denied to

[59] (1779), H. Bl. 273n. See further 3 Williston, *op. cit.*, § 818; 3 Corbin on Contracts, §§ 659-660.

[60] *Ellen* v. *Topp* (1851), 6 Ex. 424; 3 Corbin, *op. cit.*, § 660.

[61] Of this *Bettini* v. *Gye* (1876), 1 Q.B.D. 183, is an excellent illustration: the principle, deriving from *Boone* v. *Eyre*, footnote 59 *ante*, was applied to prevent a master from repudiating his contract with a tenor who arrived late for rehearsals. Thus a contract was adjusted to protect even future and unrendered service, *i.e.*, to protect the tenor's interest in his future earnings. For full discussion of this aspect of *Cutter* v. *Powell*, see Untimely Performance in the Law of Contract (1955), 71 L.Q. Rev. 527, at pp. 545-547.

[62] This raises, of course, what in the United States has been called the problem of *Britton* v. *Turner* (1834), 6 N.H. 481. See 5 Williston, *op. cit.*, §§ 1473, 1477; Keener, *op. cit.*, p. 225; Woodward, *op. cit.*, p. 166; and the interesting debate between Professors Williston and Laube (1935), 83 U. of Pa. L. Rev. 825; (1935), 84 U. of Pa. L. Rev. 65, at p. 68. Compare also notes (1927), 36 Yale L.J. 580, and (1929), 38 Yale L.J. 389, with note (1924), 24 Col. L. Rev. 88 5. In English law, it has been thought that no such rule for recovery existed: see, *e.g.*, *Lilley* v. *Elwin* (1848), 11 Q.B. 742; *Goodman* v. *Pocock* (1850), 15 Q.B. 576; *Boston Deep Sea Fishing etc. Co.* v. *Ansell* (1888), 39 Ch.D. 339; G. L. Williams, *loc. cit.*, p. 377; Salmond and Williams on Contract (2nd ed., 1945) pp. 567-568. But the old English decision in *Guy* v. *Nichols* (1694), Comb. 265, much precedes *Britton* v. *Turner*. *Guy* v. *Nichols*, however, remained unnoticed. Moreover, American law (even where *Britton* v. *Turner* was not followed) seems to have gone much farther than English law in remunerating a "defaulting" servant, if only by limiting the "default" and by extending the action for unjustifiable dismissal: compare, for example, *Byrd* v. *Boyd* (1827), 4 McCord 246 (where a servant was discharged for using abusive language

Cutter, it had also to be denied to an intentional defaulter. Yet, once it can be shown that nothing stands in the way of granting Cutter appropriate remuneration, the point now to be made is that the same thing should apply even to a defaulting servant. How, it will be asked, does this take into account the additional fact of the servant's wilful refusal to continue? Is the servant to be allowed to cash in on his breach of contract? These questions are quite easily answered. In the first place, the whole substance of the previous argument was that, since these are bargains of work for money, they call for the reward of given performance. This emphasis on things past also leaves the deliberate defaulter unaffected; for his breach of contract relates to performance in the future; his breach does not relate to things actually done and completed. And since, in the second place, this contractual breach is covered by liability in damages, any real injury to the master is adequately protected. Moreover, the master here appears to be even better protected than where the servant's breach is excused by impossibility of performance. The simple reason is that he now has a remedy by way of counterclaim or set-off which, as against a sick or dead servant, he has not. In this way we arrive at the easiest, as well as the most appropriate, solution of a much-debated problem, a problem moreover that was believed to be basically insoluble because legal principles were said to be pulling in opposite directions.[63] This theoretical conflict was, however, unreal; it was merely the result of contractual thinking that was tethered to the debt-approach and the antinomy it created.

This antinomy raises a final problem. Probably the major reason why it has been thought that a person must render complete or entire service before payment has been the misleading analogy drawn with the contract of sale. In sale, a buyer's promise to pay is, typically, conditional upon the vendor's full performance; and the vendor's failure to give all (or substantially all) he promised excuses the buyer's promise to make payment.[64] Here one promise is therefore exactly matched against the other; one party's agreed debt is co-extensive with the other's complete-as-agreed performance. Nevertheless, this analogy has led to great confusion between a contract of sale and that of service, or between (more broadly) "doing-contracts", on the one hand, and "giving-

to defendant's daughter, and the court allowed him the value of his past performance as he had been dismissed), with *Spain* v. *Arnott* (1817), 2 Stark. 256. For a similar problem relating to wilful breach in building contracts, see 3 Corbin, *op. cit.*, § 707.

[63] Cf. 5 Williston, *op. cit.*, § 1473. [64] Cf. text at footnote 34 *ante*.

contracts", on the other. For where a seller fails to *give* the exact (or substantially the exact) thing he promised, the buyer can either reject the different or incomplete article, or he can accept it in which case the old bargain is superseded by a new one. The buyer has therefore a choice between acceptance and rejection, and his choice determines whether he has to pay or has immunity from payment. But it is a choice because the buyer cannot both keep the article and not pay for its value.[65] The important point, however, is that the seller's faulty performance gives the buyer a new opportunity to decide upon his future course of action; he can now decide whether to seek elsewhere what he really wanted or take what the seller tendered. In a doing-contract, however, the promisor has already *done* what he promised, be this complete or incomplete performance. The work thus done cannot be rejected in the same way as chattels are always open to rejection; and to the extent that the work is done the master has already accepted what was performed for him in pursuance of the bargain.[66] "Work" and "things", or "doing" and "giving", thus not only involve different operations, they also represent different economic facts. But this difference, if a truism, has become overshadowed in the law of contract. For this there can be but one explanation. The explanation is that when lawyers began to use the general and more abstract language of the "performance" of "promises" the concrete realities behind performance by giving and performance in doing were lost sight of. This happened, in particular, when the more abstract language also became anchored in the law of pleading. A plaintiff had, in his declaration, to aver the "performance" of his contract. Yet, however general this averment, one thing he could never do: he could not aver "performance" where this remained incomplete because of premature termination.[67] This rule of pleading gained strong support from the decision in *Cutter* v. *Powell;* and so adjective as well as substantive law lent credence to the debt-fallacy in contract.

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[65] Even this seemingly obvious principle had first to be established by a number of decisions: *Waddington* v. *Oliver* (1805), 2 B. & P. N.R. 61; *Shipton* v. *Casson* (1826), 5 B. & C. 378; *Oxendale* v. *Wetherell* (1829), 9 B. & C. 386; *Clarke* v. *Hunt* (1849), 14 L.T.O.S. 131; and see also *U.S.* v. *Molloy* (1906), 144 Fed. 321, 11 L.R.A. (N.S.) 487. But this "obvious" proposition has been denied by an even longer series of decisions in New York and a few other jurisdictions: see 2 Williston on Sales (rev. ed., 1948) § 460.

[66] For a similar point, see Mulder, The Defaulting Employee in North Carolina (1937), 14 N. C. L. Rev. 255, at p. 259.

[67] See on all this Bullen and Leake, Precedents of Pleadings (4th ed., 1882) pp. 158, 351-352.

But why, to return to my initial point,[68] has the "great case" lost today its immediate or practical importance? How could this decline have at all been possible, seeing the deep significance of its inherent problems? There are several factors. Some effects of *Cutter* v. *Powell* have been expressly modified by legislation.[69] Again, through collective bargaining we now have detailed labour agreements with specific provisions concerning sickness and other defections.[70] Furthermore, most modern service-bargains are for short (usually weekly) periods which create fewer financial risks and less urgent dispute: short-term contracts need only a little compromise or good-will for their voluntary adjustment, they have a self-regulating quality that can dispense with law courts. Yet, clearly, neither these legislative and social changes nor the coatings of quasi-contract,[71] or even of substantial performance,[72] go to the crux of *Cutter* v. *Powell.* However much these emendations may have helped remedially, their effect on basic contractual principles has been peripheral and theoretically superficial. This paper has tried to remove the blemish; and it has tried to clarify our contractual foundations by removing an antinomy for too long undisposed of.

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[68] See text at footnote 2 *ante.*

[69] The statutory modifications fall, broadly, into three groups. (i) The Apportionment Act, 1870, ss. 2 and 5, make "periodical payments" (*e.g.* annuities) and "salaries" apportionable, *i.e.* as accruing from day to day. "Salaries" now seems to include "wages": see *Moriarty* v. *Regent's Garage Ltd.*, [1921] 1 K.B. 423, reversed on another ground, [1921] 2 K.B. 766; *Re William Porter & Co. Ltd.*, [1937] All E.R. 361, at p. 363; Batt, Law of Master and Servants (3rd ed., 1939) pp. 193-195. Although the Apportionment Act has thus been extended, it seems perhaps also clear that it was not directly intended to abrogate *Cutter* v. *Powell.* This is somewhat different from the Merchant Shipping Act, 1894, ss. 155-160, which provides for payment for seamen except for refusal to work (s. 159) or wilful default (s. 160). See Machlachlan, Merchant Shipping (7th ed., 1932) p. 178. (ii) In the United States, the so-called "wage-statutes" regulate an employee's (especially a defaulting employee's) recovery for services rendered: see note (1930), 43 Harv. L. Rev. 647; McGowan, *loc. cit.*, pp. 69ff. (iii) A further English modification (though perhaps more doubtful) is non-statutory, based on "custom", and applies to domestic servants only. See *George* v. *Davies*, [1911] 2 K.B. 445; Eversley, Domestic Relations (6th ed., 1951) pp. 645, 658.

[70] See Mathews *et al.*, Labor Relations and the Law (1953) pp. 518 *passim;* and generally Shulman, Reason, Contract, and Law in Labor Relations (1955), 68 Harv. L. Rev. 999.

[71] For quasi-contract, see text at foonote 40 *ante.*

[72] For the doctrine of substantial performance, see footnote 29 *ante.*