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*Cassell v. State of Texas*¹⁹ decided that a limitation of Negroes on the grand jury in approximate proportion to the number of Negroes eligible for grand jury service in the county constituted discrimination. The court held that the limitation was a violation of the defendant's constitutional rights to be indicted by a grand jury, in the selection of which there was neither inclusion nor exclusion because of race.

It would seem that if the defendant in the present case had established such an exclusion he would have been entitled to quash the jury panel. In view of the *Cassell* case state courts must of necessity both instruct and make sure that there has been no discrimination or systematic exclusion of Negroes from juries. The *Cassell* case may be distinguished from the principal case in that *Cassell* adequately proved a discrimination which violated his constitutional rights; whereas in the present case defendant failed to establish any discrimination.

Horace J. Blanchard.

CONTRACTS

CONDITIONS PRECEDENT—

SUFFICIENCY OF A SUBSTANTIAL EQUIVALENT

Arkansas. In a case before the Arkansas Supreme Court¹ the plaintiff, owner of a cafe and rooming house business in a building owned by third persons, contracted with the defendant for the sale of the business and fixtures. The purchase price was to be \$3,500 "if at any time within 60 days from this date buyer is able to obtain a written lease contract from the owners of the building," or \$1,000 "in event the buyer is not able to secure the kind and character of lease above described." It was stated in the contract instrument that the business would be worth the larger

¹⁹ 339 U. S. 282 (1950).

¹ *Harris v. Moorad*, ———Ark.———, 217 S. W. 2d 618 (1949).

sum if the buyer was able to continue operation at that place and worth the smaller sum "if the buyer is not able to procure the lease." The owner of the building (it having changed hands shortly after the making of the contract) "expressed the desire to sell rather than lease" and sold to the defendant within the sixty-day period. The court agreed with the plaintiff's contention that he was entitled to the larger sum.

The case is to be distinguished from those in which the condition precedent is a return performance on the part of the promisee—such cases, for example, as construction contracts, where recovery on the contract is often allowed, with appropriate abatement, for a "substantial performance" of the condition.² Assuming that the defendant discharged his implied covenant to make a bona fide attempt to secure a lease,³ the occurrence of the condition in the principal case was dependent upon a third person.

In this respect there is a similarity to the "architect's certificate" cases, where recovery of the contract price has been allowed although an express condition—the production of an architect's certificate—has failed, without fault on the part of the contractor.⁴ But the value of decisions so holding as authority for the result in the instant case is questionable, when it is considered that the architect's certificate is not, in itself, of any value to the promisor, whereas the occurrence of the condition in the principal case was expected appreciably to enhance the value of defendant's purchase.

A like objection may be made to the possible suggestion that a

² 17 C.J.S., *Contracts*, § 508. Aside from the fact that the condition in these cases, unlike that in the principal case, is a performance to be rendered by the promisee, for the failure of which he may be liable in damages, it should be noted that this type of condition is often constructive, rather than express, under the rules applicable to dependent promises. RESTATEMENT, CONTRACTS (1932) § 269. But courts may fail to make the distinction and apply the "substantial performance" doctrine, developed in cases of dependent promises, to cases where the promisor's duty is expressly made conditional upon a prior performance by the promisee. See 3 WILLISTON, CONTRACTS (Rev. Ed. 1936) 2257.

³ Similar covenants were held to be implied, in analogous circumstances, in *Bewick v. Mecham*, 26 Cal. 2d. 92, 156 P. 2d. 757 (1945); *Boies & Barrett v. Vincent*, 24 Iowa 387 (1868); and *White v. Snell*, 9 Pick. (Mass.) 16 (1829).

⁴ RESTATEMENT, CONTRACTS (1932) § 303.

precedent may be found in suits on insurance policies where a condition precedent to the insurer's liability is the furnishing of a doctor's certificate as proof of illness, injury, or death;⁵ obtaining a certificate of a magistrate or notary as proof of property damage;⁶ or appraisal of the loss by persons selected by the parties.⁷ In these cases, as in the principal case, the liability of the promisor is conditioned upon an act of a third person. In all of these types of cases decisions may be found which hold that the condition is excused where the person upon whom its satisfaction depends fails or refuses to act, without fault of the promisee,⁸ while others require an exact fulfilment of the condition. But, while they may be of considerable importance to the insurer as safeguards against the possibility of unjust claims,⁹ the conditions, unlike that in the main case, form no part of the expected benefit or gain which induces the promisor to agree to part with something of value.

In those jurisdictions and those cases where the common-law requirement of strict satisfaction of conditions precedent has been relaxed,¹⁰ the courts have been motivated by a reluctance to per-

⁵ 7 COUCH, CYCLOPEDIA OF INSURANCE LAW (1930) 5444, states that a condition requiring a physician's certificate is excused where the physician unjustly refuses to give a certificate. *Accord*: O'Neill v. Mass. Ben. Ass'n, 63 Hun. 292, 18 N.Y.S. 22 (1892); see Propst v. Capital Mut. Ass'n, 233 Mo. App. 612, 124 S. W. 2d. 515, 524 (1939). *Contra*: Audette v. L'Union St. Joseph, 178 Mass. 133, 59 N. E. 668 (1901).

⁶ 5 APPLEMAN, INSURANCE (1941) §§ 3544 *et seq.*, indicates a division of authorities on the question of strict or liberal enforcement of conditions requiring certificates of magistrates or notaries and states that such provisions are no longer in common use.

⁷ The problem of the effect of failure of conditions calling for appraisal of property damage is annotated in 94 A.L.R. 499, 500 (1935), where it is stated that there is a "decided conflict of authority" on the question of their strict or liberal enforcement.

⁸ It should be pointed out here, however, that the Arkansas courts hold such proof-of-loss provisions to be conditions subsequent. *Aetna Life Ins. Co. v. Langston*, 189 Ark. 1067, 76 S. W. 2d. 50 (1934).

⁹ See WILLISTON, *op. cit. supra* note 2, § 795.

¹⁰ 17 C.J.S., *loc. cit. supra* note 2; 30 *id.*, *Equity*, § 56b. By "relaxed" it is not meant that the courts necessarily say in so many words that strict compliance with express conditions will not be insisted upon. They may agree with Professor Corbin that "it is never correct to say that substantial performance of a condition is sufficient," Corbin, *Conditions in the Law of Contract*, 28 YALE L. J. 739, 759 (1919), but, by a process of interpretation, they may reach the conclusion that the condition is not what it appears to be from the words used, but is really some broader category of cir-

mit or enforce a forfeiture on the part of the plaintiff promisee.¹¹ This brings us to the crux of the problem in the principal case. Had the decision been against the plaintiff, what, if anything, would he have forfeited? He would have received \$1,000. Was the property with which he parted worth \$1,000 or \$3,500?

The difference of \$2,500 represented the value which the parties attached to the privilege of continuing operation at the same location on terms which they might reasonably have expected to be obtainable under a lease. Did the plaintiff lose such a privilege? Assuming that the new owner would have been no more willing to lease to the plaintiff than to the defendant, he did not. When his present lease expired, as it apparently was about to do, he would have been out in the street—with fixtures valued by the parties at \$1,000.

The court says that the defendant secured the same advantages that he had expected to receive for the larger price, the monthly payments under the terms of the purchase of the building being less than its rental value. In this connection, it should be remembered that he made a cash payment of \$3,000, became obligated to pay interest on the balance, and assumed such "burdens of ownership" as depreciation, taxes, and insurance. Conceding, however, the soundness of the court's reasoning to that extent, it would seem that the emphasis should be rather upon what the promisee stood to lose than upon what the promisor might gain. It may be that judicial disregard of express conditions is justified where it prevents a serious forfeiture, but it is at least questionable that any forfeiture was prevented in the case here under consideration. A refusal to give effect to such provisions when the only

circumstances which includes that which actually occurred. *Cf.* 3 Williston, *op. cit.* § 806. Such was the method of the court in the main case. "This", to quote Professor Corbin, "is what the irreverent might describe as making a contract for the parties." Corbin, *loc. cit. supra*.

¹¹ "The obvious reason for enforcing the defendant's promise (when that is done) in spite of the plaintiff's failure to comply with an express condition is to avoid the forfeiture of plaintiff's labor and materials which would be caused by a strict enforcement of the conditions." 3 Williston, *op. cit. supra* note 2, at 2258. See 19 Am. Jur., *Equity*, § 88; RESTATEMENT, CONTRACTS (1932) §§ 302, 374(2).

result of enforcing them would be to allow the promisor to profit—without any corresponding loss to the promisee—can less easily be defended.

EXCUSE OF CONDITIONS—BURDEN OF PROOF OF
ABILITY TO PERFORM ABSENT THE EXCUSE

Texas. Where a condition precedent to or concurrent with plaintiff's right to an immediate performance is asserted to have been excused because of a prior repudiation or a voluntary self-disablement by the defendant in a contract action, and on trial an issue is made as to whether the condition would have happened or would have been performed had the repudiation or disablement not occurred, where is the burden of proof on the latter issue? Two recent decisions of the Texas Supreme Court appear to be in conflict on this question.¹²

Corzelius v. Oliver was a suit to enforce an agreement by the defendant to reconvey to the plaintiff certain real property upon the latter's paying a debt to the defendant within one year. The repudiation consisted in defendant's declaration, before the expiration of the stipulated time, that she would not effect such a reconveyance if plaintiff proposed to mortgage the property in question in order to raise the amount of the debt. The court held that the plaintiff must prove that he would have been ready and able to pay within the time allotted, but for the defendant's repudiation.

In *Pickett v. Bishop* a real estate agent sought to recover damages for defendant seller's breach of an exclusive agency contract by selling the property through other agents during the term of the contract. One of the questions, on appeal, was the propriety of the trial court's ruling sustaining an exception to the plaintiff's petition for failure to allege that plaintiff could and would have sold the

¹² *Corzelius v. Oliver*, ———Tex.———, 220 S. W. 2d. 632 (1949); and *Pickett v. Bishop*, ———Tex.———, 223 S. W. 2d. 222 (1949).

property but for defendant's breach. In holding that the exception should have been overruled, the supreme court stated:

"If the plaintiff could not or would not have performed the contract, regardless of its breach by defendants, it was incumbent upon them to make the proof."¹³

The preponderance of authority in the United States seems to support the decision in the *Corzelius* case that the burden of proof is on the plaintiff,¹⁴ although the only other Texas Supreme Court case found which expressly decides the issue holds that the defendant must bear the burden.¹⁵

Some of the cases in accord with *Corzelius v. Oliver* turn upon a question of damages, a matter which was not involved in that case but which was the object of the suit in *Pickett v. Bishop*. These cases take the position that, unless the plaintiff proves that he would have performed the condition, he could not have been damaged by the repudiation.¹⁶

The view that in order to show damage, at least in the brokers' cases, the plaintiff must prove that he could and would have performed the condition—i.e., sold the property—but for the defendant's breach is stated in the encyclopedias without any suggestion that there are holdings to the contrary.¹⁷ The case of *Park v.*

¹³ 223 S. W. 2d. at 224, quoting *Park v. Swartz*, 110 Tex. 564, 222 S. W. 156 (1920).

¹⁴ *Petersen v. Wellsville City*, 14 F. 2d. 38 (C.C.A. 8th, 1926); *McLane v. Maurer*, 66 S. W. 693, 1108 (Tex. Civ. App. 1902), *2nd motion for rehearing denied*; *Brown v. Binz*, 50 S. W. 483 (Tex. Civ. App. 1899); *Stringfellow v. Powers*, 23 S. W. 313 (Tex. Civ. App. 1893); *Cone v. Pendersen*, 131 Conn. 374, 40 A. 2d. 274 (1944); *Bigler v. Morgan*, 77 N. Y. 312 (1879); 3 WILLISTON, CONTRACTS (Rev. Ed. 1936) §§ 698A, 882; 10 TEX. JUR. 456, 457, *Contracts*, § 265; see *Oltarsh v. Bratter*, 48 F. 2d. 567, 568 (C.C.A. 2nd, 1931); *Windsor Inv. Corp. v. T. J. McLaughlin's Sons*, 130 Misc. 730, 225 N.Y.S. 7, 10 (1927).

¹⁵ *Park v. Swartz*, 110 Tex. 564, 222 S. W. 156 (1920). *Cf.* *Empire Gas & Fuel Co. v. Pendar*, 244 S. W. 184 (Tex. Civ. App. 1922), *writ of error dismissed* (where the bringing about of the condition depended upon action by the defendant rather than by the plaintiff); *Wolf v. Willitts*, 35 Ill. 88 (1864); see *Hitchcock v. Supreme Tent of Knights of Maccabees of the World*, 100 Mich. 40, 58 N. W. 640, 641 (1894).

¹⁶ *Brown v. Binz* and *McLane v. Maurer*, both cited *supra* note 14.

¹⁷ 8 Am. Jur. 1110, *Brokers*, § 209; 12 C.J.S., *Brokers*, § 17. See RESTATEMENT, AGENCY (1933) § 455, Comments c and e; 10 Tex. Jur. 456, 457, *Contracts*, § 265.

Swartz,¹⁸ however, reached a contrary result. The court apparently thought of the question of possible inability of the plaintiff to perform, had the breach not occurred, as matter *in mitigation* of damages, and thus for the defendant to show.¹⁹

Another apparent basis for the decision in *Pickett v. Bishop* and the *Park* case cited in its support, is that a presumption should be indulged in favor of the plaintiff that he would have performed but for the defendant's breach. Thus, the statement is made in the *Pickett* case that, "proof of the allegations contained in the petition (*i.e.*, proof of the contract and of the wrongful sale by the defendant) would *prima facie* make a case for the plaintiff."²⁰ And Chief Justice Conner, in his dissent from the holding of the court of civil appeals in the *Park* case, quotes an opinion of the Supreme Court of Michigan in a similar case:

"There is no presumption, legal or otherwise, that the plaintiff could not have completed the work. . . . It is a fair presumption that he would have succeeded."²¹

The entertaining of such a presumption may have justification in both plausibility and necessity in those cases where the parties anticipated that the plaintiff would sell *all* of the property in question within the time allowed, and where the defendant's breach consists in selling all of the property himself or by another agent before the expiration of that time.²² In such cases the fact that the

¹⁸ 110 Tex. 564, 222 S. W. 156 (1920).

¹⁹ The influence of this theory on the decision is discernible in the dissent by Chief Judge Conner from the opinion by the court of civil appeals, *Swartz v. Park*, 159 S. W. 338 (1913), which dissent was expressly approved by the supreme court in reversing the civil appeals decision.

²⁰ 223 S. W. 2d. at 224.

²¹ *Swartz v. Park*, 159 S. W. 338, 341 (1913), quoting *Hitchcock v. Supreme Tent of Knights of Maccabees of the World*, 100 Mich. 40, 58 N. W. 640 (1894). *Cf.* Professor Williston's statement that "any conditions which the facts show might have been performed by him (the plaintiff promisee), it will be assumed would have been performed if the conduct of the promisor was such as to preclude the possibility of performance." 3 WILLISTON, *op. cit. supra* note 14, at 1954, 1955.

²² *E. g.*, *Pickett v. Bishop*, —Tex.—, 223 S. W. 2d. 222 (1949); *Park v. Swartz*, 110 Tex. 564, 222 S. W. 156 (1920); *Stringfellow v. Powers*, 23 S. W. 313 (Tex. Civ. App. 1893).

property has in fact been sold within the prescribed period may justify an inference that the plaintiff might have sold it if he had not been deprived of the opportunity.

On the other hand, argument for the presumption is weaker, if not entirely lacking, in cases where the contract contemplated that the plaintiff should sell in a specified period as much as possible of a large amount of property, and where the breach is a wrongful revocation of the agency without an actual accomplishment by the defendant of that which was supposed to be done by the plaintiff.²³

It would seem, however, that it need not necessarily follow in any case that because a presumption is entertained that the plaintiff would have performed, he is relieved of the burden of proving such fact by a preponderance of evidence. In many cases and, according to some authorities,²⁴ in all cases, the presumption only relieves the plaintiff of the necessity of producing evidence of the presumed fact in the absence of evidence in rebuttal by the defendant.

As was previously indicated, the matter of damages, an important factor in the decisions of some of the courts, was not involved in the case of *Corzelius v. Oliver*. The plaintiff in that case sought to compel performance by the defendant. In such a case, therefore, other reasons must be sought for a guide in determining the incidence of the burden of proof on the issue of prospective occurrence or non-occurrence of the condition.

For this purpose it may be profitable to ascertain the exact manner in which, as a matter of pleading, the issue is raised. It is said that the plaintiff must plead and prove all of the ultimate facts upon which he relies for recovery,²⁵ while it is incumbent upon the defendant to plead and prove any affirmative defenses which he

²³ *E. g.*, *McLane v. Maurer*, 66 S. W. 693, 1108 (Tex. Civ. App. 1902), *2nd motion for rehearing denied*.

²⁴ THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 313, 319; 9 WIGMORE, *EVIDENCE* (3rd. ed. 1940) § 2491.

²⁵ *Pacific Fire Ins. Co. v. Smith*, 219 S. W. 2d. 710 (Tex. Civ. App. 1949); *Boaz v. Harris*, 30 S. W. 2d. 810 (Tex. Civ. App. 1930).

may have or any available matter in avoidance.²⁶ One of the ultimate facts which the plaintiff must allege is that all conditions precedent have occurred or have been performed or that they have been excused.²⁷ The defendant desires to meet this allegation with the assertion and, if necessary, with evidence that the condition would not have occurred in any event. The question is whether such an assertion amounts merely to a contradiction of the allegation of excuse, so that defendant's evidence may come in under a general or specific denial or whether the assertion is, in effect, an admission of the excuse, and an attempt to avoid its consequences. Professor Williston's statement that "if the promisee could not or would not have performed the condition, or it would not have happened, whatever had been the promisor's conduct, the condition is not excused," seems to support the alternative first stated.²⁸

If, then, the repudiation does not excuse the condition where it would not have occurred in any event, defendant, who relies upon such prospective non-occurrence need only traverse plaintiff's allegation of excuse in order to join issue on the question and put upon the plaintiff the burden of proving that the condition would have occurred and is therefore excused. It may be observed that the plaintiff here would have, not only the affirmative of the "issue," but also the literal affirmative of the proposition in dispute.

But, under modern methods of procedure, the burden of proof is not always apportioned according to such a purely mechanical process. As a matter of fairness, which has been said to be the ultimate basis of all the so-called tests for allocating the burden of proof,²⁹ a primary consideration would seem to be the accessibility

²⁶ *Willis v. Smith*, 120 S. W. 2d. 899 (Tex. Civ. App. 1938), *writ of error dismissed*; Tex. Rules Civ. Proc., Rule 94.

²⁷ 3 WILLISTON, *op. cit. supra* note 14, at 2325; 17 C.J.S. 1168, *Contracts*, § 537. Strictly speaking, the plaintiff should not allege simply that the conditions have been excused—a conclusion of law; but should state facts from which the court may draw such a conclusion.

²⁸ 3 WILLISTON, *op. cit. supra* note 14, at 1954. *Cf.* RESTATEMENT, CONTRACTS (1932) § 306, Comment a.

²⁹ 9 WIGMORE, *op. cit. supra* note 24, § 2486; see McCORMICK AND RAY, TEXAS LAW OF EVIDENCE (1937) 32; *Rustad v. Great Northern Ry.*, 122 Minn. 453, 142 N. W. 727, 728 (1913).

of evidence or facility of proof. On this theory it probably would be easier for the plaintiff to prove that a condition would have happened than for the defendant to prove that it would not have happened—at least where, as in both the *Corzelius* and *Pickett* cases, the condition was to be performed by the plaintiff.

But the courts which hold that defendant should make the proof³⁰ seem to be influenced by a feeling that the fairness of the situation requires that the burden be placed upon the defendant, who has committed a wrongful act, rather than upon the innocent plaintiff. It is clear that in many cases the burden cannot be assigned on this basis, since whether or not the defendant is in the wrong is the very question at issue. However, in such cases as those under consideration, since the issue of whether the condition would have happened in the absence of the repudiation will not even be a proper matter for the jury to consider unless they are satisfied that there *was* a repudiation, it will already have been found, before the question of burden of proof on the former issue becomes important, that the defendant has in fact repudiated his obligation. And such a repudiation may be considered a present breach of implied promises to refrain from destroying the plaintiff's "sense of security and expectation of performance" and to abstain from impairing the "market value of his contract right."³¹ Although the plaintiff might not have been able to perform the condition, he should not have been denied his contractually guaranteed opportunity to make the attempt.

It may be suggested that the decisions in the two principal cases are not, after all, irreconcilable. There are elements peculiar to each which tend to justify the results. The plaintiff in the *Corzelius* case sought an "extraordinary remedy." Courts may require more of a plaintiff seeking equitable relief than is exacted of the petitioner at law. And performance of the condition in the *Cor-*

³⁰ Cases cited *supra* note 15.

³¹ Corbin, *Cases on Contracts* (3rd ed. 1947) 715. *Accord*: *Roehm v. Horst*, 178 U. S. 1 (1900); *Frost v. Knight*, L. R. 7 Exch. 111 (1872); see *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U. S. 581, 591 (1916).