Substantial Performance of Contracts in New York

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SUBSTANTIAL PERFORMANCE OF CONTRACTS
IN NEW YORK

Recovery for incomplete or defective work upon or materials attached to the property of another, with a special consideration of building and analogous contracts, and a comparison with other jurisdictions

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A perplexing problem which has always faced the courts and which under modern conditions has become increasingly difficult for them to solve is when to permit recovery for substantial performance of a contract. As a practical proposition, in the construction of large buildings, in the performance of the increasingly intricate contracts which the increasing complexities of trade, industry, finance and building necessitate, deviations from the letter of the contract necessarily occur. Sometimes these deviations are intentional, often accidental, occasionally quite unavoidable; or they may occur through the negligence of the contractor. Indeed, complete performance, or even "substantial performance," as a lawyer of an older day would have understood it, is, when one takes into account the intricacies of the modern physical world of mechanics and the modern, somewhat metaphysical world of commerce and finance, occasionally impractical, if not impossible.

The courts of New York have more and more come to recognize the conditions making exact or nearly exact performance impractical or impossible, and they have therefore tended to abandon strict legalistic logic and the traditional formulae of the law. They have been struggling toward a solution of the problem of how to achieve an equitable result in each individual case without depriving the law of that measure of certainty which law demands. Nevertheless, it must be recognized that the efforts of the courts to achieve individual justice in the individual case have tended to make the law a little more uncertain than it should be, to make the parties to a contract a little too uncertain of their respective legal rights, of the nature and extent of the performance which would be required of each.

Quite frequently the appellate courts, prompted by a laudable desire to shape the law to the ends and needs of the individual case, have based their decisions upon various and divers reasons of no general applicability or fundamental soundness. A somewhat too wide discretion is now left to the trier of the facts. And since different triers

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of the facts have different views, under the present state of the law, the same set of facts might lead one court to permit recovery and another to deny it.

The cases dealing with substantial performance of contracts are prolific in every jurisdiction. In New York they are, as is to be expected, more numerous than elsewhere. There is no better way than a laboratory study of the New York cases to arrive at a comprehension of the really difficult problems which the courts are trying to solve in these cases. Such a study, once the problems which they present are clearly understood, should help to bring about some fairly workable solution.

A recent and important effort of the New York Court of Appeals to meet in a specific case the problems here discussed resulted in a court divided four to three. The majority opinion in that case was written by Judge, now Chief Judge, Cardozo and an interesting minority opinion was written by Judge McLaughlin. It is worthwhile considering this case at some length. The plaintiff contracted to build a country residence for the defendant. The contract price was upwards of $77,000, all of which except $3,483.46 the defendant paid. The action was against the defendant to recover this unpaid amount. The specifications for the plumbing work provided that "all wrought iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." The contract was completed in June 1914, and the defendant at that time began to occupy the house. But subsequently, and as late as March 1915, the defendant first discovered that some of the pipe was not manufactured in Reading, but elsewhere. Instead of Reading pipe the plaintiff had used Cohoes pipe. The evidence in the case established to the satisfaction of the court that the substitution of Cohoes pipe for Reading pipe was "neither fraudulent nor willful." It was established that there was no distinction between Reading and Cohoes pipe, that although the two pipings were of different manufacture and name, there were no other differences between them. For the purposes of the appeal it was assumed that the two brands of pipe "were the same in quality, in appearance, in market value and in cost . . . that they were, indeed, the same thing, though manufactured in another place." To remove the Cohoes pipe and install the Reading pipe in its place would necessitate demolishing substantial parts of the building, since the pipes were for the most part encased in the walls. Under these circumstances four

1Jacob & Youngs v. Kent, 230 N. Y. 239, 129 N. E. 889 (1921). This is a leading case.
of the Judges of the Court of Appeals were of the opinion that the
plaintiff should recover, and the court permitted recovery as for a
substantial performance; three of the Judges however were of the
opinion that the plaintiff should not be permitted to recover. Judge
Cardozo wrote an illuminating majority opinion. Nevertheless, this
opinion helped only a little to clarify and make more certain the law,
a fact which Judge Cardozo himself recognized. He did, however,
grapple bravely with the problem and he did make a gallant attempt
to solve the difficulty. He compared the cases where the courts will
rule that a contract had been substantially performed and the cases
where they will rule that it had not been substantially performed, to
the cases involving the distinction between dependent and inde-
pendent promises, between promises and conditions. He said:

"Considerations partly of justice and partly of presumable
intention are to tell us whether this or that promise shall be
placed in one class or in another. The simple and the uniform
will call for different remedies from the multifarious and the
intricate. The margin of departure within the range of normal
expectation upon a sale of common chattels will vary from the
margin to be expected upon a contract for the construction of a
mansion or a 'skyscraper'."^2

Judge Cardozo took occasion to point out:

"Those who think more of symmetry and logic in the de-
velopment of legal rules than of practical adaptation to the
attainment of a just result will be troubled by a classification
where the lines of division are so wavering and blurred."^3

There are undoubtedly good reasons for being so troubled, and one
may well be troubled for reasons other than a philosophic love of
symmetry and logic. The practical man has good reason for wanting
to know how carefully he must guard against a failure to completely
perform his contract. The man who contracts that work be done for
him may well wonder to what extent he is entitled to performance.
Judge Cardozo's conclusion is:

"Where the line is to be drawn between the important and
the trivial cannot be settled by a formula."^4

This conclusion is distinctly not comforting. It is, after all, the
province of the law to lay down formulae, and to compel people to
live by them. The formulae should be such as to bring about justice
in the greatest number of cases. No legal formula yet devised has

^2Ibid. 242, 129 N. E. at 890.
^3Ibid. 242, 129 N. E. at 891.
^4Ibid.
been conducive of a just result in every single case to which it was applied. And yet experience has shown that this failure is in itself no reason for discarding the formula. The rules of law governing the nisi prius judge must not be too elastic.

With the result in the case under discussion we cannot quarrel. Assuming that the pipe used was exactly the same as that contracted for, the difference being only one of name, and that the substitution was unintentional, there was clearly a substantial, indeed to all intents and purposes a complete, exact, performance. The pipe was concealed in the walls, where its name would not be visible to any one. So that even the vanity of the owner of the building could in no way have been affected by the substitution, assuming that his vanity would have been more gratified by Reading than by Cohoes pipe. There was no injury whatsoever to the owner of the building, not even an injury to his feelings. The law of contracts assumes that all the contracting parties are reasonable men, and whether they are or not, deals with them as if they were. A reasonable man would necessarily regard such performance as that presented by the case under discussion as not only substantial, but exact, and one hundred per cent complete.

Nevertheless, and curious as it may seem, the decision represents a radical departure from the law as it had been laid down in the previous cases and evoked a vigorous dissenting opinion by Judge McLaughlin, concurred in by two such eminently learned and practical judges as Judges Pound and Andrews. The gist of the thought of the dissenting opinion is contained in the following words, words which are the echo of a long line of decisions in New York and of innumerable decisions in all the American states, as well as in England:

"Defendant contracted for pipe made by the Reading Manufacturing Company. What his reason was for requiring this kind of pipe is of no importance. He wanted that and was entitled to it. It may have been a mere whim on his part, but even so, he had a right to this kind of pipe, regardless of whether some other kind, according to the opinion of the contractor or experts, would have been 'just as good, better, or done just as well.' He agreed to pay only upon condition that the pipe installed were made by that company and he ought not to be compelled to pay unless that condition be performed."

Although, as Judge Cardozo says in his opinion in Jacob & Youngs v. Kent, ibid. 243, 129 N. E. at 891, citing in support thereof the English case of Dakin & Co. v. Lee, [1916] 1 K. B. 566: "The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it."

*Supra* note 1, at 247, 129 N. E. at 890.
Nevertheless, it would seem to us that there is no reason why the trial court should not have been permitted to pass upon the question of fact whether the pipe supplied was precisely the same as that contracted for, excepting only the difference of name. The minority opinion would have deprived the trial court of such power.

The consideration which we have here stressed is not that the trial court should not be permitted to pass upon what is a fair question of fact, but rather that the trial court should not be permitted to lay down the law, to make an individual rule of law for the individual case, and to decide what is rather a question of law, namely, whether the facts as found constitute substantial performance. The trial court may well decide, as in the case under discussion, whether or not there has been all the performance that a reasonable man may reasonably require, but the question as to what degree of performance warrants a recovery is rather a question of law and should, if possible, be brought within fixed principles. There is undoubtedly an inherent difficulty to be found in nearly all of the cases under discussion, and not clearly perceived by the courts, in distinguishing between the questions of fact in the case and the questions of law in the case.

It is to be noted that the plaintiff in the case under discussion sought to recover only $3,483.46 and that prior to the institution by him of the action he had been paid the principal part of the contract price of upwards of $77,000. The defendant did not counterclaim for the portion of the contract price which he had paid, and if he had counterclaimed, even the three minority judges would not have permitted him to recover the paid portion of the contract price. In all the numerous cases on the subject, in New York and other jurisdictions, such a recovery has not been permitted.7

Of course it would be manifestly shocking to permit the defendant to recover from the plaintiff about $73,500 merely because the plaintiff had substituted a different piping. Indeed, if the extent of non-performance had been very much greater, the defendant could still

7See Walker v. Millard, 29 N. Y. 375 (1864), in which case the Court said: "The action on the contract having failed, the defendant's counterclaim growing out of the contract and being in amount considerably less, necessarily failed also." The same view is expressed in Woodward v. Fuller, 80 N. Y. 312 (1880) and in other cases also. This view would seem to be illogical. If the plaintiff did not complete his contract, the Court might logically have taken the view that there was a failure of consideration for the monies paid by the defendant under the contract and there is no good legalistic reason why the Court should not have permitted the defendant who counterclaims therefor to recover the monies paid by him, the consideration for which has failed. The reasons for not permitting such a recovery are not legalistic but practical ones, and are referred to in this article.
not have counterclaimed, except to the extent of actual damages susceptible of physical proof. And yet, logically, there is no reason why,—if A fails to perform his contract and B, after paying the contract price, discovers such failure to perform,—B should not be permitted to recover upon a counterclaim the amount paid as well as to resist recovery for the amount unpaid. Why this result will not follow is logically inexplicable. But, although logical, such a result would be so grossly unjust, so grotesque, that the courts would not tolerate it.

To revert to the subject under discussion, it would seem that where the courts have allowed recovery as for a substantial performance, they have done so on the theory that complete performance is not of the essence of the contract. Of course, it is possible in every case to make complete performance essential by an express statement to that effect. As for instance, in the case last discussed, the contract might have provided that the installation of Reading pipe should be of the essence thereof, in which case the installation of Reading pipe would be a condition of recovery by the contractor.

In cases where the courts have considered the allowance of recovery for substantial performance, they have concerned themselves with the question of whether the change was of such a character as to frustrate the purpose of the contract. Such a change would ordinarily not be tolerated. The courts, however, are growing more reluctant to defeat recovery where there has been a substitution or a failure to perform of such a character as not to frustrate the purpose of the contract, particularly when such substitution or failure was not in bad faith.

Of course, as is pointed out in many cases and also in the case last discussed, a substitution may well have a different significance in the field of art than in that of utility. Nevertheless, even in the field of utility it is hard to draw the line between what may be an unreasonable caprice and between what one may reasonably desire to have for reasons good and sufficient to himself, even if not clearly perceptible to other people. There may be no known scientific reason why one brand of radiator in a building should not render the same service as another brand and the two brands may exactly correspond with each other in quality and appearance. Nevertheless, should not the owner of a building, having chosen a particular brand, perhaps because he has, accidentally or otherwise, had more fortunate experiences with the one brand than with the other, be entitled to receive the brand chosen by him? But what if, at the time the building is ready for the installation of radiators the brand chosen by...
the owner is, for some reason, no longer procurable by the contractor? Or suppose it be not the radiators, readily removable and replaceable, but some integral part of the building itself, like the material of which the floors or walls are made, that differs from the contract specifications? Or again, suppose it be the stairs, replaceable but not as readily replaceable, as the radiators? Where is the line to be drawn? Again, shall the courts take into account the differences and similarities between various standard makes, or other differences and similarities familiar to experts.

The problem in a few of its many manifestations has been stated at such pains because it is thought that it has seldom been clearly apprehended. The simpler conditions of a simpler age did not give rise to the need for such apprehension. To say, as was said by Judge Cardozo in *Jacob & Youngs v. Kent*,\(^7\) that the question is one of degree, is to relieve the appellate courts of a burden which they should properly assume and leaves too much to the discretion of the trial courts.

The uncertain state in which *Jacob & Youngs v. Kent*, left the law was manifested to some extent in a decision of the Court of Appeals rendered more than two years later in the case of *Cawley v. Weiner*.\(^8\) That case involved a contract for the construction of a dwelling and garage for the price of $8,500. The plaintiff claimed not complete performance, but substantial performance. It developed that while the specifications called for a cesspool to be constructed of No. 2 brick, the contractor had supplied cement bricks which he considered "just as good." He further omitted to cover the cesspool with a bricked dome, and to provide a three-inch cement slab. It appeared also that the drainage pipe was so constructed that when the cesspool filled up to the height of the drainage pipe, the drainage backed into the house. The dormer roof over the sewing room and toilet was six inches higher at its outer edge than where it joined the main roof of the building, being six inches out of level; also, the sun parlor leaked around the windows. Altogether the defendants claimed seventeen respects in which performance was defective, of differing degrees of importance. The specific defects hereinbefore pointed out were, however, not merely claimed by the defendant, but found as facts by the trial judge who, however, allowed the plaintiff the full amount of the contract price without any deduction for the defects in question.\(^9\)

It would seem that these defects found by the trial judge were sufficient in extent and importance to defeat any recovery on the

\(^7\) *Supra* note 1.

\(^8\) 236 N. Y. 357, 140 N. E. 724 (1923) decided by a unanimous Court of Appeals.
contract. It would seem that the plaintiff should not have been permitted as a matter of law to recover on the contract, in view of such defects. There would seem to be no question that the defects were sufficiently substantial to frustrate in a very measurable degree the purpose of the contract. Certainly the defects were of such a nature as to interfere with the comfortable enjoyment of the house which the defendant had had constructed for use as a dwelling. There was no question that these defects substantially interfered with the comfort, and possibly with the health of the occupants of the house. There was no question that the aesthetic results which the defendant had in mind, when contracting for the construction of the house, were far from completely attained. Whether or not, and at what cost, the house could be made to conform to the exact requirements of the contract, is not the sole consideration under the principles which will later in this article be suggested as the proper rule for recovery in such cases as these, a rule which though not exactly new, suggests itself as both logical, and just in its application to individual cases. Certain it is, however, that the plaintiff did not perform the contract in the case under discussion, either completely or substantially, and whether or not he should have been allowed any recovery on any other theory, he should not have been allowed to recover upon the contract. Nevertheless, the Court of Appeals, in sending the case back for a new trial, did not come to this conclusion or to any clear, satisfying conclusion. After speaking of the items of defective performance, the court said:

“If these were proper items for which allowance could be made, the plaintiff should have proved what the reasonable cost would be to remedy the condition.”

Inferentially, the court in the case under discussion would allow recovery as for substantial performance, less the cost of making good the failure to perform. The point we make is that no recovery should have been allowed upon the contract.

The court did not consider the question of good or bad faith of the contractor, perhaps because its judgment did not finally dispose of the case, or perhaps because good or bad faith was immaterial in such a case as this, where the defects in performance were of such a material nature. The unfortunate owner of the house in question must indeed have been a philosopher if, surrounded by the discomforts resulting from the defects in construction, he could, nevertheless, have derived comfort from the good faith of the contractor.

Some question was raised in this case as to whether or not there had been an acceptance of the contract and a waiver of the defects be reason of the fact that the defendants had occupied and used the house. The court pointed out that this was not the law, and that neither acceptance nor estoppel could be spelled out from the occupancy of the house by the defendants. Very properly the court said:

"This is not a case of the sale of goods.... The house was built upon the defendants' property. They could move into it, live in it and in this sense accept it without waiving any defects in construction."^{10}

And here we place a finger upon the very heart of the problem. It is true that the contractor had failed to perform his contract in important respects. Perhaps this failure was willful. Perhaps it was unintentional. If unintentional it must have been, in the case under discussion, due not to any forces or circumstances beyond the contractor's control, but rather to the ineptitude or carelessness of the contractor. On the other hand, it is equally true that the owner did not receive the full benefits that he had contracted for, and that the contract had not been performed, had not even been substantially performed. Nevertheless, the owner has received some, and perhaps very great, benefits, and he cannot be deprived of these benefits because the house contracted for has been built, even if imperfectly built, on his land, and has become his property irrevocably and forever.

Under those circumstances, it seems to us that the court, facing the facts squarely, should have held squarely that the contract was not performed and should have permitted no recovery whatsoever on the contract. It might, however, have permitted a recovery on a quasi-contractual theory. It should have followed a line of reasoning similar to that developed in the cases where, although no contract of any kind was entered into, A builds a house on B's land. In those cases if A builds the house innocently and in good faith, he will be allowed to recover from B to the extent by which B was enriched,—particularly, though some cases have not deemed this necessary, when some responsibility attaches to B, as when he stood silently by and let A build,—even though such a recovery results in improving B out of his own property, as would be the case where B has not the money to pay for the improvement and must give up the property itself in satisfaction of the judgment which A has recovered.^{11} If,

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^{10}Ibid. 361, 140 N. E. at 725.

^{11}This is not the rule at common law. Perley v. City of Cambridge, 220 Mass. 307, 108 N.E. 494 (1915). It is, however, the rule which equity has established. Olin v. Reinecke, 336 Ill. 530, 168 N. E. 676 (1929); McKelway v. Armour, 10 N. J.
on the other hand, A, not in good faith, or sometimes merely acting negligently, improved B's property, A will be allowed no recovery.\textsuperscript{12} So, in the case under discussion, if the contractor's failure to perform was not willful or malicious, he should be allowed to recover, on a quasi-contractual basis, the reasonable value of the labor and materials he has furnished, limited only by the rule that such recovery should in no event exceed the proportionate part of the contract price represented by such labor and materials, less what it would cost to make the house conform with reasonable exactness to the requirements of the contract, further allowing the owner such other equitable offsets as he may have. The nature of these equitable offsets is hereinafter more fully discussed. It may even be that the result in dollars and cents, if such a theory were adopted, would be, in the ease under discussion, the same as under the somewhat less precisely defined theory of the court, but it would at least establish a rule which would be a clearer guide for the trial courts in future cases. If the default of the contractor in the case under discussion was willful or perhaps malicious,—and indeed it seems that willful defaults of such a substantial nature as in the case under discussion might well be malicious in the sense in which the term "malice" is often used in law,—then it is doubtful whether the contractor should be permitted any recovery. Upon reasoning analogous with that contained in the line of cases in which A improves B's property without his consent, it might well be that no recovery should be permitted. Of course, the recovery, under the rule here laid down, would never exceed the contract price. It would, in fact, always be less than what the owner had contracted to pay. Under such circumstances, it might not be so unjust to permit a recovery on a quasi-contractual theory. This is a matter upon which there might be a difference of opinion, but whichever opinion the courts were to adhere to, a certain fixed rule would nevertheless arise, to be followed in future cases.

If the owner wishes to avail himself of a non-performance by the contractor he should, unless the contract be one where time is of the

\begin{thebibliography}{99}
\bibitem{Eq. 115 (1854); Lyons Nat. Bank v. Shuler, 199 N. Y. 405, 92 N. E. 800 (1910);} Rabb v. Fleniken, 32 S. C. 189, 10 S. E. 943 (1890); Pearl Township v. Thorp, 17 S. D. 288, 96 N. W. 99 (1903); 2 Pomeroy, Equity Jurisprudence (4th ed. 1918) § 867, p. 1782.
\bibitem{Camden, Atlantic & Ventnor Land Co. v. Mason, 91 N. J. Eq. 25, 108 Atl. 778 (1919) (the mistake in this case was due to negligence and the owner had no knowledge that buildings were being erected on his land); Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389 (1882); Woodhull v. Rosenthal, 61 N. Y. 382 (1875); Bohn v. Hatch, 133 N. Y. 64, 30 N. E. 659 (1892); Warner v. Warner, 199 App. Div. 159, 191 N. Y. Supp. 612 (2d Dept. 1920).}
\end{thebibliography}
essence, give the contractor the opportunity to replace such portions of his work as are defective or complete such portions thereof as are incomplete. If the contractor wishes to recover upon the contract he will do so. If the contractor fails to do so within a reasonable time, he should be relegated to an action upon a *quantum meruit* basis. He will recover what his work is reasonably worth to the owner, an amount in no event to be greater than the proportionate contract price of the work done, less the cost of conforming the work done to the requirements of the contract. Against this amount, recoverable upon a *quantum meruit* basis, the owner will be further permitted to offset or counterclaim any other losses which he may have sustained by reason of the defective performance or the non-performance of the contract. These losses must be such as flow fairly and proximately from the defective performance or the non-performance. For example, where a house was improperly constructed as in *Cawley v. Weiner* the owner might properly be unwilling to occupy the house unless it was properly altered. In such case, if the owner was put to an additional expense in residing with his family elsewhere during the course of such alteration, this should be a loss which may be properly offset against the value of the work done by the contractor. Or, if the improper installation of fixtures in a place of business requires the suspension of business for a few days or any other period of time, the owner should be permitted to offset his loss of profits during such suspension. Or, where an electrical display sign is contracted for, to be attached to the realty, and fails to operate as required by the contract, the loss of advertising value during the period required to make the sign operate as specified in the contract, unless too remote, should be a proper offset by the owner against the contractor.

These are simple instances of the operation of the rule that we have in mind, a rule which seems to be not too difficult to apply, and alike applicable to all situations which might arise. Since a quasi-contractual recovery is based upon equitable principles, the rules for measuring the amount of the recovery are flexible, and the court may properly take into account equitable offsets and other equitable considerations for which there is no room in an action on the contract itself.

In a contract, where the subject matter of the contract is susceptible of complete rejection, complete performance is required by the law. There is no reason why other than complete performance should be required in a contract where the subject matter thereof is inseparable from the property of the owner, so that he has no choice to
accept or reject. To avoid injustice to the contractor, however, recovery should be permitted upon a quasi-contractual basis to the extent and under the limitations hereinbefore outlined, except, perhaps, only in cases where the non-performance or defective performance is so grossly willful as to be malicious.

The concept of substantial performance which the New York courts have adopted to prevent injustice is inexact and should be discarded. A contract should be regarded as performed only when the performance thereof is of such a nature that any reasonable man would regard it as complete performance.

It is true that the New York courts have said that:

“Substantial performance is performance, the deviations permitted being minor, unimportant, inadvertent and unintentional.”

Nevertheless, in order to avoid injustice, and because of a reluctance to adhere to a rule of recovery upon a quasi-contractual theory where the contract has not been completely performed, the New York courts have shown a tendency to play a curious game of percentages.

Thus, in the case of a contract to build a building at a cost of approximately $15,000, it was held that since the work as done was worth one-seventh less than it would have been had it been done in compliance with the contract, there was no substantial performance and there could be no recovery. Again, in the case of a building contract, where the contract price was $3,100, a failure to perform “ten percent of the contract price” defeated a claim of substantial performance. And, in a contract to build a sewer and to make the water connections, the contract price was $2,850 and the extent of non-performance was $180. The Court of Appeals held that the extent of non-performance was sufficient to defeat recovery, finding also abandonment of performance by the contractor. In the case of another building contract, the court pointed out that about fifteen percent of the value of the work was unperformed and that neither


\[\text{Mitchell v. Williams, 80 App. Div. 527, 80 N. Y. Supp. 864 (1st Dept. 1903).}


\[\text{Hollister v. Mott, 132 N. Y. 18, 29 N. E. 1103 (1892).}
complete nor substantial performance could be predicated upon so
large a percentage of non-performance.\textsuperscript{17} A failure to perform four-
teen percent of a painting, papering and decorating contract pre-
cluded recovery thereon.\textsuperscript{18} Where only a little over one percent of
the contract was uncompleted, a bare majority of the Court of Ap-
peals held that the contract had been substantially performed, even
though the contract called for an architect’s certificate of completion
and the architect had refused it by reason of the contractor’s failure
to complete.\textsuperscript{19} A non-performance to the extent of $1,200 under a
contract to build a barn for $6,900 was too large a percentage of
non-performance for recovery.\textsuperscript{20}

A leading case is \textit{Spence v. Ham}.\textsuperscript{21} In this case the court said that
one who relies upon substantial, as contrasted with complete per-
formance, of a contract, must show that he performed, and that
through inadvertence he omitted to do some insubstantial things,
and he must further show that the things omitted can be supplied
for a comparatively small sum, in which event he can recover the
contract price after deducting that sum. The court squarely places
upon the contractor the burden of showing the cost of supplying the
omissions or remedying the defects. However, the court was of the
opinion, upon the facts of the particular case, that the defects were
of too substantial a nature to warrant any recovery upon the theory
of substantial performance. Such defects seemingly consisted of a
failure on the part of the building contractor to have girders of a
certain length and to properly place the girders and to place a wooden
partition upon a brick wall in the basement, as required by his con-
tact. These defects were, in the opinion of the court, structural de-
fects affecting the solidity of the building and tending to defeat the
object of the contract.

Nevertheless, we think unsound the rule laid down in the case that:

"The one who fails in fully performing and who invokes the
document of substantial performance, must furnish the evi-
dence to measure the compensation for the defects, as that is the
substitute for his failure to do as he agreed."\textsuperscript{22}

This rule has led to the difficulties we have pointed out, diffi-
culties which can be obviated by recognizing no basis for recovery on

779, 153 N. Y. Supp. 204 (1st Dept. 1915).
\textsuperscript{19}Crouch v. Gutman, 134 N. Y. 45, 31 N. E. 271 (1892).
\textsuperscript{20}Smith v. Ruggiero, 52 App. Div. 382, 65 N. Y. Supp. 89 (1st Dept. 1900),
aff’d, 173 N. Y. 614, 66 N. E. 1116 (1903).
\textsuperscript{21}Supra note 13.
\textsuperscript{22}Ibid. 227, 57 N. E. 414.
the contract where it has not been completely performed, but permitting a quasi-contractual recovery under the limitations hereinbefore described.\textsuperscript{23}

Of course, \textit{Spence v. Ham} speaks of "insubstantial omissions". In many of the cases where the New York courts have allowed recovery for substantial performance the omissions have been something more than insubstantial.

Professor Williston has pointed out:

"The classical English doctrine, it is true, has denied recovery altogether where there has been a material breach even though it was due to negligence rather than to wilfulness;\textsuperscript{24} and a few decisions in the United States follow this rule, where the builder has not substantially performed."\textsuperscript{25}

Professor Williston says in a footnote:

"It is interesting to observe that New York which follows the strictest theory here is the typically lenient State in allowing recovery on the contract."\textsuperscript{26}

Professor Williston refers in the footnote just quoted to the New York cases of \textit{Smith v. Brady}\textsuperscript{27} and \textit{Steel Storage & Elevator Construction Co. v. F. W. Stock}.\textsuperscript{28}

In the first of these cases the court pointed out that the owner had a right to prescribe the manner in which he wanted his house con-


\textsuperscript{28}In the sentence following the one here quoted Professor Williston points out that the English courts have themselves abandoned this doctrine.

\textsuperscript{23}\textsc{Williston, Contracts} (1920) 2627.

\textsuperscript{24}\textit{Ibid.} n. 36.

\textsuperscript{25}17 N. Y. 173 (1858).

\textsuperscript{26}225 N. Y. 173, 121 N. E. 786 (1919).
structed and that it was not for the contractor "to say that another mode of construction would do just as well." This is an early case and the rule of strict performance was laid down. Judge Comstock in a concurring opinion argued that there was no obligation on the part of the owner to pay even on a quantum meruit theory; that when a thing of value has been affixed to the land the owner is not in a position to elect to accept it or not; that if it be not what he contracted for he should not be required to pay for it; and that only if performance is complete should the owner be under any obligation to pay. Judge Comstock remarked:

"If the owner prefers a plain and simple Doric column, and has so provided in the agreement, the contractor has no right to put in its place the more costly and elegant Corinthian."\textsuperscript{29}

It is true that the New York courts have more or less frowned upon attempts of contractors to supply something different, but, in the opinion of the contractor, "just as good."\textsuperscript{30}

In Steel Storage & Elevator Construction Co. v. F. W. Stock, the plaintiff had undertaken to build an elevator, the capacity of which was to be four thousand bushels an hour. The elevator, as constructed, however, did not have a larger capacity than three hundred three hundred bushels an hour. Under such circumstances, the court held that there could be no recovery because there had been no substantial performance, either on a contractual or a quasi-contractual theory. A reading of the record of the case indicates that the grain elevator built on the defendant's land was used by the defendant. Yet he was permitted to use it without any compensation to the contractor who built it because it differed in an important detail from the specifications. The court felt that in the case of a grain elevator "rapid performance was a material element."

A possible quasi-contractual basis of recovery was disposed of by the Court in the following language:

"Plaintiff was entitled to recover the fair value of its work and materials only as it built them into the elevator plant which it agreed to construct."\textsuperscript{31}

Of course, if the elevator plant constructed was so different from the one contracted for as to be of no practical value to the owner, then no recovery should have been permitted. It may well be that the owner would have been better off if he had torn down the elevator plant constructed and built a new one of a larger capacity. If this

\textsuperscript{29}Supra note 27, at 186.

\textsuperscript{30}Schultze v. Goodstein, 180 N. Y. 248, 73 N. E. 21 (1905).

\textsuperscript{31}Supra note 28, at 176, 121 N. E. at 787.
were so, then, of course, no recovery could properly have been permitted, even on a quasi-contractual basis. The elevator plant could in such event have been of no material benefit to the owner. Also, under the quasi-contractual principles suggested in this article, there probably would have been no recovery in this case. The owner would have been entitled to offset against the reasonable value of the elevator plant as constructed the difference between the value of the plant as constructed and the value of the plant contracted for, and as consequential damages the loss of profits and business during the probable life of the elevator plant resulting from the smaller capacity of the plant. Such offsets or defenses would in all probability have precluded any recovery for the reasonable value of the plant constructed. So under the principles here suggested the result of the case would have been the same and the rules laid down therein of more general application.

It seems to us that Professor Williston's objection to the New York law is well taken. He cites *Nolan v. Whitney* and says:

"Under the existing New York law a builder may do his work pretty well, declining to comply with reasonable requirements of the architect and, nevertheless, recover a contract price expressly made conditional on compliance with such requirements, less such deduction as the jury thinks reasonable."

And in spite of the language of the New York cases hereinbefore quoted to the effect that substantial performance means exact performance, the New York law seems to be very much what Professor Williston says it is. The New York courts do not seem to require performance of a contract for recovery thereon. An example of this failure of the New York courts to require performance of a contract for recovery thereon is the case of *Woodward v. Fuller.* Though an attempt to achieve a just and equitable result in the individual case is what motivated the New York courts to abandon the requirement of exact performance, the law has in consequence become somewhat confused and uncertain. This confusion and uncertainty is avoidable if strict performance be insisted upon, but a quasi-contractual recovery allowed.

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288 N. Y. 648 (1882).
32 WILLISTON, CONTRACTS, 1540, n. 8.
340 N. Y. 312 (1880). The following cases cited in Woodward v. Fuller and not elsewhere referred to in this article are also of interest: Pullman v. Corning, 9 N. Y. 93 (1853); Sinclair v. Tallmadge, 35 Barb. 602 (N. Y. 1861); Vallser v. Millard, 29 N. Y. 375 (1864); Johnson v. DePeyster, 50 N. Y. 666 (1872); Phillip v. Gallant, 62 N. Y. 256 (1875).
The case of *Olsen v. Henderson*\(^3^8\) presents the interesting situation of a house built not on the lines shown on the plans which were part of the contract, but built one foot out of place. Under the circumstances of this case it might well be that performance was substantially complete, the deviation being trivial and occasioning no damage to the owner of the house. The court held that the plaintiff might recover the contract price less the difference between the value of the house as it was actually constructed and as it would have been if it had been set according to the plan. This case is mentioned in passing; it is a true type of the class of case in which performance is so nearly exact as to be, for all practical purposes, complete. Of course, if one foot of the house in question had been built upon an adjoining lot, belonging to a different owner, a different situation would have been presented.

Though very liberal in allowing recovery even where a contract has not been fully performed, the New York courts have taken a harsh view toward a contractor who has abandoned the performance of his contract. It may well be that one who abandons a contract before it is fully completed does less harm than one who finishes his work, but in such a way as to require the undoing of some of the work that he has done. Yet the New York courts have placed in a more favorable position one who has made some show of completing his contract than one who has deliberately abandoned it, even though the abandonment takes place after a large degree of performance beneficial to the other party to the contract. The deliberateness of the abandonment is the reason the courts refuse recovery.

A somewhat unusual situation of this kind was presented in *Fokine v. Shubert*\(^8\). The plaintiff in this case was employed to render services in connection with the production of a ballet. It seems to have been his duty to arrange the ballet and prepare it for presentation and to conduct the necessary rehearsals. He did a large part of the preliminary work but did not complete it. He conducted numerous rehearsals. There was no question that his work was of substantial value. At one of the final rehearsals the plaintiff became angry by reason of the fact that some of the chorus girls laughed at his mannerisms and he walked out refusing to return and complete his work. No recovery whatever was permitted. The court said:

"The contract was an entire one, was only partly performed. Further performance of it was abandoned voluntarily and without fault on the part of the other party to the pact and without his consent. There was no prevention by defendant of further

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\(^3^8\)113 App. Div. 676, 99 N. Y. Supp. 917 (2d Dept. 1906).

\(^8\)210 App. Div. 468; 206 N. Y. Supp. 311 (1st Dept. 1924).
performance by plaintiff, nor was there any tender of completion refused. Nothing under such circumstances can be recovered on the theory of quantum meruit, and the complaint should have been dismissed. 37

In another case, involving a contract to furnish refrigeration, the court said:

"Although the plaintiff elected to sue upon the theory of a quantum meruit, the written contract was proven. The plaintiff could not avoid its obligations to perform the conditions of the contract by the simple process of ignoring the contract and designating its demand a cause of action upon the theory of a quantum meruit." 38

And in many other cases also recovery was not permitted because the contract was abandoned before fully completed. 39

Of course, willful, malicious abandonment, of a nature calculated to do harm, should preclude recovery. But a fetish should not be made of the word "abandonment." An abandonment in any case should prevent recovery on the contract. But, unless malicious and of a highly injurious nature, should not in every case prevent a quasi-contractual recovery under the rules hereinbefore suggested.

The courts in other jurisdictions have upon occasions taken what seems to be a fundamentally sounder view. Thus, a Vermont court, 40 as far back as 1860, pointed out that a party failing to perform could recover only such a sum as his labor had benefited the other party. This court pointed out that had the contractor strictly and literally kept his agreement, he would have been entitled to the contract price. Having failed to do this, he must first deduct from the contract price such a sum as will fully compensate the other party to the contract for the imperfection in the work and the insufficiency of materials, so that in this respect the other party to the contract should be made as good pecuniarily as if the contract had been strictly performed; secondly, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract may have occasioned the other. It was pointed out that only by considering both of these elements can the benefit which

37Ibid. 470, 206 N. Y. Supp. at 313.
39Kohl v. Fleming, 21 Misc. 690, 47 N. Y. Supp. 1092 (Sup. Ct. 1897), is an illustration of this type of case. The action in that case was, however, for only a small unpaid balance, a situation which obtains in a great many of the cases where recovery was not allowed by reason of abandonment.
the one party to the contract might have derived from the labor of the other, when such benefit is measured by the contract and the contract price, be ascertained.\footnote{For a comparison with other jurisdictions, and also with earlier times, the following cases should be read: Stillwell Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 501 (1889); Kaufman v. Raeder, 108 Fed. 171 (C. C. A. 8th, 1901), 54 L. R. A. 247 (1902); St. Charles v. Stookey, 154 Fed. 772 (C. C. A. 8th, 1907); Northwestern Theatrical Ass'n v. Hannigan, 218 Fed. 259 (C. C. A. 2d, 1914); Haywood v. Leonard, 7 Pick. 181 (Mass. 1828); Moulton v. McOwen, 103 Mass. 587 (1870); Powell v. Howard, 109 Mass. 192 (1872) in which it was pointed out that a contractor who has not fully performed is entitled to recover what his work is fairly worth, having regard to the contract price, and that the contractor must make good what the owner has suffered by his failure to perform; Marsh v. Richards, 29 Mo. 99 (1859); Walter v. Huggins, 164 Mo. App. 69, 148 S. W. 148 (1912); Danforth v. Freeman, 69 N. H. 466, 43 Atl. 621 (1898); Thornton v. Place, 1 Moody & R. 218 (1832); H. Dakin & Co. v. Lee, supra note 5. A further comparative study of the cases may be made by reading the annotations in (1923) 23 A. L. R. 1435, and the cases from the various states in such annotation cited; also 2 Williston, Contracts, §§ 724, 805, 841 to 843 incl. and the footnotes of such sections; also 13 C. J. 691, particularly note 85 and the supplements of Corpus Juris containing further citations under such note. Reference should also be made to Contracts Restatement § 270, and to the annotations thereto in 15 Cornell Law Quarterly (Supp.) 177–180.}

Another interesting situation in which the New York Court of Appeals relieved a party of strict performance is to be found in the case of Matter of Casualty Company of America (Bliss Company Claim).\footnote{250 N. Y. 410, 165 N. E. 829 (1929).} Though not exactly in line with the subject matter of this article, it is illustrative of the tendency of the New York courts to relieve a party of strict performance when strict performance works a hardship, and yet to permit recovery on a contract unperformed. In this case A agreed to machine-finish certain forgings for B. It was held that there was an implied warranty that the forgings could be machine-finished by ordinary commercial means, and that since the forgings were made of such metal that it was impossible, except at great expense, delay and by extraordinary means, to perform the work contracted for, the failure to perform was not a breach of contract. Of course, if the failure to perform was due to no fault of the contractor but rather to that of the other party to the contract or of the subject matter of the contract itself, there is no reason for refusing recovery on the contract. Thus, in the case of Kuh v. Flower City Tissue Mills Co., the contractor was required to build foundation walls. It was specifically provided in the contract "that the
waterproofing shall be water-tight." Nevertheless, one of the walls cracked and was not water-tight. The court however, said:

"...where the owner assumes to specify the manner of construction to produce the result, the owner assumes the responsibility if the work does not turn out as expected." 44

And in another case,45 a contractor who built a reservoir for the City of Brooklyn was allowed to recover the contract price even though the reservoir was defectively constructed and leaked, inasmuch as he had performed his work in accordance with the instructions of the engineer for the city.

These cases illustrate the rule that defective performance may nevertheless be complete performance, a rule, the soundness of which under the circumstances given in the cases hereinbefore discussed, cannot be questioned. But this article has been concerned primarily with cases where defective or incomplete performance was due neither to the fault of the party to the contract for whom the work was done nor to the subject matter of the contract itself, but rather to the fault of the contractor. The following is submitted.

**CONCLUSION**

If the defects or omissions are of so trivial a nature as to have caused no appreciable damage or injury, the law properly does not take cognizance of them. In such cases, the performance is not merely substantial, it is complete, exact, literal performance. If the defects or omissions are of a nature more than trivial, so as to have caused other than nominal damage or injury, the contract has not been performed. The theory of substantial performance, as the New York courts have adopted it, should not be applied. No recovery should be allowed on the contract. The contractor should, however, be allowed a recovery upon a quasi-contractual basis, unless his abandonment of the contract, his non-performance or his defective performance thereof, has been of a malicious nature, deliberately calculated to cause injury to the other party to the contract or to defy his reasonable wishes expressed in the contract, wishes which should be even more literally followed in the field of art or esthetics than in the field of utility. If such malicious or deliberately defiant conduct on the part of the contractor is not present, and if the defects or omissions are not of such a pervasive nature as to defeat the object of the contract, the contractor should be allowed a recovery upon the following quasi-con-

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45 *In Re Freel*, 38 N. Y. Supp. 143 (Sup. Ct. 1895).
tractual basis: He should recover the reasonable value of his labor and materials, in no case to exceed the proportionate part of the contract price represented by such labor and materials, less the reasonable cost of conforming the work done to the exact requirements of the contract, and as against this recovery the other party to the contract should be allowed to offset the loss or injury he has sustained by reason of the defective or insufficient performance, including any loss or injury which flows fairly and proximately from the defective or insufficient performance, such as the deprivation of the full enjoyment of his property during the period required for making the work done conform to the work contracted for, including items such as loss in profits or advertising value during the period of time the improper or inadequate performance necessarily remained unremedied, or any other special damages which the special circumstances of the particular case might require, such damages to be based upon such equitable offsets or considerations as might properly commend themselves to the court.