(1) No possibility for recovery on a quasi-contractual theory. (2) If the circumstances show by clear and convincing evidence that the parties intended compensation for the services, then possibly there may be a recovery on a contract implied in fact. (3) But according to the language in some cases (unless it can be explained on the basis of a misunderstanding of the true meaning of "express contract") recovery is only possible upon proof of an express contract between the parties.

JAMES A. GORRELL

EQUITY

EXCUSE FOR NON-PERFORMANCE OF CONDITIONS IN SPECIFIC PERFORMANCE

Plaintiff owned land on which the defendant held a first mortgage of $10,348.00 and on which there was a second mortgage of $27752.00. At the suggestion of the defendant, the plaintiff arranged to get a loan of $9500.00 from the Federal Land Bank. The defendant and the other creditors were to accept a scale down so that this could be used to completely liquidate all indebtedness. On December 4th, 1934, the defendant's authorized agent signed an agreement whereby the defendant was to accept $8100.00 in full satisfaction, "if payment was made within 90 days after the date of this commitment." On January 1st, 1935, the defendant notified the land bank that it would not abide by the agreement, and the evidence clearly showed that, because of this, the plaintiff was delayed in securing the loan and did not tender the amount due the defendant until April 25th, 1935, or 52 days after the date set. The defendant then refused to carry out the contract, and the plaintiff asks specific performance. The court held that time had been made of the essence of the contract because it was specifically carried into the proposal and circumstances of the agreement; but that the delay of the plaintiff in making tender was caused by the conduct of the defendant, and that this amounted to an excuse for the delay of the plaintiff in tendering the amount due. Specific performance was granted. *Bretz* v. *Union Central Life Insurance Co.*, 25 Ohio L. Abs. 333 (1937).

Judge Barnes dissented from the decision of the court on the ground that this was really a case of an option so the condition precedent should be strictly enforced.

The holding of both the majority and dissent that time was of the essence of the contract seems to be well justified. Ohio cases have held

that, although time is not ordinarily of the essence in equity, it may be made so by stipulation of the parties, by the nature of the contract, by notice, or where it was necessary for the benefit to accrue. *Hutcheson* v. *Heirs of McNutt*, 1 Ohio 14 (1821); *Scott* v. *Fields*, 7 Ohio, Part II, 90 (1836); *Remmington* v. *Kelly*, 7 Ohio, Part II, 97 (1836); *Higby* v. *Whittaker and Burchard*, 8 Ohio 198 (1837); *Kirby* v. *Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677 (1853); *Brock* v. *Hidy*, 13 Ohio St. 306 (1862); *Curtis* v. *Factory Site Co.*, 12 Ohio App. 148, 31 Ohio C.C. (N.S.) 365, 65 W.L.B. 15, 17 Ohio L.R. 392 (1919); *Condorodis* v. *Kling*, 33 Ohio App. 452, 169 N.E. 836 (1928); *Schaengold* v. *Dick*, 36 Ohio App. 78, 172 N.E. 839, 31 Ohio L.R. 336, 8 Ohio L. Abs. 633 (1929); *Ziedman* v. *Davis*, 37 Ohio App. 418, 174 N.E. 790 (1930); *Domigan* v. *Domigan*, 46 Ohio App. 542, 189 N.E. 860, 40 Ohio L.R. 98 (1933). Other courts have held that time cannot be made essential in a contract even by so declaring it, and have reached this result by treating the contract of sale as a mortgage relation and allowing a period of redemption. *Batty* v. *Snook*, 5 Mich. 231 (1858); *Richmond* v. *Robinson*, 12 Mich. 193 (1864). However, this approach has been expressly repudiated in Ohio. *Kirby* v. *Harrison*, *supra*.

A forefeiture clause, which will have the effect of making time of the essence in some states, will not have that effect in Ohio. *Garcin* v. *Pennsylvania Furnace Co., et al.*, 186 Mass. 405, 71 N.E. 793 (1904; *Curtis* v. *Factory Site Co.*, *supra*. It is, of course, true in Ohio, as well as elsewhere, that time is of the essence in an option. *Longsworth and Anderson* v. *Mitchell*, 26 Ohio St. 334 (1875); *Bingham* v. *Shoup*, 22 Ohio L. Abs. 429 (1936).

Since time was of the essence of this contract, the real problem involved was whether or not the act of the defendant in attempting to repudiate was a sufficient *excuse* for a failure of the plaintiff to perform the condition precedent, in this case performance on time. It is well to remember at this point that there is in this case no question of waiver, for the actions of the defendant definitely negatived any such suggestion, and that the real question is one of excuse for non-performance.

"Courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed." *Steedman* v. *Drinkle*, 1 A.C. 275 (1916). But in general, courts of equity will uphold express conditions precedent. *Giddings* v. *Ins. Co.*, 102 U.S. 108, 26 L.Ed. 92 (1880); *Phipps* v.

Munson, 50 Conn. 267 (1882); Clark, *Principles of Equity*, p. 186 (1919). The phrase, "In order to ask for specific performance the plaintiff must be ready, desirous, prompt and eager," which has been attributed to Lord Kenyon in a note to *Hertford* v. *Boore*, 5 Ves. Jr. 719, 31 Eng. Reprint 823 (1801), has been applied many times in this state. "A court of equity will not lend its assistance to enforce the specific execution of a contract for the purchase of land, unless the party seeking it has performed all the contract requires of him." *Brown* v. *Haines, et al.*, 12 Ohio 1 (1843); *Campbell* v. *Hicks*, 19 Ohio St. 433 (1869); *Domigan* v. *Domigan, supra.* It is quite obvious that this would be an especial requisite where, as in this case, there is an express condition stipulated. It would seem, therefore, that the general rule would be that in the absence of an excuse for, or a waiver of, non-performance, a court of equity will not grant specific performance of a contract unless the party asking it has performed conditions precedent.

There was, however, in this case a repudiation by the vendor before the time set for performance. Where the vendee in a land contract was ready, willing, and able to perform the contract, and the vendor repudiated the contract by a declared intention not to perform, a formal tender at the specified time may be excused although time was of the essence of the contract. *Weidermann Brewing Co.* v. *Maxwell*, 78 Ohio St. 54, 84 N.E. 595 (1908); *Bickett* v. *White*, 13 Ohio D.R. 481, 1 Cin. S.C.R. 170 (1871), (reversed on other grounds, 27 Ohio St. 405); *Fleming* v. *O'Donohue*, 306 Ill. 595, 138 N.E. 183 (1923); *Neidhart* v. *Frank*, 325 Ill. 596, 156 N.E. 769 (1927); *Hager* v. *Rey*, 209 Mich. 194, 176 N.W. 443 (1920). A formal tender is not required where it would have been refused, even though this was not discovered until later. *Shannon* v. *Freeman*, 117 S.C. 480, 109 S.E. 406 (1921). "A purchaser under a land contract of which time is the essence is not bound to tender performance within the time stipulated as a condition of the right to maintain a suit for specific performance where the vendor has openly or unconditionally refused to perform on account of his defective title or otherwise, or where his vendor's conduct, voluntary or involuntary, amounts to an anticipatory breach." *Wimer* v. *Wagner*, 323 Mo. 1156, 20 S.W. 650, 79 A.L.R. 1231 (1929).

One more fact must, however, enter our consideration of this case, for the vendee was neither ready nor able to perform at the time set for performance. Many courts have said that, where the vendee in a land contract is asking specific performance, a failure to tender on the date when it was due will be excused where the vendor was the cause of the delay. This result has been attributed to various causes: A refusal by

the vendor to accept payment by check; actions on the part of the vendor which lead the vendee to believe he would waive a forfeiture; a suit by the vendor against the vendee in another cause in which excessive bail was demanded; a refusal by the vendor to let appraisers on the land value it when the price was to be set by a reference; a representation by the vendor to the vendee that a different place than that specified would be just as satisfactory to close the deal, and then later insisted on the requirement of the contract; a waiver of payment of interest over a period of years. *Kennedy* v. *Neil*, 333 Ill. 629, 165 N.E. 148 (1920); *Barnett* v. *Meisterling*, 327 Ill. 564, 158 N.E. 806 (1928); *Hickman* v. *Chaney*, 155 Mich. 217, 118 N.W. 993 (1908); *Houghton* v. *Cook and Beeman*, 91 Vt. 197 (1918); *Morse* v. *Merest*, 6 Mad. (Eng.) 26 (1821); *L'Engle* v. *Overstreet*, 61 Fla. 653, 55 So. 381 (1911); *Kopeyka* v. *Woodstrom*, 305 Ill. 69, 137 N.E. 137 (1923); *Brock* v. *Hidy*, *supra*; *Strohmaier* v. *Zeppenfeld*, 3 Mo. App. 429 (1877); *Gates* v. *Parmley*, 93 Wis. 294, 66 N.W. 253 (1896). The necessity of tender in an action for specific performance is governed by equitable principles. Equity is disinclined to enforce a forfeiture. 79 A.L.R. 1248. If the delay upon the part of the vendee is attributable to the conduct of the vendor, it will not stand in the way of a decree for specific performance of the contract on behalf of the vendee. *Howard* v. *Moore*, 4 Sneed (Tenn.) 317 (1857).

However, if it is the essence of the contract that it shall be performed upon a day certain, there is very respectable authority that the failure of the vendee to perform on time will not be excused even when it is caused by the vendor. *Kelsey* v. *Crowther*, 162 U.S. 404, 40 L.Ed. 1017, 16 S.Ct. 808 (1896). The courts of Ohio have at times applied a strict construction where the vendor was the cause of the delay and have enforced express conditions precedent. In one case where the vendor led the vendee to believe he would be lenient, because he had been lenient on prior payments, specific performance was denied. *Campbell* v. *Hicks*, *supra*. In another case, the original vendee assigned the contract to the present complainant who then entered negotiations for a new contract which was never consummated, and the negotiations for a new contract were held not to constitute an excuse for delay. *Brophy* v. *McGurk*, 15 Ohio App. 73, 19 Ohio L.R. 466 (1921). An early case went so far as to hold that a default by not paying on time was equivalent to an express rescission, where time had been made of the essence of the contract by notice from the vendor to the vendee. *Remmington* v. *Kelly*, *supra*.

Thus we see that there are two views on the question of whether

or not a court of equity will strictly enforce the condition precedent when time has been made of the essence of a bilateral contract. Though it seems that most of the other cases in Ohio have adopted a strict construction, and required performance of conditions precedent, there is abundant authority favoring the lenient construction adopted by the majority.

It was, however, the view of the dissent that this was not a case of a bilateral contract, but of an option, and for that reason the condition precedent of performance on time should be strictly enforced. This seems to be a perfectly justifiable view if we can consider that this was an option, since equity will not give relief where there is a failure to comply with the conditions of an option because there is no forfeiture, but the option holder is left in *status quo*. *Lauderdale Power Co.* v. *Perry*, 202 Ala. 394, 80 So. 476 (1918); *Hughes* v. *Holliday*, 149 Ga. 147, 99 S.E. 301 (1919); 1 Ames, *Cases on Equity Jurisdiction*, p. 320n (1904). "The burden of proof in an action for specific performance of an option is on the plaintiff to show either a tender of the purchase price or a justification for his failure to do so. But a mistaken belief that title was encumbered will not excuse the plaintiff's failure to tender the purchase price within time." *Bingham* v. *Shoup*, *supra*. The general view is, then, that in the case of an option time will be of the essence, and will be regarded as a condition precedent which will be strictly enforced. There is, however, one line of authority which holds that a condition precedent will not be strictly enforced even in an option. *F. B. Fountain Co.* v. *Stein*, 97 Conn. 619, 118 Atl. 47, 27 A.L.R. 976 (1922). If this view were followed, the decision of the majority could be upheld even if this be considered an option, though to go to this extent would seem to be a glaring example of coddling a debtor.

JOHN S. MITCHELL

EVIDENCE

PRESUMPTION OF CONTRIBUTORY NEGLIGENCE RAISED BY PLAINTIFF'S OWN EVIDENCE

Plaintiff's evidence disclosed that his automobile was struck by defendant's backing engine on an improved grade crossing. The crossing was well known to plaintiff, and the visibility was obscured by the early morning fog. The trial court charged on negligence, and requested counsel for any additionally desired instructions. None were offered, but defendant's counsel made a general exception. The court of appeals reversed a judgment for the plaintiff on the sole ground that the trial