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Performance Obligations of the Aggrieved Contractant: The French Experience

EDWARD A. TOMLINSON*

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INTRODUCTION

Most contracts today are bilateral. Contract formation occurs through an exchange of promises, but what each party desires to obtain is not the other party's promise but the promised performance. If that performance does not occur, the aggrieved party may seek specific performance or damages. These remedies do not assure that the plaintiff will receive the promised performance; court-enforced performance is likely to be untimely and may not be available at all,

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while damage awards may be too little or too late to provide an adequate substitute. In addition, impossibility or related doctrines may excuse the defendant's nonperformance. These inadequacies explain why a party often desires to respond defensively to nonperformance by preserving the value of its own performance.

Contract law must therefore determine the effect of one party's nonperformance — normally a breach, but in some cases an excused breach — on the other party's performance obligations. May the latter party withhold a performance otherwise due? May it terminate the contract and obtain the desired counter-performance from someone else? May it retrieve from the nonperforming party any performance it has already rendered? Most likely, the parties will have neglected to address these three questions in the contract itself. Therefore, the law of contracts must provide these answers for them.

This article will contrast the French responses to these questions with the more familiar responses provided by the common law. Hopefully, the comparison will demonstrate that the study of how a foreign legal system responds to a particular problem is both interesting in itself and enables us better to appreciate our own system's response. Both systems' treatment of nonperformance has evolved over time, and this article focuses on the significant contributions made by jurists, both judges and academics, to that historical development.

Part I describes the common law's efforts to identify those breaches which entitle the aggrieved party to withhold its own performance or to claim a discharge from any further performance obligations. In addition, it will describe the restitutionary relief made available to that party to retrieve any performance already rendered. Part II introduces how French law addresses the same questions. The focus will be on the judicial termination of contracts under article 1184 of the Civil Code of 1804. Part III explores the advantages that judicial termination offers the aggrieved party. The sweeping restitutionary remedy which may accompany termination is far more generous than the restitutionary remedies available against a nonperforming party in common-law systems. Part IV presents the history behind article 1184 to explain a second striking difference between its approach and that of the common law. While the common law recognizes the aggrieved party's self-help remedy of contract termination, article 1184 imposes on the aggrieved party the burden of obtaining a discharge from the courts. Part V describes how the courts have defused this unrealistic requirement by some sensible law-

making. Such judicial lawmaking, usually disguised as interpretation, has become an accepted part of the French legal system. Finally, Part VI seeks to draw some lessons from this comparative study. The principal lesson is that the two systems are not as different as one might initially think. Each system has its own history and its own way of expressing the applicable rules, but there is a surprising convergence in the results actually achieved.

I. MATERIAL BREACH, TERMINATION, AND RESTITUTION AT COMMON LAW

A contracting party confronted by the other party's nonperformance wants to determine if it may safely cease performing, if it may terminate the contract to obtain a substitute performance elsewhere, and if it may retrieve any performance it has already rendered. These three matters are of considerable practical importance. Withholding performance and terminating the contract are simple self-help remedies; the former may encourage the other party to perform, while the latter may better protect an aggrieved party's interests than an action for damages or specific performance. If those self-help remedies are available, a party may be well-advised to invoke them, especially if they do not preclude a subsequent suit for damages. Also, the party may be well-advised to seek restitution of its own performance rather than to assume the sometimes difficult task of proving the precise damages (if any) caused by breach.

A. *The Contemporary Scene: The United States*

Present-day American law addresses the first two of these questions through the doctrine of constructive conditions of exchange. Under this approach, the law implies a condition in a bilateral contract which suspends or even discharges a party's duty to perform if there is an "uncured material failure" by the other party to render a performance then due.¹ This doctrine, now enshrined in section 237 of the *Second Restatement of Contracts*, stems from a seminal article by Professor Corbin, in which he described constructive conditions of

1. The quoted phrase comes from section 237 of the RESTATEMENT (SECOND) OF CONTRACTS, which reads in full:

Except as stated in § 240 [on exchanges with agreed equivalents] it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).

exchange as contract terms supplied by the courts to fill a gap in the parties' agreement or, as Corbin described it, "to determine the jural relations of the parties as they are now."²

This recognition, that a bilateral contract contains constructive conditions of exchange, offers significant protection to an aggrieved party, who need not lose the value of its own performance when the counter-performance it bargained for is not forthcoming. However, this recognition also poses significant risks to a party who invokes the other party's breach to escape from the contract. All breaches give rise to a damage action, but not all breaches allow the aggrieved party to refuse its own performance. A party who believes itself aggrieved must determine, not only whether the other party has committed a breach, but also whether that breach is sufficiently serious or material to allow it to suspend its own performance or to consider itself discharged. A wrong guess on either of these questions may be costly, since a court may find that the aggrieved party's response was itself a material breach. Under the theory of constructive conditions, the first party to commit a material breach is liable for that breach regardless of any prior nonmaterial breaches of the other party.³

What constitutes a material breach is often a ticklish question. Normally, it is safe for an aggrieved party to respond to a breach by briefly suspending its own performance in order to make inquiries or seek assurances,⁴ but it is often risky for a party to suspend its performance for a protracted period or to terminate the contract, i.e., to take the position that the breach discharges it from any further duty to perform.⁵

2. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 741 (1919). The article appears as part of a tribute to Professor Hohfeld. On the importance of Corbin's work, see E. FARNSWORTH, *CONTRACTS* § 8.9, at 579 (1982).

Professor Corbin's "now" refers to the time when a party's performance, although due, is not forthcoming. If the contract requires concurrent performances, or requires the nonperforming party to perform first, then the other party need not perform, at least if the first party's failure to perform was material. The failure to perform may be a breach or may be excused under the doctrine of impossibility or related doctrines. The former situation is more commonplace; therefore, analysis usually centers on identifying which breaches of contract are material. For an analysis of the material breach doctrine, see Anderson, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073 (1988).

3. E. FARNSWORTH, *CONTRACTS* § 8.15, at 609 (1982).

4. Rossett, *Contract Performance: Promises, Conditions and the Obligation to Communicate*, 22 UCLA L. REV. 1083, 1100 (1975).

5. The *Uniform Commercial Code* uses "termination" to describe a party's putting "an end to the contract otherwise than for its breach" and "cancellation" to describe a party's putting "an end to a contract for breach." U.C.C. §§ 2-106(3)-(4) (1987). This article, on the other hand, uses the word "termination" to cover both kinds of acts by a party. For this use of

A contractant who believes itself the victim of the other side's nonperformance often lacks the clear and dispassionate judgment needed to analyze the merits of its own case. An aggrieved party may therefore exaggerate the seriousness of a breach and repudiate its own obligations in a fit of righteous indignation. Take, for example, poor Herbert Harrison, the irate dry cleaner in the well-known case of *Walker & Co. v. Harrison*.⁶ Harrison, who for a monthly fee had rented a neon sign to advertise his dry cleaning establishment, became quite indignant when the sign company refused to maintain the sign in the manner he believed required by the agreement. After repeated telephone calls brought no response, Harrison dispatched an angry telegram repudiating his obligations under the contract. The rental company thereupon successfully sued Harrison for total breach, recovering the entire balance due under the agreement.

That harsh result was a straightforward application of the first material breach rule. No doubt Harrison's complaints about the lack of maintenance have a ring of triviality to them — after all, the neon sign did not go out but only suffered from some rust, cobwebs, and that famous rotten tomato — but most consumers will agree with the court's characterization of the rental company's stonewalling as "irritating."⁷ The court nevertheless admonished Harrison that he should have kept his cool and continued paying the monthly rent. According to the court:

[t]he injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.⁸

The *Second Restatement of Contracts* offers little assistance to an aggrieved party, such as Herbert Harrison, forced to decide whether to maintain or repudiate a contract. Sections 241 and 242, which closely parallel sections 275 and 276 of the *First Restatement*, adopt Professor Williston's fairness approach for identifying material

the word "termination," see E. FARNSWORTH, *CONTRACTS* § 8.15, at 606 n.2 (1982). On the penalties for guessing wrong, see *K & G Constr. Co. v. Harris*, 223 Md. 305, 164 A.2d 451 (1960) (subcontractor's walking off job a material breach not justified by contractor's suspension of progress payments following subcontractor's earlier breach).

6. 347 Mich. 630, 81 N.W.2d 352 (1957).

7. *Id.* at 636, 81 N.W.2d at 356.

8. *Id.* at 635, 81 N.W.2d at 355.

breaches.⁹ Williston recognized that the materiality issue normally arose in suits brought by a party in breach — the sign company, for example — claiming that the other party's defensive refusal to perform was itself a breach of contract. Therefore, the question for the courts was the materiality of the plaintiff's breach. According to Williston, the answer depended on whether

it is fairer to allow the plaintiff to recover [on the contract], requiring the defendant to bring a cross action or counter claim for such breach of contract as the plaintiff may have committed, or whether it is fairer to deny the plaintiff a right of recovery on account of his breach, even at the expense of compelling him to forfeit any compensation for such part performance as he has rendered.¹⁰

Quite naturally, that fairness approach did not result in firm rules but in a list of relevant circumstances to consider which take into account the interests of the wrongdoer as well as those of the aggrieved party. Such balancing of interests may be feasible when done by a judge after the fact, but it is difficult for a party to accomplish at the time of breach. The task was surely beyond the competence of Herbert Harrison.

Faithful to Williston's approach, section 241 of the *Second Restatement* identifies five "circumstances" as "significant" in determining whether a failure to render performance is "material."¹¹ Those circumstances focus on the effect of nonperformance on both the aggrieved party (To what extent will he lose the benefit expected? Will damages adequately compensate him? Is cure likely?) and the party in breach (Will he suffer forfeiture? Did his conduct conform to standards of good faith and fair dealing?). Applying these circumstances,

9. Anderson, *supra* note 2, at 1082-83.

10. 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 841, at 2360 (1936).

11. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979). The full text reads as follows:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id.

in addition to whatever other factors it wishes to consider, a court must evaluate after the fact whether any nonperformance by the aggrieved party was proper or itself constituted a material breach.

Section 242 then introduces two additional "significant circumstances" to consider if the aggrieved party does not merely suspend performance but, like Herbert Harrison, claims a discharge from any further duty to perform.¹² Once again courts must weigh all the circumstances after the fact to pass judgment on the aggrieved party's response. Plainly, the *Second Restatement* envisions a two-step process for most cases, with a party first suspending performance and then terminating the contract.¹³ How long an aggrieved party must wait before terminating depends on the need to act promptly to make substitute arrangements and the extent to which the agreement requires timely performance.¹⁴

Surprisingly, sections 241 and 242 do not even tell the aggrieved party to what extent a court will scrutinize more closely the alleged breach if the party invokes it to terminate the contract rather than merely to suspend performance. There is no indication in the text or commentary whether the breach must be a more serious one for the aggrieved party to terminate the contract and thus treat itself as discharged. It appears to be only a question of how long the party must wait, which in turn depends on how promptly it must act to make reasonable substitute arrangements and what the agreement itself provides for when delayed performance becomes the equivalent of no performance at all. It is even possible that discharge may follow immediately upon a material breach if the parties had agreed that late

12. *Id.* at § 242. The full text reads as follows:

In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance under the rules stated in §§ 237 and 238, the following circumstances are significant:

- (a) those stated in § 241;
- (b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;
- (c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

Id.

13. E. FARNSWORTH, *CONTRACTS* § 8.15, at 606-07 (1982).

14. These are the two additional circumstances mentioned in section 242. *RESTATEMENT (SECOND) OF CONTRACTS* § 242 (1979).

performance was not acceptable.¹⁵

These *Restatement* texts do no more than give courts a framework for deciding cases by providing formulas or phrases that judges can grab hold of and purport to apply. They do not give any practical guidance to contractants on how to respond to a breach, and surely their drafters never intended them to do so. At most, sections 241 and 242 warn a contractant that a breach must be very serious, or must seriously disrupt the contractant's affairs, if it wishes to invoke the breach as a basis for refusing its own performance. Perhaps the strongest message communicated by the *Restatement* is to avoid precipitous action since a party acts at its peril. The sections thus reflect the courts' preference for upholding contracts and for avoiding forfeiture, if they can do so without seriously disappointing justified expectations.¹⁶

Sections 241 and 242 appear to adopt, as does much of Article 2 of the Uniform Commercial Code, Karl Llewellyn's philosophy of "immanent law," under which the applicable text, be it a statute or *Restatement*, does not state what the law is but tells the judges how to find it.¹⁷ They are to find it, not in doctrinal formulations or through policy analysis, but in the fact-patterns of everyday life. This reliance on the judges' situation-sense for deciding cases reappears in the Uniform Commercial Code itself, which makes no attempt whatsoever to define "substantial impairment of a contract's value," the Code's equivalent of the *Restatement's* concept of material breach.¹⁸ Plainly, such a formulation does not provide contractants with rules regarding when they may terminate for breach; they must seek guidance, not in the legal text, but in the way their fellow human beings conduct their affairs. That inquiry is also necessary under the *Restatement*, despite the effort to mask it through a lengthy list of relevant circumstances.

15. See *RESTATEMENT (SECOND) OF CONTRACTS* § 242(c) (1979) and E. FARNSWORTH, *CONTRACTS* § 8.18, at 617-18 (1982).

16. E. FARNSWORTH, *CONTRACTS* § 8.15, at 607 (1982). Professor Anderson has suggested reformulating the material breach doctrine to recognize the role it should play in protecting the aggrieved party's interest in future performance. His approach treats a breach as material only if it sufficiently impairs the victim's interest in future performance to warrant a reasonable belief that termination is justified. Anderson, *supra* note 2, at 1107. That reformulation has the advantage of focusing on what Anderson believes to be the most significant factor in the materiality analysis.

17. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621, 626-27 (1975); Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 *WM. & MARY L. REV.* 341, 359-71 (1988).

18. See *U.C.C.* §§ 2-608(a) and 2-612(3) (1987) as discussed in 1 J. WHITE AND R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 8.3 (3d ed. 1988).

Professor Corbin, who played no small role in its drafting, insisted that there was no other way to approach the materiality inquiry. For Corbin, whether a breach was material was "a question of degree; and it must be answered by weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case."¹⁹

Present-day American law has less difficulty identifying the remedies available to the victim of a material breach than it does in identifying material breaches, but those remedies include only limited opportunities to retrieve a performance already rendered. A material breach, at least when the delay in performance also becomes material under section 242, discharges the aggrieved party's duty to perform. That party, therefore, has the option of treating the contract as terminated and immediately suing for damages for total breach, i.e., for damages based on all of the injured party's remaining rights to performance.²⁰ Alternatively, the aggrieved party may seek "restitution for any benefit that he has conferred on the other party by way of part performance or reliance."²¹ Restitution offers a party who has performed the advantage of retrieving the value of its performance even in cases where expectancy damages are unavailable because they are too speculative or because the contract was a losing one. Restitutionary relief may also include, in appropriate cases, specific restitution of any benefit conferred on the party in breach.²²

The *Second Restatement* makes no mention of rescission as a contract remedy, and the Uniform Commercial Code expressly disavows it.²³ Indeed, Professor Corbin challenged the very existence of rescission as a remedy for breach. According to Corbin, rescission occurs only when the parties agree to terminate their contractual relations prospectively.²⁴ The parties' rescission of their contract may or

19. 4 A. CORBIN, CORBIN ON CONTRACTS § 946, at 809 (1951).

20. RESTATEMENT (SECOND) OF CONTRACTS §§ 236(1) and 243(1) (1979). The aggrieved party may also opt to treat the breach as partial and thus keep the contract in force. *Id.* § 236(2). See also E. FARNSWORTH, CONTRACTS § 8.15, at 608 (1982).

21. RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1979).

22. *Id.* § 372(1). These remedies described above are potentially cumulative, and the *Second Restatement* only precludes a party from pursuing inconsistent remedies. Thus, an injured party cannot seek both restitution and either damages for total breach or specific performance, but may obtain both restitution and damages for any costs incurred in undoing the transaction. *Id.* § 378 comment d.

23. U.C.C. § 2-608 comment 1 (1987) (substituting concept of buyer's revocation of acceptance).

24. 5 A. CORBIN, CORBIN ON CONTRACTS § 1236, at 533-34 (1964).

may not include an accord and satisfaction settling all claims for breach. Rescission thus requires mutual assent but no action by a court. If the parties do not agree to rescind, there is no basis for a court to do so because what discharges a party from its contractual duties is the other party's material breach and not the court's order. The aggrieved party, if it opts to terminate the contract, may then seek restitution from the breaching party, but to describe that process as "rescission and restitution" is to add an unnecessary step.²⁵

Professor Dobbs, the leading contemporary authority on remedies, agrees with Corbin only in part. In most cases, Dobbs acknowledges that the injured party can obtain restitution without any judicial rescission of the contract. However, Dobbs insists that there are cases in which the courts cannot award restitution without first undoing a completed transaction.²⁶ In those cases, for a plaintiff to recover a performance already rendered, a court must either order the defendant to reconvey property, or must itself cancel the relevant documents to undo the transaction.²⁷ To Professor Dobbs, the word "rescission" appropriately describes the courts' actions in those cases.²⁸

This modern restitutionary remedy for breach is subject to a number of limitations which make it a less generous remedy than that available under French law. First, restitution is not available to an aggrieved party who has fully performed if the only performance still due from the party in breach is the payment of a definite sum of money.²⁹ Thus, a seller cannot seek restitution for goods delivered to the buyer if the buyer does not pay the agreed price. Second, the availability of specific restitution in equity has traditionally turned on the familiar criteria of the uniqueness of the thing transferred and the inadequacy of the damages remedy.³⁰ Third, even if the plaintiff satis-

25. *Id.* § 1105, at 571.

26. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.3, at 254-56 (1973).

27. Equity courts have traditionally exercised *in personam* powers which allow them to order defendants to do what ought to be done. In addition, modern court rules generally confer on courts exercising equity powers the authority to cancel documents or to give legal effect to documents drafted in the defendant's name. *See, e.g.*, FED. R. CIV. P. 70.

28. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.3, at 256 (1973). *See also* 1 G. PALMER, *THE LAW OF RESTITUTION* § 4.6 (1978).

29. *RESTATEMENT (SECOND) OF CONTRACTS* § 373(2) (1979).

30. *RESTATEMENT (FIRST) OF CONTRACTS* § 354 (1932). Section 372(1)(a) of the *Second Restatement* only authorizes a court, in its discretion, to withhold the remedy of specific restitution if granting it would "unduly interfere with the certainty of title to land or otherwise cause injustice." *RESTATEMENT (SECOND) OF CONTRACTS* § 372(1)(a) (1979). It is unclear if any change was intended. Perillo, *Restitution in the Second Restatement of Contracts*, 81 *COL. L. REV.* 37, 47 (1981).

fies these criteria, specific restitution is normally awarded in cases where the plaintiff avoids the contract, and not in cases involving material breach.³¹

The explanation for this last limitation is not entirely clear. Professor Dobbs suggests that a party must establish some property interest, either legal or equitable, in the benefit conferred to obtain specific restitution.³² That requirement poses no problem when a party avoids a contract for duress, mistake or fraud. Those defects vitiate the contract's very formation and give the injured party at least an equitable claim to any property conveyed. Termination for breach, on the other hand, discharges all remaining performance duties but does not affect any performance that has already occurred. This distinction rightly encourages courts to avoid sowing disruption by unscrambling transfers of property that occurred prior to termination.³³

Finally, the Uniform Commercial Code, consistent with prior sales law, sharply limits restitutionary remedies for breach. An unpaid seller cannot reclaim goods delivered to a buyer that becomes insolvent unless the insolvency occurs within ten days of receipt of the goods.³⁴ In all other cases, the seller receives the same treatment as the buyer's other unsecured creditors.³⁵ Likewise, the buyer cannot return nonconforming goods and retrieve the price paid unless it satisfies quite demanding requirements for revoking its acceptance of the goods.³⁶ In the case of installment sales, similar requirements limit the buyer's right even to reject nonconforming goods.³⁷ These provisions limit the buyer's ability to divert any losses caused by an unprofitable deal back onto the seller. The buyer must perform and be content with its damages remedy.

B. A Look Backward: England

When compared to American law, English law has encountered far more difficulty in answering the basic questions of when a contractant, confronted with the other party's nonperformance, may

31. E. FARNSWORTH, *CONTRACTS* § 12.19, at 907-08 (1982).

32. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.3, at 255-56 (1973).

33. The reported cases granting specific restitution following breach involve sellers retrieving land exchanged for other land or in return for promised lifetime care. *See, e.g.*, the cases cited by E. FARNSWORTH, *CONTRACTS* § 12.19, at 907 n.26 (1982).

34. U.C.C. § 2-702(2) (1987). The ten day limitation does not apply if the buyer misrepresented its solvency to the particular seller in writing within three months before delivery.

35. R. NORDSTROM, *HANDBOOK ON THE LAW OF SALES* § 165, at 499-500 (1970).

36. U.C.C. § 2-608 (1987).

37. *Id.* § 2-612.

either withhold its own performance, terminate the contract, or seek restitution. Perhaps the fact that the lawmakers in England (primarily the judges) had to perform first explains this phenomenon. English judges had developed the basic rules resolving these questions by 1804, the year the French decided to codify their own law of contract. The American law of contract developed later and often profited from the earlier English experience. Even Williston, a conservative thinker, frequently criticized the formalism of English law and the reluctance of English judges to develop more flexible rules.³⁸ American jurists' willingness to learn from past mistakes has contributed to more rapid changes in the law. The American law of contract has experienced not only a Williston, but also a Corbin, two Restatements, and a Uniform Commercial Code; the legal landscape has been greatly altered as a result. English contract law, on the other hand, shares with French law a greater continuity with the past. Neither body of law has experienced modernizing windstorms comparable to those that have swept the American legal scene; both still rely on legal rules first formulated in cases (England) or statutes (France) roughly two centuries ago. This similarity may make English law more suitable for comparative purposes when studying French law on the discharge of contractual duties.

English law has traditionally addressed the questions of when a contractant may suspend its performance or claim a discharge under the rubric of who may sue for breach of contract. Such issues arose when a party, who had not fully performed, sued a defendant who had responded to that nonperformance by invoking the self-help remedy of refusing its own performance. Thus, the question before the court was whether the plaintiff could sue for breach of contract despite its own nonperformance.

During the sixteenth and seventeenth centuries, the common law responded to that question with at least a presumptive "yes."³⁹ The issue had not arisen prior to that time on account of the narrow horizons of the common law of contracts. Contractual liability was either

38. See *infra* notes 67 and 76.

39. This account largely follows S. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 148 (1975) [hereinafter STOLJAR, A HISTORY OF CONTRACT] and Stoljar, *Dependent and Independent Promises: A Study in the History of Contract*, 2 SYDNEY L. REV. 217 (1957) [hereinafter Stoljar, *Dependent and Independent Promises*]. For a different view, arguing that the common law did not change much over time but retained a steady mix of dependent and independent promises, see McGovern, *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659 (1978).

formal, based on a sealed covenant executed by the defendant, or real, based on some *res* or thing already transferred from the plaintiff to the defendant. In the latter case, the plaintiff had already fully performed when it sought to hold the defendant liable in debt or detinue for not performing. The plaintiff's nonperformance became an issue when the courts, beginning at the end of the fifteenth century, recognized the bilateral contract (a promised exchanged for a promise). Could the plaintiff, who had promised but failed to perform, enforce the defendant's promise? The courts' initial response was "yes," on the grounds that the two promises were independent. The defendant, sued by a plaintiff who had not performed, still had the plaintiff's promise and could bring a separate action to enforce it. Since the plaintiff still had to perform, there was no justification for the defendant withholding performance.⁴⁰

The common law's original response, to whether a party who had not performed could enforce a bilateral contract, did not prove lasting. By the end of the eighteenth century, the presumptive "yes" given by the courts had become a presumptive "no." The courts soon recognized, more realistically, that a party to a bilateral contract bargained, not just for a promise, but for the promised performance. A lawsuit to enforce that promise was not an adequate substitute for the performance itself. That reality led Lord Mansfield, in the famous case of *Kingston v. Preston*,⁴¹ to treat the defendant's promise as dependent on the plaintiff's performance, thus allowing the defendant to withhold his own performance in response to the plaintiff's breach. That decision has been hailed by leading scholars as a revolutionary innovation "contrary to what had been held for law from time immemorial,"⁴² and announced "in spite of three centuries of opposing precedents."⁴³ However, as will be shown, the *Kingston* decision was

40. See STOLJAR, *A HISTORY OF CONTRACT*, *supra* note 39, at 149; P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 208 (1979); Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 534 (1979). This initial position in favor of independent promises resembled the common law's earlier approach to mutual covenants, which the courts generally treated as independent unless the parties clearly indicated a contrary intent through the use of a verbal formula indicative of an express condition. For a fuller discussion, see Stoljar, *Dependent and Independent Promises*, *supra* note 39, at 219-23.

41. Lofft 194, 98 Eng. Rep. 606 (K.B. 1773). A report of the case also appears as part of the argument of counsel in *Jones v. Barkley*, 2 Dougl. 684, 689, 99 Eng. Rep. 434, 437 (K.B. 1781). Subsequent citations to *Kingston* have normally referred to that report.

42. C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* 184 (1880).

43. 3 S. WILLISTON, *supra* note 10, § 817, at 2299 (1936). This notion that *Kingston v. Preston* was the "first strong authority" on dependent promises originated with Justices Grose and Le Blanc in *Glazebrook v. Woodrow*, 8 T.R. 366, 101 Eng. Rep. 1436 (K.B. 1799).

not quite as novel as Lord Mansfield's reputation as an innovator has led some to believe.

The facts of *Kingston v. Preston* amply demonstrate the harshness of the common law's initial approach of independency. In *Kingston*, an apprentice and his master agreed that the apprentice would serve for one year and then the master would convey the business to him. The apprentice promised that he would provide the master with good and sufficient security for the agreed price. After failing to provide that security, the apprentice nevertheless sued the master to enforce the latter's promise to convey. The master's counsel⁴⁴ argued that it was highly unreasonable for the court to interpret the agreement so as to oblige the master to perform by surrendering a valuable business and to rely on the apprentice's personal assets, which both parties admitted to be worth nothing. That unfortunate result struck Lord Mansfield as "the greatest injustice;" he avoided it by interpreting the apprentice's giving such security as a "condition precedent" to the master's promise.⁴⁵ The master's promise was thus dependent on the satisfaction of the condition, which allowed the master to withhold his performance if the apprentice had not procured the promised security. That result, according to Lord Mansfield, reflected "the evident sense and meaning of the parties."⁴⁶ He thus invoked the parties' intent (albeit that intent was not as clearly expressed as it might have been) as the basis for determining that a promise was dependent on the other party's performance.

Kingston certainly does not read like an innovative decision; the court merely interpreted the agreement to find the intent of the parties.⁴⁷ Indeed, it seems more accurate to characterize the decision as giving "shape and consistency"⁴⁸ to the law rather than revolutionizing it. Long before *Kingston*, the common law had responded to the

44. The future Justice Grose. *Glazebrook*, 8 T.R. at 371-72, 101 Eng. Rep. at 1439-40.

45. *Jones*, 2 Dougl. at 691, 99 Eng. Rep. at 438.

46. *Id.*

47. In the course of his opinion Lord Mansfield did describe "three kinds of covenants:" independent, dependent, and concurrent (i.e., "mutual conditions to be performed at the same time"). The discussion of concurrent or mutually dependent covenants was dictum because Lord Mansfield plainly found the apprentice's performance to be a condition precedent which the apprentice had to satisfy *before* the master's duty to perform arose. Professor Stoljar believes the dictum to be the most significant aspect of the opinion. Its recognition of concurrent conditions prepared the way for a new body of rules on cooperation in the mutual completion of an exchange. STOLJAR, A HISTORY OF CONTRACT, *supra* note 39, at 155-59.

48. Professor Street so described the decision in 2 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 137 (1906).

inconvenience of treating promises as independent. During the seventeenth and eighteenth centuries the courts had developed an elaborate set of rules for determining whether a plaintiff had to show performance, or only a counter-promise and consideration, before it could sue on a bilateral contract. The answer depended on what the parties intended since it was undisputed that a party could make its own obligations conditional on another's performance.⁴⁹ Those rules purported to be merely interpretive ones for ascertaining the intent of the parties. Their effect, according to a leading legal historian, was to make it "most unusual for a plaintiff to be able to sue for breach without showing performance or tender."⁵⁰

The older common-law rules, in fact, survived *Kingston* when the much-maligned Sergeant Williams, in a case note in his 1798 edition of *Saunders' Reports*, restated what he believed to be the rules governing the dependency or independency of mutual promises.⁵¹ Although confusing and difficult to apply, these rules for ascertaining the parties' intent had more impact on the common law's development than Lord Mansfield's opinion in *Kingston* which was really no more than one application of them. In the United States, Professor Corbin made both Sergeant Williams' rules and *Kingston* largely irrelevant when he replaced implications of dependency with constructive conditions of exchange supplied by the courts to fill gaps in the agreement. English law, on the other hand, still seeks to ascertain the parties' intent concerning whether the plaintiff must perform, or at least tender performance, in order to sue on the defendant's promise. Over the centuries the law has evolved from treating mutual promises as independent, if no contrary evidence appears (the original sixteenth-century response to the law's recognition of a promise for a promise), to the current approach of treating them as dependent unless there is contrary evidence.⁵² The *Kingston* decision is little more than the most visible step in that long transition.

Four years after deciding *Kingston*, Lord Mansfield made a second, and perhaps more original, contribution to the law of contract. In the famous case of *Boone v. Eyre*,⁵³ the seller sued for the price on an executed sale of a West Indian plantation together with its stock of slaves. The buyer had refused to pay the remainder of the price due

49. A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 452 (1975).

50. Simpson, *supra* note 40, at 544 n.58.

51. 3 S. WILLISTON, *supra* note 10, §§ 819-823.

52. H. BEALE, REMEDIES FOR BREACH OF CONTRACT 27 (1980).

53. 1 H. Bl. 273, 126 Eng. Rep. 160(a) (K.B. 1777).

on the grounds that the seller did not lawfully possess some of the slaves. That defense did not appeal to Lord Mansfield, who had no difficulty concluding that the seller could sue for the full price, subject to the buyer's right to collect damages for any deficiency in the seller's performance. Since the seller's breach went "only to a part" of the "consideration," it "ought to be paid for in damages" rather than pleaded as a "condition precedent."⁵⁴ The buyer, therefore, could not refuse its own performance on account of the seller's breach.

Boone thus recognizes that while every breach gives rise to an action for damages, not every breach allows the innocent party to withhold its own performance. Lord Mansfield's brief opinion, however, provides little guidance for distinguishing between the two types of breaches. His reference to the seller's breach affecting only "part" of the consideration seemingly encouraged courts to distinguish between types of breaches based on their effect on the innocent party, but for nearly two centuries English law generally took a quite different approach. The courts did not consider so much the effect of the breach as they did the intent of the parties at the time of contract formation.⁵⁵ Did the parties intend the contractual provision breached by the plaintiff to be a condition or a warranty? If they intended it to be a condition, the plaintiff's nonperformance justified the defendant's refusal to perform its own promise. If they intended it to be a warranty, the plaintiff was liable in damages for its breach but still could sue on the contract.⁵⁶

This classificatory approach appears in such famous nineteenth-century cases as *Bettini v. Gye*,⁵⁷ where the court held that the plaintiff opera singer's attendance at rehearsals was not a condition precedent, the nonperformance of which did not justify the defendant's refusal to accept her services for the remainder of the engagement, and *Ellen v. Topp*,⁵⁸ where the court held that a master's teaching an apprentice the three trades in which he was engaged was a condition precedent to the apprentice's duty to serve. In both cases, the party who brought suit was the party who had committed the first breach, and the plaintiff's success depended on the court's finding that the parties did not

54. *Id.*

55. Devlin, *The Treatment of Breach of Contract*, CAMBRIDGE L.J. 192 (1966); H. BEALE, *supra* note 52, at 39-49; M. FURMSTON, CHESIRE, FIFOOT, AND FURMSTON'S LAW OF CONTRACT 140-49 (11th ed. 1986).

56. Devlin, *supra* note 55, at 196, 202-03.

57. 1 Q.B.D. 183 (1876).

58. 6 Ex. 424, 155 Eng. Rep. 609 (1851).

intend the contractual provision breached to be a condition precedent.⁵⁹ Only in the 1960s, in the aftermath of the path-breaking opinions of Justices Upjohn and Diplock in the *Hong Kong Fir* case,⁶⁰ did the English courts forthrightly analyze the effect of a breach to determine whether it was sufficiently material to allow the innocent party to refuse its own performance. English scholars, on the whole, have welcomed this new, more flexible approach, while recognizing that it sacrifices some certainty to achieve greater fairness.⁶¹

Both *Kingston* and *Boone* involved suits by parties who had withheld their own performance because the other party had not performed fully. Therefore, the decisions directly addressed only the first of the questions which interest us (when may an aggrieved party withhold its own performance?) and not the follow-up questions of when an aggrieved party may claim a discharge from ever performing and when an aggrieved party may retrieve a performance already rendered. The former question has never attracted much attention in England; its resolution seemingly depends on whether the time which the contract allows for performance has expired.⁶² The latter question received a more formalistic answer than Lord Mansfield believed appropriate. In *Towers v. Barrett*,⁶³ the plaintiff sued to recover ten guineas he had paid for a "one horse chaise and harness." The agreement allowed the plaintiff to return the chaise if his wife did not like it. The plaintiff's wife disapproved of the chaise, causing the plaintiff to return it and tender the agreed per diem charge. Nevertheless, the defendant kept the ten guineas and the plaintiff sued for return of the money. The plaintiff's action for money had and received provoked a warm response from Lord Mansfield, who proclaimed himself a "great friend" of the action, which he believed to be "very beneficial" and "founded on principles of eternal justice."⁶⁴ To Lord Mansfield, the case was an easy one: "The defendant has got his chaise again,

59. In applying the condition vs. warranty distinction, the *Bettini* court focused more on the importance of the term (did the attendance at rehearsals go to the "root of the matter"?) than on the actual intent of the parties. 1 Q.B.D. at 188 (Blackburn, J.). The court also suggested that the defendant could seek damages even though the singer's nonattendance resulted from illness. *Id.* at 187.

60. *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, 2 Q.B. 26 (1962).

61. H. BEALE, *supra* note 52, at 98; Treitel, *Some Problems of Breach of Contract*, 30 MOD. L. REV. 139 (1967).

62. H. BEALE, *supra* note 52, at 82-84. Once the court finds a material breach there is no separate inquiry, as under section 242 of the *Second Restatement*, on the materiality of the delay in performing.

63. 1 T.R. 133, 99 Eng. Rep. 1014 (K.B. 1786).

64. *Id.* at 134, 99 Eng. Rep. at 1015.

and, notwithstanding that, he keeps the money.”⁶⁵

To Justice Buller and the other Justices sitting in *Towers*,⁶⁶ the case was a bit more complicated. Justice Buller reasoned that the action for money had and received — a restitutionary action in modern terminology — was available to the plaintiff to recover his money only if the original contract had been “rescinded.” Rescission, according to Justice Buller, could occur in either of two ways: first, as in the present case, rescission occurs under “the original terms of the contract”; second, rescission could follow “a subsequent assent” of the parties. In the former case, it is the operation of a condition found in the original contract that rescinds the contract. For example, it was the wife’s disapproval of the chaise which relieved the buyer’s obligation to pay for it. In the latter case, it is the subsequent agreement of the parties which rescinds the contract; the parties rescind when the aggrieved party accepts the other party’s repudiation of the contract.

Justice Buller’s formalistic views on rescinding contracts have largely prevailed in English law, at least until recent times. Rescission is a consensual process requiring mutual assent, either at the time of contract formation through the inclusion of condition or in a subsequent agreement to rescind. Unilateral rescission is not possible.⁶⁷ As recently as 1979, the House of Lords described the process of a party’s putting an end to a contract in terms of the party’s “accepting” the other party’s “repudiation.”⁶⁸ That opinion nevertheless attracted favorable comment because it made clear that what English judges have traditionally called “rescission” was not really a rescission at all, or at least not a “rescission *ab initio*.” Rather, it was more like a “termination,” i.e., the discharge of the parties’ remaining performance obligations, but not the retroactive destruction of the original

65. *Id.*

66. The two other Justices sitting (Willes and Ashhurst) expressed views similar to those of Justice Buller. *Id.*

67. Professor Williston sharply criticized, as erroneous in principle and unfortunate in practice, this rigid consensual approach to rescission. Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 317, 421 (1901). That criticism, which first appeared in a law review article published early in his career, remained substantially unchanged in the 1936 edition of his contracts treatise, even though he did note some change in English law. See 3 S. WILLISTON, *supra* note 10, § 1467, at 4103, 4104 n.4. Professor Woodson of Stanford also condemned the English law on rescission. F. WOODSON, *THE LAW OF QUASI CONTRACTS* 429 (1913).

68. *Johnson v. Agnew*, [1980] App. Cas. 367, 392 (H.L. 1979) (opinion of Lord Wilberforce).

contract.⁶⁹ This equation of rescission with termination does not affect English law's preference for treating the process as consensual rather than as an aggrieved party's exercise of an option given it by the law.

The availability of restitutionary relief in England has suffered from the common law's insistence on rescission as a prerequisite.⁷⁰ Only after the original contract has been avoided by rescission may a party who has paid money under it obtain restitution for money had and received.⁷¹ This dichotomy between contractual and quasi-contractual recoveries led the English common law to take the extreme position that a plaintiff could recover in quasi-contract for money had and received only upon a total failure of consideration.⁷² Thus, a quasi-contractual recovery was unavailable if the plaintiff obtained any benefit from the defendant's performance, although the plaintiff might avoid this limitation if somehow he were able to return everything received. In the leading case of *Hunt v. Silk*,⁷³ the plaintiff was unable to return everything because he had enjoyed the defendant's premises for at least ten days before he sought to rescind an agreement to lease them. Therefore, he was unable to retrieve what he had paid after the defendant failed to execute the promised lease. Lord Ellenborough held that the plaintiff could not recover in quasi-contract because "where a contract is to be rescinded at all, it must be rescinded in total, and the parties put in status quo."⁷⁴ This requirement has prompted much criticism in England⁷⁵ and never became part of American law.⁷⁶ English law still treats quasi-contractual and

69. H. BEALE, *supra* note 52, at 105, 108; Shea, *Discharge from Performance of Contracts by Failure of Condition*, 42 MOD. L. REV. 623, 640-42 (1979); M. FURMSTON, *supra* note 55, at 530-33.

70. R. GOFF & G. JONES, *THE LAW OF RESTITUTION* 31 n.85 (3d ed. 1986). The authors cite as authority *Weston v. Downes*, 1 Doug. 23, 99 Eng. Rep. 19 (K.B. 1778) (the precedent distinguished by Justice Buller in *Towers*), and Justice Buller's subsequent opinion in *Toussaint v. Martinnant*, 2 T.R. 100, 105, 100 Eng. Rep. 55, 57 (K.B. 1787). In *Towers*, the court held that the buyer could rescind the sale and obtain restitution upon the failure of the condition precedent. 1 T.R. 133, 136, 99 Eng. Rep. 1014, 1016 (K.B. 1786).

71. The same limitation applies in actions for services rendered (*quantum meruit*) and goods delivered (*quantum valebat*).

72. R. GOFF & G. JONES, *supra* note 70, at 44-47; G. TREITEL, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT* 386-88 (1988).

73. 5 East 449, 102 Eng. Rep. 1142 (K.B. 1804).

74. *Id.* at 450-52, 102 Eng. Rep. at 1143-44.

75. R. GOFF & G. JONES, *supra* note 70, at 371, 460-61; P. BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 259-64 (1985).

76. 5 S. WILLISTON, *supra* note 10, § 1460, at 4080. The more liberal American rule would have allowed the plaintiff to recover the money paid if it tendered the defendant a

contractual remedies as distinct and mutually exclusive,⁷⁷ while in the United States restitution has become another remedy for breach of contract.⁷⁸

The *Towers* and *Hunt* decisions should prompt considerable skepticism concerning the importance of quasi-contractual remedies in English law. Professor Atiyah, one of the strongest advocates of benefit-based recoveries, has defended the "apparent dominance" of quasi-contract in eighteenth-century England.⁷⁹ According to Atiyah, contracting parties rarely sued to enforce an expectancy interest. Most lawsuits involved partially performed contracts and plaintiffs who were concerned about losing the benefit of their performance. Professors Simpson⁸⁰ and Dawson⁸¹ are more skeptical and describe the quasi-contractual remedy for money had and received as an alternative, fall-back remedy accompanying a contractual claim. Modern English authorities emphasize that the action for money had and received was popular due to its simplicity and convenience.⁸² The plaintiff had the advantage of suing for a liquidated sum and did not need to prove damages. Any dominance of quasi-contract in the eighteenth century is most likely attributable to those factors. While it may have been popular, its scope was certainly limited. The relief granted was a money judgment, almost always for money had and received. The other quasi-contractual or common count remedies for services rendered or goods sold and delivered never quite developed in England.⁸³ In particular, the unpaid seller could not even obtain restitution for the value of goods delivered to the buyer.⁸⁴

reasonable daily rental for the use of the premises. Williston naturally preferred the American approach to the "severity" and "rigor" of the rule in *Hunt v. Silk*. *Id.* § 1454A, at 4062 n.3, and § 1460, at 4080.

77. The House of Lords has modified the *Hunt* rule to require, as a prerequisite for restitution, only the prospective termination and not the retroactive annihilation of the original contract; but this modification has not affected the separate requirement that the plaintiff seeking restitution establish a total failure of consideration. See R. GOFF & G. JONES, *supra* note 70, at 45, 459 (discussing *Johnson v. Agnew*, [1980] App. Cas. 367 (H.L. 1979)).

78. RESTATEMENT (SECOND) OF CONTRACTS § 345 (1979) (listing remedies for breach of contract).

79. P. ATIYAH, *supra* note 40, at 184. The nineteenth century supposedly saw a decline of quasi-contract and an increase of suits to enforce purely executory contracts. *Id.* at 455-57.

80. Simpson, *supra* note 40, at 587-88.

81. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 175-76 (1959).

82. H. BEALE, *supra* note 52, at 204. See also Dawson, *supra* note 81, at 175.

83. P. BIRKS, *supra* note 75, at 229 ("the plaintiff who has conferred a non-money benefit will not often be able to obtain restitution").

84. The American rule is no more favorable to the unpaid seller's restitutionary interest despite the contrary wishes of Professors Keener and Woodward. See 1 G. PALMER, *supra*

English sales law further reflects the poverty of common-law restitutionary remedies and, as will be seen, provides a striking contrast with the broad restitutionary remedy provided by French law. One of the major areas of conflict in the nineteenth-century English law of sales was the unpaid seller's right to resell goods.⁸⁵ The problem arose because in most credit sales the property interest in the goods passed to the buyer before the goods did. If the goods were the buyer's property, how could the seller sell them to somebody else? Of course, the unpaid seller had a lien on the goods while they were in its possession and could stop them in transit, but those remedies only protected the seller's interest in the price. To resell the goods, the seller had to have title. Revesting the property in the seller required an agreement, which could occur only if the buyer's nonpayment was a repudiation of the original contract which the seller then accepted. If the buyer did not repudiate, the seller had to hold the goods for the buyer and sue for the price.⁸⁶

The conservatism of the English judges, their reluctance to change established rules, and their formalistic insistence on rescission by mutual consent before the seller could resell, were all sharply criticized by Professor Williston, who praised American courts for not hesitating to formulate rules that better served mercantile conveyance.⁸⁷ Of course, from the perspective of the unpaid seller under French law, the differences between nineteenth-century English and American law were trifling. The only issue considered under English and American law was the seller's power to resell goods that had not yet reached the buyer (i.e., goods which the seller still possessed or had stopped in transit). In neither system did the unpaid seller have a goods-oriented remedy once the buyer took delivery. As one English court noted, there was no "case to be found in the Books" which allowed the unpaid seller to reclaim goods delivered to the buyer.⁸⁸ American law has not been any more generous in providing the un-

note 28, § 4.3, at 379, citing W. KEENER, *A TREATISE ON THE LAW OF QUASI-CONTRACTS* 301 (1893) and F. WOODWARD, *THE LAW OF QUASI CONTRACTS* § 262 (1913).

85. For an exhaustive treatment of the subject, see 5 J. BENJAMIN, *A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY* pt. 1, at ch. 5 (5th ed. 1906).

86. It was not until 1893 that section 48(2) of the English Sale of Goods Act (still in force) finally recognized the seller's right to resell upon giving notice to the buyer. *Sale of Goods Act*, 1893, 56 & 57 Vict. 365, ch. 71, § 48(2).

87. 3 S. WILLISTON, *THE LAW CONCERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 544, at 166, and § 555, at 185-86 (1948).

88. *Page v. Cowasjee Eduljee*, 1 L.R. 127, 145 (P.C. 1866).

paid seller a restitutionary remedy.⁸⁹

II. THE EFFECT OF NONPERFORMANCE IN CONTEMPORARY FRENCH LAW

Compared to the common law, contemporary French law takes a dramatically different approach to the effect of nonperformance (normally due to breach) on the aggrieved party's duties and remedies under a bilateral contract. Under French law, one party's nonperformance may suspend, but does not discharge, the other party's duty to perform; discharge occurs only when a court terminates the original contract. Following termination, the aggrieved party may retrieve any performance already rendered by it, or the value thereof. Thus, termination is neither a unilateral nor a consensual process but a judicial one. Judicial termination offers the victim of nonperformance a convenient restitutionary remedy.

The primary source for this body of law is article 1184 of the Civil Code.⁹⁰ That text has remained unchanged since the Code's promulgation in 1804 as part of Napoleon's effort to codify French private law.⁹¹ How it operates is reasonably clear if one ignores the confusing reference in paragraph one to the "implied" terminating condition and goes directly to the second sentence of paragraph two. That provision affords a party to a bilateral contract a choice when the other party has not performed: the aggrieved party may either "force the other party to perform the contract when possible, or demand termination with damages." Both remedies require the intervention of a court. This requirement, implicit for specific relief remedies (only a court can "force" a party to perform), is made explicit for termination by paragraph three, which states that "termination must be sought from the courts." Thus, termination does not

89. See *supra* text accompanying note 34.

90. Article 1184 contains three paragraphs which read as follows (author's translation):

[1] The terminating condition is always implied in bilateral contracts in case one of the two parties does not perform the agreement.

[2] In that case the contract is not terminated as a matter of right (*de plein droit*). The party in whose favor the agreement has not been performed has a choice either to force the other party to perform the contract when possible, or to demand termination with damages.

[3] Termination must be sought from the courts, and a delay may be granted the defendant, according to the circumstances.

CODE CIVIL [C. CIV.] art. 1184 (Fr.).

91. Article 1184, like many articles in the Code, did not create but merely made uniform customs that were already widespread in pre-revolutionary France. A full understanding of its purpose must therefore await Part IV's description of its historical background.

occur as "a matter of right" or "by operation of law" (two possible translations of the phrase *de plein droit* appearing in the first sentence of paragraph two) simply because one party does not perform its side of the agreement. There can be no discharge of the other party's obligation to perform until that party secures the contract's termination from a court. Article 1184 thus tells aggrieved parties such as Herbert Harrison⁹² that they cannot terminate a contract on their own initiative. If they believe the other party's nonperformance is serious enough to warrant termination of the contract, they must seek that relief from the courts. Above all, article 1184 tells aggrieved parties not to assume the role of judge in their own cause.

While addressing the issue of discharge in article 1184, the Civil Code does not address, at least not as a general matter, whether a party to a bilateral contract may withhold or suspend its performance if the other party's performance is due but not forthcoming. Nevertheless, after much hesitation, the courts have recognized the defense of nonperformance, generally designated by its Latin name *exceptio non adimpleti contractus*, which allows an aggrieved party to suspend its performance on its own initiative.⁹³ The availability of that defense, while not directly contrary to article 1184's requirement of judicial intervention for termination, has certainly limited the negative effects of that rule. If a breach is serious enough and the court accepts the defense of nonperformance, the party-in-breach, such as the apprentice in *Kingston*, is unable to obtain specific relief from the other party or hold that party liable in damages for nonperformance. The latter party, however, cannot terminate the contract on its own initiative, as Herbert Harrison did, or do anything to preclude performance of its contractual obligations, such as reselling identified goods to another buyer or hiring another contractor to finish promised repairs. In theory, at least, a party remains bound by its promise until it has obtained a discharge from a court.⁹⁴

In summary, under contemporary French law, a contractant cannot claim a discharge unilaterally, and thus remains bound until it

92. For a discussion of the *Harrison* case, see *supra* text accompanying notes 6-9.

93. See *infra* text accompanying notes 206-220.

94. For a recent case upholding this proposition, see Cass. com., 24 June 1980, 1981 Dalloz Jurisprudence [D. Jur.] I.R. 40. In that case, a buyer repudiated a contract for the sale of an automobile when the seller had not yet delivered the automobile three months later. The contract provided for delivery as soon as possible. The seller obtained judicial termination and damages because its breach did not allow the buyer, "on its own authority, and without recourse to the courts, to repudiate the contract." One treatise has sought, rather lamely, to justify that result on the grounds that the three-month delay was not an essential breach. P.

obtains termination from a court. However, a party can suspend performance unilaterally if the other party is in breach. Courts, as we will learn,⁹⁵ grant termination and recognize the defense of nonperformance only for "grave" breaches. Although similar to the common-law doctrine of material breach, this limitation focuses more on the innocent party's good faith in responding to the breach. Good faith requires a response that is proportionate to the seriousness of the breach.

The following three parts of this article analyze two remedies for breach; (1) the judicial termination of the contract, and (2) the aggrieved party's suspension of performance. The article also discusses how these two remedies fit into the general French law on contract remedies. First, Part III will address the broad restitutionary remedy which accompanies termination. The scope of that remedy assures it a place of considerable importance in contemporary French law. Part IV will then explain the genesis of article 1184's requirement that an aggrieved party obtain termination from a court. Finally, Part V will describe the damage control efforts conducted by scholars and courts to limit the negative effects of article 1184. The result will not be the one suggested above, that perhaps the French approach would have saved Herbert Harrison, but quite a different one based on the capacity of legal systems to defuse absurd rules. Article 1184's requirement of judicial termination for the discharge of contractual obligations is, if not an absurd rule, certainly a most unrealistic one. It is unrealistic because it requires the innocent party to assume the burden of litigation in disputes over contract performance. The capacity of the French legal system to adjust to such a rule, to overlook it when necessary, and to manipulate it by interpretation, demonstrates once again the creative role of the judiciary.⁹⁶

MALAURIE & L. AYNÈS, *COURS DE DROIT CIVIL; LES CONTRATS SPÉCIAUX* n° 437, at 173 n.137 (1986).

Dalloz [D.] and *Juris Classeur Périodique* [J.C.P.] (also known as *La semaine juridique*) are the leading privately published French case reports. They publish a weekly selection of decisions, many of them accompanied by case notes written by leading jurists. French citation form for cases generally does not include the names of the parties but only the date of the decision (here June 24, 1980) and the identity of the court (here the Commercial Chamber of the Court of Cassation, France's highest court). "*Jurisprudence*" is the French word for cases or case law. Citations to French treatises, such as the Malaurie and Aynès work on particular contracts, generally include the section number (n°) which does not change from edition to edition.

95. See *infra* text accompanying notes 139 and 212.

96. See A. WATSON, *FAILURE OF THE LEGAL IMAGINATION* 22 (1988), where the author makes a similar point on the French legal system's ability to live with the absurd rules on

It may also demonstrate the disadvantage of freezing such a specific requirement in the text of a Code. Case law rules fade away more readily than do codified rules when subsequently perceived to be outmoded or unwise. Witness the fate of *Towers v. Barrett* and *Hunt v. Silk*, two questionable English cases decided almost contemporaneously with the promulgation of the Civil Code.⁹⁷ Despite the excessive weight often given to precedent in English law, it is doubtful that these artifacts can do much mischief today. Too much water and too many new cases have gone over the dam in the interim.⁹⁸ On the other hand, French lawyers and judges must still contend with the text of article 1184.

III. THE POSITIVE SIDE OF ARTICLE 1184: TERMINATION AS A REMEDY FOR BREACH OF CONTRACT

Modern contract law offers a party to a contract three basic remedies for its breach: specific relief, damages, and termination.⁹⁹ Specific relief is more widely available in France than it is in England and America, where the aggrieved party usually must settle for the substitutionary relief provided by damages. French law, on the other hand, prefers to enforce the agreement of the parties.¹⁰⁰ Courts may order a defendant to perform any contractual duty which is not a strictly personal one.¹⁰¹ One cannot compel a painter to paint a picture, but buyers can usually compel sellers to deliver goods and sellers can always recover the price. As a practical matter, however, aggrieved parties usually find it simpler to halt performance and seek either damages or termination.¹⁰² Damage awards, set exclusively by professional

tort liability found in articles 1382-1386 of the Civil Code. For my earlier effort to describe what the judges have accomplished under the guise of interpreting those articles, see Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988).

97. See *supra* text accompanying notes 63-78.

98. For a case limiting *Hunt v. Silk*, see *Rowland v. Divall*, [1923] 2 K.B. 500 (buyer of stolen car obtained restitution of price even though he used it before learning it was stolen).

99. G. TREITEL, *supra* note 72, at 1. Professor Treitel's survey of the contract remedies offered by different legal systems is the best work on the subject available in English. For a general survey of French contract law, see B. NICHOLAS, *FRENCH LAW OF CONTRACT* (1982).

100. A. WEILL & F. TERRÉ, *DROIT CIVIL; LES OBLIGATIONS* n° 829 (4th ed. 1986).

101. One would not discover any such rule by reading the Civil Code. In fact, article 1142 appears to state a quite different rule, when it provides that a duty to perform "gives rise to damages, in the case of nonperformance on the part of the debtor." C. CIV. art. 1142. For the Court of Cassation's surprising interpretation of article 1142, and for French law's preference for performance over damages, see the famous case note by Paul Esmein accompanying Cass. civ., 20 Jan. 1953, 1953 J.C.P. Jur. II 7677.

102. See G. TREITEL, *supra* note 72, at 56.

judges, tend to be less generous than jury verdicts in the United States, which explains in part the popularity of termination.

The remedy of termination, recognized in article 1184 of the Civil Code, is primarily a restitutionary one which permits a party to retrieve its own performance or the value thereof. That remedy, unlike restitution in this country,¹⁰³ is not available to a party in breach because paragraph two of article 1184 restricts it to "the party in whose favor the agreement has not been performed."¹⁰⁴ For that party, however, the remedy is more generous because the text explicitly allows a party to seek both termination and damages, a course not always allowed by common-law courts which often hold that a party who avoids a contract by obtaining restitution cannot also seek damages for its breach.¹⁰⁵

The practice of judicial termination, as will be seen more fully below, does have its positive side in that it provides an effective remedy for breach of contract. The remedy's restitutionary nature has encouraged the courts to extend, by interpretation, article 1184 to cover cases in which a party's nonperformance is not a breach but is excused under impossibility or other related doctrines.¹⁰⁶ Even though the excused party is not liable in damages for nonperformance, the other party may still invoke article 1184 to obtain restitution of its own performance. The courts have also developed under article 1184 rather imaginative solutions for cases in which the defendant has performed only in part. In those cases, the courts often grant the

103. See *Britton v. Turner*, 6 N.H. 481 (1834) and RESTATEMENT (SECOND) OF CONTRACTS § 374 (1979).

104. C. CIV. art. 1184, ¶ 2.

105. English law requires the nonbreaching plaintiff to choose between restitution and damages. See *supra* text following note 63. Professor Dobbs criticizes this election of remedies reasoning on the grounds that restitution is merely one way to measure contract damages; a plaintiff should be able to invoke more than one measure as long as it does not result in double recovery. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.5 (1973). The *Uniform Commercial Code* adopts Professor Dobbs' approach by allowing the buyer, if the seller tenders nonconforming goods, both to cancel the sale by returning the goods and to seek damages. U.C.C. § 2-711(1) (1987). The *Second Restatement* more cautiously suggests that a party obtaining restitution may also recover some incidental damages. See RESTATEMENT (SECOND) OF CONTRACTS § 378 comment d (1979).

106. The lead case is Cass. civ., 14 Apr. 1891, 1891 D.P. Jur. I 329 (note Planiol), 1894 S. Jur. I 391 (the *Albertini* case). Dalloz [D., D.P. or D.H.] and Sirey [S.] are privately published French reports which merged in the late 1940s to become Dalloz-Sirey [D.S. or D.].

Contract liability under French law is more fault-based and less strict than at common law. *Force majeure* (i.e., some unexpected and irresistible force) generally provides a defense for nonperformance. A. WEILL & F. TERRÉ, *supra* note 100, nn^o 410-415. Therefore, defenses resembling impossibility play a greater role.

plaintiff a partial termination by discharging some of its performance duties, while at the same time compensating it in damages for the other party's incomplete performance.¹⁰⁷

For parties pursuing termination as a restitutionary remedy, article 1184's requirement of judicial intervention is neither a surprising nor a significant burden. Parties seeking specific relief and damages also must go to court to obtain them. What is surprising, at least to the common-law observer, is the retroactive effect of judicial termination. Retroactivity results from the combined operation of paragraph one of article 1184, which defines nonperformance as a "terminating condition," and from paragraph one of article 1183, which defines a terminating condition as one that, when it occurs, operates to "discharge" a party's contractual duty and "returns things to the same state as if that duty had never existed."¹⁰⁸ This definition makes nonperformance, the terminating condition covered by article 1184, more than just an event which discharges a party's remaining duties to perform (what the common law called a "condition subsequent" until the *Second Restatement* attempted to abolish that useful term),¹⁰⁹ since, when followed by judicial termination, nonperformance also operates retroactively to put the aggrieved party into the position it enjoyed before contracting.

Thus, if a court grants a seller's request to terminate a sales contract for the buyer's breach in paying the price, the court's judgment

107. *Id.* n° 487. Under French law, a party seeking damages for total breach should, if it has not already fully performed, also seek at least a partial termination, i.e., a discharge under article 1184 from any remaining performance duties. As a practical matter, however, a party seeking only damages, and not the retrieval of any performance rendered, usually does not request termination. That party's nonperformance is simply not at issue, or becomes so only if the defendant claims nonperformance as a cost saved when the court computes the damages caused by defendant's breach. The action is, in effect, one to enforce the contract by obtaining the substitute performance of damages. This reality conflicts somewhat with the sharp dichotomy, recognized in paragraph 2 of article 1184, between "forcing the other party to perform" (specific relief) and "demanding termination with damages." These two choices do not appear to exhaust the options available to the victim of a contract breach. No one has ever questioned the victim's right to sue for damages without demanding termination, a right explicitly recognized by article 1142. See *supra* note 101.

108. Article 1183, which has remained unchanged since 1804, reads as follows:

[1] The terminating condition is that which, when it occurs, affects the discharge of a duty and returns things to the same state as if the duty had never existed.

[2] It does not suspend the performance of a duty: it only requires the obligee to restore that which he has received in case the event contemplated by the condition occurs.

C. CIV. art. 1183.

109. RESTATEMENT (SECOND) OF CONTRACTS § 230 and § 224 comment e (1979).

has the effect of returning the property to the seller.¹¹⁰ The seller, who is once again the property's owner, may reclaim it wherever it can be found,¹¹¹ subject only to the defenses afforded to purchasers of real property by the recording system¹¹² and to good faith acquirers of personal property by article 2279 of the Civil Code.¹¹³ To retrieve its own performance in that fashion, the aggrieved party, referred to as the obligee or creditor in article 1183, must, of course, make restitution for whatever performance it has received.¹¹⁴

The retroactive effect of termination is an application of the more general rules on conditions found in articles 1179 and 1183 of the Civil Code. These rules, much criticized for hindering the free flow of goods,¹¹⁵ derive from Roman law and from the customary law of pre-revolutionary France. They thus appear firmly embedded in French law.¹¹⁶ Under article 1179, the occurrence of a condition precedent, called a suspensive condition in French law, retroactively renders the contract effective from the date of its formation. This rule has a striking impact, when combined with the rule, found in articles 1138 and 1583 of the Civil Code, that treats the sales contract itself as transferring the property to the buyer.¹¹⁷ The buyer becomes the owner from the date of the sale, even if the satisfaction of the suspensive condition occurs long afterward. Still more striking is the retroactive effect, under article 1183, of a condition subsequent, called a terminating condition in French law. For example, if a buyer of a horse includes in the sales agreement a clause terminating the sale if the horse does not win a specified race, the horse's failure to win the race means that

110. A. WEILL & F. TERRÉ, *supra* note 100, n° 489.

111. To reclaim property from a third party, the seller must normally bring, as the property's owner, a separate action. C. CIV. art. 2279.

112. As a general matter, sellers of real property must record their termination right as they would a security interest. *See* article 2108 of the Civil Code and A. WEILL & F. TERRÉ, *supra* note 100, n° 492.

113. That article provides that the possession of personal property is the equivalent of title ("*la possession vaut titre*"). Courts have interpreted that language to protect persons who acquire possession in good faith. A. WEILL, F. TERRÉ, & P. SIMLER, *DRIT CIVIL; LES BIENS*, nn°° 412-415 (3d ed. 1985).

114. *See* C. CIV. art. 1183, ¶ 2.

115. *See, e.g.*, 7 M. PLANIOL & G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 1045, at 400 (2d ed. 1954). *See also* A. WEILL & F. TERRÉ, *supra* note 100, n° 492, at 514 (retroactivity creates dangerous insecurity for third parties).

116. 7 M. PLANIOL & G. RIPERT, *supra* note 115, n° 1037. Professors Colin and Capitant have argued that the Code's drafters misunderstood the earlier law when the drafters generalized rules intended only for exceptional cases. 2 A. COLIN & H. CAPITANT, *TRAITÉ DE DROIT CIVIL* n° 1694 (J. de la Morandière ed. 1959). This view has not prevailed.

117. C. CIV. art. 1138 & 1583.

the buyer never became its owner.¹¹⁸

This analysis of termination under article 1184 demonstrates that its principal advantage as a contract remedy is not the discharge obtained by the aggrieved party, but rather the opportunity termination offers that party to retrieve, perhaps at the expense of the breaching party's other creditors, a performance already rendered. That remedy is particularly useful to unpaid sellers, who retain the equivalent of a security interest in the property sold. In one of the first reported cases under the 1804 Code, a court terminated in 1819 a sales contract executed in 1801.¹¹⁹ At that time, the terminating seller's property claim took precedence over the claims of an insolvent buyer's other creditors, but at present the Bankruptcy Law substantially restricts that priority. Today, termination allows unpaid sellers to reclaim property ahead of other creditor claims only if the court order terminating the sale pre-dates any insolvency proceeding initiated against the buyer.¹²⁰

Despite this limitation, the possibility of retrieving a performance remains the most attractive feature of termination under article 1184.

118. 2 H. MAZEAUD, L. MAZEAUD, J. MAZEAUD, & F. CHABAS, *LEÇONS DE DROIT CIVIL; OBLIGATIONS* n° 1027, at 1071-72 (7th ed. 1985) [hereinafter 2 MAZEAUD]. These provisions have led Dean Carbonnier to lament that French law is deficient because it lacks any condition which merely *extinguishes* an obligation. 4 J. CARBONNIER, *DROIT CIVIL; LES OBLIGATIONS* § 63, at 230 (10th ed. 1979).

119. Cass. civ., 16 Aug. 1820, 1820 S. Jur. I 300. The trial court had terminated the contract in 1819 and the Court of Cassation found no error. The latter Court held that it did not matter whether articles 1184 and 1654 (a more specific article on the termination of sales contracts by unpaid sellers) provided the applicable rule, because those articles merely codified a principle recognized by the Parliament of Paris prior to the Code's enactment in 1804. On pre-Code law, see *infra* note 177.

120. For present law, see article 117 of the Law of January 25, 1985, reprinted as an appendix to DALLOZ, *CODE DE COMMERCE* 602 (1988/89). In the rare case where the seller obtains termination other than for nonpayment, it is sufficient if the seller *initiates* the action for termination prior to the buyer's insolvency. Cf. U.C.C. § 2-702(2) (1987). The Code provision is more restrictive in that it allows the seller to retrieve goods from an insolvent buyer only if the insolvency occurred within ten days of delivery.

Under French law, sellers may still protect themselves from a buyer's insolvency by inserting in sales contracts a clause reserving to themselves the property sold until the payment of the price (*la clause de réserve de propriété*). Such a clause protects the seller's expectancy interest in the price rather than its restitutionary interest in the goods. This remedy received a much-needed boost when the French Parliament confirmed its validity in the law of May 12, 1980, now codified as article 121-2 of the law of January 25, 1985 (reprinted as an appendix to the DALLOZ, *CODE DE COMMERCE*). That validation brought French creditors' rights law into conformity with the norms of the European Economic Community. See 2 G. RIPERT & R. ROBLOT, *TRAITÉ ÉLÉMENTAIRE DE DROIT COMMERCIAL* nn° 3159-63 (10th ed. 1986). The limited protection previously afforded the seller's security interest explains in part the popularity of the more general termination remedy.

The aggrieved party's recovery does not appear limited to the benefit conferred on the defendant, as is the restitutionary remedy for breach of contract in this country.¹²¹ Indeed, it resembles more closely the specific restitutionary relief available in common-law jurisdictions to victims of fraud, duress, and mistake, who are able to avoid their contracts and retrieve any property lost. Courts exercising equity jurisdiction have traditionally assisted them in recovering their property, through constructive trusts and other tracing doctrines, while at the same time protecting the interests of third parties who relied in good faith on the avoided contract.¹²²

French courts afford similar relief to the aggrieved party when terminating a contract for breach under article 1184. The aggrieved party can pursue its property by invoking the fiction that it never ceased to be the owner. The scope of the retrieval mechanisms available do not vary much between the two systems.¹²³ What is striking is that French courts offer such relief in cases of breach and not just in cases of contracts avoided for fraud, duress, or mistake. While specific restitution and various tracing remedies are theoretically available in the common-law world when an aggrieved party seeks restitution for breach, they remain largely undeveloped because of a theoretical concern over the plaintiff's title¹²⁴ and a more legitimate practical concern that the victim of the breach may secure an advantage over the breacher's other creditors.¹²⁵ The latter concern is not as great when a party promptly seeks to avoid a contract by claiming that fraud, duress or mistake tainted its very formation. Even in these cases, where there is a stronger case for fashioning an effective restitutionary remedy, courts will deny restitutionary relief when they perceive it to be too "radical" or when they find the unravelling of past

121. See 1 G. PALMER, *supra* note 28, at ch. 4.

122. E. FARNSWORTH, *CONTRACTS* § 4.15, at 255 (1982) (avoidance of a contract for fraud).

123. Common-law systems protect good faith purchasers by recognizing that they may obtain legal title from a seller whose title is voidable, i.e., subject to a prior seller's avoidance and reclaiming of the property. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.7 (1973). French law protects a slightly broader class of good faith acquirers. Article 2279 of the Civil Code provides that the possession of personal property is the equivalent of title. Such statutory "title," if acquired in good faith, prevails over the terminating seller's claim that it never ceased being the owner of the property. A. WEILL, F. TERRÉ & P. SIMLER, *supra* note 113, n° 514. Both systems protect purchasers of real property through recording requirements.

124. See *supra* text accompanying note 32.

125. G. PALMER, *supra* note 28, § 4.10, at 452-57.

transactions to be too "disruptive."¹²⁶ French courts do not often demonstrate any such hesitancy.

French law perhaps reflects a similar concern over the disruptive effect of undoing past transactions when it stresses the discretionary nature of the termination remedy. Termination is not available to an aggrieved party as a matter of right, except where the other party's nonperformance is definitive and total. However, the reasons invoked for limiting termination as a remedy seem more paternalistic than those advanced in this country. French scholars argue that termination is a disfavored remedy because it destroys a transaction desired by the parties.¹²⁷ Both the innocent party and the contract breaker do not obtain what they desire, namely, performance or some substitute for it if performance itself is no longer possible. Thus, if a party sues for termination, and the party in breach has either performed in part or is now able and willing to perform, a French court will normally require the innocent party to accept that performance, combined with an award of damages to compensate for any delay or other deficiency.¹²⁸ These decisions denying termination seem to be based on a certain solicitude for the debtor that is reflected in many Code provisions. One such provision is the third paragraph of article 1184 which explicitly authorizes the court to allow the party in breach a further extension in the time allotted for performance.¹²⁹

Long-term installment contracts present a special case where the disruptive effect of retroactive termination has proved too pronounced for the French courts to ignore. Does it make any sense to terminate a fifty-year lease retroactively, when the lessor wrongfully evicts the lessee in the forty-ninth year? Can the lessee demand the return of all

126. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 4.3, at 256 (1973).

127. Deprez, *Rapport sur les sanctions qui s'attachent à l'inexécution des obligations contractuelles en droit civil et commercial français*, in *LES SANCTIONS ATTACHÉES A L'INEXÉCUTION DES OBLIGATIONS CONTRACTUELLES* 28, 52-53 (XVII Travaux de l'Association Henri Capitant ed. 1968); J. CARBONNIER, *supra* note 118, § 80, at 300; Cassin, *Réflexions sur la résolution judiciaire des contrats pour inexécution*, 1945 *REVUE TRIMESTRIELLE DE DROIT CIVIL* [REV. TRI. DR. CIV.] 159, 161. The *Revue trimestrielle de droit civil* is the leading French law review on private law.

128. 2 MAZEAUD, *supra* note 118, at n° 1098.

129. French writers often distinguish between the Civil Code, which seeks to protect the weak (the debtor), and the Commercial Code, which seeks to protect the strong (the merchant). Perhaps the most well-known debtor relief provision in the Civil Code is article 1244, which authorizes judges to suspend suits and accord delays for performance "in consideration of the position of the debtor." The availability of a separate body of commercial courts often provides merchants an escape hatch from impractical Civil Code rules. See *infra* note 227.

rent paid and offer to pay only the fair rental value for the premises enjoyed? Courts have traditionally avoided such an unfortunate result by terminating the contract from the date of breach and leaving untouched any completed performances.¹³⁰

This sensible, well-established practice of nonretroactive termination troubled some purists because they believed it to violate the clear text of article 1183, which provides that termination "returns things to the same state as if the duty had never existed."¹³¹ This same text provided the basis for a 1982 decision by the Court of Cassation (France's Supreme Court), which seemingly rejected the established practice of terminating installment contracts only from the date of breach.¹³² In that case, the Court of Cassation found that a regional Court of Appeals, a second-level trial court,¹³³ had violated article 1184 when it granted a franchisor termination and damages without requiring it to return all past payments made by the franchisee in breach.

In a 1987 decision, the Court of Cassation retreated from its apparent insistence on full retroactivity when it formulated, for the first time, a test for determining the temporal scope of termination.¹³⁴ The new test seeks to effectuate the parties' intent. It provides that "termination for partial nonperformance affects the entirety of the contract or certain of its installments only, according to whether the parties intended an agreement that was indivisible or was broken up into a series of agreements."¹³⁵ If the parties intended their successive exchanges of performances to be a series of separate agreements, then the courts should honor that intent and should not upset past performances when terminating for breach.

The crucial criterion under this new approach appears to be the equivalence of the successive performances. If the agreement requires that one party initially perform more substantially than the other party, then the first party should be able to obtain restitution of that disproportionate performance upon termination of the agreement.

130. A. WEILL & F. TERRÉ, *supra* note 100, n° 491.

131. For a superb summary of the purists' objections, see Cass. com., 12 Oct. 1982, 1984 J.C.P. Jur. II 20166 (note Signoret). For the text of article 1183, see *supra* note 108.

132. Cass. com., 12 Oct. 1982, 1984 J.C.P. Jur. II 20166 (note Signoret).

133. The regular French judicial system has two levels of trial courts and one appellate court (the Court of Cassation). The regional Courts of Appeal retry (or at least decide *de novo*) cases on appeal from local (departmental) tribunals. Therefore, the Courts of Appeal are a second level of trial courts.

134. Cass. civ., 13 Jan. 1987, 1987 J.C.P. Jur. II 20860 (note Goubeaux).

135. *Id.*

The Court of Cassation adopted this approach in its 1987 decision when it allowed a student, enrolled in a driver's education school, to recover a hefty down payment, upon the school's breach of its obligation to continue providing driving lessons until the student obtained his license.¹³⁶ The same full retroactivity is not likely to occur under the Court's formulation in cases in which the parties' successive performances are true equivalents, as where a buyer pays in installments for goods delivered in installments or a lessee pays a monthly rent for the enjoyment of the leased premises. In those situations, the Court respects the parties' intentions, and the text of article 1184, when it treats past performances as separate, completed agreements and only terminates the contract from the date of the first breach. Thus, the Court's 1987 formulation provides a solid basis for continuing the traditional practice of nonretroactive termination of true installment contracts.¹³⁷

The installment contract cases demonstrate the advantages which may flow from the involvement of professional judges in fashioning remedies in cases of part performance. Those advantages, as described by French academics, flow from both the protective and dynamic roles of judges when an aggrieved party seeks termination under article 1184.¹³⁸ The judges' protective role is to insure that the defendant's breach is sufficiently serious to warrant the termination of the contract, a remedy which deprives the defendant of any advantage it expected from the plaintiff's performance. The judges' dynamic role, on the other hand, is to fashion remedies, short of full termination, which afford the parties as much benefit as possible from each other's performances. Those remedies may include modifications of the contract which reduce the plaintiff's duties under it.

It is unclear to what extent the French system realizes these advantages offered by the practice of judicial termination. It is difficult to obtain information because the judges expected to fulfill these roles

136. Surprisingly, the Court did not require the student to make any restitution for driving lessons actually received prior to the school's breach. Perhaps, having failed the driver's test, the student received no benefit. But would not the instruction received provide some benefit if the student recommenced lessons elsewhere?

137. For a similar analysis on termination of installment contracts, see Ghestin, *L'effet rétroactif de la résolution des contrats à exécution successive*, in MÉLANGES OFFERTS À PIERRE REYNAUD 203 (1985). Section 240 of the *Restatement (Second) of Contracts* similarly treats as severable any part performances which are agreed equivalents.

138. A. WEILL & F. TERRÉ, *supra* note 100, n° 487; H. CAPITANT, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE n° 112, at 393 (8th ed. 1984) (case note on *Albertini*); Deprez, *supra* note 127, at 50-55.

are trial court judges whose decisions rarely appear in the privately published reporters. Trial court judges have acquired that responsibility under the Court of Cassation's settled interpretation of article 1184. The Court's interpretation of article 1184, at least since 1845, has denied the aggrieved party any right to termination for nonperformance. Under this prevailing interpretation, the trial judges must determine whether "the nonperformance, given all the facts and circumstances, has sufficient importance for the termination to be pronounced immediately, or whether it will be adequately compensated by an award of damages."¹³⁹ Thus, some nonperformances (including some breaches) allow the performing party to escape the contract and others do not. It all depends on the significance of the nonperformance.

This formulation contributes much less to a definition of material breach than do the criteria listed in sections 241 and 242 of the *Second Restatement*. However, the Court of Cassation's intent was not to define which nonperformances or breaches are material, but to allocate decision-making competence in the French legal system. The Court of Cassation, as the sole appellate court in the hierarchy of regular courts, reviews lower or trial court judgments only to insure that they did not misinterpret or otherwise violate a legal text; it does not review judgments for evidentiary sufficiency. As a result, if the Court of Cassation defines a question as a factual one, as it does the question of a nonperformance's importance or gravity, the trial courts' resolution of that question largely escapes its control. Thus, the Court of Cassation's interpretation of article 1184 makes the availability of the termination remedy a factual matter left to the discretion of the trial court judges.

This phenomenon of delegating broad discretion to trial courts occurs frequently in French law. Trial judges exercise sovereign, unreviewable powers over fact-finding,¹⁴⁰ and the Court of Cassation

139. The quoted language comes from the *Albertini* decision in which the defendant's nonperformance was excused due to impossibility. Cass. civ., 14 Apr. 1891, 1891 D.P. Jur. I 329, 1894 S. Jur. I 391. Professor Capitant traces its origin to an 1845 decision, Cass. civ., 15 Apr. 1845, 1845 D.P. Jur. I 411, 1845 S. Jur. I 345, where the nonperformance was a breach. H. CAPITANT, *DE LA CAUSE DES OBLIGATIONS* n° 154, at 344 n.1 (3d ed. 1927). The Court has repeated its formulation on many occasions, in both categories of cases, although perhaps not as rigidly as it has other formulaic interpretations of Code articles. See, e.g., Cass. civ., 22 Nov. 1921, 1923 S. Jur. I 82 (note Hugueney) (breach case). Sometimes, the Court has substituted the word "gravity" for "importance."

140. On factual matters, the Court of Cassation recognizes "le pouvoir souverain des juges du fond" ("the sovereign power of the trial judges"). B. NICHOLAS, *supra* note 99, at 17.

tends to define the category of "fact" quite broadly. Perhaps the best-known example is the Court's treatment of contract formation.¹⁴¹ The Court treats the required mutual assent as a factual matter and has declined to formulate elaborate rules, such as those developed at common law and preserved in the two *Restatements*, on what constitutes an effective offer or a timely and responsive acceptance.

This judicial reticence may be attributed in part to the skimpiness of the Code provisions on contract formation. However, in other areas, the thinness of the applicable texts has not prevented the Court of Cassation from formulating elaborate case-law rules under the guise of interpretation.¹⁴² On the issues of what constitutes mutual assent or what is a material breach, the Court must believe it unnecessary or unhelpful to formulate more precise rules. Its withdrawal from the scene leaves the matter to the trial courts. Such a delegation would be unthinkable in our system. One cannot imagine granting lay jurors, serving intermittently, unreviewable discretion to decide what is an offer, an acceptance, or a material breach. The situation is different in France because panels of professional judges preside in civil cases, and most litigants have access to two levels of trial court jurisdiction. These special features allow the trial courts to perform the protective role assigned them under the prevailing interpretation of article 1184. From this side of the Atlantic, it is hard to determine how well they perform their role.

Furthermore, considerable uncertainty exists as to whether the trial courts have fulfilled the dynamic role expected of them. In a number of well-known cases, where the courts have modified, rather than terminated, contracts only partially performed because full performance had become impossible, that difficult role has been fulfilled. For example, trial courts have reduced rents when wartime conditions made rented premises uninhabitable¹⁴³ or caused a rented neon sign to be darkened at certain hours.¹⁴⁴ In another case, a court substituted

141. *Id.*

142. For example, see the immense body of rules on tort liability which the Court of Cassation has developed under the guise of interpreting articles 1182, 1183 and 1184 of the Civil Code. See Tomlinson, *supra* note 96.

143. Seine, 23 Dec. 1940, 1941 Gazette du Palais [G.P.] Jur. I 19 and accompanying unsigned note. "Seine" identifies a decision by the first-level trial court for the former department of the Seine (Paris). The Gazette du Palais is another private reporter.

144. Paris, 13 Nov. 1943, 1943 G.P. Jur. II 260. "Paris" identifies a decision by the Paris Court of Appeals, a second-level trial court. France's approximately twenty regional Courts of Appeal, designated by the name of the city in which they sit, retry (or at least decide *de novo*) all cases appealed to them.

the payment of an annuity for an obligation to furnish services when an elderly woman, who had sold her property in return for lifetime personal care, became institutionalized and sought to terminate the sale on the grounds that the buyers were no longer performing the agreed services.¹⁴⁵ These decisions reflect a desire to give as much effect as possible to frustrated contracts.

Judicial modification becomes more problematic if the partial nonperformance constitutes a breach, and the court may award damages to the party seeking termination. Nevertheless, in a very recent case, the Paris Court of Appeals did reduce the license fee for a meeting hall which did not conform to contract specifications.¹⁴⁶ Earlier cases had approved rent reductions where a lessor's failure to repair affected the habitability of the premises.¹⁴⁷ Scholars have defended these decisions by arguing that what the courts were really doing was granting the aggrieved party a partial termination with an accompanying award of damages for the other party's breach, a solution which article 1184 plainly permits. This analysis makes the reduction in the aggrieved party's performance merely a "shortcut" for awarding damages.¹⁴⁸ That explanation is strained because the courts make no effort to ascertain whether the breach actually caused any damage.¹⁴⁹ In the rental hall case, for example, the Court of Appeals simply reduced the license fee without inquiring whether the hall's defects actually caused the licensee any loss. Once one rejects the "shortcut to damages" explanation, the cases become quite difficult to defend because article 1134 gives contracts the force of law between the parties and article 1243 expressly forbids forcing either party to accept a performance other than the performance due. Perhaps those general prohibitions of contract modification explain why the examples of judicial "dynamism" under article 1184 are so infrequent. The cases ordering modifications appear isolated and exceptional.¹⁵⁰

145. Cass. civ., 8 July 1936, 1936 D.H. Jur. 554. The trial court's modification of the contract allowed the buyers to continue purchasing the property. The Court of Cassation found no error. For a similar case, see Cass. civ., 27 Nov. 1950, 1951 G.P. Jur. I 132, discussed in 2 K. ZWIEGERT & H. KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 188 (2d ed. 1984) (T. Weir trans. 1987).

146. Paris, 17 Mar. 1987, 1988 D. Jur. 219 (note Mirbeau-Gauvin).

147. See, e.g., Cass. civ., 5 Mar. 1894, 1897 S. Jur I 74 (the famous *Levis-Mirepoix* case).

148. A. WEILL & F. TERRÉ, *supra* note 100, n° 487, at 509-10. One might ask why the reduction is not the equivalent of a partial discharge, something plainly permitted by article 1184. The answer appears to be that ordering a party (here the licensee) to pay something different than it agreed to pay is not a discharge.

149. See Paris, 17 Mar. 1987, 1988 D. Jur. 219 (Mirbeau-Gauvin).

150. For a more sanguine view of the willingness of French courts to revise contracts, see

IV. THE NEGATIVE SIDE OF ARTICLE 1184: JUDICIAL MONOPOLY OVER DISCHARGE

A. The Problem and Its Origin

Termination has worked reasonably well as one of the remedies French law offers for breach of contract. Its retroactive effect is potentially troubling, but French law has kept retroactivity within manageable limits. What has proved more troublesome, and has required more ingenuity to overcome, is the monopoly which article 1184 gives to the courts in granting a discharge. As will be shown, the drafters' desire to maintain that monopoly explains article 1184's presence in the Civil Code of 1804.

Judicial control over the enforcement of contracts is an accepted feature of both the French and the common-law systems. Damages and specific relief are remedies for breach available only from the courts. But what if an aggrieved party to a contract simply wants a discharge from its own contractual obligations? A prompt discharge is often a matter of legitimate concern to the victim of a contract breach. A seller does not want to hold goods for a buyer who has not paid on time, but rather wishes to sell them to someone else; a business does not want to keep an employee or contractor whose work is deficient, but rather wishes to retain someone new; and a builder does not wish to continue work for which payment is in arrears, but instead wishes to secure new work. In these cases the aggrieved party's freedom of action should not depend on the breaching party's willingness to agree to rescission.

The common law has developed rules on the dependency of promises and on material breach which allow an aggrieved party to protect itself, first by withholding its own performance and then by claiming a discharge, when the other party does not perform. French law has encountered difficulty in devising similar protections. The primary cause of this difficulty is article 1184, which provides that a discharge does not occur by operation of law but only by court order. In addition, the Civil Code does not explicitly recognize, other than in a few isolated instances, the right of the aggrieved party to suspend performance (what civilians call the defense of nonperformance). Must the aggrieved party continue to perform until it obtains a court order terminating the contract? Surely that result is a harsh one.

Why must the aggrieved party, who believes itself to be an innocent victim of a contract breach, assume the time-consuming and expensive burden of suing for termination, when it could better protect itself by not performing? The latter course offers the further advantage of making it unnecessary in many cases for the courts ever to intervene. A party who terminates a contract for breach, particularly if the contract is still an executory one, often will suffer no damages worth pursuing in court, and certainly will have no need to seek restitution of the performance it otherwise would have rendered to the party in breach.

These practical concerns did not trouble the drafters of article 1184, who borrowed heavily, here as elsewhere, from the works of the eighteenth-century French jurist Robert-Joseph Pothier.¹⁵¹ Pothier recognized nonperformance as a terminating condition, thus making promises dependent on any performance then due. However, he maintained that judicial intervention was necessary for the discharge of a promise. This limitation reflected the concern of prior centuries that contractants should not judge the merits of their own cause. To understand this distrust of self-proclaimed discharges, and article 1184's response to it, requires a knowledge of history.

In civil-law jurisdictions history necessarily begins with Roman law.¹⁵² Roman law recognized four types of consensual agreements (sale, hire, partnership, and agency), plus various "real" contracts where one party performed by delivering a thing (*res*) to another party, who assumed duties with respect to the thing's care and return. If the party receiving the thing did not perform, the first party could obtain restitution from the unjustly enriched recipient. That result did not flow from any notion of dependent promises because the first or "delivering" party never made a promise. The "real" contract was in fact a unilateral one, which the first party fully performed by delivering the thing prior to the recipient's promising with respect to the thing. The first party's restitutionary recovery was not a contractual one.

151. Robert-Joseph Pothier (1699-1772) was in many ways the French Blackstone. He taught law at Orleans and produced numerous treatises which synthesized the largely customary law applied by the courts (*parlements*) in northern France. He was also well grounded in Roman law, where he found many of his organizing principles. His basic *Traité des obligations*, first translated into English in 1805, had a pronounced impact on nineteenth-century English law.

152. For a background on Roman law, see B. NICHOLAS, INTRODUCTION TO ROMAN LAW 159 (1967); B. NICHOLAS, *supra* note 99, at 39-41.

The consensual contracts, on the other hand, were bilateral contracts involving two promises, but Roman law treated the promises as independent. Thus, the seller remained under a duty to deliver even though the buyer had breached its duty to pay, and the buyer remained under a duty to pay even though the seller did not deliver conforming goods.¹⁵³ To avoid this unfortunate result, sellers routinely inserted in sales agreements a termination clause called a *pacte* or *lex commissoria*, which allowed them to rescind the sale if the buyer did not pay on time. The prevalence of these clauses reflected the stronger bargaining power of sellers, and perhaps their greater vulnerability to breach. Sellers did not wish to hold goods for insolvent buyers, but rather wished to resell them as rapidly as possible to minimize loss.

Pothier, in his basic *Traité des obligations* (*Treatise on Obligations*), recognized the prevalence in French customary law of termination clauses similar to the Roman *lex commissoria*.¹⁵⁴ However, Pothier's treatment of termination clauses differed from that of Roman law in at least two respects. First, Roman law viewed the clause as a self-help remedy which allowed a party to terminate the contract when confronted with nonperformance. Pothier, on the other hand, explained that

in French practice it was customary to summon, through the sergent, the creditor [i.e., the party from whom one is claiming a discharge] so that he may satisfy the condition with a referral before the judge who will pronounce the nullity [i.e., the extinction] of the engagement if the creditor fails to satisfy the condition.¹⁵⁵

Thus, Pothier required judicial intervention for termination even if the agreement contained a *lex commissoria* or similar clause.¹⁵⁶

Second, Pothier recognized that nonperformance could discharge the other party's duties even if the contract did not contain a termina-

153. Interestingly, for the consensual contract of hire or lease, Roman law ultimately treated the lessor's and lessee's promises as dependent. See B. NICHOLAS, *supra* note 99, at 40. The common law has acted similarly only in the last twenty years for real property leases. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969).

154. R. POTHIER, *TRAITÉ DES OBLIGATIONS* n° 672 (1761). All quotations in this and the following paragraph come from section 672 of Pothier's text. The translations are my own. Pothier's American translator renumbers the section and badly mangles the French original. 1 R. POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS* § 636 (Evans trans. 1826).

155. R. POTHIER, *TRAITÉ DES OBLIGATIONS* n° 672 (1761).

156. *Id.*

tion clause, i.e., any clause recognizing nonperformance as a condition allowing the other party to terminate. But once again termination "did not occur by operation of law," but by the "judgment" of a court which "[would] discharge the duty."¹⁵⁷ Therefore, termination was a remedy available from the courts regardless of whether the agreement contained a termination clause. According to Pothier, the absence of such a clause only affected the scope of the remedy. If the party had not protected itself through a termination clause, then the judge had "discretion to give the nonperforming party such delay as the judge believe[d] appropriate to perform its obligation."¹⁵⁸ The judicial discretion to give the party in breach the benefit of a further delay was not present if the party seeking termination invoked a clause making performance an express condition.

In his more specialized *Traité du contrat de vente* (*Treatise on the Contract of Sale*),¹⁵⁹ Pothier vigorously defended treating nonperformance as a basis for termination in all sales. His arguments were very practical ones. First, he cited Justinian to establish the independence of promises in Roman law and then acknowledged that French customary law "had formerly followed those principles."¹⁶⁰ However, according to Pothier, the law had now changed to allow "the seller to request the termination of a sales contract for nonpayment of the price although there was no *pacte commissoire*."¹⁶¹ This departure from the older principles had proved necessary because "it most often happens that one cannot, without great expense, get paid by one's debtors."¹⁶² Therefore, the practical difficulties of collecting money from contract breakers led French law to recognize that a party should not be required to perform if the other party had breached.

Pothier did not directly address why a party confronted by nonperformance had to obtain a discharge from a court. However, he did present a hypothetical which may explain why he believed the judges' role to be so important when a party sought to terminate.¹⁶³ The hypothetical involved the sale of land where the seller had promised to

157. *Id.*

158. *Id.*

159. R. POTHIER, *TRAITÉ DU CONTRAT DE VENTE* n° 475 (1764). Once again the translations are my own. For an English translation, see R. POTHIER, *A TREATISE ON THE CONTRACT OF SALE* (C. Little & J. Brown trans. 1830).

160. R. POTHIER, *supra* note 155, n° 475.

161. *Id.*

162. *Id.*

163. *Id.*

allow the buyer to graze cattle on the seller's adjoining land. Could the buyer terminate the sale if the seller were evicted from the adjoining land and the buyer lost the grazing rights? To Pothier, the answer depended on whether the buyer would have bought the land without the grazing rights. If so, perhaps because other grazing opportunities were available, then the court should not terminate the sale but only reduce the price which the buyer was required to pay. If the buyer would not have purchased the land without the grazing rights, then the court should terminate the sale by discharging the buyer's duty to pay.¹⁶⁴ This hypothetical demonstrates that Pothier envisioned that judges, at least in the absence of a termination clause (there was none in the hypothetical case), would exercise considerable discretion in determining whether the defendant's breach warranted a full discharge.¹⁶⁵

The enactment of article 1184 in 1804 prompted little discussion.¹⁶⁶ Bigot-Préameneu, one of the four commissioners designated by Napoleon to draft the Code, characterized the provisions on contractual obligations as conforming "to principles which are in the reason and in the hearts of all men."¹⁶⁷ In analyzing article 1184, he presented as among those principles that nonperformance was always a terminating condition.¹⁶⁸ Pothier recognized that courts had invented that condition to allow them to terminate contracts even if the parties had not included an express termination clause. But Bigot-Préameneu, somehow misinterpreting a passage in Pothier, instead based the condition on the presumed intent of the parties.¹⁶⁹ This misunderstanding appears in the text of article 1184, which provides

164. *Id.*

165. The terminating buyer, upon returning the land, may seek judicial intervention to retrieve any money already paid. Pothier, however, was only addressing whether the buyer should obtain a full discharge or a reduction in the price.

166. The legislative history of the Civil Code, first published in 1827, fills fifteen thick volumes. See P. FENET, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* (1827). The published materials mainly consist of two things: the debate before Napoleon's Council of State on the commissioners' draft Code and the presentations before the legislature (the *Tribunat* and the *Corps législatif*) by those charged with defending the Code as approved by the Council of State.

167. 13 P. FENET, *supra* note 166, at 215 (presentation before the *Corps législatif*).

168. *Id.* at 244. Bigot-Préameneu also recognized as a fundamental principle the authority of judges to accord a party in breach additional time in which to perform. *Id.* Before the *Tribunat*, Favart defended this "valuable right" as based "on humanity" and as a necessary tempering of article 1134's more rigorous rule which defines the contract as law between the parties. *Id.* at 327.

169. Bigot-Préameneu told the *Corps législatif*: "In bilateral contracts each party is pre-

in paragraph one that the "terminating condition is always implied in bilateral contracts in case one of the two parties does not perform the agreement."¹⁷⁰

The confusing wording of article 1184 led nineteenth-century commentators to find the basis for the institution of judicial termination in the *lex commissoria* of Roman law.¹⁷¹ That interpretation posed at least two serious difficulties. First, why did article 1184 require the aggrieved party to obtain termination from a court? Next, how did the courts acquire discretionary authority to deny termination once they found a breach? The seller who invoked a clause *lex commissoria* unilaterally terminated the sale. If the buyer believed that the seller had no grounds for termination, the buyer had to sue the seller for breach. If the court disagreed and found that it was the buyer who had breached, the court had no choice but to respect the intent of the parties by confirming the seller's termination. Therefore, *lex commissoria* looked like an unlikely ancestor for judicial termination under article 1184. These inadequacies in the nineteenth-century interpretation of article 1184 prompted the emergence, early in the twentieth century, of an alternative theory on the basis for judicial termination. Quite fittingly, its two principal proponents, René Cassin and Henri Capitant, became two of the most distinguished French jurists of the century.

sumed to have contracted only under a terminating condition for the case where the other party would not perform his agreement." *Id.* at 244.

The disputed passage from Pothier is in section 672 of his *Traité des obligations*. Pothier said:

Even when one would not have expressed in the agreement the nonperformance of your engagement as a terminating condition of the one I have contracted towards you, nevertheless that nonperformance may often affect the cancellation of the deal and consequently the extinction of my obligation. But it is necessary that I have pronounced the cancellation by the judge.

R. POTHIER, *TRAITÉ DES OBLIGATIONS* n° 672 (1761).

This passage provides scant basis for treating the terminating condition as implicitly intended by the parties, especially when considered in light of the accompanying language recognizing the custom of judicial termination. See *supra* text accompanying note 154. In addition, Pothier's analysis in his *Traité du contrat de vente* strongly supports the judicial construct theory. See *supra* text accompanying notes 154-156. Bigot-Préameneu did not cite any specific passage from Pothier, but subsequent authors have identified the passage quoted above as the source of the misunderstanding. See H. CAPITANT, *supra* note 139, n° 151, at 334.

170. For the full text of article 1184, see *supra* note 90.

171. G. Aubry & G. Rau, *Cours de droit civil français d'après la méthode de Zachariae* n° 302, at 82 (4th ed. 1871); C. DEMOLOMBE, *COURS DE CODE NAPOLÉON* n° 483, at 462 (1876).

B. Two Efforts to Achieve Understanding: Cassin and Capitant

René Cassin did the major ground-breaking for the new understanding in his doctoral thesis, published in 1914 under the title *L'exception tirée de l'inexécution (Defense of Nonperformance)*.¹⁷² Cassin established that it was the canonists of the late Middle Ages who first invoked notions of fairness and equity to argue that if one party to a bilateral agreement broke its word, the other party should no longer be bound by its promise.¹⁷³ The canonists, however, did not allow the latter party simply to liberate itself by disregarding its own promise, but required it to seek a discharge from a Church court. The Church, which had an interest in the keeping of promises, would then verify whether the other party's breach provided the promisor with a legitimate reason for not keeping its own promise.

Cassin described how this practice of judicial discharge, invented by the canonists, entered the received Roman law of Western Europe through the writings of Bartolus, a glossator of the fifteenth century who was both a civil and a canon lawyer.¹⁷⁴ Judicial discharge then became part of customary French law under the Old Regime through the writings of leading jurists such as Dumoulin, Domat, and especially Pothier.¹⁷⁵ These jurists' writings inspired the drafters of article 1184 to require judicial intervention for a discharge, but they evidently misinterpreted Pothier when they based the judicial termination of contracts on the implied intent of the parties. Pothier, in his *Treatise on Obligations*, had done no more than recognize that termination was available as a remedy for breach, even if the parties had not stipulated to that effect.¹⁷⁶ He had not meant to suggest, accord-

172. The full title of the work is *De l'exception tirée de l'inexécution dans les rapports synallagmatiques (exception non adimpleti contractus)*. In the late 1930's, Cassin wrote an updated summary of his thesis which he published after the Second World War. See Cassin, *Réflexions sur la résolution judiciaire des contrats pour inexécution*, 1945 REV. TRI. DR. CIV. 159.

Cassin, in addition to being a distinguished university teacher and scholar, fought valiantly in World War I, spearheaded inter-war French efforts to alleviate the plight of refugees, rallied immediately to de Gaulle's June 18, 1940 call to continue the war against Germany, served as a head of the French Council of State from 1941 to 1960, founded the International Institute for the Rights of Man, and received in 1968 the Nobel Peace Prize for his efforts on behalf of the rights of man. On October 5, 1987, the French government transferred his ashes to the Pantheon. For biographical tributes, see 1987 REVUE DE DROIT PUBLIC 1425-48.

173. The canonists' motto was *Frangenti fides, fides non servanda est*. R. CASSIN, *L'EXCEPTION TIRÉE DE L'INEXÉCUTION* 44-46 (1914) (quoting Bartolus).

174. R. CASSIN, *supra* note 173, at 42-55.

175. *Id.* at 124-37.

176. R. POTHIER, *supra* note 169, n° 672.

ing to Cassin and (later) Capitant, that the courts' authority to terminate a contract depended on the intent of the parties.¹⁷⁷

Henri Capitant, in his seminal work, first published in 1923 under the title *De la cause des obligations* (*Of the Cause of Obligations*), both confirmed Cassin's findings and gave a sounder theoretical basis to the concept of termination.¹⁷⁸ Capitant found that basis in the notion of "*cause*," one of the four prerequisites to a valid contract enumerated in article 1108 of the Civil Code.¹⁷⁹ The significance of that requirement has generated much controversy.¹⁸⁰ Basically, French jurists define the *cause* as the purpose or goal pursued by a promisor, i.e., the reason why the promisor assumed a contractual duty. In bilateral contracts, each party's promise provides the *cause* for the other's promise, but gratuitous promises, which are enforceable in France if the parties observe certain formalities, also have a valid *cause* in the promisor's desire to make a gift. Promises made unenforceable by the *cause* requirement included those made for an illicit *cause*, e.g., promises made in return for sexual favors. Thus, French law requires that a promisor have some proper reason for promising, but that reason need not be, as required by the bargain theory of consideration, the desire to obtain something in exchange. The "*cause*" required by the French Civil Code for the enforcement of a promise is both broader and looser than the "consideration" required by the common law.

Capitant argued that a promise required a valid *cause* not only at the contract formation stage, but also at the performance stage.¹⁸¹ Thus, in the case of a bilateral contract, if one party did not perform

177. For a summary of Cassin's (and Capitant's) argument, see H. CAPITANT, *supra* note 139, nn^o 150-151 (3d ed. 1927). Capitant recognized that the institution of judicial termination never developed in some areas of southern France where the *parlements* (regional courts) applied a purer Roman law. *Id.* at 331 n.1. Before the unification accomplished by the Civil Code, there was often a sharp distinction between the customary law applied by the *parlements* of northern France (including Paris) and the "written" or Roman law prevailing in the South.

178. Professor Capitant wrote, with Ambroise Colin and later Julliot de la Morandière, the most successful student text on the Civil Law published in the first half of the century. Their *Cours élémentaire de droit civil français* went through eight editions between 1914 and Capitant's death in 1937. His other publications, academic honors, and professional activities fill thirteen pages in *ETUDES DE DROIT CIVIL À LA MÉMOIRE DE HENRI CAPITANT* xi-xxiii (1977). He also inaugurated the first and only case book of decisions interpreting the Civil Code. See H. CAPITANT, *supra* note 138.

179. The other prerequisites are the capacity and the consent of the parties and a definite subject matter (*objet*) for the agreement. C. CIV. art. 1108.

180. For a summary of the debate, see B. NICHOLAS, *supra* note 99, at 112-31.

181. For the argument summarized in the three paragraphs which follow, see H. CAPITANT, *supra* note 139, n^o 147.

its promise, the other party's promise no longer had a *cause*. To Capitant, excused nonperformance provided the clearest example of this phenomenon. If impossibility or other *force majeure* excused one party's performance, then the other party need not perform because its promise now lacked a *cause*.¹⁸² This result, which the common law explains in terms of a failure of consideration, is a sensible one, but one which finds little explicit support in the Civil Code other than through Capitant's interpretation of the *cause* required by article 1108. To Capitant, the same result followed if the other party's nonperformance constituted a breach.¹⁸³ He condemned as sheer sophistry the argument that the *cause* did not vanish in the latter case because the innocent party could still enforce the breacher's promise by seeking specific relief or damages. Those options were not available if the nonperformance were excused, but that distinction carried no weight because the *cause* which made the innocent party's promise enforceable was not just the return promise but the promised performance. In terms reminiscent of Corbin,¹⁸⁴ Capitant argued that promisors bind themselves to obtain a desired performance, and not to purchase a lawsuit.¹⁸⁵

Most of what Capitant says makes a great deal of sense, but he does not adequately explain why only judges can discharge a promisor. The explanation he advances for the judicial termination of contracts is largely historical. Medieval canonists and Old Regime jurists gave that power exclusively to judges, and the drafters of the Civil Code simply continued that tradition. In defense of that tradition, Capitant does no more than suggest that judges may protect debtors from creditors who exaggerate trivial breaches and may preserve, to the extent possible, partially performed contracts. Even though he is on the right side of the Atlantic to conduct such an inquiry, Capitant does not seek to ascertain whether judges have in fact done those good things.

What, therefore, explains the survival of the historical relic of judicial termination at the end of the twentieth century? Perhaps its staying power is merely attributable to its inclusion in textual form in article 1184 of the Code. Grant Gilmore has described how statutes tend to address past generations' problems; they survive, despite their

182. *Id.*

183. *Id.*

184. See, e.g., 3A A. CORBIN, CORBIN ON CONTRACTS § 653 (1960).

185. H. CAPITANT, *supra* note 139, n° 147.

obsolescence, because courts manage to defy or ignore them, which gives legislatures little incentive to repeal them.¹⁸⁶ However, talk of the Code's obsolescence is not popular in France, and French jurists prefer to find the basis for article 1184's staying power in the general principle of law that "no one may mete out justice to oneself (*nul ne peut se faire justice à soi-même*)."¹⁸⁷ For these jurists, article 1184's requirement of judicial termination reflects a broader principle which condemns self-help as a contract remedy, a principle which they believe pervades much of French law. For example, article 1144 requires that a creditor obtain court approval before seeking a substitute performance (cover) at the expense of the debtor in breach. Rules that make little sense when viewed in isolation evidently become defensible when they form a pattern implementing a more general principle.

No doubt general principles of law, such as "no one may mete out justice to oneself," do play an important role in French law.¹⁸⁸ Scholars and judges extract them from Code provisions or find them among the premises underlying the Code itself. Once identified, they serve as potential sources of law. A general principle never prevails over an explicit statutory text, but courts use these principles as guides for interpreting unclear texts and for deciding cases to which no specific text applies.

The Civil Code may sufficiently disfavor self-help to justify the courts' treating the adage "no one may mete out justice to oneself" as a general principle of law, but the adage's source and scope remain unclear. Cassin, who endorsed the adage only if properly understood, seems to find its source in the same medieval canonists who invented the practice of judicial termination.¹⁸⁹ He saw as its basis the related concerns that persons who believe themselves wronged are not likely to be impartial judges on the merits of their own cause and are all too likely to disturb the peace if allowed to enforce what they believe to be

186. Gilmore, *Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).

187. For a symposium dedicated to that principle, see "NUL NE PEUT SE FAIRE JUSTICE À SOI-MÊME" LE PRINCIPE ET SES LIMITES EN DROIT PRIVÉ (XVI Travaux de l'Association Henri Capitant ed. 1966). See especially Béguin, *Rapport sur l'adage "nul ne peut se faire justice à soi-même" en droit français*, in "NUL NE PEUT SE FAIRE JUSTICE À SOI-MÊME" LE PRINCIPE ET SES LIMITES EN DROIT PRIVÉ 41-94 (XVI Travaux de l'Association Henri Capitant ed. 1966).

188. Boulanger, *Principes généraux du droit et droit positif*, in 1 LE DROIT PRIVÉ FRANÇAIS AU MILIEU DU XX^e SIÈCLE; ETUDES OFFERTES À GEORGES RIPERT 51 (R. Pichon & R. Durand-Auzias ed. 1950) [hereinafter ETUDES RIPERT]; Béguin, *supra* note 187, at 47-48.

189. R. CASSIN, *supra* note 173, at 330-31.

their rights. Cassin found these concerns legitimate, but argued that the ban on self-help did not bar the defense of nonperformance and even permitted the unilateral termination of contracts in certain cases.

French law at the turn of the century did not conform to Cassin's expectations. For example, in an 1876 decision, the Court of Cassation held that a buyer's failure to pay did not discharge the seller's duty to deliver; therefore, the buyer could sue to terminate the contract with damages if the seller failed to perform when the buyer subsequently tendered payment.¹⁹⁰ The seller had unsuccessfully invoked, as analogous authority, article 1657 of the Code, which allows a seller to terminate a sales contract as a matter of right if the buyer does not accept delivery of the goods within any contractually prescribed period. That text recognizes a limited right of self-help (the aggrieved seller could unilaterally terminate and resell), but the Court evidently believed that article 1657 derogated from the Code's general condemnation of self-help. It therefore declined to extend article 1657's right to terminate unilaterally to cover the buyer's failure to pay.

A well-known and still more troubling 1897 decision similarly found an electric company liable for terminating the services it had contracted to supply a Paris hotel (the Hôtel de Lille et d'Albion) when the hotel fell behind in its promised payments.¹⁹¹ The hotel successfully sued the electric company in the lower courts under article 1184 for termination of the contract and damages. The Court of Cassation found no error in that surprising outcome. It held that the electric company could have sued the hotel for the amounts due, or could have itself sought termination with damages under article 1184, but it could not "unilaterally break (*rompre*) a contract which had not ceased to exist."¹⁹²

That interpretation of article 1184 was particularly troubling because it apparently condemned, not only a unilateral or self-declared discharge, but also a temporary suspension of performance designed to pressure the other party into performing.¹⁹³ The reported facts do

190. Cass. civ., 12 Dec. 1876, 1877 D. Jur. I 228, 1877 S. Jur. I 459.

191. The Hôtel de Lille et d'Albion, Cass. req., 1 Dec. 1897, 1898 D. Jur. I 289 (note Planiol), 1899 S. Jur. I 174.

192. 1898 D. Jur. I at 290.

193. Commentators, beginning with Marcel Planiol, whose critical case note appears in the Dalloz reporter following the decision (*Id.* at 289), have sought to defend the actual result in this case by suggesting that the hotel's breach was not sufficiently serious to justify even a suspension of performance by the electric company. The dispute between the parties appeared

not make clear whether the electric company claimed a discharge or merely suspended its performance, and the Court of Cassation plainly did not care which was the case. That indifference troubled Marcel Planiol, the decision's commentator in the Dalloz reporter and one of the most distinguished civil-law scholars of the time.¹⁹⁴ Planiol was also troubled by the Code's silence on the defense of nonperformance, a defense which would allow a party to suspend performance if the other party is in breach. Planiol unconvincingly explained the Code's silence by characterizing the defense as one of those "elementary notions which serve as the bases for our laws and which the legislature may overlook in more practical things."¹⁹⁵

Cassin, in his magisterial work on the defense of nonperformance, sought to dissipate the "confusion" caused by the Code's silence and to win recognition for the defense as part of French law.¹⁹⁶ He succeeded admirably, at least in the latter task. His basic argument was two-fold. First, the Code was not completely silent on the defense of nonperformance, but recognized its existence in a number of particular situations. For example, article 1612 allowed the seller in a cash sale to refuse delivery until paid, and article 1653 allowed the buyer in a credit sale, when threatened with eviction, to suspend further payment until the buyer's title was assured. In these and similar situations, the Code recognized a creditor's right of retention over a debtor's property as a means to coerce the debtor's performance.¹⁹⁷

Second, the defense of nonperformance was not inconsistent with the general principle of law banning self-help.¹⁹⁸ The fragmentary provisions recognizing the defense in certain situations therefore pro-

to be a good-faith billing dispute which the hotel was willing to arbitrate. To restate this explanation in common-law terms, the electric company, like Herbert Harrison, overreacted and committed the first material breach. But that explanation was not the one given by the Court of Cassation.

194. Planiol was the author of the preeminent turn-of-the-century treatise on the Civil Code. M. PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* (1899). For Planiol's distinguished career, see the preface by Georges Ripert to the Louisiana State Law Institute's 1959 translation of the treatise's twelfth edition.

195. 1898 D. Jur. I at 289. The only credible explanation for this oversight, and for many other gaps in the Code, is the haste imposed by Napoleon during its drafting. Four commissioners drafted the Code in four months, and Napoleon then forced a recalcitrant legislature to ratify it quickly. On the defense of nonperformance, the *tribunal d'appel* of Grenoble had submitted to the commissioners a proposed article which clearly recognized the defense. However, the legislative history of the Code discloses nothing about what happened to this proposal and why the drafters "overlooked" the defense. See R. CASSIN, *supra* note 173, at 133.

196. R. CASSIN, *supra* note 173, at iii.

197. R. CASSIN, *supra* note 173, at 127-37.

198. *Id.* at 337-60.

vided to the courts a basis for reasoning by analogy to formulate a general defense. The Code's drafters had not done so because they had focused on article 1184's termination remedy to the detriment of the lesser remedy of suspension of performance. That oversight certainly did not constitute a rejection of the defense of nonperformance. One could not infer rejection of the defense from silence, given the considerable recognition that it had received in the writings of the canonists and of the jurists of the Old Regime.¹⁹⁹

Cassin's argument is a good example of civil-law reasoning. He was addressing the issue of whether the courts should limit particular Code provisions to their terms or should extend them to cover analogous situations. French jurists treat that question as one of statutory interpretation and often reason by analogy to apply specific statutory provisions to situations not covered by the text if construed literally.²⁰⁰ Extensions by analogy occur frequently in contract law because the Civil Code contains very few general provisions applicable to all contracts. A much larger number of special provisions apply only to particular contract types, usually derived from Roman law, such as contracts for sale, lease, or deposit. For example, the Code addresses what we call the failure of consideration defense in only a few fragmentary articles, such as article 1722, which provides that a lessee need not pay rent if the thing leased is destroyed. It is nevertheless possible to generalize the defense through reasoning by analogy. What is appropriate for leases may be appropriate for other contracts as well.²⁰¹

This tendency to reason by analogy, to generalize rules whenever appropriate, is a useful response to gaps and inadequacies in the Code. Courts reject it primarily when they find that a particular Code article derogates from a more general principle. In these cases, courts interpret the disfavored article narrowly, not by analogy, so as to limit it to its terms. For example, in the 1876 decision discussed above,²⁰² the Court of Cassation so interpreted article 1657, which allows a seller to terminate a sale unilaterally when the buyer refuses delivery. That

199. *Id.* at 132.

200. See Tomlinson, *supra* note 96, at 1305-10.

201. Although this mode of reasoning occurs frequently, the Court of Cassation, in the *Albertini* decision, preferred to reason that a promisor's promise lacked a *cause* if the doctrine of impossibility excused the other party from performing its promise. Cass. civ., 14 Apr. 1891, 1891 D.P. Jur. I 329, 1894 S. Jur. I 391. That decision then became the principal support for Professor Capitant's efforts to find the basis for termination in a continuing requirement that a promise have a *cause*.

202. See *supra* text accompanying note 190.

article's authorization of self-help does appear to be a special provision responding to the special need of a seller to resell goods thrust upon it by the buyer's refusal to accept them. Thus, the Court limited the article to its terms.

Cassin and other proponents of the defense of nonperformance have advanced a number of arguments to distinguish it from self-help, or at least to treat it as an acceptable form of self-help.²⁰³ The latter characterization appears more accurate in light of the fact that a party who suspends its own performance often desires to coerce the other party into performing. That tactic appears to be a form of self-help, but it is nevertheless purely defensive and involves "no positive act of violence of the kind to trouble the public peace."²⁰⁴ According to Cassin and his followers, its legitimacy rests on notions of fairness and equity first developed by the medieval canonists. A party in breach who demands the other party's performance does not act in good faith, and the victim of that aggression may legitimately defend its patrimony by refusing to perform. Ideally, the victim should invoke the aid of the courts, but usually there is no time to do so. The victim needs to defend itself at once, and naturally does so at its peril. Fortunately, the defensive suspension of performance affects only the alleged aggressor's estate and not its person.

Although much of this argument sounds strange and unnecessary to common-law ears, in a way the civilians are only clearing away some local underbrush before addressing the more difficult question of how to determine the order of performance under a bilateral contract. Indeed, both Cassin and Capitant analyze at length the order of performance question, and reach conclusions similar to those reached by the common law, namely, presumptions in favor of simultaneous performances and of forcing the party whose performance is more complex to perform first.²⁰⁵ The defense of nonperformance thus allows the parties to maintain the desired contractual equilibrium or, as explained by Capitant, allows a promisor at least to suspend its own performance if its promise no longer has a *cause*.

203. Cassin's most prominent successor is Jean-Francois Pillebout, a notary who published in 1971 his doctoral thesis *Recherches sur l'exception d'inexécution*. The core of their argument appears at R. CASSIN, *supra* note 173, at 42-46, 421-29; J. PILLEBOUT, *RECHERCHES SUR L'EXCEPTION DE L'INEXÉCUTION* 197-99 (1971).

204. R. CASSIN, *supra* note 173, at 422.

205. *Id.* at 440-555; H. CAPITANT, *supra* note 139, nn^{oo} 123-131.

V. JUDICIALLY FASHIONED ESCAPE HATCHES FROM ARTICLE 1184

Twentieth-century French judges have labored mightily to reduce the impact of article 1184's absurd rule requiring judicial termination to discharge a promisor. The three most prominent escape hatches recognized by the judges have been the defense of nonperformance, express terms allowing a party to terminate a contract without any judicial intervention and the power of unilateral termination — a *rupture unilaterale* to distinguish this phenomenon from the judicial termination (*résolution*) recognized by the Code. The impact of these devices makes contemporary French law on the suspension and discharge of contractual duties not much different, at least in actual operation, from the common law. In both systems, questions of suspension or discharge normally arise in suits by parties in breach seeking to enforce the contract; parties who merely wish to escape their contractual obligations rarely have sufficient incentives to sue. Similarly, neither system gives the aggrieved party any real guidance on when it may respond to breach by suspending its own performance or terminating the contract. This situation does not trouble French jurists who believe that the over-arching requirement of good faith, applied after the fact by professional judges, provides the parties with sufficient flexibility to protect their interests during contract performance.

A. *The Defense of Nonperformance*

Cassin defined the defense of nonperformance to cover only an innocent party's suspension of its own performance in order to coerce the other party's performance.²⁰⁶ The party invoking it does not claim a discharge but seeks to enforce the agreed exchange. Thus, the defense provides a self-help remedy for maintaining contracts but not for escaping from them. Cassin recognized that this sharp theoretical distinction often breaks down in actual practice.²⁰⁷ A party withholding its own performance may not make clear whether it still wishes to have the other party perform and whether it would still perform upon receiving it. More significantly, the passage of time or other change in circumstances may preclude any subsequent conforming performance by the party in breach. When that occurs, the aggrieved party's suspension of performance effectively becomes a termination. That tran-

206. R. CASSIN, *supra* note 173, at 365.

207. *Id.* at 365-66, 397-98.

sition from suspension to termination also occurs when the aggrieved party is no longer willing to complete the exchange. At this point, the party has shifted from invoking the defense of nonperformance to claiming a discharge. According to Cassin, that party, if sued, should invoke article 1184 defensively by asking the court to terminate the contract, and the court should do so at the *defendant's* behest if the plaintiff's breach was important enough to warrant it.²⁰⁸

Contemporary French law, unlike French law at the turn of the century, largely conforms to Cassin's expectations. Defensive termination has not taken hold, but courts and scholars now universally recognize the defense of nonperformance. The court's broad formulation of that defense undermines article 1184 by including within the defense cases in which the defendant actually seeks to escape the contract by claiming a discharge. How this all occurred is not crystal clear. Perhaps the best explanation is that everyone found Cassin's argument persuasive. All subsequent writers cite his work approvingly, if not reverently.

The most well-known case recognizing the defense, perhaps on account of its colorful facts, is that of Monsieur Dubosc, the irritable curist of Châtel-Guyon.²⁰⁹ Dubosc became annoyed by various controls instituted by the owners of that venerable spa and refused to present his bather's card while using their facilities. The company's agents promptly confiscated his card (reimbursing him for the entry fee) and expelled him from the premises. Dubosc, now genuinely irate over the interruption of his cure, claimed damages for breach of contract, but lost when the Court of Cassation ruled that the resort's response to his behavior was legitimate. The Court reasoned that Dubosc was himself in breach for refusing to show his card, and that the spa could respond to Dubosc's breaches by suspending its performance through retention of his bather's card. Dubosc had argued that the spa's actions, in particular the reimbursement of the entry fee, represented more than the suspension of performance and constituted a definitive and complete rupture of the contract. He argued that the spa could not take these actions without obtaining a discharge from the courts under article 1184. The Court of Cassation did not dispute Dubosc's interpretation of article 1184 as conferring on judges a monopoly over discharges, but it held that it was within

208. *Id.* at 365, 404.

209. Cass. civ., 5 Dec. 1934, 1935 S. Jur. I 46, 1935 G.P. Jur. I 134. For a discussion of this case, see J. PILLEBOUT, *supra* note 203, at 73-75.

the discretion (*pouvoir souverain d'appréciation*) of the trial judges to find that the spa had only suspended its performance when it retained Dubosc's card. In so ruling, the Court legitimized the defense of nonperformance.

More recent decisions explicitly designate the defense under its Latin name *exceptio non adimpleti contractus*.²¹⁰ Its availability is clearest in cases in which the party in breach has not performed at all.²¹¹ In those cases, the aggrieved party may suspend performance without any fear of liability. For cases of partial nonperformance, the Court of Cassation has developed a formula for determining whether a suspension of performance is permissible. That formula, which the Court has repeated literally hundreds of times, gives even less guidance to contractants than does the *Second Restatement's* effort in section 241 to define material breach. According to the Court: "In bilateral contracts, nonperformance by one of the parties of some of the agreement does not necessarily liberate the other from all of its obligations; it belongs to the judge to decide, according to the circumstances, if the nonperformance is grave enough to cause any such result."²¹² This formula — a "nothing burger" of a rule if there ever was one — has become, in the opinion of the author of the most recent study on the defense, classic or set.²¹³ The sphinx will say no more.

The Court of Cassation's enigmatic formula prompts a number of observations. First, the Court has not presented its formula as the interpretation of any statutory text. This rule appears to be purely judge-made, or "praetorian" as the civilians would say. Its defenders, if pressed, might designate its source as the third paragraph of article 1134, which requires parties to perform their contracts in good faith. Arguably, the duty of good faith performance requires a party to continue performing despite a trivial breach by the other party, but the Court has not presented its formula as an interpretation of that text.

Second, the formula uses the ambiguous word "liberate" to describe the potential effect of a breach on the other party's duty to perform. That word raises connotations of discharge; it indicates that

210. For a recent example, see Cass. com., 27 Jan. 1970, 1970 J.C.P. Jur. II 16554 (note Huet).

211. *Id.*

212. J. PILLEBOUT, *supra* note 203, at 210. For a more recent decision applying this formula to uphold a farmer's refusal to perform part of his contract with an agricultural cooperative, see Cass. civ., 5 Mar. 1974, 1974 J.C.P. Jur. II 17707 (note Voulet).

213. J. PILLEBOUT, *supra* note 203, at 210.

the judges will not scrutinize too closely the aggrieved party's conduct to assure that it did no more than suspend its own performance to coerce the exchange. Take, for example, the lead case of the irritable curist.²¹⁴ Did not the spa consider itself discharged from providing any additional services to Dubosc when it reimbursed the entry fee? Nevertheless, the Court of Cassation treated the spa's actions as a suspension of performance. Under the common law, the spa would surely have argued that the curist's material breach discharged its dependent promise to furnish bathing services. French law, on the other hand, seems inclined to apply the suspension formula without much inquiry as to whether the "suspender" really was claiming a discharge. This preference is readily explained by the looming presence of article 1184 and the monopoly over discharge which it grants to the courts. Courts naturally feel more comfortable recognizing a party's right to suspend performance than to claim a discharge. The latter claim conflicts more openly with article 1184.

Third, the intended audience of the Court of Cassation's formula is primarily the lower courts or trial judges who must apply it. The Court does not attempt to give guidance to contractants, but delegates authority to trial judges, who must determine whether the nonperformance was "grave enough" to justify the aggrieved party's refusal to perform. In the French system, panels of trial judges (there are no lay jurors in civil cases) write reasoned opinions in which they find the facts and apply the law to them. As indicated previously,²¹⁵ the Court of Cassation (the sole appellate court) does not review factual findings, but only determines whether the lower courts have misinterpreted the law. Factual matters are left to the unreviewable discretion or, as the French call it, the "sovereign appreciation" of the trial judges. The Court of Cassation occasionally exercises some control over factual matters by treating their characterization as a legal issue (e.g., was the contract a sales contract or a loan?), but it has not exercised any such control over trial judges' findings on the gravity of contract breaches.

Finally, the formula's negative phrasing does warn the aggrieved party that there is something special if not dangerous about withholding a performance due. It tells the party that a breach "does *not* necessarily liberate the other party from *all* of its obligations." Plainly, the aggrieved party withholds a performance at its peril. However,

²¹⁴ Cass. civ., 5 Dec. 1934, 1935 S. Jur. I 46, 1935 G.P. Jur. I 134.

²¹⁵ See *supra* text accompanying notes 140-141.

the formula does hint that there is less risk if the withholding is only a partial one. As the formula states, breach does not necessarily liberate the aggrieved party from "all" of its obligations. Indeed, the French courts seem receptive to the defense of nonperformance primarily in cases in which the aggrieved party withholds only part of a performance due, as by reducing the rent paid when lack of heat makes an apartment uninhabitable during winter.²¹⁶ Here, as in so much French contract law, the concept of good faith determines what is permissible.²¹⁷ More specific guidance would only permit contractants to evade their obligations in bad faith. The courts expect contractants to perform in good faith and to protect themselves through nonperformance only when necessary to maintain contractual equilibrium; any suspension of performance must therefore be a proportionate response to the breach.²¹⁸ Within these limits, contractants may defend themselves, but they do so at their peril. Their actions are subject to a rigorous after-the-fact review which, even jurists favorable to the defense of nonperformance agree, is a necessary check on self-help.²¹⁹

The case law further demonstrates the risk taken when an aggrieved party suspends its performance. The irritable curist's case upheld a party's suspension of all its remaining performance obligations in response to a breach by a party who had already performed in part, but that case is surely something of a sport. A well-known string of cases uniformly rejects the defense of nonperformance when invoked by tenants who responded to their landlord's failure to make promised repairs by refusing to pay any rent. The tenants acted at their peril in withholding rent and found themselves promptly evicted.²²⁰ Overall, the case law on the defense seems undeveloped, which is perhaps attributable to the low visibility of most trial court decisions. Another explanation for this phenomenon is that courts have become less hesitant about upholding unilateral terminations. The discharge which accompanies termination provides greater relief to the victim of a serious breach than does the right to suspend performance.

216. Cass. civ., 10 Apr. 1959, 1960 D. Jur. 61.

217. Paragraph 3 of article 1134 requires that "all contracts be performed in good faith." On the pervasiveness of good faith requirements in French law, see G. RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* (1949).

218. J. PILLEBOUT, *supra* note 203, at 210.

219. *Id.* at 239; R. CASSIN, *supra* note 173, at 359-60.

220. Cass. civ., 7 July 1955, 1957 D. Jur. 1 (note R. Savatier). For earlier cases, see case note by J. Brunet in 1953 S. Jur. I 177.

B. Unilateral Terminations

Judicial recognition of a party's power to terminate a contract for breach has proved to be another fertile escape hatch from article 1184's rather porous requirement of judicial termination. Courts sometimes label the party's action a *rupture unilaterale* — literally a unilateral breaking — to distinguish it from the judicial termination (*résolution*) recognized by the Code. A party's exercise of this option to terminate unilaterally does not depend on the presence of any particular clause in the contract; termination clauses, as will be shown in the next section, provide a separate and distinct escape hatch from article 1184.

Starting at the end of the last century, courts recognized, in a growing number of situations, that one party may respond to the other party's nonperformance by terminating the contract on its own initiative. Unilateral termination differs from a suspension of performance because the party treats it as definitive. The party who only suspends performance treats the contract as "asleep" and subject to revival once the other party resumes performance; the party who terminates treats the deal as off.²²¹ This distinction resembles the one found in the *Second Restatement of Contracts*, which analyzes separately when a party may suspend its own performance (section 241), and when a party may claim a discharge (section 242). In the French system, unilateral termination also differs from judicial termination because it does not appear to have any retroactive effect, but merely discharges prospectively the terminating party's duty to perform.

The legitimacy of unilateral termination has rightly caused French scholars a good deal of anguish.²²² Unilateral termination is a creation of the judges that finds little support in the text or underlying premises of the Code.²²³ How can one reconcile the Court of Cassation's approval of that practice with the general principle of French law prohibiting self-help and article 1184's requirement of judicial termination? The general consensus is that one cannot do so, and contemporary scholars do not attempt such a reconciliation as Cassin

221. 6 M. PLANIOL & G. RIPERT, *supra* note 115, n° 428.

222. *Id.* n° 428, at 577; Deprez, *supra* note 127, at 55-57; Béguin, *supra* note 187, at 61-63; see also Cassin, *supra* note 172, at 178-79.

223. There is only one Code article explicitly recognizing a power of unilateral termination. Article 1657 authorizes a seller to terminate as of right if the buyer refuses to accept delivery. C. CIV. art. 1657. During the nineteenth century, the Court of Cassation treated that article as exceptional and narrowly limited it to its terms. See *supra* text accompanying note 190.

and his followers have attempted to reconcile the defense of nonperformance. It is difficult, if not impossible, to deny that the terminating party judges the merits of its own cause in determining whether it may respond to a perceived nonperformance by releasing itself from its own promise to perform. The drafters of article 1184, and the medieval canonists who inspired them, condemned that form of self-help because they believed that the sensitive and difficult determination was one worthy of impartial judges and not interested promisors. The judicial recognition of a power to terminate unilaterally thus becomes an embarrassing, but perhaps necessary, accommodation to the real world.

The Court of Cassation has accentuated the embarrassment by making no effort to reconcile unilateral termination with the text of article 1184. As will be shown, that reconciliation is possible, but only if one ignores the article's historical background. The Court's reticence has not deterred the lower courts, actually confronted by suits brought by parties claiming breach, from rebelling against the absurdity of requiring the victim of the breach to bring suit to obtain a discharge. That rebellion became full-blown after the turn of the century, and the Court of Cassation has refused to quash it by imposing on the lower courts an interpretation of article 1184 more consistent with its text and history.

Two basic principles of law support the rebellion. First, there is the general principle of law requiring good faith. In part, this principle is non-textual, but it does find textual support in article 1134's requirement that parties perform their contracts in good faith. This principle has generated a large body of case law and doctrinal writing condemning what the French call the misuse of a right (*l'abus d'un droit*).²²⁴ The misuse of a right, the invoking of a right in bad faith, usually results in tort liability. Therefore, it is not surprising that the courts deny relief to a party in breach who challenges the other party's unilateral termination of a contract without itself offering to perform. That party is acting in bad faith and is "misusing" its right to enforce the other party's undischarged promise.

Second, there is the principle that the urgency of a situation affects what is lawful. This principle receives some specific statutory applications, as in the Penal Code's recognition of various justificatory defenses. Doctrinal writers have argued that it also provides a basis for avoiding statutory "formalities," such as article 1184's re-

224. A. WEILL & F. TERRÉ, *supra* note 100, nn^{oo} 638-643.

quirement of judicial termination.²²⁵ These writers acknowledge that the substitution of self-help for compliance with a statutory formality should be a relatively rare event, but they contend that in some situations the raw facts of the "real" world must prevail over the "ideal" rules found in the Code.

The operation of article 1144 provides an example of this phenomenon. That article requires a contractant to obtain court authorization for any substitute performance or cover which it wishes to charge to a party in breach. Taken literally, it requires owners to obtain court approval before substituting a new builder for one in breach if they wish to recover any additional costs incurred as damages. The formality of court approval, while consistent with article 1184's recognition that only a court can terminate a contract, is inconsistent with the urgencies (or at least the practicalities) of the real world in denying the aggrieved party an effective self-help remedy. That tension has sometimes led courts to allow the aggrieved party to obtain a substitute performance at the breacher's expense.²²⁶ In these cases, the urgency of the situation permits dispensing with the formality of court approval. These decisions remain exceptional, and there appear to be none awarding damages to buyers who purchase, on their own authority, substitute goods from another seller. Although commercial law recognizes the utility of cover as a prompt, self-help remedy,²²⁷ article 1144 treats cover, in transactions subject to the civil law, as an impermissible form of private justice unless accomplished with court approval or justified by the urgency of the situation.

Unilateral termination, the form of self-help with which we are primarily concerned, initially received judicial recognition in cases where employers had terminated employees hired for a definite term. In the first case to attract widespread attention, a village notable named Combes had, in 1894, employed a certain Mademoiselle Savagnac as a servant girl for seven and one-half months.²²⁸ Combes

225. Vasseur, *Urgence et droit civil*, 1954 REV. TRI. DR. CIV. 405, 409; Savatier, *Réalisme et idéalisme en droit civil d'aujourd'hui*, in 1 ETUDES RIPERT, *supra* note 188, at 75-76.

226. The cases usually involved tenants who successfully charged their landlords for repairs which the landlord had a duty to make. See Cass. civ., 2 July 1945, 1946 D. Jur. 4. See also Carbonnier, *Contrats spéciaux*, 1946 REV. TRI. DR. CIV. 37, 39.

227. Deprez, *supra* note 127, at 43-44. Commercial law awards as damages any cost differential suffered by merchant buyers who respond to breach by covering; commercial sellers who resell receive similar protection. These "rules" do not appear in the Commercial Code, but they are among the commercial practices recognized by the separate system of commercial courts. 2 G. RIPERT & R. ROBLOT, *supra* note 120, nn^{oo} 2535-2544 (10th ed. 1986).

228. Cass. civ., 26 Feb. 1896, 1897 S. Jur. I 187.

dismissed her because he believed she was pregnant and she had refused to allow a physician who had examined her to inform Combes of her condition. Mademoiselle Savagnac sued to recover her unpaid wages and damages. In denying her any relief, the trial court judges plainly based their decision on the facts of the case. Their judgment²²⁹ did not cite article 1184 or any other legal text, but merely recited the facts, including what the judges characterized as the servant girl's "self-confessed" pregnancy. The whereas clause in the judgment which came closest to stating a legal conclusion, oozed sympathy for the employer's predicament. According to the judges, "from no point of view can one consider an employer bound to keep in his service a pregnant girl, given how one perceives the immorality of the conduct, the bad example in the house, the interference with the work, and the grave inconvenience resulting from giving birth."²³⁰ To these judges (undoubtedly all male), it was self-evident that an employer could show a pregnant servant girl the door.

But what about article 1184, which treats a party as bound by a promise until a court discharges the obligation? Mademoiselle Savagnac believed that text contained the applicable legal rule. She argued before the Court of Cassation that the lower court had violated article 1184 when it upheld her employer's termination of the employment contract "by his own declaration and without any judicial decision." The Court disagreed and found no misinterpretation of the law in the lower court's judgment. As is often the case when the Court of Cassation finds no legal error, the Court did not advance its own interpretation of article 1184, much less an interpretation consistent with the power of unilateral termination.

The very next year, the Court of Cassation did extract from the text of article 1184 a rule similar to the one proposed by Mademoiselle Savagnac. The occasion was the previously discussed case of the electric company which had terminated service to the Hôtel de Lille et d'Albion for payment arrearages.²³¹ The lower court found that the electric company had breached its contract and ordered it to perform. The reaction of the trial judges to the electric company's termination was quite different, and less sympathetic, than the reaction of the trial judges to Combes' actions in the prior case. Their judg-

229. Reprinted in 1897 S. Jur. I at 187-88 before the Court of Cassation's judgment.

230. *Id.* at 187.

231. *See supra* text accompanying notes 191-194.

ment²³² recited the details of the billing dispute, the amounts unpaid (a small proportion of the total bill), and the hotel company's willingness to submit the matter to arbitration. Once again the judgment cited no legal text and focused almost exclusively on the facts. The only legal analysis which it contained concerned the mechanism for compelling the electric company to perform (the *astreinte*).

Quite plainly, the trial judges in the latter case did not believe that the hotel's breach (if there was one) put the electric company into a predicament similar to that confronting poor Combes. The hotel might be liable in damages for its actions, but, unlike the pregnant servant girl, it could in good faith demand that the other party continue to perform; the judges ordered the electric company to do so. This result is a sensible one, and the Court of Cassation might have rejected the electric company's challenge by invoking the trial judges' discretionary authority to evaluate the gravity of a party's breach. Instead, the Court advanced an unnecessarily broad interpretation of article 1184, when it invoked that article to condemn the electric company's "unilateral breaking of a contract that had not ceased to exist." That condemnation of unilateral termination was certainly broad enough to cover Combes' dismissal of his servant girl.

This comparison between the cases of Mademoiselle Savagnac and that of the Hôtel de Lille et d'Albion discloses an unfortunate feature of the French system of case law. The Court of Cassation takes no responsibility for synthesizing its precedents. The two cases are easily reconcilable on their facts, but the Court made no effort to reconcile the different results. The first case involved a serious breach of contract which would have created an intolerable predicament for the employer if he were forced to continue the contractual relationship, while the second case involved a trivial billing dispute which the electric company used as a pretext to escape from its contractual obligations. Rather than reconcile the two cases, the Court formulated two over-broad and largely inconsistent rules, one condemning unilateral terminations and the other finding no error when a trial court approves a unilateral termination. This phenomenon occurs frequently in French law. As Professor Dawson describes it, the Court of Cassation has available to it a kaleidoscope of often inconsistent rules from which it can pick and choose as it wishes.²³³ The system

232. The lower court's judgment appears in Cass. req., 1 Dec. 1897, 1899 S. Jur. I 174, 175.

233. J. DAWSON, ORACLES OF THE LAW 414-15 (1968).

still works, at least in part because trial judges strive to achieve factual justice and also, because the Court of Cassation favors rules which allow those judges' situational sense to prevail.

French case law on unilateral termination still suffers from a toleration for inconsistent rules. Thus, it lacks a clear rule to dictate when a party may terminate for breach. The Court of Cassation has never disapproved the interpretation of article 1184 advanced in the *Hôtel de Lille et d'Albion* case, but on many occasions it has affirmed trial court decisions allowing employers to dismiss misbehaving or incompetent employees²³⁴ as well as decisions allowing wrongfully dismissed employees to disregard noncompetition covenants.²³⁵ The Court has reacted similarly to trial court decisions upholding theatre owners' ejection of unruly patrons²³⁶ and trade associations' expulsion of members who have violated association rules.²³⁷ In the important area of construction contracts, trial courts have also allowed owners to terminate contracts unilaterally when the builder is in breach without compensating the builder.²³⁸ The courts have done so in direct opposition to article 1794 of the Civil Code, which allows an owner to terminate a construction contract at any time *if* the owner compensates the builder for the latter's expected profit.²³⁹ Finally, in one recent, widely-noted decision, a trial court ruled in favor of an unpaid seller who had unilaterally terminated a sales contract by reselling identified goods.²⁴⁰ That result apparently conflicts with the Court of Cassation's 1876 decision, which had held that a seller could not unilaterally discharge itself from its contractual duties to the first buyer.²⁴¹

The best explanation for these decisions, and for the growing recognition of unilateral termination, seems to be the trial judges' reaction to the facts of cases. The leading decisions on unilateral

234. Cass. civ., 25 Apr. 1936, 1936 G.P. Jur. I 879. On this body of case law, see 4 J. CARBONNIER, *supra* note 118, § 81, at 305. Article L. 122-6 of the *Code du travail* now provides a statutory basis for the employer's action.

235. See, e.g., Cass. civ., 4 Jan. 1910, 1911 S. Jur. I 195.

236. Cass. civ., 31 July 1897, 1898 S. Jur. II 85.

237. Cass. req., 22 Dec. 1920, 1922 S. Jur. I 369 (note Morel).

238. Poitiers, 12 June 1918 and 23 Dec. 1918, 1920 D. Jur. II 41 (note R. Savatier).

239. Article 1794's purpose is to allow an owner to terminate a losing construction contract at any time if the owner is willing to pay expectancy damages to the terminated builder. 3 H. MAZEAUD, L. MAZEAUD, & J. MAZEAUD, *LEÇONS DE DROIT CIVIL: PRINCIPAUX CONTRATS* n° 1358, at 768 (5th ed. 1979) [hereinafter 3 MAZEAUD].

240. Colmar, 7 Feb. 1975, 1978 D. Jur. 169 (note Ortscheidt).

241. See *supra* text accompanying note 190.

termination are all lower court decisions, or Court of Cassation decisions finding no violation of the law in a lower court decision upholding a unilateral termination against a challenge based on article 1184. In these latter cases, the Court of Cassation usually limits itself to finding no error or to suggesting that a party in bad faith, or who has not performed at all, cannot complain about the other party's failure to seek termination under article 1184. Only in the *Estivanti* case, a 1936 decision, did the Court go further and rule that an employer may terminate an employment contract without judicial intervention, whenever the employee has rendered that termination necessary due to a "grave failure" to perform his contractual obligations.²⁴²

The trial courts' rebellion and the Court of Cassation's acquiescence in this rebellion is readily understandable. When a party in breach sues, not just for restitution but for performance or damages, the reaction of the trial judges is likely to be similar to that of the trial judges in *Savagnac v. Combes*, at least if the breach is a serious one. Attitudes towards employee pregnancy have fortunately changed since the 1890s, but attitudes towards contract breach have not. Judges rightfully hesitate to hold liable the victim of a serious breach of contract merely because article 1184 suggests that an aggrieved party remains bound until it takes the initiative of securing a discharge from a court. A rule barring all unilateral terminations would in effect require an employer to obtain judicial approval before dismissing an employee for breach of contract. This result surely was unintended by the drafters of article 1184, and one which they would have rejected if they had considered the problem. The defense of non-performance provides aggrieved employers some protection — they need not pay a non-performing employee — but employers usually desire to remove an offending employee from the premises and hire someone new in replacement. As was shown earlier in the case of the irritable curist, the Court of Cassation has sometimes evaded article 1184 by refusing to distinguish clearly between a suspension of performance, which does not require judicial approval in advance, and a discharge, which does require such approval. This evasion tactic occasionally reappears, but courts have been candid enough to recognize that employers are terminating a contract when they discharge an employee, as do owners when they order contractors to quit work and remove equipment from the premises.²⁴³

242. Cass. civ., 25 Apr. 1936, 1936 G.P. Jur. I 879.

243. See *supra* notes 234 and 238.

French jurists have sought to impose some order on this unruly judicial creation of unilateral termination. The principal concern, other than the legitimacy of the entire enterprise, is the absence of any standard for determining when unilateral termination is permissible. Earlier treatise writers emphasized the exceptional nature of unilateral termination.²⁴⁴ They read the employee discharge cases to allow the employer to terminate unilaterally only when the employee's bad faith or intentional breach created an urgent need to replace the employee immediately. These commentators reluctantly conceded that the prohibition against self-help was not absolute, and that the necessities of the situation permitted the aggrieved employer to terminate a contractual relationship already undermined by the gravity of the employee's breach. How could an employer retain an employee in whom the employer no longer had any confidence? Another early commentator, Professor Morel, sought, in a case note to a 1920 decision,²⁴⁵ to limit unilateral termination to cases where the breach was so complete and self-evident that a judicial order terminating the contract would be no more than a useless formality. Article 1184's *raison d'être*, according to Morel, was to allow judges to evaluate whether a breach was serious enough to warrant termination. Therefore, unilateral termination was permissible if the party in breach had not performed at all, or if the gravity of the breach was self-evident.

Twentieth-century courts have never confined unilateral termination so narrowly. Professor René Savatier, a leading law professor of the inter-war years, complained about the absence of such a narrow limitation in a case note accompanying two trial court decisions which had upheld unilateral terminations of construction contracts.²⁴⁶ In one case, the builder had been arrested for disturbing the peace (it was not clear where the offense occurred) and the workers had at least temporarily left the job site, while in the other case the builder had used some of the owner's equipment for personal purposes. In both cases the court found that the builder's breach justified the owner's termination of the contract. This result troubled Savatier. He acknowledged that the two contractors were at fault, but questioned whether either breach seriously prejudiced the owner or prevented the builder from fulfilling its remaining contractual obligations.

244. 6 M. PLANIOL & G. RIPERT, *supra* note 115, n° 428; 2 A. COLIN & H. CAPITANT, *supra* note 116, n° 1025.

245. See case note by Morel in Cass. req., 22 Dec. 1920, 1922 S. Jur. I 369, 370.

246. See case note by R. Savatier in Poitiers, 12 June 1918 and 23 Dec. 1918, 1920 D. Jur. I 41, 43.

Perhaps those breaches in fact satisfied both of Savatier's proposed criteria, but the trial judges made no effort in their decisions to convince the reader, as had the judges in the *Savagnac* case, that it was unreasonable to expect the aggrieved party — in these cases the owner — to continue the contractual relationship. Savatier concluded that the courts might as well strike article 1184 from the Civil Code unless they developed some standard for determining what breaches were serious enough to warrant unilateral termination. Savatier, like Morel, suggested a hierarchy of breaches: only the most serious breaches would justify unilateral termination, an intermediate category of breaches would permit a court to terminate with damages, and the least serious breaches would give rise only to liability for damages without affecting the aggrieved party's performance obligations.

Professors Morel and Savatier wrote their case notes in the early 1920s. Their prodding has not resulted in any judicial definition of which breaches justify unilateral termination. The Court of Cassation seems content to leave the matter to the trial courts. While the Court of Cassation has a formula for determining when lower courts should terminate a contract under article 1184 — the nonperformance must be of "sufficient importance" to make damages an inadequate remedy²⁴⁷ — the Court has no formula for determining when a party may terminate on its own initiative. The closest it came was in the *Estivant* case,²⁴⁸ but the decision's "grave failure to perform" test has not been repeated in subsequent cases. Even in *Estivant*, the Court did not define what constituted a "grave failure" or explain how a "grave failure to perform" differed from the "nonperformance of sufficient importance" required for judicial termination. The Court simply held that the trial judges had properly found that the employee (*Estivant*) had been sufficiently neglectful and incompetent at selling cars to justify his termination under the "grave failure" standard.

This uncertainty as to the scope of unilateral termination has not affected its importance. The present generation of treatise writers recognizes it to be a more common and less troublesome phenomenon than had their predecessors. Why should a party not respond to a breach by terminating a contract, if it can do so without disturbing the peace and if it is willing to assume the risk of a mistake?²⁴⁹ Is this not a more practical solution in most cases than suing for termina-

247. See *supra* text accompanying note 139.

248. See *supra* text accompanying note 242.

249. 4 J. CARBONNIER, *supra* note 118, § 81, at 305-06.

tion? The Germans wisely adopted this approach in their Civil Code of 1900,²⁵⁰ and some scholars believe that, in practice, French law now approaches that position.²⁵¹ The aggrieved party terminates if it believes the other party's breach warrants that response, and the other party then challenges the termination in court if it believes, as will rarely be the case, that the termination is worth challenging. Under this approach, the judges play a different role than that envisioned under article 1184. Judges do not release promisors before the fact, but determine after the fact whether they acted properly in dishonoring their promises. The judges' new role will be a more limited one, primarily because they will have fewer occasions to exercise their power, as most unilateral terminations will go unchallenged.

This new approach is, of course, the American approach, lacking whatever beneficial guidance the *Restatement* sections give the terminating party. It is unclear whether the French system has really gone that far in gutting article 1184. A much-noted 1975 Court of Appeals decision²⁵² supports the conclusion that such a gutting has taken place, while at the same time the decision suggests the unworkability, if not meaninglessness, of any rule which binds a promisor to its promise until it obtains a discharge from a court.

The 1975 case involved an agreement to sell an identified piece of machinery. The applicable law was the Civil Code, not commercial practice, which allows a merchant seller to terminate by reselling upon the initial buyer's breach.²⁵³ Relations between the buyer and seller became quite acrimonious; disputes arose over the extension of credit to the buyer and the buyer's surreptitious use of the machine. The unpaid seller, who apparently had never delivered the machine, became fed-up with the buyer's shenanigans, sold the machine at public auction, and then sued the buyer for damages (the difference between the contract price and the auction price). The buyer challenged the seller's unilateral termination of the contract and argued that the seller should have obtained a discharge from a court before reselling the machine.

The Court of Appeals rejected the buyer's argument for two reasons. First, the court confirmed that the seller *could have* obtained judicial termination of the sales contract prior to the auction sale on

250. 3 C. LARROUMET, *DROIT CIVIL; LES OBLIGATIONS* n° 702, at 679-80 (1986).

251. *Id.* n° 712, at 687; A. WEILL & F. TERRÉ, *supra* note 100, n° 488, at 511.

252. Colmar, 7 Feb. 1975, 1978 D. Jur. 169 (note Ortscheidt).

253. *See supra* note 227.

account of the buyer's breach of its obligation to pay. Second, the court excused the seller's *actual* failure to obtain judicial termination because of the urgent need to resell the machine upon the buyer's bad faith failure to pay. According to the court, a breach sufficiently grave to warrant judicial termination also justified unilateral termination if the aggrieved party must act immediately to protect its interests.

This decision, despite its banal facts and common-sense holding, has aroused considerable controversy. Two leading scholars have labelled as "heretical" its circumventing of article 1184,²⁵⁴ something which commercial practice has proved quite adept at doing. The commentator in the Dalloz reporter questioned what special urgency confronted the seller (the court was quite specific on the buyer's bad faith but not the seller's need to resell) and questioned whether the decision did not establish a general rule that a seller could always terminate unilaterally by reselling if the buyer breached by failing to pay.²⁵⁵ French law does not recognize any such rule, but its absence may be less attributable to the requirement of judicial termination than to the Civil Code rule that, unless the parties express a contrary intent, the sales agreement itself transfers identified property to the buyer.²⁵⁶ Therefore, the buyer owns the property even if it has not yet taken delivery, and the unpaid seller cannot resell what it no longer owns. Instead, the seller must first terminate the contract by suing under article 1184 or by invoking a termination clause of the type described in the next section.

The need to undo the transaction may therefore limit the seller's power to terminate a sales contract unilaterally. But when the seller does not face that obstacle, as where the seller has reserved a property interest in the goods,²⁵⁷ how can the buyer challenge a unilateral termination? In the 1975 case, the buyer raised the seller's failure to obtain judicial termination as a *defense* to a damage action brought by the seller. This defense is a startling one because the buyer had never tendered payment. Furthermore, there was no indication that the buyer was now either willing or able to pay for the machine, or had any further desire to purchase it. If the seller had not resold, it could have sued the buyer for specific relief (the full price), while at the

254. P. MALAURIE & L. AYNÈS, *supra* note 94, n° 510, at 213.

255. See case note by Ortscheidt in 1978 D. Jur. at 170.

256. C. CIV. art. 1583.

257. See *supra* note 120.

same time thrusting upon the buyer the unwanted machine. There is surely an air of unreality to the nonperforming buyer's challenge to the aggrieved seller's effort to mitigate losses.

The issue before the court would have been more difficult if the buyer had tendered the price and sought to hold the seller liable for breach of contract. The buyer's argument would be that the seller's unilateral termination did not discharge its contractual duty — only a court could do that under article 1184 — and that the seller was now liable for its breach in not delivering the machinery. Surprisingly, this argument has attracted little attention. Cassin, alone among the modern authors, has addressed it when he analyzed the unilateral termination cases as cases in which the aggrieved party sought termination defensively.²⁵⁸ Rather than sue for termination, the aggrieved party requests termination when sued for breach of contract, arguing that the court should now discharge it from its own obligation because of the plaintiff's breach. Thus, the question for the court in our hypothetical case would be whether the buyer's delay in performing provided grounds for the court's termination of the contract at the defendant seller's request. If not, the seller would be in breach for refusing to deliver the property sold.

The Court of Cassation approved this approach in an 1845 case in which a seller sued the buyer for performance, that is, sought a court order requiring the buyer to accept delivery and pay for two shipments of goods.²⁵⁹ The defendant buyer sought termination because the first shipment was late and the second shipment was both late and nonconforming. The trial court, treating each shipment as a separate contract, granted termination for the second shipment but denied it for the first. The buyer argued before the Court of Cassation that a trial court must terminate a contract once it finds a breach. The Court rejected that argument and recognized the discretionary nature of the termination remedy.²⁶⁰ There is no right to terminate for breach, and the trial court did not err when it held that the aggrieved party (the buyer) had an obligation to accept the first shipment while obtaining damages to compensate for its lateness. However, the Court of Cassation also held that the trial court had properly terminated the contract for the second shipment rather than

258. R. CASSIN, *supra* note 173, at 365-66.

259. Cass. civ., 15 Apr. 1845, 1845 D.P. Jur. I 411, 1845 S. Jur. I 345.

260. On the importance of this holding, see H. CAPITANT, *supra* note 139, n° 151, at 344 n.1.

obligating the buyer to accept a shipment that was both late and nonconforming.

What discharged the buyer's obligation to accept the second shipment is a theoretical question of no particular import. Under the Court of Cassation's approach, there apparently was no discharge until the trial court granted one. But that judicial monopoly over discharge became a matter of little significance once the Court recognized the defense of nonperformance. This defense permits a party not only to refuse a gravely defective performance, but also to withhold its own performance until the other party is no longer in breach. Thus, an employer may reject the performance of a pregnant servant girl and a buyer may reject goods that are both late and nonconforming; both may also withhold performance of their own promise to pay. Of course, aggrieved parties act at their peril, and the party in breach may have an opportunity to cure. However, at some point the breach will become grave enough that the party in breach can no longer tender a performance that the other party must accept. At that point, the aggrieved party's suspension of performance necessarily becomes permanent, although one can never be sure that such a discharge has occurred until a court pronounces or confirms it.

French jurists have never developed Cassin's suggestion regarding a party seeking judicial termination defensively, and the Court of Cassation's 1845 decision has produced few progeny.²⁶¹ Courts today do not grant termination to defendants but analyze whether a defendant's unilateral termination, if challenged by the plaintiff, was proper. Party termination evidently still raises suspicions as a measure of private justice, and courts do not wish to give it too much encouragement, as might happen if they explicitly ruled that it did not matter whether a party sought judicial termination before or after a suit challenging nonperformance. In addition, defensive termination, while perhaps consistent with article 1184's text, which only requires that a party seek termination from a court, contradicts the ideal behind the requirement of judicial termination: one should keep one's promises until a court discharges them. To preserve at least the appearance of that ideal, twentieth-century jurists have hesitated to take the final step of equating unilateral and judicial termination.

261. For another example of a defendant obtaining termination, see Cass. req., 4 Dec. 1900, 1901 D. Jur. I 518, 1901 S. Jur. I 222.

C. Termination Clauses

Judicial approval of termination clauses has provided contractants a third escape hatch from the judicial monopoly over discharge recognized by article 1184. Termination clauses resemble what the common law would call express promissory conditions.²⁶² They allow a party to treat any specified nonperformance by the other party, not only as a basis for withholding performance, but also as a basis for unilaterally terminating the contract and obtaining restitution of any performance rendered once it is too late to satisfy the condition. Thus, as was the case in the leading nineteenth-century decision validating termination clauses,²⁶³ a lease may contain a provision authorizing the lessor to terminate the contract if the lessee fails to pay any monthly installment of rent. Termination under such a clause may occur retroactively, as does judicial termination, or the clause may limit that retroactive effect. In the lease case, for example, the clause provided that the lessor's termination would leave untouched any completed past performances; the lessor could only terminate the lease from the date of the first nonpayment, and then, only if the lessee failed to pay within thirty days of the lessor's invocation of the clause.²⁶⁴

Pothier and the drafters of the Civil Code did not believe that a termination clause eliminated the need for judicial intervention.²⁶⁵ The party invoking such a clause still needed to obtain the judgment of a court to terminate the contract. At most, the clause eliminated any judicial discretion to deny termination once the judges confirmed the nonperformance of the condition. That narrow interpretation of termination clauses did not prevail for long. What did prevail was the idea, enshrined in article 1134, that the parties could fashion their

262. On express promissory conditions, see E. FARNSWORTH, *CONTRACTS* § 8.2, at 539, and § 8.3, at 547 (1982).

263. Cass. civ., 2 July 1860, 1860 D. Jur. I 284.

264. Termination clauses in French law differ from what the common law refers to as a termination clause. In common-law systems, a termination clause allows a party, normally an employer or franchisor, to terminate a contract prospectively for any reason upon giving some minimal notice to the other party. The party invoking such a clause need not establish any breach in order to end the contractual relationship. See E. FARNSWORTH, *CONTRACTS* § 7.17, at 532-34 (1982). Termination clauses of the common-law variety have not played a major role in French law, because the overriding obligation of good faith limits a party's opportunity to invoke them. A party cannot terminate a contract without a good faith justification, even if the contract is for an indefinite duration and would be, at common law, terminable at will. 3 C. Larroumet, *supra* note 250, nn^o 203-208.

265. See *supra* text accompanying notes 154-169.

own contracts which would have the force of law between them. Thus, parties could give greater force to termination clauses if they made their intent clear. If a clause did no more than recognize the right of a party to terminate for nonperformance, the courts would likely interpret it as a simple reminder of what article 1184 already provided. However, if a clause stated explicitly that a party could terminate without judicial intervention, and without even summoning the other party to perform, then the court would most likely respect the parties' intent. Courts interpreted termination clauses narrowly, but determined parties had no trouble drafting clauses which allowed termination for breach without judicial intervention. This result was consistent with the will theory of contract which prevailed throughout the nineteenth century.²⁶⁶

Termination clauses have become commonplace in sales, leases, and many other contracts. Contemporary French scholars have expressed concern that the stronger party to a transaction, normally the seller or lessor, may use its dominant position to secure the inclusion of a clause allowing it to terminate for nonperformance.²⁶⁷ The dominant party does so because termination under such a clause offers substantial advantages even if the party invoking the clause must still seek a court judgment. The principal advantage is the diminution, if not elimination, of the judicial control over the remedy which a party encounters if it seeks judicial termination under article 1184. In those cases, the trial judges must determine whether any nonperformance is sufficiently grave to warrant undoing the contract, or whether the aggrieved party must still perform and accept damages as compensation for the breach. In addition, the judges have broad discretion to grant a further delay to a party in breach before terminating the contract.²⁶⁸

This notorious indulgence for debtors explains the interest of the economically stronger party in substituting party termination for judicial termination. Similar considerations motivate contractants in this country to make their own duty to perform subject to an express

266. For a strong defense of the growing recognition that the parties could opt out of article 1184's requirement of judicial termination, see 4 C. AUBRY & C. RAU, *supra* note 171, n° 302, at 84 n.84.

267. Borricand, *La clause résolutoire expresse dans les contrats*, 1957 REV. TRI. DR. CIV. 433, 439-44; Béguin, *supra* note 187, at 59-61; Deprez, *supra* note 127, at 53-55.

268. The third paragraph of article 1184 explicitly authorizes the court to grant the defendant a delay, according to the circumstances, before terminating a contract for nonperformance. C. CIV. art. 1184, ¶ 3. Likewise, the second paragraph of article 1244 authorizes judges to allow any debtor in breach, in light of its position and economic situation, up to two additional years to perform. C. CIV. art. 1244, ¶ 2.

promissory condition. Courts normally hold that anything less than full performance of the express condition discharges a party, while substantial performance of a constructive condition of exchange suffices to force the other party to perform and accept damages.²⁶⁹ Thus, termination clauses and express conditions both seek to eliminate any judicial role in evaluating the seriousness of a breach.

In the French system, termination clauses also present the advantage of eliminating any need to sue for a discharge. They permit an aggrieved party to terminate by a simple declaration or other manifestation of intent. Thus, the aggrieved party can avoid the delay and expense of suing for termination under article 1184. But this advantage is subject to two major limitations. First, if a party terminates to obtain restitution, it may still need to invoke the aid of the courts to retrieve its own performance. The seller who terminates retroactively may, in theory, never have ceased to be the owner of the goods sold, but the seller's ownership does not authorize it to seize the goods from the buyer without the intervention of a court. If the buyer does not return goods delivered to it voluntarily, the seller must still sue to obtain restitution. Likewise, a terminating lessor cannot evict the lessee without judicial intervention. Of course, the elimination of the courts' protective role strengthens the creditor's position in reaching a settlement with the party in breach. If the terminating party does invoke the aid of the courts to obtain restitution, the judges' role is much more limited than their role under article 1184. In cases of party termination, the judges' role is merely to confirm that the other party has not fully performed and that the terminating party has acted in good faith.²⁷⁰ The judges have no discretion to evaluate the seriousness of the nonperformance, and only rarely have they found a party liable for bad faith in invoking a termination clause.²⁷¹

There is a second limitation on the advantages offered by termination clauses. If a party terminates to obtain a discharge, it necessarily acts at its peril. The other party may claim that it had fully

269. E. FARNSWORTH, *CONTRACTS* § 8.2, at 539, and § 8.3 at 547 (1982).

270. 3 C. LARROUMET, *supra* note 250, n° 716, at 691-93; 2 MAZEAUD, *supra* note 118, n° 1104, at 1132.

271. Perhaps the absence of much case law on bad faith party termination suggests that courts preach more than they enforce the obligation of good faith performance. The cases finding bad faith involve parties that have terminated for truly trivial breaches. *See* Cass. civ., 14 Mar. 1956, 1956 D. Jur. 449 (payment by mail delayed by holiday); Cass. civ., 6 June 1984, 1984 J.C.P. Jur. IV 260 (failure to pay symbolic franc). *But see* Hémard, *Ventes, transports et autres contrats commerciaux*, in 1964 REV. TRI. DR. COM. 808, 813-14 (discussing Paris, 22 June 1964 which involved over-hasty termination of long-time commercial relationship).

performed, or that any nonperformance was a permissible response to the terminating party's own nonperformance. In such cases, the non-terminating party may challenge as a breach any nonperformance by the party invoking a termination clause. The terminating party will itself be liable for breach of contract unless the court confirms that the first party to breach was the terminating party. However, that risk is less than the risk assumed when a party terminates in the absence of a termination clause because the judges need only confirm the existence of the identified breach. Judges will not evaluate the seriousness of the breach as they would have to do if a party sought termination under article 1184 or, in the absence of a termination clause, terminated unilaterally.

Termination clauses still cause French scholars considerable difficulty. The principal concern has been to reconcile them with the general principle of law which prohibits a party from judging one's own cause. Most writers view party termination as a form of self-help which lacks firm textual support and is therefore of questionable validity in light of the principle. When confronted with the near unanimous judicial approval of termination clauses, scholars tend to advance untenable rationalizations to support courts' actions. They suggest that the prohibition against self-help yields when the victim consents in advance,²⁷² or that the Code somehow tacitly recognizes the Roman clause *lex commissoria* despite expressly opting for judicial termination in article 1184.²⁷³ Other suggested reasons are that the courts are merely taking into account practical realities by reducing the scope of article 1184,²⁷⁴ or that the courts somehow adequately restrain the impulse in favor of self-help by narrowly construing termination clauses.²⁷⁵ More persuasively, scholars also recognize that the invocation of a termination clause is potentially subject to subsequent judicial scrutiny. Such scrutiny serves as a check on self-help, but provides little protection from the harsh results which often accompany party termination for what may have been a minor breach. The common law encounters the same problem under the guise of the forfeiture which may accompany the failure of

272. 4 C. AUBRY & C. RAU, *supra* note 171, n° 302, at 85.

273. A. WEILL & F. TERRÉ, *supra* note 100, n° 494, at 515-16; 2 MAZEAUD, *supra* note 118, n° 1104, at 1132.

274. A. WEILL & F. TERRÉ, *supra* note 100, n° 494, at 516; 4 J. CARBONNIER, *supra* note 118, § 81, at 306.

275. 6 M. PLANIOL & G. RIPERT, *supra* note 115, n° 436, at 587. But dominant parties have encountered little difficulty in drafting clear and effective termination clauses.

an express condition. French courts proved unable to avoid forfeiture once they recognized the validity of termination clauses. A partial solution has come from the legislature, which has closely regulated termination clauses in a number of special statutes governing particular contract types such as insurance, commercial and residential leases, and construction contracts. These legislative interventions, all outside the Civil Code, protect consumers and other special groups from one-sided termination clauses imposed by dominant parties.²⁷⁶

The French courts' approval of termination clauses appears to have a much simpler explanation which, although not ignored by French scholars, is so basic that they do not highlight it. This explanation derives from the Code's approach to contracts. The articles in the Civil Code governing contracts are almost all subject to modification by party agreement. They are, as the French call it, "suppletive," meaning they govern, where relevant, the contract between the parties, but that the parties may opt out by agreeing to their own terms.²⁷⁷ The Code plainly rejects the contrary approach of Roman law which limited consensual contracts to four predetermined types (sale, lease, agency, and partnership). For a valid agreement, the Code requires only consent, capacity, a definite subject matter, and a licit *cause*. Within those limits, the parties' agreement has the force of law between them subject to the limitation in article 6 that one cannot derogate from laws involving public order or good morals by agreement. Therefore, express terms supersede statutory terms unless the latter involve public order or good morals.

The Code's affirmation of freedom of contract provides the best explanation for the unanimous and unquestioning judicial approval of termination clauses. Two cases from the 1860s, still cited today, illustrate the courts' treatment of the basic principle that the parties have complete freedom to contract subject only to the public order limitation.

The first case involved a twelve-year commercial lease with a clause authorizing the lessor to terminate upon nonpayment of any month's rent.²⁷⁸ The lessee, who operated a boutique, missed a monthly payment at the end of the lease's third year. The lessor invoked the clause, which gave the lessee an additional month's grace

276. For the fullest survey of these special statutes, see 2 B. STARCK, *DROIT CIVIL OBLIGATIONS; CONTRAT ET QUASI-CONTRAT* nn^{oo} 1620-1624, at 561-62 (1986).

277. R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 83-92 (1972).

278. Cass. civ., 2 July 1860, 1860 D. Jur. I 284.

period to pay before the termination became effective. The lessee did not pay during that period, and the lessor sued to regain possession of the premises. At that point, the lessee offered to pay the rent due, and the Paris Court of Appeals (the second-level trial court) invoked article 1244 as a basis for allowing the delayed payment. That article, one of the debtor relief provisions of the Code, authorized the courts to allow hard-pressed debtors up to two additional years to perform. The lessor challenged the Court of Appeals' judgment in the Court of Cassation, which quashed it for violating (among other articles) article 1134. The Court reasoned that the parties could agree that a specified delay in performance was a terminating condition which allowed the aggrieved party to terminate upon its occurrence. There was nothing illicit about such an agreement, which "had the force of law for those who make it." The Court cited the provisions in articles 1184 and 1244, which allowed courts to grant debtors additional time to perform, but plainly treated those provisions as suppletive ones that the parties had opted out of by express agreement.

The second case denied effect to a clause in a lease which barred a tenant from seeking termination of the lease if the lessor breached its duty to maintain the leased premises in a habitable state.²⁷⁹ Without expressly invoking article 6, the Court found that the clause was a nullity because it was in manifest opposition to the essential rules governing lease contracts. This decision, according to one of the leading contemporary treatises, recognizes that the statutory right to seek termination for grave breaches is a matter of public order which the parties cannot agree to reject at the time of contracting.²⁸⁰ If such agreements were valid, a party in total breach could enforce the other party's performance. Such a result would "disequilibrize" the bilateral contract and deprive it of all efficacy. The parties, by agreement, may define what constitutes a breach, and what breaches are grave enough to warrant termination, but they cannot by agreement change the law of remedies. The remedies available for breach are largely a matter of public order not subject to modification by the parties.²⁸¹

279. Cass. req., 1 Jan. 1863, 1863 S. Jur. I 185.

280. 3 MAZEAUD, *supra* note 239, n° 1012, at 351.

281. Another treatise argues that a contractant should be able to agree to seek only damages if the other party breaches (i.e., to perform regardless of any breach). A. WEILL & F. TERRÉ, *supra* note 100, n° 493, at 515. This position seems more consistent with the common-law practice that parties may make their promises independent of one another if they do so clearly.

VI. CONCLUSIONS

This comparative study on the effect of breach on the aggrieved party's performance obligations prompts a number of observations, applicable to this, and perhaps other, areas of the law. First, there is a surprising similarity between the common law and French law. Both systems recognize the importance of preserving contractual equilibrium in bilateral relationships. That recognition leads both systems to treat promises as dependent whenever possible, thus allowing an aggrieved party to preserve the benefit of its own performance. Both systems also distinguish between an aggrieved party's suspension of performance and its termination of the contract, but neither has been particularly successful in defining which breaches permit a party to invoke these defensive measures. Trivial breaches plainly do not qualify, but only permit the aggrieved party to sue for damages. The question of which breaches are trivial and which are sufficiently serious is left to a case-by-case determination. The most striking difference between the two systems is the greater scope of the aggrieved party's restitutionary remedy in France. This difference may be attributed, at least in part, to French law's treatment of that remedy as providing a type of security interest analogous to the security interests in goods which parties can create at common law if they so agree.

Second, the predominant lawmaking role in both systems has been shared by judges and scholars. Judges first announce the law in the course of deciding cases, and scholars subsequently bring some order to the judges' work product. The role of the legislature, at least until recently, has been minimal. In England and America, there was very little private-law legislative activity until the twentieth century, and the principal legislative contribution of the twentieth century (the Uniform Commercial Code) leaves many of the harder questions to the judges for case-by-case determinations. In France, the major legislative initiative of 1804 actually did no more than codify, as general principles, solutions already achieved by pre-revolutionary jurists. Only recently has the French Parliament intervened in a more regulatory fashion, as it has when enacting detailed legislation governing termination clauses for particular contract types.

Third, present law in both systems is the product of a long historical development which can only be understood in light of that history. Rules formulated in the past, sometimes under quite different conditions, have often weighed heavily on future developments. Nevertheless, the law evolved over time to accommodate new conditions.

The consensus in both systems seems to be that, over time, the judges have worked things out pretty well and that, as a result of their efforts, the law is in a more satisfactory state today than in the past. This upbeat spirit pervades the French treatises, which generally applaud what the French judges have done to preserve the equilibrium between the parties to a bilateral contract. Recent judicial innovations in England, such as the doctrine of material breach and unilateral termination, have also been welcomed as improvements in the law of remedies. In America, the much acclaimed *Restatements* now spur the law's evolution by generalizing the better judge-made rules.

Fourth, the experience of both systems demonstrates that issues of contract performance most often arise in suits brought by the party in breach. That party has a strong incentive to sue if it has performed in part without receiving payment under the contract. The aggrieved party who has not received a promised performance, and who also has not performed has less incentive to sue because it only faces the loss of the bargain and not the loss of its performance. Therefore, it is unrealistic to state as a general rule that the innocent party must take the initiative to sue for a discharge. The drafters of the Civil Code unwisely fixed such a rule in the text of article 1184, but the judges, faced with the realities of life presented to them in the form of actual cases, have defused that rule through interpretation. The drafters of the *Restatements* and of the Uniform Commercial Code have avoided fixed rules, such as that found in article 1184, as to what are the permissible responses to breach. Their approach gives the parties little guidance, at least from the text, on what is permissible, but that uncertainty is probably inevitable. Such uncertainty is surely preferable to article 1184's proposed solution which requires judicial termination or to the "cure," sometimes recognized by the common law, which allows the parties to include in their contract express conditions of performance to be enforced strictly by the courts to achieve forfeiture.

These observations all emphasize the similarities between the French and common-law systems. That they are similar should not be too surprising. Political, economic and social conditions in France, England and America are broadly similar, and have been so for several centuries. Should not one expect the private law rules generated by these three countries to be similar on such a basic matter as maintaining equilibrium between the parties in a bilateral contract? Naturally, each system has its own origins, its own procedures, and its own formulations for the operative rules. Each system works out its re-

sponse to a legal problem in ways that may seem mysterious to outsiders, and studying in detail those responses may tell us a good deal about how different systems function. But should not the results actually achieved tend to converge? One would think so, and this comparative study of one area of contract law provides at least some support for that generalization.

