

sideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the condition out of which his ability to make a return for the benefit received by him arises." *Ogdens v. Nelson*, [1904] 2 K. B. 418. Much depends on whether the contract has been executed on one side and the whole consideration given by the party seeking to enforce the implied obligation, as was pointed out by Kennedy, J., in *Bovine, Limited, v. Dent*, 21 Times L. R. 82 (November, 1904). The earlier cases were under consideration by this Court in *Morris v. Dinnick*, 25 O. R. 291; and in this particular transaction I think the words are those of expectancy and promise as to the sale of what was to be cut at the switch, and not an actual contract to cut so much or any quantity at the switch.

No means in fact existed of cutting at the switch, as both parties knew; it was contemplated on the part of defendant that he would employ or get in a portable mill during the season, by which he might be able to cut logs into timber, but this plan was not carried out by him, for sufficient reasons. There was no continuing condition which was to be preserved in this case; there was no consideration passing, in view of that, from one to the other; but only an executory engagement as to the future, which has not the elements of contract as to an existing thing: *Johnson v. McDonald*, 9 M. & W. 600. Had any logs been cut into lumber by defendant at the switch during the season of 1902, no doubt liability would have arisen to sell them to plaintiff at the given price, but I see nothing which requires or obliges defendant so to cut any logs: *Hamblyn v. Wood*, [1891] 2 Q. B. at p. 495.

Judgment as to plaintiff's claim reversed. Judgment as to counterclaim affirmed. No costs of appeal. Defendant to have costs of action, to be set off against the costs he pays on the counterclaim.

MEREDITH and MAGEE, JJ., concurred, each giving reasons in writing.

MEREDITH, J., referred to *Hill v. Ingersoll and Port Burwell Gravel Road Co.*, 32 O. R. 194.