THE RELIANCE INTEREST IN CONTRACT DAMAGES: 1

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THE proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as a means to an end has been commonplace for at least half a century. There is, however, no justification for assuming, because this attitude has now achieved respectability, and even triteness, that it enjoys a pervasive application in practice. Certainly there are even today few legal treatises of which it may be said that the author has throughout clearly defined the purposes which his definitions and distinctions serve. We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed? Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomforting relevance to legal science.

In no field is this more true than in that of damages. In the assessment of damages the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration. The language of the decisions sounds in terms not of command but of discovery. We *measure* the *extent* of the injury; we *determine* whether it was *caused* by the defendant's act; we *ascertain* whether the plaintiff has included the *same item* of damage twice in his complaint. One unfamiliar with the unstated premises which language of this sort conceals might almost be led to suppose that Rochester produces some ingenious instrument by which these calculations are accomplished.

It is, as a matter of fact, clear that the things which the law of damages purports to "measure" and "determine"—the "injuries", "items of damage", "causal connections", etc.—are in considerable part its own creations, and that the process of "measuring" and "determining" them is really a part of the process of creating them. This is obvious when courts work on the periphery of existing doctrine, but it is no less true of fundamental and established principles. For example, one frequently finds the "normal" rule of contract damages (which awards to the promisee the value of the expectancy, "the lost profit") treated as a mere corollary of a more fundamental principle, that the purpose of granting damages is to make "compensation" for injury.[1] Yet in this

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1. "In fixing the amount of these damages, the general purpose of the law is, and should be, to give compensation:—that is, to put the plaintiff in as good a position as

case we "compensate" the plaintiff by giving him something he never had. This seems on the face of things a queer kind of "compensation". We can, to be sure, make the term "compensation" seem appropriate by saying that the defendant's breach "deprived" the plaintiff of the expectancy. But this is in essence only a metaphorical statement of the effect of the legal rule. In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a "loss" only by reference to an unstated *ought*. Consequently, when the law gauges damages by the value of the promised performance it is not merely measuring a quantum, but is seeking an end, however vaguely conceived this end may be.

It is for this reason that it is impossible to separate the law of contract damages from the larger body of motives and policies which constitutes the general law of contracts. It is, unfortunately for the simplicity of our subject, impossible to assume that the purposive and policy-directed element of contract law has been exhausted in the rules which define contract and breach. If this were possible the law of contract damages would indeed be simple, and we would have but one measure of recovery for all contracts. Of course this is not the case. What considerations influence the setting up of different measures of recovery for different kinds of contracts? What factors explain the rather numerous exceptions to the normal rule which measures damages by the value of the expectancy? It is clear that these questions cannot be answered without an inquiry into the reasons which underlie (or may underlie) the enforcement of promises generally.

In our own discussion we shall attempt first an analysis of the purposes which may be pursued in awarding contract damages or in "enforcing" contracts generally; then we shall attempt to inquire to what extent, and under what circumstances, these purposes have found expression in the decisions and doctrinal discussions. As the title suggests, the primary emphasis will be on what we call "the reliance interest" as a possible measure of recovery in suits for breach of contract.

The Purposes Pursued in Awarding Contract Damages

It is convenient to distinguish three principal purposes which may be pursued in awarding contract damages. These purposes, and the situations in which they become appropriate, may be stated briefly as follows:

First, the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his promise. The court may force the defendant to disgorge the value

he would have been in had the defendant kept his contract." 3 Williston, Contracts (1920) §1338.

he received from the plaintiff. The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promisee; more briefly, the prevention of unjust enrichment. The interest protected may be called the *restitution interest.* For our present purposes it is quite immaterial how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon a rescission of the contract. These questions relate to the superstructure of the law, not to the basic policies with which we are concerned.

Secondly, the plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title, or has neglected the opportunity to enter other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the *reliance interest.*

Thirdly, without insisting on reliance by the promisee or enrichment of the promisor, we may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff, or, in a suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the *expectation interest.*

It will be observed that what we have called the *restitution interest* unites two elements: (1) reliance by the promisee, (2) a resultant gain to the promisor. It may for some purposes be necessary to separate these elements. In some cases a defaulting promisor may after his breach be left with an unjust gain which was not taken from the promisee (a third party furnished the consideration), or which was not the result of reliance by the promisee (the promisor violated a promise not to appropriate the promisee's goods). Even in those cases where the promisor's gain results from the promisee's reliance it may happen that damages will be assessed somewhat differently, depending on whether we take the promisor's gain or the promisee's loss as the standard of measurement.[2] Generally, however, in the cases we shall be discussing, gain by

2. Thus in Johnston v. Star Bucket Pump Co., 274 Mo. 414, 202 S. W. 1143 (1918), a building contractor was allowed to recover in quantum meruit for part performance a sum considerably larger than his out-of-pocket loss. The discrepancy between the reasonable value of his part performance and its actual cost to him arose from the fact that he had made very favorable contracts with subcontractors. In such a case the

the promisor will be accompanied by a corresponding and, so far as its legal measurement is concerned, identical loss to the promisee, so that for our purposes the most workable classification is one which presupposes in the restitution interest a correlation of promisor's gain and promisee's loss. If, as we shall assume, the gain involved in the restitution interest results from and is identical with the plaintiff's loss through reliance, then the restitution interest is merely a special case of the reliance interest; all of the cases coming under the restitution interest will be covered by the reliance interest, and the reliance interest will be broader than the restitution interest only to the extent that it includes cases where the plaintiff has relied on the defendant's promise without enriching the defendant.

It should not be supposed that the distinction here taken between the reliance and expectation interests coincides with that sometimes taken between "losses caused" (damnum emergens) and "gains prevented" (lucrum cessans).[3] In the first place, though reliance ordinarily results in "losses" of an affirmative nature (expenditures of labor and money) it is also true that opportunities for gain may be foregone in reliance on a promise. Hence the reliance interest must be interpreted as at least potentially covering "gains prevented" as well as "losses caused". (Whether "gains prevented" through reliance on a promise are properly compensable in damages is a question not here determined. Obviously, certain scruples concerning "causality" and "foreseeability" are suggested. It is enough for our present purpose to note that there is nothing in the definition of the reliance interest itself which would exclude items of this sort from consideration.)[4] On the other hand, it is not

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restitution interest (if we mean by that, compelling the defendant to disgorge) is broader than the reliance interest. It should be pointed out, however, that in a suit for "damages" asking reimbursement for reliance plus the lost profit (RESTATEMENT, CONTRACTS (1932) §333) the saving on the subcontracts, which in the *Johnston* case was reflected in an increased "reasonable value" of the plaintiff's performance, would have been reflected in the lost profit.

In Cincinnati Siemens Lungren Gas Illuminating Co. v. Western Siemens Lungren Co., 152 U. S. 200 (1893), damages for breach of a contract not to compete were restricted to the profit realized by the party guilty of breach. It was assumed, however, that the promisee's loss was at least equal to the defaulter's gain, and the limitation of recovery to the defaulter's profit was imposed partly on the ground that there existed no adequate factual basis for determining the business lost to the promisee. In 6 DEMOGUE, TRAITÉ DES OBLIGATIONS (1931) §287, the view is expressed that the gain of the defaulter is acceptable as a measure of damages only as a kind of surrogate for the more usual rule measuring damages by the creditor's prospective gain.

3. RESTATEMENT, CONTRACTS (1932) §329.

4. The German Civil Code limits relief on contract in certain situations to the "negative" (i.e. reliance) interest. The "negative interest" is assumed to cover gains prevented (*entgangener Gewinn*) as well as positive losses. See the annotation to §122 in BUSCH,

possible to make the expectation interest entirely synonymous with "gains prevented". The disappointment of an expectancy often entails losses of a positive character.[5]

It is obvious that the three "interests" we have distinguished do not present equal claims to judicial intervention. It may be assumed that ordinary standards of justice would regard the need for judicial intervention as decreasing in the order in which we have listed the three interests. The "restitution interest," involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.[6]

On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more active role.[7] With the transition, the

DAS BÜGERLICHE GESETZBUCH (1929). But apparently the loss of the particular gain must under the circumstances have been foreseeable as a probable consequence of the contract. See §252 and its annotation.

5. For example, in Eastern Advertising Co. v. Shapiro, 263 Mass. 228, 161 N. E. 240 (1928), the defendant's failure to take advertising space on certain billboards made it necessary for the plaintiff to expend money in placing "fillers" on the boards.

6. ARISTOTLE, NICOMACHEAN ETHICS, *1132a-1132b*.

7. "No doubt, when, after having an object delivered, or profiting from a service, I refuse to furnish a suitable equivalent, I take from another what belongs to him, and we can say that society, by obliging me to keep my promise, is only preventing an injury, an indirect aggression. But if I have simply promised a service without having previously received remuneration, I am not less held to keep my engagement. [This is true in Anglo-American law in the case of the bilateral contract.] In this case, however, I do not enrich myself at the expense of another; I only refuse to be useful to him." DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY (Simpson's trans. 1933) 217. Where the defendant has not already received some remuneration, the enforcement of the contract is viewed by Durkheim as having "an eminently positive nature, since it has for its purpose the determination of the way in which we ought to cooperate." *Id.* at 216.

". . . [T]he principle that promise or consent creates obligation is foreign to the idea of justice. . . . It is plain that if anyone promises a friend to give him something and does not do it, he does not commit an injustice,—at least, understand, if he does not wrong justification for legal relief loses its self-evident quality. It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance. Since this "normal rule" throws its shadow across our whole subject it will be necessary to examine the possible reasons for its existence. It may be said parenthetically that the discussion which follows, though directed primarily to the normal measure of recovery where damages are sought, also has relevance to the more general question, why should a promise which has not been relied on ever be enforced at all, whether by a decree of specific performance or by an award of damages?

It should also be said that our discussion of "reasons" does not claim to coincide in all particulars with the actual workings of the judicial mind, certainly not with those of any single judicial mind. It is unfortunately very difficult to discuss the possible reasons for rules of law without unwittingly conveying the impression that these "reasons" are the things which control the daily operations of the judicial process. This has had the consequence, at a time when men stand in dread of being labelled "unrealistic", that we have almost ceased to talk about reasons altogether. Those who find unpalatable the rationalistic flavor of what follows are invited to view what they read not as law but as an excursus into legal philosophy, and to make whatever discount that distinction may seem to them to dictate.

WHY SHOULD THE LAW EVER PROTECT THE EXPECTATION INTEREST?

Perhaps the most obvious answer to this question is one which we may label "psychological". This answer would run something as follows: The breach of a promise arouses in the promisee a sense of injury. This feeling is not confined to cases where the promisee has relied on the promise. Whether or not he has actually changed his position because of the promise, the promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been "deprived" of something which was "his". Since this sentiment is a relatively uniform one, the law has no occasion to go back of it. It accepts it as a datum and builds its rule about it.[8]

The difficulty with this explanation is that the law does in fact go back of the sense of injury which the breach of a promise engenders.

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this friend indirectly." TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW (Read's trans. 1922) 499-500.

8. This is essentially the view of Schlossmann, though one discerns in his discussion an admixture of elements from what is called later in the text the "economic" or "institutional" explanation. SCHLOSSMANN, DER VERTRAG (1876) §36.

No legal system attempts to invest with juristic sanction all promises. Some rule or combination of rules effects a sifting out for enforcement of those promises deemed important enough to society to justify the law's concern with them. Whatever the principles which control this sifting out process may be, they are not convertible into terms of the degree of resentment which the breach of a particular kind of promise arouses. Therefore, though it may be assumed that the impulse to assuage disappointment is one shared by those who make and influence the law, this impulse can hardly be regarded as the key which solves the whole problem of the protection accorded by the law to the expectation interest.

A second possible explanation for the rule protecting the expectancy may be found in the much-discussed "will theory" of contract law. This theory views the contracting parties as exercising, so to speak, a legislative power, so that the legal enforcement of a contract becomes merely an implementing by the state of a kind of private law already established by the parties. If A has made, in proper form, a promise to pay B one thousand dollars, we compel A to pay this sum simply because the rule or *lex* set up by the parties calls for this payment. *Uti lingua nuncupassit, ita jus esto.*[9]

It is not necessary to discuss here the contribution which the will theory is capable of making to a philosophy of contract law. Certainly some borrowings from the theory are discernable in most attempts to rationalize the bases of contract liability. It is enough to note here that while the will theory undoubtedly has some bearing on the problem of contract damages, it cannot be regarded as dictating in all cases a recovery of the expectancy. If a contract represents a kind of private law, it is a law which usually says nothing at all about what shall be done when it is violated. A contract is in this respect like an imperfect statute which provides no penalties, and which leaves it to the courts to find a way to effectuate its purposes. There would, therefore, be no necessary contradiction between the will theory and a rule which limited damages to the reliance interest. Under such a rule the penalty for violating the norm established by the contract would simply consist in being compelled to compensate the other party for detrimental reliance. Of course there may be cases where the parties have so obviously anticipated that a certain form of judicial relief will be given that we can, without stretching things, say that by implication they have "willed" that this relief should be given. This attitude finds a natural application to promises to pay a definite sum of money. But certainly as to most

9. "A legal transaction is the exercise of the creative power which the private will possesses in legal matters. The individual commands, and the law adopts his command as its own." WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS (9th ed. 1906) § 68, n. 1a.

types of contracts it is vain to expect from the will theory a ready-made solution for the problem of damages.

A third and more promising solution of our difficulty lies in an economic or institutional approach. The essence of a credit economy lies in the fact that it tends to eliminate the distinction between present and future (promised) goods. Expectations of future values become, for purposes of trade, present values. In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property. In such a society the breach of a promise works an "actual" diminution of the promisee's assets—"actual" in the sense that it would be so appraised according to modes of thought which enter into the very fiber of our economic system. That the promisee had not "used" the property which the promise represents (had not relied on the promise) is as immaterial as the question whether the plaintiff in trespass *quare clausum fregit* was using his property at the time it was encroached upon. The analogy to ordinary forms of property goes further, for even in a suit for trespass the recovery is really for an expectancy, an expectancy of possible future uses. Where the property expectancy is limited (as where the plaintiff has only an estate for years) the recovery is reduced accordingly.[10] Ordinary property differs from a contract right chiefly in the fact that it lies within the power of more persons to work a direct injury to the expectancy it represents. It is generally only the promisor or some one working through or upon him who is able to injure the contract expectancy in a direct enough manner to make expedient legal intervention.

The most obvious objection which can be made to the economic or institutional explanation is that it involves a *petitio principii.* A promise has present value, why? Because the law enforces it. "The expectancy,"

10. Commons remarks that MacLeod's view of a debt as an economic commodity was "so strange to the economists that they could not understand it. . . . Its strangeness to the classical economists consisted in that it contained Futurity as one of its dimensions, as well as the use-value and scarcity value of the older schools. Yet futurity is the essence of the ownership side of a commodity, which they had taken for granted." INSTITUTIONAL ECONOMICS (1934) 394.

"We are accustomed to conceive of the breach of a promise under an entirely different point of view from that which we apply to injuries to property, and the notion that the enforcement of a promise may be equivalent to compensation for an injury to property is foreign to us. That this manner of viewing the thing arbitrarily separates things which belong together can be shown by an analysis of the notion of property damage." SCHLOSSMANN, DER VERTRAG (1876) §37. Schlossmann goes on to show that damage to "property" is really damage to an expectancy. Specific performance is for Schlossmann just as much reparation for a wrong as is a mandatory injunction ordering a tortfeasor to rebuild property he has destroyed. *Id.* at §39.

regarded as a present value, is not the cause of legal intervention but the consequence of it. This objection may be reinforced by a reference to legal history. Promises were enforced long before there was anything corresponding to a general system of "credit", and recovery was from the beginning measured by the value of the promised performance, the "agreed price". It may therefore be argued that the "credit system" when it finally emerged was itself in large part built on the foundations of a juristic development which preceded it.

The view just suggested asserts the primacy of law over economics; it sees law not as the creature but as the creator of social institutions. The shift of emphasis thus implied suggests the possibility of a fourth explanation for the law's protection of the unrelied-on expectancy, which we may call *juristic*. This explanation would seek a justification for the normal rule of recovery in some policy consciously pursued by courts and other lawmakers. It would assume that courts have protected the expectation interest because they have considered it wise to do so, not through a blind acquiescence in habitual ways of thinking and feeling, or through an equally blind deference to the individual will. Approaching the problem from this point of view, we are forced to find not a mere explanation for the rule in the form of some sentimental, volitional, or institutional dätum, but articulate reasons for its existence.

What reasons can be advanced? In the first place, even if our interest were confined to protecting promisees against an out-of-pocket loss, it would still be possible to justify the rule granting the value of the expectancy, both as a cure for, and as a prophylaxis against, losses of this sort.

It is a cure for these losses in the sense that it offers the measure of recovery most likely to reimburse the plaintiff for the (often very numerous and very difficult to prove) individual acts and forbearances which make up his total reliance on the contract. It we take into account "gains prevented" by reliance, that is, losses involved in foregoing the opportunity to enter other contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched. Physicians with an extensive practice often charge their patients the full office call fee for broken appointments. Such a charge looks on the face of things like a claim to the promised fee; it seems to be based on the "expectation interest". Yet the physician making the charge will quite justifiably regard it as compensation for the loss of the opportunity to gain a similar fee from a different patient. This foregoing of other opportunities is involved to some extent in entering most contracts, and the impossibility of subjecting this type of reliance to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses.

The rule that the plaintiff must after the defendant's breach take steps to mitigate damages[11] tends to corroborate the suspicion that there lies hidden behind the protection of the expectancy a concern to compensate the plaintiff for the loss of the opportunity to enter other contracts. Where after the defendant's breach the opportunity remains open to the plaintiff to sell his services or goods elsewhere, or to fill his needs from another source, he is bound to embrace that opportunity. Viewed in this way the rule of "avoidable harms" is a qualification on the protection accorded the expectancy, since it means that the plaintiff, in those cases where it is applied, is protected only to the extent that he has in reliance on the contract foregone other equally advantageous opportunities for accomplishing the same end.

But, as we have suggested, the rule measuring damages by the expectancy may also be regarded as a prophylaxis against the losses resulting from detrimental reliance. Whatever tends to discourage breach of contract tends to prevent the losses occasioned through reliance. Since the expectation interest furnishes a more easily administered measure of recovery than the reliance interest, it will in practice offer a more effective sanction against contract breach.[12] It is therefore possible to view the rule measuring damages by the expectancy in a quasi-criminal aspect, its purpose being not so much to compensate the promisee as to penalize breach of promise by the promisor. The rule enforcing the unrelied-on promise finds the same justification, on this theory, as an ordinance which fines a man for driving through a stop-light when no other vehicle is in sight.

In seeking justification for the rule granting the value of the expectancy there is no need, however, to restrict ourselves by the assumption, hitherto made, that the rule can only be intended to cure or prevent the losses caused by reliance. A justification can be developed from a less negative point of view. It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic. Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened

11. RESTATEMENT, CONTRACTS (1932) §336; MCCORMICK, DAMAGES (1935) §§33-42.

12. It has been suggested as a partial justification for the rule measuring damages in deceit by the expectancy, that it offers a more effective deterrent to fraud than the rule limiting recovery to the out-of-pocket loss. MCCORMICK, DAMAGES (1935) 453.

by any rule which limited legal protection to the reliance interest. Such a rule would in practice tend to discourage reliance. The difficulties in proving reliance and subjecting it to pecuniary measurement are such that the business man knowing, or sensing, that these obstacles stood in the way of judicial relief would hesitate to rely on a promise in any case where the legal sanction was of significance to him. To encourage reliance we must therefore dispense with its proof. For this reason it has been found wise to make recovery on a promise independent of reliance, both in the sense that in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance.

The juristic explanation in its final form is then twofold. It rests the protection accorded the expectancy on (1) the need for curing and preventing the harms occasioned by reliance, and (2) on the need for facilitating reliance on business agreements. From this spelling out of a possible juristic explanation, it is clear that there is no incompatibility between it and the economic or institutional explanation. They view the same phenomenon from two different aspects. The essence of both of them lies in the word "credit." The economic explanation views credit from its institutional side; the juristic explanation views it from its rational side. The economic view sees credit as an accepted way of living; the juristic view invites us to explore the considerations of utility which underlie this way of living, and the part which conscious human direction has played in bringing it into being.

The way in which these two points of view supplement one another becomes clearer when we examine separately the economic implications of the two aspects of the juristic explanation. If we rest the legal argument for measuring damages by the expectancy on the ground that this procedure offers the most satisfactory means of compensating the plaintiff for the loss of other opportunities to contract, it is clear that the force of the argument will depend entirely upon the existing economic environment. It would be most forceful in a hypothetical society in which all values were available on the market and where all markets were "perfect" in the economic sense. In such a society there would be no difference between the reliance interest and the expectation interest. The plaintiff's loss in foregoing to enter another contract would be identical with the expectation value of the contract he did make. The argument that granting the value of the expectancy merely compensates for that loss, loses force to the extent that actual conditions depart from those of such a hypothetical society. These observations make it clear why the development of open markets for goods tends to carry in its wake the view that a contract claim is a kind of property, a conception which—for all the importance he attached to it—MacLeod seemed to regard as the product of a kind of legal miracle. He who by entering one contract passes by the opportunity to accomplish the same end elsewhere will not be inclined to regard contract breach lightly or as a mere matter of private morality. The consciousness of what is foregone reinforces the notion that the contract creates a "right" and that the contract claim is itself a species of property.

If, on the other hand, we found the juristic explanation on the desire to promote reliance on contracts, it is not difficult again to trace a correspondence between the legal view and the actual conditions of economic life. In general our courts and our economic institutions attribute special significance to the same types of promises. The bilateral business agreement is, generally speaking, the only type of informal contract our courts are willing to enforce without proof that reliance has occurred—simply for the sake of facilitating reliance. This is, by no accident, precisely the kind of contract (the "exchange", "bargain", "trade", "deal") which furnishes the indispensable and pervasive framework for the "unmanaged" portions of our economic activity.[13]

The inference is therefore justified that the ends of the law of contracts and those of our economic system show an essential correspondence. One may explain this either on the ground that the law (mere superstructure and ideology) reflects inertly the conditions of economic life, or on the ground that economic activity has fitted itself into the rational framework of the law. Neither explanation would be true. In fact we are dealing with a situation in which law and society have interacted. The law measures damages by the expectancy *in part* because society views the expectancy as a present value; society views the expectancy as a present value *in part* because the law (for reasons more or less consciously articulated) gives protection to the expectancy.

The combined juristic and economic explanation which has just been developed may seem vulnerable to one serious objection. This lies in the fact that the "normal" rule, which measures damages by the expectancy,

13. In referring by implication to a species of economic activity which is "managed" we do not have in mind exclusively or even primarily management by the state, but rather those means of organizing economic activity which Commons classifies as rationing and managerial transactions. As Marx was fond of pointing out, contract has always played a very small role in the internal organization of the factory. The enormous growth of the corporation since his time has meant a further decrease in the importance of contract as an organizing force, since the corporation and vertical integration tend to substitute for an organization resting on contract one resting on the relation of superior and inferior (management) and on "rationing transactions" (*cf.* the fiduciary duties of boards of directors). Adam Smith's assumption, that free contract is the sole cause of the division of labor, is to be explained as resting not simply on the conditions of his time, but also as due in part to his preoccupation (despite the title of his great work) with distributive as against productive economic activity, or, in Commons' terms, with scarcity rather than with efficiency.

has been frequently applied to promises of a type having no conceivable relation to "the credit system," the division of labor, or the organization of economic activity. Professor Williston apparently goes so far as to assume that the "normal" rule is the only permissible rule of recovery even in the case of promises made enforceable by § 90 of the Contracts Restatement, that is, in the case of promises for which no price has been given or promised and which are enforced only because they have been seriously relied on.[14] Most of the arguments for the rule measuring damages by the expectancy which we developed under our combined economic and juristic explanation have no application to such promises. The suggestion that the expectation interest is adopted as a kind of surrogate for the reliance interest because of the difficulty of

14. *"Mr. Coudert:* . . . Would you say, Mr. Reporter, in your case of Johnny and the uncle, the uncle promising the $1,000 and Johnny buying the car—say he goes out and buys the car for $500—that uncle would be liable for $1,000 or would he be liable for $500?

"Mr. Williston: If Johnny had done what he was expected to do, or is acting within the limits of his uncle's expectation, I think the uncle would be liable for $1,000; but not otherwise.

"Mr. Coudert: In other words, substantial justice would require that uncle should be penalized in the sum of $500.

"Mr. Williston: Why do you say 'penalized'?

". . . *Mr. Coudert:* Because substantial justice there would require, it seems to me, that Johnny get his money for the car, but should he get his car and $500 more? I don't see.

"Mr. Williston: Of course, it would be possible to say that for Section 88 [now §90] should be substituted a section in the restatement of quasi-contract that under these circumstances the promisee should be allowed to recover such a sum as would represent the injury he had suffered. . ." Quoted from the discussion of what is now §90 of the CONTRACTS RESTATEMENT reported in AMERICAN LAW INSTITUTE, PROCEEDINGS, Vol. IV, Appendix (1926) 98-99.

In a later discussion of the case of uncle and Johnny, Professor Williston was reported as saying in answer to a repetition of the question why Johnny should receive more than $500, "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made. As I said to Mr. Coudert, I could leave this whole thing to the subject of quasi contracts so that the promisee under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the *status quo." Id.* at 103-104.

Cf., "A promise of one thousand dollars with which to buy a motor car may thus be binding if it induces the purchase of the car." 1 WILLISTON, CONTRACTS (2d ed. 1936) § 140.

On the other hand, Professor Gardner seems to assume that in cases coming under §90 the promisee should be merely "indemnified for loss suffered in reliance" on the promise. He regards the "assumption that a suit for breach of promise must necessarily be a suit to recover the value of the asserted power" as "both analytically and historically incorrect." Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 23.

proving reliance can scarcely be applicable to a situation where we actually insist on proof of reliance, and indeed, reliance of a "definite and substantial character." The notion that the expectancy is granted as compensation for foregoing the opportunity to enter other similar contracts is also without application in this situation, if for no other reason than because no contract is here "entered" at all. Finally the policy in favor of facilitating reliance can scarcely be extended to all promises indiscriminately. Any such policy must presuppose that reliance in the particular situation will normally have some general utility. Where we are dealing with "exchanges" or "bargains" it is easy to discern this utility since such transactions form the very mechanism by which production is organized in a capitalistic society. There seems no basis for assuming any such general utility in the promises coming under § 90, since they are restricted only by a negative definition—they are not bargains.

Is the application of the "normal" rule of damages to non-bargain promises then an unanswerable refutation of the explanation which we have attempted of the rule? We think not. In the first place, it is obviously possible that courts have, through force of habit, given a broader application to the rule than a philosophic inquiry into its possible bases would justify. In the second place, it is by no means clear, from the decisions at any rate, that the rule of recovery in the case of these "non-bargain" promises *is* necessarily that which measures damages by the expectancy. There are, as we shall show in our second installment, cases which indicate the contrary.

It is not difficult to demonstrate that the judicial treatment accorded contracts is affected by the relation between the particular contract and what we have called "the credit system." The ideal contract from the standpoint of the credit system is the (bargain) promise to pay money. Here we find a combination of legal qualities which reflects the intimate association of this type of contract with the economic institution of credit: free alienation by the creditor; free substitution of another's performance by the debtor; easy convertibility between present and future claims, the difference being measured by interest; damages measured by a mechanical standard which excludes consideration of the peculiarities of the particular situation; finally, damages measured by the expectancy, with no tendency to substitute a different measure.

If it were not for certain complicating cross currents we might expect to find a uniform increase in the tendency to remit the plaintiff to the reliance interest as we progress away from the credit system. This would come about in two ways, both of which may be illustrated in the contract to adopt.[15] (1) The farther removed a contract is from the credit sys-

15. See Sandham v. Grounds, 94 Fed. 83 (C. C. A. 3d, 1899) holding that recovery for breach of contract to adopt is limited to the reliance interest. In (1899) 13 HARV.

tem the more difficult it is to measure the value of the expectancy. (2) The farther removed a contract is from the credit system, the less is the judicial incentive to grant the expectancy, the less pressing are the basic policies which justify the granting of the expectancy in the ordinary business agreement.

We have referred to complicating factors which prevent a steady increase in the tendency to depart from the rule granting the expectancy as we progress away from the credit system. The chief of these lies in the fact that courts have a natural preference for the rule of recovery which offers the most easily administered standard. This factor has a peculiar relevance to promises coming under § 90 of the Restatement, where the expectancy is generally a definite sum of money. An attempt to trace the influence of this factor will be undertaken in the next section.

THE DIVERGENCE OF MEASURE AND MOTIVE AND THE PROBLEM OF MIXED MOTIVES

We have already intimated the nature of the principal difficulty which is encountered in any analysis of the purposes of contract law. This difficulty consists in the fact that it is impossible to assume that when a court enforces a promise it necessarily pursues only one purpose and protects one "interest", or that the purpose or interest which forms the rationale of the court's action necessarily furnishes the measure of the promisee's recovery.[16] In actuality not only may a court consider itself in a given case as vindicating more than one of the three contract "interests" we have distinguished, but even where it is reasonable to suppose

L. REV. 223, the rule there laid down is regarded as desirable "although contrary to the theory of damages."

It may at first seem puzzling that there should be a considerable number of cases granting "specific performance" of contracts to adopt. (The cases will be found collected in 1 C. J. 1379). An examination of these cases will reveal, however, that they are mostly, if not entirely, cases where two factors are present: (1) the foster parent is dead; (2) the plaintiff had done everything necessary to perfect his rights under the agreement before the death of the promisor. In such a situation the granting of the expectancy can be explained on two grounds: (1) the expectation interest has ceased entirely to be conjectural, being now merely a statutory share in the estate, and (2) granting "specific performance"—that is, assigning to the plaintiff a child's share in the estate—is the most natural and most certain method of reimbursing the plaintiff's reliance, or, as is usually the case, of accomplishing a restitution of values received by the deceased promisor. Neither of these considerations applies, however, where the promisor is still alive, or where, as was apparently the case in *Sandham v. Grounds, supra,* there was a repudiation of the contract by the foster parent before the child had performed his side of the agreement.

16. A failure to take into account what may be called motivational cross-currents seems to constitute the principal defect of Professor Cohen's valuable article, *The Basis of Contract* (1933) 46 HARV. L. REV. 553.

that a single interest furnishes the exclusive *raison d'être* of legal intervention it is still possible that for reasons of convenience and certainty the court may choose a measure of recovery which differs from that suggested by the interest protected.

A difficulty in identifying the "ultimate" motives for enforcing contracts exists even as to the earliest stages of legal history. Without attempting to review here what is known concerning the early history of contract, it may safely be said that in England,[17] in Rome,[18] and perhaps generally in primitive law,[19] a place of favor was accorded what may be called the real contract, the "delivery-promise,"[20] or the half-completed exchange. In reliance on a promise by the defendant to pay a named price the plaintiff confers some benefit on the defendant; the defendant fails to pay, and the plaintiff brings suit for the agreed price. This is, in outline form, the real contract. Not only was this the situation where in the absence of formalities courts were most willing to intervene, but it is probable that some such transaction originally furnished an indispensable factual core for most formal contracts.[21]

So long as the law confines its intervention to this situation (or to the extent that it grants certain remedies only in this situation) it would seem that the fundamental purpose of the law is the prevention of unjust enrichment, since enrichment of the promisor at the expense of the promisee is the *sine qua non* of judicial interference. Yet though the prevention of unjust enrichment may seem to supply the underlying rationale of legal intervention in the case of the real contract, the measure of recovery was, as we know, from the very beginning the promised price, the expectancy. Various explanations may be given for this apparent discrepancy between the conditions under which liability was imposed and the terms of the liability itself. Even if it were granted

17. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (1929) 401.

18. RADIN, ROMAN LAW (1927) §60. The precise order in which the various types of informal contracts became enforceable in Rome seems to be a matter of doubt. GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN (8th ed. 1929) 467. Of course both in England and in Rome there was a gradual expansion of the relief granted, so that in time a direct benefit to the promisor ceased to be essential.

19. DIAMOND, PRIMITIVE LAW (1935) 391-445. Speaking of Babylonian and Assyrian law he writes, "There are no transactions which are made binding by the mere fact of agreement without the transfer of property. That type of commercial transaction has not yet been reached; law compensates for loss, and until there are middlemen, and market prices that fluctuate from day to day, there will be no purely executory agreement to purchase and sell on a future date, nor can there be pecuniary loss by failure to perform such an agreement." *Id.* at 409.

20. Henry, *Consideration in Contracts* (1917) 26 YALE L. J. 664, 678.

21. As in the Roman *nexum* (assuming that that transaction was once used to create obligations), and perhaps in the sealed contract in England. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 213.

that the sole purpose pursued by the courts was the prevention of unjust enrichment it would be possible to regard the promised price as the most obvious and most simple method of measuring the extent of that enrichment, particularly in an age which veered away from any kind of legal relief which involved estimation. If this is the proper explanation for the measure of damages in real contracts we have in them an illustration of the divergence of measure and motive; or, to speak with less attempt at epigram, a case where though the fundamental motive was prevention of unjust enrichment the court was moved to substitute for the measure which that purpose would normally dictate a simpler and more easily administered measure.[22]

A quite different and perhaps more accurate explanation can, however, be given for the measure of recovery applied to real contracts. It may be said that the element of unjust enrichment present in those cases served to unlock, as it were, the latent impulse to hold men to their bargains. The courts would have preferred to see men perform their agreements in all cases. But where the promisee had as yet given nothing for the promise there was a hesitancy about legal intervention (and no doubt also about moral condemnation), which only the combination of unjust impoverishment and unjust gain that the real contract presents sufficed to overcome. Viewed in this way the measure of recovery applied to real contracts was not so much a case of the divergence of measure and motive as a case of mixed motives.

The ambiguity concerning ultimate motives and concerning the congruity of measure and motive which haunts the earliest period of legal history casts a shadow over all its later developments. Thus in the early stages of its growth the action of assumpsit was clearly dominated by the reliance interest, so much so that Ames assumed, even in the absence of cases in point, that recovery in assumpsit must originally have been limited to compensation for change of position.[23] But if this was in fact the original rule it was not in any event long before damages were measured by the expectation interest. So long, however, as it was only the relied-on promise which was enforced by the action of assumpsit,

22. McCormick discerns as one of the advantages of the rule measuring damages in deceit by the expectation interest, that it generally offers, in comparison with the rule measuring damages by the reliance interest, "a simple standard, reasonably definite and easily understood." McCormick, Damages (1935) 453.

23. To be sure Ames spoke in terms of "reimbursement for the loss of the thing given for the promise" which sounds more like a description of restitution than compensation for injurious reliance. Ames, Lectures on Legal History (1913) 144. But since there is nothing in the history of assumpsit to suggest that the remedy would ever have been restricted to the recovery of a benefit conferred, it is safe to assume that Ames' language was due to the not uncommon though careless identification of reimbursement for change of position with restitution.

we have the same problem here that we had in the case of the real contract. Was the expectation interest taken as the measure of recovery because it offered a more certain standard than the reliance interest, or because the factor of reliance served to unlock the impulse to compel men to make good their promises? It is, of course, impossible to give any conclusive answer to this question.

In modern law the problem of mixed motives and the divergence of measure and motive, though present everywhere, is most acute in what may be called "non-bargain" promises. In the case of those contracts which perform a function in "the credit system," which, in other words, have more or less directly to do with the mechanism which in a capitalistic society provides an organization for the production, exchange, and distribution of goods, the expectation interest tends to become dominant. But when we go outside the realm of "bargains," as for example in the promises coming under § 90 of the Contracts Restatement, we find that reliance reassumes an important role. A promise which invites, but does not request as its "price," some reliance by the promisee becomes enforceable only when relied on. If reliance is here the *sine qua non* of legal intervention, then protection of the reliance interest is obviously a part of the motive actuating courts in such cases. Is it the whole motive? Does reliance here also furnish the measure of recovery? To these questions, vital as they are, the decisions afford us no clear cut answer. As has already been recalled, Williston assumes that the measure of recovery for these "non-bargain" promises is the same as for "bargains," namely, the expectancy.[24] Assuming that this is a correct statement of the law (and there are many cases to support it as well as some to refute it) how are we to explain the discrepancy between what appears as the fundamental motive (compensation for detrimental reliance) and the measure of recovery, which disregards reliance? As in the case of the real contract and the action of assumpsit in its early stages, two principal explanations are conceivable. If we leave out of account the possibility that courts have here granted the expectancy merely from habit, then either the expectation interest is preferred as a measure of recovery because of its greater definiteness ("divergence of measure and motive") or the factor of reliance serves to release the impulse to compel men to make good their promises ("mixed motives"). Of course there is no method of demonstrating which of these is the "true" explanation. Yet by leaving the matter of the controlling motive in this ambiguous state, we leave unsettled questions of very considerable practical importance. For example, if in cases coming under § 90 the expectation interest is preferred as a measure of recovery merely for its

24. See note 14 *supra*.

certainty, then we might expect to see substituted for it the reliance interest in every case in which that interest happened to offer a relatively certain standard for computing damages. On the other hand, if reliance merely serves as a kind of catalytic agent to stimulate the impulse to hold men to their promises, the question whether the reliance interest offered a practicable measure of recovery would be irrelevant, and the expectation interest would in any event be adopted as the measure of recovery.

The same difficulty in assigning to the expectation and reliance interests their respective roles which arises in contracts coming under § 90 arises generally in "informal" and "non-commercial" contracts (including the many cases classified under such headings as "waiver" and "estoppel") and in all situations where reliance by the promisee is an indispensable condition to judicial interference. A more detailed study of cases of this type must be postponed to our second installment.

We are accustomed to think of these non-bargain promises, where the promisee must show reliance in order to recover, as anomalous, as not quite contracts in the full sense of the term. It is worthy of observation, since it will show how subject to manipulation our "fundamental principles" are, that it would be quite possible to reverse our conceptions in this connection of what is normal and what is anomalous, without doing any violence to the rules which ultimately determine what contracts are to be enforced. We might easily base the whole law of contracts on a fundamental premise that only those promises which have been relied on will be enforced. As the chief exception to this principle we should have to list the bilateral business agreement.[25] The rationale for this exception could be found in the fact that in such agreements reliance is extremely likely to occur and extremely difficult to prove. Juristic tact might even suggest conferring on the exception the disguising vesture of a conclusive presumption. "In the case of bilateral business agreements we do not dispense with proof of reliance but instead conclusively presume that reliance has taken place and that the expectancy is the proper measure of the extent of the reliance." Such a presumption would certainly do no more violence to the facts than most conclusive presumptions. It is not at all clear that such a rationalization of contract law

25. This is in fact the approach taken in HARRIMAN, CONTRACTS (2d ed. 1901) § 133. " . . . With the exceptions hereafter to be noted, the consideration must be an act done in reliance on the promise." § 135 . . . "Where a contract consists of mutual promises, each of the promises is the consideration for the other. To say that each promise is given in reliance upon the other would not seem to be stretching legal theory too far; yet it may seem simpler to some to regard the case of mutual promises as an exception to the general rule."

Cf. ". . . It may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise . . ." 1 WILLISTON, CONTRACTS (2d ed. 1936) §139.

in terms of reliance might not have advantages over the more customary modes of thought which tend to relegate the reliance interest to the field of not-quite contract law.

With this preliminary survey of the three contract interests, we are now ready to turn our attention more directly to the interest which is the chief subject of this inquiry, the reliance interest.

The Relation between the Reliance Interest and the other Contract Interests

The abstract definitions which we have given of the three contract "interests" would seem on casual reading to be mutually exclusive. Yet here as everywhere in the law we are plagued by the borderline cases. Not only does there exist, as we have shown in our last section, an ambiguity concerning these interests from a psychological or motivational point of view, so that it is difficult to tell which of them a court is "really" seeking to vindicate, but there is also an ambiguity in them even from an analytical or definitional point of view.

The reliance interest is, as we have already pointed out, generally broad enough to cover all of the cases coming under the restitution interest.[26] It is also broad enough to embrace some cases not covered by that interest. The problem of the relation between these two interests hinges, therefore, chiefly on the problem of defining this surplus area of the reliance interest. Since this area consists of the cases in which the promisee has detrimentally relied on a promise without thereby benefiting the promisor, it is obvious that the extent of this area will depend upon the scope given the concept "benefit." If we define benefit narrowly by insisting on an "actual" increase in the promisor's "assets" then the field of cases covered by the reliance interest but excluded from the restitution interest will be relatively large. Thus if A were hired by B to cast spells, we might, assuming A devoted himself assiduously to his task, be able to find detrimental reliance by A without any corresponding "benefit" to B. At the other extreme lies a conception which would view as a "benefit" anything for which the promisor bargained and was willing to pay a price.[27] If this conception of "benefit" were accepted in its extreme form only a relatively narrow field would be left for the reliance interest. Any bargained-for reliance would automatically fall within the restitution interest. Excluded from the restitution interest we should find only two kinds of reliance: (1) reliance

26. But see the qualifications made *supra* at p. 54, and in note 2 *supra*.

27. The Contracts Restatement goes almost this far, but adds the qualification that the performance must have been "received" by the defendant. Restatement, Contracts (1932) § 348. The term "received" is, however, given a very broad definition. See comment *a* to § 348.

on promises which are not bargains (as under § 90 of the Contracts Restatement), and (2) unbargained-for reliance on bargain promises (reliance "outside the contract," as for example in "passing up" other offers). The field occupied by these two types of reliance would, so far as legal effect is concerned, be even further narrowed by the application of such notions as "causality" and "foreseeability." Hence it is clear that any conception which made "benefit" equivalent to "bargained-for act" would leave only an extremely limited field as the exclusive hegemony of the reliance interest.

The inescapable flexibility of the concept "benefit" means that drawing the line between the reliance and restitution interests is in the end a rather arbitrary affair. By substituting for "benefit" a stricter term like "enrichment" we shift the line in one direction; by substituting a looser term like "performance received by the promisor" we shift it in the other. In view of the fact that the line is set ultimately by a kind of definitional fiat it is remarkable that it should have become customary to think of restitution as a remedy entirely distinct from the usual suit on a contract. Where "the contract" is regarded as furnishing a kind of conduit for the ordinary suit, it becomes an obstruction in the way of restitution and must be removed by "rescission." That in this legal hydromechanics sight should be lost of the purposes underlying the remedies involved can occasion no wonder.

The conception (or perhaps we should say "visualization") of restitution as something entirely different from a suit "on the contract" has had a number of unfortunate consequences. Among them we may list: (1) the importation into the problem of the notion of "election" (the plaintiff has to choose in advance along what route his action will run) with the consequence that restitution and an action "on the contract," cannot be, except provisionally, combined in one suit;[28] (2) the requirement that the plaintiff must as a condition precedent to suit for restitution return any benefits received,[29] and (3) must in any event first give notice of his intention to remove the obstacle of the contract.[30] In certain cases it is possible for the plaintiff to avoid the inconveni-

28. WOODWARD, QUASI CONTRACTS (1913) §266; 3 WILLISTON, CONTRACTS (1920) §1469. The doctrine of election is reduced to its most innocuous terms in RESTATEMENT, CONTRACTS (1932) §381. However, even under the Restatement it remains impossible, apparently, to combine restitution and a suit for "damages" in one action.

29. RESTATEMENT, CONTRACTS (1932) §349; WOODWARD, QUASI CONTRACTS (1913) §265; 3 WILLISTON, CONTRACTS (1920) §1460.

30. WOODWARD, QUASI CONTRACTS (1913) §267. In listing these restrictions on restitution as unfortunate consequences of the notion that restitution is founded on a destruction of the contract we do not mean to imply that they are all settled law. The last requirement mentioned is particularly of doubtful standing, as Woodward points out in the section cited.

ences and hazards involved in restitution by bringing a suit for the value of his "expenditures in performance," a suit which protects the reliance interest (and therefore by necessary implication, the restitution interest) but which has been regarded as a suit "on the contract."[31]

In one aspect it is perhaps fortunate that the reliance interest, though extensively recognized in our law, has received its recognition in a covert —one is tempted to say, clandestine—fashion. Had it been openly labelled as a distinct basis of suit it is quite probable that the courts would have compelled the plaintiff suing on a contract to "elect" between the reliance and the expectation interests. Fortunately, there seems to be no suggestion in the cases of the necessity for such an election, and the suit which seeks reimbursement for reliance has accordingly remained free from the pitfalls which surround the action for restitution.[32]

In distinguishing between the reliance and the expectation interests we encounter not so much a shifting line of division as a miscellaneous group of cases which seem equally happy in either category. These two interests will furnish identical, or nearly identical, measures of recovery in at least three kinds of cases.

First, where the plaintiff's reliance takes the form of acts essential to the enforcement of the contract by him (such as partial performance of the contract or necessary preparations to perform) and the defendant breaks or repudiates the contract before complete performance has taken place, it is possible to classify the plaintiff's suit as resting either on the

31. 3 WILLISTON, CONTRACTS (1920) §1341; *cf.* RESTATEMENT, CONTRACTS (1932) §333.

32. In Rabinowitz v. Marcus, 100 Conn. 86, 123 Atl. 21 (1923), however, the apparently unique view was taken that a suit to obtain reimbursement for reliance (an important portion of which did not benefit the defendant) was based on a rescission of the contract. There is even language in the decision which might be construed as implying that there must be an election between a suit for "damages" and a suit to obtain reimbursement for expenses incurred.

Attention should also be called to those cases where the plaintiff has relied on a contract within the Statute of Frauds, and where the courts have felt constrained (in order to avoid the appearance of permitting a suit "on the contract") to treat the claim to reimbursement for reliance as a suit for restitution. That in these cases items of reliance are often compensated which are not properly regarded as covered by even the most generous definition of restitution will be shown in our second installment. Where, as in cases of this sort, a suit to obtain reimbursement for reliance has to be disguised as a suit for restitution, it is obvious that there is a danger that the disguise may be taken seriously, and that the suit will be subjected to all the limitations imposed on a "real" suit for restitution.

There may be a hint of the notion of an election between the reliance and expectation interests in the occasional statements that the plaintiff cannot recover reimbursement for his part performance and the lost profit in one suit. See note 44 *infra.* The ostensible ground for this view is, however, that allowing both of these items would result in "double recovery".

expectation interest alone, or on a combination of the expectation and reliance interests. If a building contractor has finished half the structure when the property owner puts an end to the contract the contractor's declaration may list two items of damage: (1) expenditures actually made in performing or preparing to perform, and (2) the profit which he would have made on the whole contract. This looks like a combination of the reliance and the expectation interests, and it will necessarily be so analyzed if we restrict the scope of the expectation interest to what may be called the net expectancy, in other words, if we make "the expectation interest" and "the lost profit" synonymous. But in cases where the plaintiff has undertaken performance or preparations to perform a profitable contract before the defendant's breach it involves no distortion to say that the plaintiff's expectancy is really twofold and includes (1) reimbursement for what has been done, and (2) a profit in addition. This broader expectancy we may call the *gross expectation interest.* Using this broader concept the contractor's suit in the case supposed will appear to be founded entirely on the expectation interest.[33] The possibility of subsuming a recovery for the value of part performance under the expectation interest is indicated by the fact that it is possible to state, entirely in terms of the expectancy, measures of recovery which would, if all the relevant data were available, yield the same sum as the formula measuring recovery by the reasonable value of what has been done plus the profit. Examples of such measures would be: (a) payment for work done at the contract rate, plus the profit lost on the unperformed portion of the contract, (b) the full contract price less the cost of completion.

Secondly, where the reliance interest is conceived to embrace the loss of the opportunity to enter similar contracts with other persons, the reliance and expectation interests will have a tendency to approach one another, the precise degree of their correspondence depending upon the extent to which other opportunities of a similar nature were open to the plaintiff when he entered the contract on which suit is brought. The physician who by making one appointment deprives himself of the opportunity of making a precisely similar appointment with another patient presents a case of a complete correspondence between the reliance and expectation interests. The tendency of the expectation and reliance interests to coalesce in cases of this sort has the consequence that the same item of damages may often be classified under either heading. Thus where the defendant's breach of contract results in the plaintiff's property remaining idle for a period, the courts in awarding the plaintiff the rental value of the premises have sometimes considered that they

33. It is so analysed in RESTATEMENT, CONTRACTS (1932) § 333, comment *a.*

were granting reimbursement for the loss of the opportunity to employ the property for other purposes (the reliance interest),[34] and sometimes that they were granting compensation for the loss of the profits which would have been made had the defendant performed his promise (expectation interest).[35]

Thirdly, the reliance and the expectation interests will coincide in those cases where the breach of a contract results not simply in the loss of the promised value but in some direct harm. A farmer buys a cow warranted to be free from disease. The cow is in fact diseased and contaminates the purchaser's whole herd. So far as the item of direct loss is concerned (the contamination of the herd) it is not possible to draw a distinction between the reliance and the expectation interests. This loss would not have occurred either if the defendant had not broken his contract, or if the plaintiff had not entered and relied on the contract.

SHOULD THE EXPECTATION INTEREST SET THE LIMIT OF RECOVERY?

In the contracts upon which suit is brought the value of the expectancy ordinarily exceeds the reliance interest. It is possible, however, that the reliance interest may offer the plaintiff a more generous measure of recovery than the expectation interest. In such cases should the value of the expectancy be regarded as setting a limit on recovery? The sections of the German Civil Code which accord protection to the reliance interest provide that the recovery shall in no event exceed the expectation interest.[36] The covert treatment accorded the reliance interest in our law makes it impossible to expect so explicit and general an answer to the problem as it arises in the common law. There are not lacking, however, intimations of a view similar to that taken in the German Code.[37] Is there any basis for this notion that recovery based on reliance should never be allowed to exceed the value of the expectancy?

Before attempting an answer it should be noted that there are at least two ambiguities in our question, both of which have to do with

34. This was apparently the way the matter was viewed in Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621 (1896).

35. As in Griffin v. Colver, 16 N. Y. 489 (1858).

36. §§122, 179, 307. The language of the limitation is in each section substantially the same, " . . . jedoch nicht über den Betrag des Interesses hinaus, welches der andere Teil an der Gültigkeit [or "Wirksamkeit"] des Vertrags hat."

37. See RESTATEMENT, CONTRACTS (1932) §333 (a) ("such expenditures are not recoverable in excess of the full contract price"); Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 22 ("not exceeding the value of the power asserted"); Glaspie v. Glassow, 28 Minn. 158, 9 N. W. 669 (1881).

the meaning of the expression "value of the expectancy." In the first place does this term refer to the "net expectation interest" ("the lost profit") or to the "gross expectation interest," the expectancy in the case of full performance? The answer is pretty clearly that it is the latter which is meant, since a limitation on recovery in terms of the "net expectation interest" would be absurd.[38] That a building contractor stood to make only $200 on his contract as a whole should not prevent him from recovering, let us say, $5,000 as reimbursement for expenditures made before the defendant's breach. The second ambiguity is less easy to deal with. Is the value of the expectancy to be measured "objectively," according to its market price or "reasonable value," or is it to be measured in terms of its utility to the plaintiff in his particular situation? The importance to the promisee of a promise to deliver a piece of machinery "reasonably worth" $100 may vastly transcend this "objective" value. With this piece of machinery, the plaintiff may be able to operate his factory at a profit of thousands of dollars; without it, he may suffer heavy losses. Let us for the time being assume—as the language usually employed in formulating the limitation ("the full contract price") justifies us in assuming—that the "value of the expectancy" is to be measured "objectively," and discover what justification there may be for a rule which declares that recovery for reliance on a contract should never be permitted to exceed the "objective" value of the expectancy.

To pass on this question it is necessary to inquire what things may bring it about that the reliance interest exceeds the "reasonable value" of the defendant's promised performance. The most obvious possibility is that the plaintiff has entered a losing contract. A manufacturer has undertaken to construct a machine for $1,000 failing to foresee that it will be necessary at a cost of $1,500 to tear down and replace a wall of his plant in order to remove the machine when it is completed. If the manufacturer here should seek to recover the full reliance interest ($1,500 plus the cost of materials and labor on the machine) the obvious objection might seem to be that he is trying to shift the burden of his own improvidence to the other party. In answer it may be pointed out that he will have no opportunity to do this unless the other party has first been guilty of a breach of contract. If the buyer promptly pays the $1,000 agreed upon as the purchase price no suit by the manufacturer will be possible; if the manufacturer is going to be able to sue at all, it will be because the purchaser is in default. The question then really becomes, should default by the defendant have the consequence

38. The limitation prescribed by Gardner (*loc. cit. supra*, note 37) seems to be phrased in terms of the net expectation interest, though this was probably not intended.

of entitling the plaintiff to shift to him the loss which he would have suffered if the defendant had performed the contract? Is this a proper penalty to impose for contract breach? Probably in most cases it would not be so regarded. It should be noted, however, that in suits for restitution there are many cases permitting the plaintiff to recover the value of benefits conferred on the defendant, even though this value exceeds that of the return performance promised by the defendant.[39] In these cases it is no doubt felt that the defendant's breach should work a forfeiture of his right to retain the benefits of an advantageous bargain. It would be going but a step farther (particularly when it is recalled that the "benefits" which the defendant "retains" in the restitution cases are often little more than legal figments) to lay down a broad rule that breach should deprive the defaulter of the power to limit the other party's recovery for detrimental reliance. Again, in a suit for deceit, reimbursement has been granted the plaintiff for his reliance though this exceeded the actual value of the defendant's promised performance, in other words, although the plaintiff would have had a poor bargain even if the defendant's statements had been true.[40] Cases of this sort can be distinguished from the type of case we are discussing only on the somewhat indefinite ground that the policy in favor of discouraging deceit is stronger than that in favor of discouraging breach of contract. By invoking these comparisons with suits for deceit and restitution we do not mean to suggest that the "full contract price" (that is, the "objective" value of the expectancy) ought not to limit recovery in the ordinary type of case under discussion. We only suggest that it would perhaps be unwise to lay down a categorical rule about the matter, and that it is quite possible in a case of a particularly inexcusable breach that the court might feel it was not imposing too heavy a penalty on the defendant to shift to him the loss which the plaintiff would have incurred even if the defendant had performed his contract.

But does an excess of the reliance over the expectation interest necessarily imply that the plaintiff has entered a losing bargain? In the old case of *Nurse v. Barns*[41] the defendant "in consideration of 10£" promised to give the plaintiff the use of certain premises for a period of six months. Relying on this promise the plaintiff laid in a stock of goods. The defendant then failed to perform his promise. Because his expenditures for goods were thus rendered vain the plaintiff lost £500, which he was permitted to recover from the defendant. Here there was nothing to indicate that the plaintiff entered a losing bargain; on the contrary

39. 3 WILLISTON, CONTRACTS (1920) § 1485; WOODWARD, QUASI CONTRACTS (1913) § 268.

40. Wallace v. Hallowell, 56 Minn. 501, 58 N. W. 292 (1894).

41. T. Raym. 77 (1664).

it was expressly found that the lease was worth just what the plaintiff agreed to pay for it.

It is obvious that we need a distinction between two kinds of reliance. Certain acts of reliance are in a loose sense the "price" of whatever benefits the contract may involve for the plaintiff. This type of reliance we shall call "essential reliance". Under this heading would be included the performance of express and implied conditions in bilateral contracts, the performance of the act requested by an offer for a unilateral contract, preparations to perform in both of the cases just mentioned, and the losses involved in entering the contract itself, as, for instance, in foregoing the opportunity to enter other profitable contracts. As to this kind of reliance ("essential reliance") if we do not limit recovery by the "contract price" we are permitting the plaintiff to shift to the defendant his own contractual losses, when the defendant is guilty of nothing more reprehensible than breach of contract.

In contrast to "essential reliance" is the kind of reliance involved in *Nurse v. Barns,* which we shall call "incidental reliance." The plaintiff's reliance there (laying in a stock of goods) followed naturally, and, we may assume, foreseeably, from the contract. It did not, however, consist of acts necessary to the perfection of the plaintiff's rights on the contract; it cannot be regarded as the "price" of the defendant's performance. To shift the burden of such reliance to the defendant in an amount exceeding "the full contract price" is not to shift to the defendant the plaintiff's contractual losses. In such a case therefore there appears no valid reason to limit the plaintiff's recovery by the expectation interest measured "objectively." If there is to be any limit at all it must be according to some standard more generous than the "contract price."

Should there be any limit on recovery in cases like *Nurse v. Barns*? Suppose it had been shown in that case that the business contemplated by the plaintiff would have been operated at a loss and that this loss would have exceeded the amount which the plaintiff sought to recover as reimbursement for his reliance. If the plaintiff is in such a situation permitted to recover, it is obvious that we are in effect shifting to the defendant the loss which the plaintiff would have incurred in the venture undertaken in reliance on the contract. To prevent this we must limit the plaintiff's recovery by the expectation interest measured "subjectively," that is, with reference to the profit or loss reasonably to be anticipated from the contemplated business.[42] In practice this limitation

42. A suggestion of such a limitation is found in Crutcher & Co. v. Elliott, 13 Ky. Law Rep. 592 (1892), where the court said, "While the plaintiff in this case sued for and was allowed to recover the amount paid for the seed, the rental value of the land on which it was sown, and the cost of preparing the land and sowing the seed, *yet as that, in the absence of any allegation by the defendant of special facts, is presumptively*

will be of slight significance since in cases like *Nurse v. Barns* it will seldom be possible to judge with any accuracy what the fate of the venture would have been had it not been interrupted by the defendant's failure to perform his contract.

We may summarize the conclusions reached so far in the following terms. A claim based upon "essential reliance" should normally be limited by the expectation interest measured "objectively," because an excess of the reliance interest over the reasonable value of the thing promised by the defendant would indicate that the plaintiff had entered a losing bargain. To permit a recovery beyond the "full contract price" would be to permit the plaintiff to shift his contractual losses to the defendant. Where "incidental reliance" is involved there is no reason to limit recovery by "the full contract price," that is, the "objective" expectancy. On the other hand, the plaintiff should no more be permitted to shift to the defendant the losses incurred in a venture undertaken in reliance on the contract than he should be permitted to compel the defendant to stand the loss he incurred in entering the contract itself. Accordingly, in cases where reimbursement for "incidental reliance" is sought recovery should be limited by the expectation interest measured "subjectively." In practice this limitation will generally be too indefinite, however, to be of great significance. All of these points are contained by implication in a very simple formula: *We will not in a suit for reimbursement for losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed.*

We have spoken so far only of a gross limitation on the plaintiff's recovery. However, the proposition that we will avoid conferring on the plaintiff advantages beyond those which performance of the contract would have involved carries the further corollary that there should be deducted from the plaintiff's recovery any losses he would have suffered had the contract been performed. If a contractor sues for reimbursement for $5,000 spent in partial performance of a contract on which he would have lost $1,000 had he been permitted to complete it, probably most courts would award the plaintiff only $4,000.[43] In cases of incidental reliance the deduction of prospective losses might conceivably be twofold, and embrace both contractual losses (the plaintiff entered a

less than the value of the crop would have been if the seed had been of the kind represented, the defendant is not prejudiced." (Italics supplied.) On the other hand, the fact that the plaintiff would merely have "broken even" in the dependent venture offers no reason for denying or reducing recovery for incidental reliance. Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197 (1892).

43. RESTATEMENT, CONTRACTS (1932) §333 (d); Reynolds v. Levi, 122 Mich. 115, 80 N. W. 999 (1899). On the other hand, the deduction would probably not be made in a suit for restitution. Bush v. Canfield, 2 Conn. 485 (1818).

bad bargain with the defendant) and the losses he would have suffered in the dependent venture even if that venture had not been frustrated by the defendant's breach.

The formula which directs us not to confer on the plaintiff seeking reimbursement for reliance advantages more extensive than performance of the contract would have given him is useful as a generalization, but only as a generalization. As we have already suggested it is quite possible that this formula might in some cases be viewed as too strict on the plaintiff. Where the breach of the defendant was of a type to provoke indignation the court might shy away from the left-handed enforcement of the contract for the benefit of a defaulter which this formula seems to imply. On the other hand, the formula might in some cases be rejected as too generous to the plaintiff. An example would perhaps be a contract falling under § 90 of the Contracts Restatement. An uncle promises his nephew $1,000 as a gift. The nephew decides to go into business, and, reserving the promised sum for use in paying his rent, spends a large sum of money laying in a stock of goods. The uncle declines to perform his promise; the nephew is forced to abandon his plans, and sells his stock of goods at a sacrifice of $2,000. There would be no violation here of the suggested formula if we granted the nephew $2,000, at least not if we assume that the nephew's venture would have been successful. The case differs, however, from cases like *Nurse v. Barns* in that the contract involved, if it is a "contract," is an anomalous one. Its enforcement even to the extent of the $1,000 promised is conceived to involve a considerable stretching of legal doctrine. It may therefore be felt that if recovery is here granted at all it should be limited by the objective value of the uncle's promise. Some such rationale seems to underlie the limitations in the sections of the German Civil Code already mentioned. These sections provide for a recovery of the reliance interest in situations where, because of some hampering circumstance, a perfect contract (which would yield the expectation interest) does not result. Since the reliance interest is a kind of consolation for not getting a perfect contract, it would be going beyond the underlying basis of recovery to impose on the defendant a burden greater than performance of the contract would have involved.

The Problem of Overlapping Items of Damage

A near cousin to the problems just discussed is the question raised by those cases in which elements of the reliance and expectation interests are combined in one suit and it is contended that the plaintiff has listed the same injury twice under different rubrics. In dealing with this problem of "double recovery" it is necessary to recur to the distinction already taken between two kinds of reliance.

So far as "essential reliance" is concerned the problem of double recovery is controlled by the same principle that underlies the problems discussed in the last section. This principle, somewhat vaguely stated, is that a man cannot claim the benefits of a bargain without incurring its detriments. Since "essential reliance" consists of those acts which must occur before the plaintiff is entitled to the benefits of the contract and is therefore in a sense the "price" of those benefits, it is improper for the plaintiff to recover those benefits and at the same time shift the cost of them to the defendant—unless of course breach of contract is regarded as an offense serious enough to justify permitting a kind of *qui tam* action. If a plaintiff should perform his side of the contract and then claim both compensation for the reliance involved in his performance and at the same time the full value of the defendant's performance, it would be obvious that he was asking too much. The case would be the same if he performed half his contract and then, on repudiation by the defendant, sought compensation at the contract rate for what he had done and at the same time compensation for his partial performance.

This principle against eating your cake and having it applies, however, only to those cases where the plaintiff seeks what we have called the "gross expectation interest." If a plaintiff seeks in one suit compensation for "essential reliance" and the lost profit ("the net expectation interest") no double recovery will be involved if both items are allowed.[44] Here the plaintiff has, to be sure, eaten his cake, but he asks only for the icing which was denied him. Less metaphorically, the reason why there is not here any double recovery lies in the fact that the lost profit is based on a deduction of the plaintiff's past or prospective "essential reliance" (or his actual reliance in performing the contract if this has exceeded "essential reliance") from the value of the performance promised by the defendant. Whatever is added under the heading "essential reliance" should serve to reduce pro tanto the residuum which is the lost profit. Hence if the lost profit is correctly calculated there is no danger of double recovery in a suit which combines a claim for essential reliance and for the lost profit.[45] (An exception would exist if the

44. RESTATEMENT, CONTRACTS (1932) § 333, comment *c*, and illustration 1; McCORMICK, DAMAGES (1935) §142; see United States v. Behan, 110 U. S. 338, 345 (1883). There are a surprisingly large number of cases in which a contrary opinion is intimated. Worthington v. Given, 119 Ala. 44, 24 So. 739 (1898); Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015 (1892); Noble v. Ames Mfg. Co., 112 Mass. 492 (1873); Mount Pleasant Stable Co. v. Steinberg, 238 Mass. 567, 131 N. E. 295 (1921); Irwin v. Worcester Paper Box Co., 246 Mass. 453, 141 N. E. 286 (1923); Otis v. Koontz, 70 Mo. 183 (1879); Holt v. United States Security Life Ins. Co., 76 N. J. Law 585, 72 Atl. 301 (1909).

45. The qualification, "if the lost profit is correctly computed," serves to explain the judicial statements, referred to in the last note, to the effect that a claim for expendi-

plaintiff were to ask compensation for his reliance in foregoing the opportunity to enter other profitable contracts. This is properly "essential reliance" and should be so considered, for example, in connection with the rule limiting recovery by the full contract price. But, assuming that such a loss is compensable, it cannot be combined with a claim for "the lost profit" because, unlike other forms of essential reliance, this type of reliance is not deducted in calculating the amount of "the lost profit.")

At first glance there would seem to be no problem of double recovery in connection with "incidental reliance." Because "incidental reliance" takes place, as it were, "outside the contract" it might appear that there could be no duplication between the items comprehended under it and those comprehended under the expectation interest. But this would be to overlook the fact that while incidental reliance is *ex vi termini* not essential to the plaintiff's right to enforce the contract, it may be essential to a concrete realization of the values assumed in measuring the expectation interest. The defendant breaks a contract to supply a feature film to the plaintiff, the proprietor of a motion picture theater. The plaintiff brings suit seeking to recover compensation for (1) the difference between the gross income actually derived from a substitute picture and that which would have been derived from the promised film, and (2) reimbursement for sums spent in advertising the promised film.[46] Here the reliance in spending money for advertising was not "essential reliance"; the plaintiff could have held the defendant to the contract without spending a cent for that purpose. Advertising was not therefore the "price" of the defendant's performance. Yet it was the "price" of the particular value which the plaintiff seeks to attribute to that performance. Had the defendant performed his contract the advertising expense would have been deducted from the plaintiff's gross income from the picture; it would therefore be improper to permit the

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tures in performance is incompatible with a claim for the lost profit. There is reason to suppose that in each of the cases there cited the lost profit was being computed according to a method which did not involve the deduction of the particular expenditure for which the plaintiff was seeking reimbursement. Thus in Noble v. Ames Mfg. Co., 112 Mass. 492 (1873), the plaintiff made an expensive trip in order to undertake his duties under a one year contract of employment. He sought both reimbursement for his travelling expenses and compensation for the lost salary. In denying the claim for reimbursement for travelling expenses, the court overlooked the possibility of computing the lost profit by deducting these expenses from the year's salary, and assumed that the lost profit must consist of the promised salary less only what the plaintiff could earn elsewhere after employment was refused him. That the problem of overlapping in these cases hinges ultimately on the method by which the lost profit is computed is recognized in American-Hungarian Pub. Co. v. Miles Bros., 68 Misc. Rep. 334, 123 N. Y. Supp. 879 (App. Term 1910).

46. Vitagraph-Lubin-Selig-Essanay v. Billings, 87 Okla. 192, 209 Pac. 773 (1922).

plaintiff to recover the difference in gross income and the advertising expense at the same time.

The overlapping involved in the case just discussed is fairly obvious because the value of the defendant's performance was measured with special reference to the plaintiff's situation; damages were "special" rather than "general" and we can observe what factors were taken into account in determining them. But where damages are "general" (the difference between the market price or "the reasonable value" and the contract price) the problem of overlapping becomes much more perplexing. The difficulty here arises because the figure which represents the market price or "the reasonable value" is not specially computed by the court but represents a datum accepted from extracurial sources. It is therefore impossible to know precisely what factors entered into its determination. Justice Holmes once expressed the view that the vendee under a contract for the sale of oil could not recover the difference between the market price (f.o.b. buyer's tank at seller's mill) and the contract price, and at the same time reimbursement for expenses incurred in arranging for shipment of the oil. "If it [the plaintiff corporation] had received the oil, these were deductions from any profit which the plaintiff would have made. But, if it gets the difference between the contract price and the market price, it gets what represents the value of the oil in its hands, and to allow these items in addition would be making the defendant pay twice for the same thing."[47] To be compared with this holding are a number of cases granting the lessee who was denied possession of the premises both reimbursement for moving expenses paid out before the defendant's breach, and the difference between the "reasonable value" of the lease and the rent reserved in the contract.[48] There seems little to distinguish these cases from that discussed by Justice Holmes, unless it be that a court or jury can in cases involving "reasonable value" avoid overlapping by an adjustment (perhaps intuitive) in the estimation of "reasonable value," an adjustment which would be impossible in the case of a market price.

The most perplexing problem of all is perhaps that presented by the combination of an expectancy measured by the market price or "reasonable value," and a claim for advertising disbursements. The defendant breaks a contract to assign a patent. The plaintiff sues, asking (1) the difference between the "reasonable value" of the patent and the contract price, and (2) reimbursement for sums spent in advertising articles which were to have been manufactured under the patent. In passing on the problem of overlapping we should have to consider the following ques-

47. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 546 (1903).

48. Koneman v. Seymour, 176 Ill. App. 629 (1913); Driggs v. Dwight, 17 Wend. 71 (N. Y. 1837); Giles v. O'Toole, 4 Barb. 261 (N. Y. 1848).

tions: (1) To what extent had the advertising already reflected itself in an increased "reasonable value"? To this extent there would be overlapping. (2) Assuming that the advertising had not yet had its full effect, or that it was spent in such a way as not to affect the value of the patent itself, to what extent was allowance made for expenses of this sort in the computation of the "reasonable value" of the patent? To this extent, again, there is overlapping. (3) Assuming again that the advertising has not operated to increase the "reasonable value" of the patent, to what extent can the advertising be regarded as an independent productive factor paying for itself and producing its own return? To this extent there would be no overlapping, since the expenditure for advertising is in this aspect a separate economic venture occasioned by the contract, and not simply a price paid to "get at" a value contained in the contract. This last question involves a problem of the type which economists deal with under the heading of "imputational economics," though the conditions for an effective application of their methods will scarcely be present in the cases likely to be litigated.[49]

These illustrations should be enough to suggest the difficulties involved in the problem of "double recovery," difficulties which we make no pretense of having solved here. At the most our contribution has been to localize the sources of trouble and to take some of the necessary preliminary distinctions.

The Reliance Interest and Hadley v. Baxendale

Before we discuss the relation between the reliance interest and *Hadley v. Baxendale*[50] it will be necessary to state briefly what seems to us to be involved in that famous case, considering it not so much as an event in legal history but as the accepted symbol for a set of problems. The case may be said to stand for two propositions: (1) that it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach, and (2) that specifically the proper test for determining whether particular items of damage should be compensable is to inquire whether they should have been foreseen by the promisor at the time of the contract. The first aspect of the case is much more important than the second. In its first aspect the case bears an integral relation to the very bases of contract liability. It declares in effect that just as it is wise to refuse enforcement altogether to some

49. See von Wieser, Social Economics (Hinrichs' trans. 1927) §20, *"The Problem of Attribution of Yields"*. The difficulties in measuring the precise effects of advertising expenditures on volume of sales and on prices are dealt with in Smith, *The Imputation of Advertising Costs* (1935) 45 Economic Journal 682.

50. 9 Exch. 341 (1854). The problems involved in the case are penetratingly analyzed in McCormick, Damages (1935) §§138–141.

promises (considerationless, unaccepted, "social" promises, etc.) so it is wise not to go too far in enforcing those promises which are deemed worthy of legal sanction. The answer to the question of *Hadley v. Baxendale* (where shall we stop?) must inevitably be as complex as the answer to the question (where shall we begin?) which is implicit in the law of mutual assent, consideration, and the rules governing the formation of contracts generally.

In its second aspect *Hadley v. Baxendale* may be regarded as giving a grossly simplified answer to the question which its first aspect presents. To the question, how far shall we go in charging to the defaulting promisor the consequences of his breach, it answers with what purports to be a single test, that of foreseeability. The simplicity and comprehensiveness of this test are largely a matter of illusion. In the first place, it is openly branded as inappropriate in certain situations where the line is drawn much more closely in favor of the defaulting promisor than the test of foreseeability as normally understood would draw it.[51] There are, therefore, exceptions to the test, to say nothing of authorities which reject it altogether as too burdensome to the defaulter.[52] In the second place, it is clear that the test of foreseeability is less a definite test itself than a cover for a developing set of tests. As in the case of all "reasonable man" standards there is an element of circularity about the test of foreseeability. "For what items of damage should the court hold the defaulting promisor? Those which he should as a reasonable man have foreseen. But what should he have foreseen as a reasonable man? Those items of damage for which the court feels he ought to pay." The test of foreseeability is therefore subject to manipulation by the simple device of defining the characteristics of the hypothetical man who is doing the foreseeing. By a gradual process of judicial inclusion and exclusion this "man" acquires a complex personality; we begin to know just what "he" can "foresee" in this and that situation, and we end, not with one test but with a whole set of tests. This has obviously happened in the law of negligence, and it is happening, although less obviously, to the reasonable man postulated by *Hadley v. Baxendale.*

Even if the reasonable man who does the foreseeing is a juristic construct, endowed precisely with those qualities which the court feels he ought to have for the purpose at hand, it does not seem that there is a complete *petitio principii* in the test of foreseeability. When we import into a question of liability the "reasonable man" standard we do at least two things. In the first place we increase the chance that the case will ultimately be determined by the jury. Though the court may define the

51. McCormick, Damages (1935) §139.
52. See McCormick, Damages (1935) §141.

reasonable man, it cannot be sure that its definition will be regarded by the jury, and any test which speaks of the reasonable man decreases the court's chance of removing the case from the jury. In the second place, whether the case is ultimately decided by the judge or the jury, stating the problem in terms of the reasonable man creates a bias in favor of exempting *normal* or *average* conduct from legal penalties. The reasonable man is not necessarily the average man, but he tends to be, and the notion of what is normal and average puts a bridle on the judicial power of defining reasonableness. But the restraint is far from complete. It becomes illusory in those situations where the concepts "normal" and "average" are without definite content; where the "average man" is as much a juristic construct as the "reasonable man." The restraint is often thrown off even in those fields where, because rather definite lay ways of thought and action are discoverable in them, the notion of the "normal" and "average" has some objective reality. The courts have not hesitated to invest the reasonable man with capacities either greater or less than those of the average man. For an example of this judicial autonomy within the reign of fact one need look no further than the case which originated the test of foreseeability, *Hadley v. Baxendale* itself.[53]

So much for the general implications of *Hadley v. Baxendale*. Our discussion of the relation between that case and the reliance interest has to do with two distinct problems. First, assuming it is wise to avoid putting too heavy a penalty on breach of contract, are there cases in which the reliance interest may be substituted for the expectation interest as a measure of damages in order to reduce recovery? In this aspect the question is whether the reliance interest may not serve as a kind of substitute for the test of *Hadley v. Baxendale*. Secondly, what of the problem of *Hadley v. Baxendale* as it arises inside the reliance interest itself? Should we refuse to grant compensation for acts of reliance where they are not "proximately caused" by the contract, or were not "reasonably foreseeable" by the promisor? We shall discuss these problems in the order given.

In his pioneering article on *culpa in contrahendo* Ihering suggested that the reliance interest (in his terminology, the negative interest) ought to be the proper measure of recovery in a series of situations which we may call "not-quite" contracts.[54] For example, in cases where there is

53. "Thus, in Hadley v. Baxendale itself, the carrier was told of the use to which the broken shaft was to be put and that the mill was shut down, but it was held that this was not enough, since it was not told that another shaft was not available!" McCormick, Damages (1935) §140.

54. *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen* (1860), published in 1 Ihering, Gesammelte Aufsatze (1881)

a misunderstanding concerning the terms of the contract and where, accordingly, applying a "subjective" theory of mutual assent, we would arrive at the conclusion that no perfect or complete contract existed, it may nevertheless be found that the misunderstanding was due predominantly to the fault of one party, or that the risk of misunderstanding was created by the act of one of the parties. In this situation it may be just to impose on the party who was at fault, or whose act created the risk of misunderstanding, a liability to compensate the "innocent" party for any actual change of position in reliance on the apparently perfect contract.[55] Here we stop halfway between full contract liability (expectation interest) and a denial of liability altogether. In this aspect the reliance interest bears a resemblance to *Hadley v. Baxendale* as a compromise between no enforcement and complete but too onerous enforcement of the promise.

We shall discuss in our second installment a number of cases in which American courts have restricted recovery to the reliance interest perhaps primarily because they felt that imposing liability for the expectation interest would be going too far. These cases represent a kind of midway station between no contract and a "complete" contract. To be sure cases of this sort are not ordinarily considered as having any special relationship to the problem of *Hadley v. Baxendale.* But this is because the two aspects of that case which we have distinguished above are confused, and the test of foreseeability is permitted to obscure the more fundamental implication of the case, which is that it is unwise to impose too onerous consequences on breach of contract.

In dealing with the problem of *Hadley v. Baxendale* as it relates to the reliance interest itself, it is necessary to recall again the distinction taken between essential and incidental reliance. So far as essential reliance is concerned, there is usually no occasion to deny reimbursement for "remote" items, and the problem of *Hadley v. Baxendale* does not normally give any difficulty. Applying the test of foreseeability, one would not hesitate to say that the defaulter should have foreseen that the plaintiff would undertake those acts necessary to perfect his rights on the contract. Furthermore, the limitation of recovery by the full con-

327–425. The statement in 1 WILLISTON, CONTRACTS (1920) §60a, and the intimation to be derived from combining §60AA and §63A of 1 WILLISTON, CONTRACTS (2d ed. 1936), that Ihering regarded this liability as founded on tort is incorrect. In fact Ihering devoted a considerable portion of his article to showing that the liability should be regarded as contractual.

55. Ihering's suggestion as to this situation was adopted by the German Civil Code, §122, and the Swiss Code of Obligations, §26. The Swiss Code, however, gives the judge the discretion to increase damages beyond the reliance interest (presumably to the expectation interest) if to do so would "correspond to equity".

tract price is a limitation sufficiently drastic to dispense with the need for any other device for reducing recovery.[56]

As to incidental reliance the case is entirely different. Here the limitation of recovery by the full contract price is generally inappropriate. The definition of this type of reliance being purely negative (it consists of those acts of reliance which are not "essential" reliance), there is need for some other limitation on recovery. It would be impossible to deal adequately in this place with the ways in which courts have solved this problem. Here as elsewhere the talk is primarily of foreseeability and notice.[57] Here as elsewhere there is much reason to suspect that courts are influenced by factors which have nothing to do with foreseeability. Particularly apparent is an impulse to preserve some proportion between the liability imposed on the defendant and the compensation which was paid him under the contract.[58] One also notes that the items commonly refused tend to fall into fairly definite classes. Thus where a breach of contract by the defendant makes impossible the undertaking of a business planned by the plaintiff there is discernable a tendency to deny compensation for sums paid by the plaintiff to employees,[59] while moving costs and losses on goods are rather regularly allowed.[60]

56. In those cases where the gross expectancy is too speculative to serve as a significant limitation on recovery, the problem of *Hadley v. Baxendale* may arise as to essential reliance. In Williams v. Barton, 13 La. 404 (1838), the plaintiff gave up a profitable law practice in order to enter into a business venture with the defendant. The court denied reimbursement for the loss of the plaintiff's practice on the ground that it was not a loss caused by the defendant's breach—an objection broad enough to exclude the reliance interest from consideration in any case. However, since the expectation interest was too conjectural here to offer a significant limitation on recovery, it is likely that a court willing generally to grant reimbursement for detrimental reliance would discover that there was here lacking a sufficient "causal" connection between the loss and the contract, and deny reimbursement on that ground. Woodbury v. Jones, 44 N. H. 206 (1862), is a similar case on its facts and holding.

57. Overstreet v. Merritt, 186 Cal. 494, 200 Pac. 11 (1921); Bernhard v. Curtis, 75 Conn. 476, 54 Atl. 213 (1903); Security Stove & Mfg. Co. v. American Ry. Express Co., 227 Mo. App. 175, 51 S. W. (2d) 572 (1932); Price v. Eisen, 31 Misc. Rep. 547 64 N. Y. Supp. 405 (1900); Schatzinger Realty Co. v. Stonehill, 19 Ohio C. C. (N. S.) 403 (1912); Shaboub v. De Lacie, 59 S. W. (2d) 954 (Tex. Civ. App. 1933); Gross v. Heckert, 120 Wis. 314, 97 N. W. 952 (1904).

58. The fact that the maximum benefits derivable from the contract by the defendant were very small in comparison with the liability sought to be imposed on him was expressly made a basis for denying the relief asked in Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 209, 31 N. E. 1018 (1892), and was no doubt an important if latent factor in Price v. Eisen, 31 Misc. Rep. 457, 64 N. Y. Supp. 405 (App. Term 1900), and Koneman v. Seymour, 176 Ill. App. 629 (1913).

59. Koneman v. Seymour, 176 Ill. App. 629 (1913); Davis & Major v. Cincinnati, Hamilton & Dayton R. R. Co., 12 Ohio Dec. Rep. 463 (1855); Sinclair Refining Co. v. Hamilton & Dotson, 164 Va. 203, 178 S. E. 777 (1935); Gross v. Heckert, 120 Wis.

THE RELIANCE INTEREST IN THE RESTATEMENT OF CONTRACTS

The distinction which we have taken between three "contract interests"—the restitution, reliance, and expectation interests—is not to be found in the Restatement of Contracts. The classificatory scheme of that work admits only two procedures in dealing with breach of contract. A court may either seek to confer on the plaintiff the value of the expectancy in the form of damages or specific performance, or it may grant the plaintiff restitution. There is no *tertium quid.* This simplification of the problem would be commendable if it really "worked." Unfortunately, it does not. On the contrary it not only causes the Restatement to convey a misleading impression of existing law, but generates confusion within the system of the Restatement itself, particularly in connection with the subject of restitution.

In the Comment to Section 347 it is said: "In granting restitution as a remedy for breach . . . the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him before the contract was made." This passage makes restitution sound strangely like reimbursement for detrimental reliance, particularly since in the same context restitution is contrasted with another purpose of contract law which is that of "putting the injured party in as good a position as he would have occupied had the contract been fully performed by the defendant." Any hope, however, that the "restitution" of the Restatement might be broad enough to cover the reliance interest must be shattered by the express provisions of Section 348 and the earlier and much more accurate description of the remedy given in the comment to Section 326, which describes it in terms of an effort "to bring about the restitution in value of a performance rendered by the plaintiff and received by the defendant." The discrepancy in these descriptions of restitution and particularly the (no doubt unintended) identification of the restitution and reliance interests in the passage first quoted

314, 97 N. W. 952 (1904). Reimbursement for sums paid employees was, however, granted in Douglas v. Guardian Holding Corp., 132 Cal. App. 585, 23 Pac. (2d) 80 (1933); Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621 (1896); Walter Box Co. v. Blackburn, 157 S. W. 220 (Tex. Civ. App. 1913).

There seems also to exist a disinclination to grant reimbursement for the loss involved in giving up a business in reliance on the contract. Schnierow v. Boutagy, 33 Cal. App. 336, 164 Pac. 1132 (1917); Williams v. Barton, 13 La. 404 (1838) ("essential reliance"); Woodbury v. Jones, 44 N. H. 206 (1862) ("essential reliance"); Greer v. Varnell, 27 Tex. Civ. App. 255, 65 S. W. 196 (1901). Reimbursement for such a loss was, however, granted in Overstreet v. Merritt, 186 Cal. 494, 200 Pac. 11 (1921); and in Shaboub v. De Lacie, 59 S. W. (2d) 954 (Tex. Civ. App. 1933) the plaintiff was allowed to recover for the loss involved in giving up a job in reliance on a contract by the defendant to lease a filling station which the plaintiff planned to operate.

60. See note 65 *infra.*

is symptomatic of an assumption underlying the whole treatment of contract damages in the Restatement, that reimbursement for detrimental reliance on a promise cannot of itself be a proper object of judicial concern.[61]

However uncompromisingly this assumption may be adhered to in the theoretical passages of the Comments, it might seem that the provisions of Section 333 mark a departure from it. This section provides for the reimbursement of the plaintiff for his expenditures "reasonably made in performance of the contract or in necessary preparation therefor." To one uninitiated in the systematics of the Restatement this might seem like a rather sweeping recognition of the reliance interest. Yet even here the relief, though confessedly somewhat exceptional, is brought within the cover of the expectation interest. "A judgment for such expenditure, therefore, is a judgment for a portion of the value promised by the defendant, the receipt of which by the plaintiff is prevented by the breach."[62] There is no reason to quarrel with this unobjectionable though certainly tendentious interpretation. There is, however, much reason to be disturbed by its negative implications. It seems to strengthen the inference (already justified on the principle *expressio unius est exclusio alterius*) that Section 333 means to exclude all those kinds of reliance on a contract which do not take the form of expenditures "made in performance of the contract or in necessary preparation therefor."

If we treat Section 333, as it seems we must, not as merely illustrative but as an exclusive enumeration of the kinds of reliance which are compensable, what is the basis for the limitation it contains? Why must the "expenditures" on the faith of the contract to be compensable consist of performance of the contract or of preparations to perform? Certainly this limitation is not to be derived from the cases. It is true that there are many cases which "support" Section 333 in the sense that they have granted reimbursement for expenditures made in performing a contract or in preparing to perform it. But they are innocent

61. In making this assumption the RESTATEMENT of course follows the analysis of most of the legal texts, which strenuously preserve, no doubt for its pedagogical convenience, a neat distinction between contract and tort. Professor Williston is particularly impatient with any attempt to import into contract law what Professor Gardner (*supra*, note 37, at 22) calls "the tort principle," i.e., the principle that compensation should be granted for detrimental reliance. Even the cases granting reimbursement for reliance which consists of performance of the contract he views, in one place (3 WILLISTON, CONTRACTS (1920) §1341) as "hard to explain . . . satisfactorily", in another (§1455) as "erroneous", and in any event (§1340) as "exceptions" to "the general principle". (It should be noted, however, that it was Professor Corbin, rather than Professor Williston, who drafted the RESTATEMENT sections relating to damages.)

62. RESTATEMENT, CONTRACTS § 333, comment *a*.

of any but the vaguest intimations that it is only such expenditures which are compensable. On the other hand, the cases are legion in which courts have granted reimbursement for reliance which did not consist of "performance of the contract or necessary preparation therefor." Aside from an extensive miscellaneous group of cases,[63] we may note specially two

63. *Cases granting reimbursement for expenditures made in anticipation of the arrival of goods delivered to the defendant for shipment:* Gray v. Wabash Ry. Co., 220 Mo. App. 773, 277 S. W. 64 (1925); Security Stove & Mfg. Co. v. American Ry. Express Co., 227 Mo. App. 175, 51 S. W. (2d) 572 (1932); *Davis & Major v. Cincinnati, Hamilton & Dayton R. R. Co., 12 Ohio Dec. Rep. 463 (1855).

Cases granting reimbursement for expenditures in preparing to receive and use goods which the defendant had contracted to supply: Sperry and Hutchinson Co. v. O'Neill-Adams Co., 185 Fed. 231 (C.C.A. 2d, 1911); *Grosse v. Petersen, 30 Cal. App. 482, 158 Pac. 511 (1916); Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197 (1892).

Miscellaneous cases: Cohn v. Bessemer Gas Engine Co., 44 Cal. App. 85, 186 Pac. 200 (1919) (plaintiff, who had bought an engine from the defendant for the purpose of operating an irrigation pump, recovered, *inter alia,* reimbursement for the cost of planting alfalfa seed when the engine failed to operate satisfactorily and the crop was lost); Dean v. White & Haight, 5 Iowa 266 (1857) (defendant breached a contract to set up a sawmill for the plaintiff; the plaintiff was permitted to recover for expenses incurred in procuring an engine and boiler to run the mill); Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621 (1896) (defendant broke a contract to supply gas for a glass factory, the plaintiff was granted, *inter alia,* reimbursement for the cost of transporting skilled workmen to operate the factory); American-Hungarian Pub. Co. v. Miles Bros., 68 Misc. Rep. 334, 123 N. Y. Supp. 879 (1910) (plaintiff granted reimbursement for expenses incurred in preparing to participate in a display which the defendant had contracted to furnish); Schatzinger Realty Co. v. Stonehill, 19 Ohio C. C. (n.s.) 403 (1912) (vendee permitted to recover sums paid to an architect and a contractor in anticipation of the construction of a building on the land which the defendant had contracted to convey); Martin v. Seaboard Air Line Ry., 70 S. C. 8, 48 S. E. 616 (1904) (court held that in the case of a "final and complete breach" by the defendant of its contract to construct a spur track for the plaintiff, plaintiff entitled to recover reimbursement for the cost of moving its sawmill to the site of the promised spur). In People ex rel Burnham v. Flynn, 189 N. Y. 180, 186, 82 N. E. 169, 171 (1907), there is a dictum to the effect that the purchaser of a ticket denied admittance to the theater may recover reimbursement for his expenses incurred in order to attend the performance (taxi fare?).

In most of the cases cited in this and the two notes following, the objection that contract damages can only be measured by the expectancy was dismissed by the court in a very summary fashion. Perhaps the most extended discussion of the point is to be found in Security Stove & Mfg. Co. v. American Ry. Express Co., 227 Mo. App. 175, 182, 51 S.W. (2d) 572, 576 (1932). "Defendant contends that plaintiff 'is endeavoring to achieve a return of the status quo in a suit based on a breach of contract. Instead of seeking to recover what he would have had, had the contract not been broken, plaintiff is trying to recover what he would have had, had there never been any contract of shipment' . . . It is no doubt, the general rule that where there is a breach of contract the party suffering the loss can recover only that which he would have had, had the contract not been broken. . . . But this is merely a general statement of the rule and is not inconsistent with the holdings that, in some instances, the injured party may recover expenses commonly recurring situations where this type of relief seems as firmly established as long judicial usage can establish a remedy: (1) the numerous seed warranty cases granting the disappointed purchaser reimbursement for his costs of planting and cultivation;[64] and (2) cases involving contracts to lease premises for business purposes, where the prospective lessee who is denied possession receives reimbursement for losses sustained in laying in a stock of goods, for his moving costs, and generally for out-of-pocket losses.[65] Certainly it would be difficult (though apparently in Georgia it would not be impossible[66]) to bring the items of reliance involved in these cases within the notion of "performance of the contract or necessary preparations therefor."

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incurred in relying upon the contract, although such expenses would have been incurred had the contract not been breached."

(We are indebted to the various state annotations to the RESTATEMENT for assistance in finding the cases indicated by an asterisk in this note and in note 65 *infra,* all of which were cited, without comment, as supporting §333.)

64. Ferris v. Comstock, Ferre & Co., 33 Conn. 513 (1866); Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 So. 410 (1909); Butler v. Moore, 68 Ga. 780 (1882); Crutcher & Co. v. Elliott, 13 Ky. Law Rep. 592 (1892); Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N. W. 484 (1917); Lundquist v. Jennison, 66 Mont. 516, 214 Pac. 67 (1923); Reiger v. Worth Co., 127 N. C. 230, 37 S. E. 217 (1900). The only reference to the seed warranty cases in the RESTATEMENT is in the fourth illustration to §331, which indicates that the purchaser can recover the lost profit "if his evidence gives a sufficient basis for estimating" it. Nothing is said about what happens when the evidence does not suffice for this purpose.

65. Schnierow v. Boutagy, 33 Cal. App. 336, 164 Pac. 1132 (1917); Douglas v. Guardian Holding Corp., 132 Cal. App. 585, 23 Pac. (2d) 80 (1933); *Bernhard v. Curtis, 75 Conn. 476, 54 Atl. 213 (1903); *Musial v. Kudlick, 87 Conn. 164, 87 Atl. 551 (1913); Koneman v. Seymour, 176 Ill. App. 629 (1913); Tidwell v. Meyer Bros., 160 La. 778, 107 So. 571 (1926); Narragansett Amusement Co. v. Riverside Park Amusement Co., 260 Mass. 265, 157 N. E. 532 (1927); *Driggs v. Dwight, 17 Wend. 71 (N. Y. 1837); Giles v. O'Toole, 4 Barb. 261 (N. Y. 1848); Walter Box Co. v. Blackburn, 157 S. W. 220 (Tex. Civ. App. 1913); Texas Power & Light Co. v. Roberts, 187 S. W. 225 (Tex. Civ. App. 1916); Shaboub v. De Lacie, 59 S. W. (2d) 954 (Tex. Civ. App. 1933); Gross v. Heckert, 120 Wis. 314, 97 N. W. 952 (1904); Nurse v. Barns, T. Raym. 77 (1664); see Hodges v. Fries, 34 Fla. 63, 74, 15 So. 682, 685 (1894). But *cf.* Rhodes v. Baird, 16 Ohio St. 573 (1866).

66. Almost identical in its effect with the main provision of §333 of the RESTATEMENT is §20–1414 of the GEORGIA CODE (1933) which reads, "Any necessary expense which one of the two contracting parties incurs in complying with the contract may be recovered as damages." In Butler v. Moore, 68 Ga. 780, 783 (1882), a case in which the plaintiff had bought seed for his own use, the court said, " . . . if the seed were worthless, the measure of damages would be the purchase money with interest and *any expense incurred in complying with the contract* after the same was entered into, *such as the hauling of the seed, preparing the lands for planting, sowing, and rolling said seed. . . .* " (Italics ours.) Surely here was an object lesson for those who drafted §333! If courts ever develop toward the RESTATEMENT the same treacherous deference they display toward codes, we may perhaps expect to see §333 tortured in a similar manner. Section 333, however, presents an obstacle to judicial ingenuity which

Does any other section of the Restatement offer these cases of "incidental reliance" the haven which Section 333 denies them? (For it will be observed that the practical effect of the limitation in Section 333 is to exclude what we have called "incidental reliance" and to limit reimbursement to "essential reliance.") Hope for such a haven might at first be derived from the broad language of Section 329, which states that contract damages will be given for the "net amount of the losses caused and gains prevented by the defendant's breach." The term "losses caused by the defendant's breach" might seem broad enough to include any kind of detrimental reliance, whatever its nature. But the hope that this term can serve as a general cover for the reliance interest must be short-lived. The comment to Section 333 declares that expenditures made by the plaintiff in performing his contract cannot be considered as "losses caused by the defendant's breach."[67] If such expenditures are not losses caused by breach then certainly other kinds of detrimental reliance are not. Apparently the term "losses caused" as used in Section 329, far from being identical with detrimental reliance, is intended merely to include those cases where the breach of a contract inflicts some direct harm, as where a cow warranted to be free from disease infects the purchaser's herd. The illustrations to Section 329 imply as much.

The conclusion then must be that reimbursement for reliance which does not consist of performance of the contract or preparations to perform is excluded from the Restatement. It is excluded from its theory, from its express provisions, and from its illustrations.[68] It is excluded not simply in the sense that it receives no explicit recognition. That would be understandable; a neglect of nuances in judicial treatment is inevitable in an attempt to reduce to twenty sections the whole law of contract damages. It is excluded in the sense that the systematics of the Restatement leaves no gap through which it can effect an entry. It is not only uninvited to the feast, but the doors are barred against its intrusion.

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is lacking in the Georgia Code, in the form of a limitation of recovery by "the full contract price". It is difficult to imagine how the relief granted in *Butler v. Moore* would have been possible with such a limitation.

67. Comment *a.* See also the cases cited in note 56 *supra.*

68. Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621 (1896), a case in which the defendant by failing to perform its contract to supply gas rendered vain large expenditures by the plaintiff for a glass factory, serves twice as an illustration in the RESTATEMENT. See §329, the sixth illustration; and §331, the sixth illustration to subsection (1). In both illustrations the discussion hinges entirely on the problem of proving the profits expected to be derived from the operations of the factory, whereas in the actual case, expected profits were rejected as too conjectural and reimbursement was granted for the costs involved in establishing the factory. Needless to say, *Gas v. Glass* does not reappear as an illustration to §333.

We have said that reimbursement for "incidental" reliance is excluded from the illustrations of the Restatement. This is nearly, but not quite true. There is perhaps no more striking demonstration of the artificiality of the restriction imposed in Section 333 than the fact that it seems to have been ignored in two of the illustrations given under that section. In the fifth illustration A conveys lots to B in return for B's promise to build a hotel on them. A then pays $5,000 to an architect for plans for the hotel. On breach of contract by B this item of expense is regarded as compensable. Was this an act by A which constituted "performance of the contract or . . . necessary preparation therefor"? If so, there is nothing in the illustration to indicate that it was.

The seventh illustration is based on *Globe Refining Co. v. Landa Cotton Oil Co.*[69] In that case the defendant was under contract to sell oil to the plaintiff to be delivered at the seller's mill. The plaintiff sent its tank cars for the oil. On breach by the defendant the plaintiff sought reimbursement for the freight paid on these cars. There is no intimation in the discussion of the illustration that this could not be regarded as a compensable act of reliance within Section 333. But was it a part of the plaintiff's performance of the contract that he ship cars from a distance? As Justice Holmes said in the actual case, " . . . it is obvious that the plaintiff was free to bring its tanks from where it liked, —a thousand miles away or from an adjoining yard,—so far as the contract was concerned."[70] Of course one could say that in shipping its tanks the plaintiff was preparing to perform "its contract to receive the oil" and that under the circumstances, since the cars were not in an "adjoining yard," sending the cars from a distance was a necessary act of preparation. But where is the line to be drawn? Was the plaintiff in *Nurse v. Barns*[71] preparing to perform his contract to lease the premises when he bought a stock of goods, on the theory that it was only through this act that he would be able to earn the money to pay his rent?

The questions just raised reveal the fact that the limitation in Section 333 not only does not accurately reflect the law, but that it suffers from an ambiguity, or rather from a series of ambiguities. The difficulty of deciding just how closely connected an act must be with "performance of the contract" before it can be regarded as "necessary preparation therefor" has just been mentioned. But there are other difficulties fully as embarrassing as this one. Does the term "performance of the contract" imply that the plaintiff must himself have been under a duty? If so, then Section 333 is limited to bilateral contracts, and expenditures

69. 190 U. S. 540 (1903), discussed *supra* p. 83.

70. *Id.* at 545.

71. T. Raymond 77 (1664), discussed *supra* p. 77.

made in reliance on an offer for a unilateral contract are excluded. Does Section 333 preclude measuring damages by the amount of detrimental reliance in the case of promises made enforceable by Section 90? As to such promises the term "performance" is certainly inappropriate. The nephew in *Devecmon v. Shaw*[72] was not "performing" anything; he was merely relying on a promise. Yet it is precisely as to such promises that it is often wise to limit recovery to the reliance interest.

Since there seems so little to justify an exclusion of incidental reliance from compensation, our final question must be, why was Section 333 phrased exclusively in terms of "performance of the contract" and "necessary preparations" to perform? There are probably a good many reasons. In the first place, such reliance, which is roughly equivalent to what we have called "essential reliance," may be brought within the conceptual cover of the expectancy. It can be fitted into a system which excludes reimbursement for detrimental reliance from the objects legitimately pursued by contract law. It would not have been so easy to deal with "incidental reliance" in the same way. In the second place, the cases involving recovery for expenditures for performance or preparations to perform are the most easily classified of the cases granting reimbursement for reliance. Accordingly, they form the subject of special sections in the texts and digests.[73] The cases involving other types of reliance have been less systematically dealt with. They are to be found lurking under such deceptive titles as, "No recovery for lost profits," the annotator having neglected to say that there *is* recovery for lost efforts. In the third place, two of the limitations imposed in Section 333 would as they now stand have been inappropriate as applied to incidental reliance. These are subsection (b), which deals with the problem of double recovery, and subsection (a), which provides that the total recovery may in no event exceed "the full contract price." (It should be observed that the limitation of subsection (a) destroys any hope that by a broad interpretation of "performance" and "preparations to perform" the courts might within the framework of Section 333 be able to make adequate provision for reimbursing incidental reliance.) Lastly, there may have been a feeling that if compensable reliance were too broadly extended the difficulty of *Hadley v. Baxendale* would become embarrassingly acute. That there is a real difficulty here must be admitted, but Section 333 seems much too simple and drastic a cure for it.

Our discussion of the Restatement so far has related wholly to its

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72. 69 Md. 199, 14 Atl. 464 (1888). It should be noted that so far as restitution is concerned the RESTATEMENT makes express provision for cases of this type. §347 (1) (b).

73. Title "Damages" in 17 C. J. §126, and 8 R. C. L. §56; 3 WILLISTON, CONTRACTS (1920) §1341; 6 PAGE, CONTRACTS (2d ed. 1922) §3208.

failure to take account of "incidental reliance." Even as to "essential reliance" it should be noted, however, that the Restatement conveys a misleading impression of the case law. In our discussion of the problem of *Hadley v. Baxendale* we referred to cases in which courts have deliberately restricted recovery to the reliance interest even where the expectation interest could be easily proved. These cases find no echo in the Restatement. Section 333 is phrased in terms of a plaintiff's option, and the only obstacle to a recovery of the expectation interest which it recognizes is the difficulty of proof. That in some situations another and very formidable obstacle may be encountered in the form of a judicial determination to confine legal protection to the reliance interest will be shown in our second installment.