THE CONTRACT PRICE AS A LIMIT ON RESTITUTION FOR DEFENDANT'S BREACH

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The rule of the common law, Baron Parke said, "is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[1] Although this is only one of many ideas that enter into the measurement of contract damages, it has been accepted as a central objective of the damage remedy, pursuant to which somewhat more precise formulas have been developed for various types of cases. The present paper is not concerned with the damage remedy as such but rather with restitution of benefits conferred on a party who has breached a contract. Restitution is not always available as a remedy, even for essential breach, but, where it is, our purpose is to determine whether Baron Parke's generalization operates as a *limitation* on recovery.[2]

In February 1812 one Canfield agreed to deliver 2,000 barrels of flour to Bush in New Orleans on or before May 1, at seven dollars a barrel. Bush paid $5,000 in advance of delivery and sued to recover this amount when Canfield failed to make delivery on May 1. On that date the market price of flour in New Orleans was five dollars and fifty cents a barrel, and Canfield sought to limit Bush's recovery to $2,000 by application of the measure of damages for breach of contract which Baron Parke described. If Bush was to be put in the situation that he would have been in had the contract been performed, so far as money could do it, he would have paid an additional $9,000 in order to receive flour worth $11,000; hence, it was argued, he should recover only $2,000. The argument was rejected by the Connecticut court and Bush recovered his entire payment.[3]

The conventional formula for measuring contract damages works well enough when the plaintiff could have performed the contract at a profit, or without loss, though it is capable of almost unlimited extension

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[1] Robinson v. Harmon, 1 Ex. 850, 154 Eng. Rep. 363 (1848).

[2] Convenience fully justifies the usage in the text, which differentiates the restitution and damage actions. This is illustrated by Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916), where a client discharged his attorney after part performance and the latter sued in *quantum meruit* for the value of his services. Under New York law the discharge was not a breach of contract and the lawyer could not therefore recover "damages." His only remedy was to seek restitution for the value of his services.

[3] Bush v. Canfield, 2 Conn. 485 (1818).

and means of limiting it must be used.[4] In the early history of assumpsit the emphasis was on compensation for the plaintiff's "real" losses, and the later inclusion of loss of an expected profit came as an expansion of relief in favor of the plaintiff.[5] The use of the resulting generalization to limit plaintiff's recovery, where he has made an unprofitable bargain, is quite another matter, and one that should be judged on its own merits. Broadly, the problem arises in two types of cases one where there is a reliance loss without gain to the defendant, and the other where there *is* such gain.

The first type is illustrated by *L. Albert & Son v. Armstrong Rubber Co.*,[6] where a buyer of machinery justifiably rejected the goods because of late delivery and sought to recover $3,000 spent in building foundations on which to install the machinery. This was held a proper item of damages, subject, however, to deduction of any amount which the seller could show that the buyer would have lost had the contract been performed. There is not much satisfactory case authority on the subject, but Judge Learned Hand found support for his conclusion in leading texts[7] and especially in Professor Fuller's notable articles on the reliance interest.[8]

Our concern is with the type of case in which the contract-breaker has received a benefit from the plaintiff, as in *Bush v. Canfield*. Whatever the merits may be of limiting protection of the reliance interest as was done in the *Armstrong Rubber* case, the claim to restitution is

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[4] As in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). See Washington, *Damages in Contract at Common Law*, 48 L. Q. REV. 90, 107 (1932).

[5] Although there is difference of opinion over how damages were measured in the early history of assumpsit, it seems to be agreed that they were not measured by the value of the promised performance. This came later and surely was thought of as an extension of liability for breach. Washington, *Damages in Contract at Common Law*, 47 L.Q. REV. 345, 371-79 (1931). An example is Robinson v. Harman, *supra* note 1, from which the quotation at the start of this paper was taken. Defendant had agreed to lease a house to plaintiff for twenty-one years at an annual rent of £110. In an action for damages following defendant's refusal to make the lease, the parties were agreed that defendant was liable for plaintiff's expense in paying a lawyer to examine title and prepare a lease. The plaintiff proved that the premises were "worth more" than the agreed rent, and the decision upheld an award of £200 to plaintiff for "the loss of his bargain." Before the rise of assumpsit a plaintiff could sometimes recover the value of a promised performance in the action of debt, as in the case of goods sold and delivered on a promise to pay money. But recovery of the promised amount was not thought of as enforcement of the promise; the defendant was rather "conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender." AMES, LECTURES ON LEGAL HISTORY 88 (1913).

[6] 178 F.2d 182 (2d Cir. 1949).

[7] CORBIN, CONTRACTS § 1033 (1951); MCCORMICK, DAMAGES § 142 (1935); RESTATEMENT, CONTRACTS § 333(d) (1932).

[8] Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936). The problem is discussed by the authors at pp. 75-80.

sufficiently stronger to leave the question uncontrolled by such decisions and to call for evaluation of the restitution cases in their own terms. The problem may arise either when plaintiff has performed his contract only in part or when he has fully performed, but little time need be spent on the latter situation. The problem as there framed is not the proper measure of recovery in a restitution action but rather whether restitution is available at all, though of course the denial of restitution will usually mean that plaintiff's recovery is limited by the contract price or other promised performance. There is no dissent from the view that where defendant's obligation is to pay money the plaintiff who has fully performed cannot obtain restitution but is limited to recovery of the debt.[9] It is equally well settled that where plaintiff's performance is a money payment restitution is in no way precluded by the fact that plaintiff has fully performed.[10]

Thus far there is a certain symmetry in the law relating to full performance. Plaintiff is limited to enforcement of the contract where that gives him the very thing he bargained for in return for his performance, that is, a sum of money. He is not so limited when this would give him only a money substitute for the promised performance, for example, the value of goods which defendant has promised to deliver in return for a price paid in advance. Upon non-delivery of the goods he may recover the price.[11] If this were the pattern of decision then it

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[9] Oliver v. Campbell, 43 Cal. 2d 298, 273 P.2d 15 (1954); Russell v. John Clemens & Co., 196 Iowa 1121, 195 N.W. 1009 (1923); Lynch v. Stebbins, 127 Maine 203, 142 Atl. 735 (1928); Bankston v. McKnight, 139 Miss. 116, 103 So. 807 (1925); Oliver L. Taetz, Inc. v. Graff, 363 Mo. 825, 253 S.W.2d 824 (1953); Smith v. Johannsen, 199 App. Div. 823, 192 N.Y. Supp. 478 (1922); Reams v. Wilson, 147 N.C. 304, 60 S.E. 1124 (1908); Sinnock v. Zimmerman, 132 Ore. 137, 284 Pac. 838 (1930). Because of the historical development of general assumpsit the common counts can be used, but this is not restitution since recovery is of the amount owed by defendant. Farron v. Sherwood, 17 N.Y. 227 (1858); Pusey & Jones Co. v. Dodge, 3 Pa. (19 Dela.) 63, 49 Atl. 248 (1900).

[10] In one of the early cases allowing use of a common count for defendant's breach plaintiff had paid the price of shares in Welsh copper mines which defendant agreed to deliver at a future date. After defendant breached by non-delivery the buyer was permitted to use a count for money had and received. However, the court followed the damage approach in fixing the amount of recovery. The value of the stock at the time when it should have been delivered was less than the price paid and judgment was limited to that value. Dutch v. Warren, 1 Strange 406, 93 Eng. Rep. 598 (1721), reported more fully by Mansfield in Moses v. Macferlan, 2 Burr. 1005, 1010, 97 Eng. Rep. 676, 680 (1760). A similar case in the same term permitted use of the money count with no suggestion of such a limit on recovery. Anonymous, 1 Strange 407, 93 Eng. Rep. 600 (1721). Since then it has become settled that the money payment is recoverable. Nash v. Towne, 72 U.S. (5 Wall.) 689 (1866); Keeler v. General Products, Inc., 137 Conn. 247, 75 A.2d 486 (1950).

[11] This was the situation in Nash v. Towne, *supra* note 10.

is to be expected that one who has parted with goods or services on the faith of a promised exchange of goods or services would be given restitution of the value of what he parted with when the other party has failed to perform. In an effort to achieve symmetry the *Restatement of Contracts*, in section 350, states that plaintiff may obtain restitution of the value of his performance in such a case, but most of the decisions are to the contrary, though there is some support for the *Restatement*,[12] especially in situations where there would be special difficulty in putting a money value on defendant's promised performance.[13] The case law on full performance has been under attack by textwriters at least since the time of Keener. Both Keener[14] and Woodward[15] advocated the recognition of restitution even where the defendant's obligation was to pay money, but their views seem to have had no influence on the cases. Williston[16] and Corbin[17] seem to confine their attack to the refusal of restitution where defendant's obligation is not to pay money, but again it is difficult to find any evidence that this formidable weight of opinion has appreciably influenced decision. There will be more profit in turning to a discussion of part performance.

The facts of *Bush v. Canfield* are not at all representative of the situations in which the problem arises. That was a money payment by the plaintiff and even after full performance he would be entitled to restitution. If the case is useful here it is only in providing a baseline by which to gauge more complicated and controversial transactions. Certainly on those facts it is difficult to see the justice of allowing the seller to retain $3,000 of the amount received from the buyer, on the plea that the buyer would have lost this amount if the seller had performed a contract which in fact he did not perform. The seller gave nothing in exchange for the $3,000 except a broken promise and the principle of unjust enrichment surely is applicable. If the buyer had made no payment and had been the party who repudiated the contract, the seller could have recovered $3,000 damages for loss of his bargain. It would be curious indeed for the seller to obtain the same advantage when he is the one guilty of breach. Of course there is a difference between recovery of money and retention of money as against another's

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[12] Cases are collected in 57 MICH. L. REV. 268 (1958); CORBIN, CONTRACTS § 1110 (1951); WILLISTON, CONTRACTS § 1471 (rev. ed. 1937).

[13] Brown v. St. Paul, M. & M. Ry., 36 Minn. 236, 31 N.W. 941 (1886). Plaintiff performed legal services for the railroad for which he was to receive an annual pass over defendant's lines; on defendant's failure to furnish the pass plaintiff was awarded the value of his services because it was thought to be "impossible to measure the value of the pass."

[14] KEENER, QUASI-CONTRACTS 301 (1893).

[15] WOODWARD, QUASI-CONTRACTS § 262 (1913).

[16] WILLISTON, CONTRACTS §§ 1459, 1471 (rev. ed. 1937).

[17] CORBIN, CONTRACTS § 1110 (1951).

claim: money which could not be recovered in a legal action may often be retained. This may occur in various situations but the only one relevant here is where a man has received money, or other value, to which he had no right but which is not recoverable by the one conferring the benefit for lack of any recognized ground for restitution.[18] In *Bush v. Canfield*, however, there is such ground, that is, the conferring of a benefit on the defendant at his request and with the expectation of receiving a value in exchange—an expectation that the defendant has without excuse defaulted.

The general problem arises most frequently in an action by a builder to recover the value of part performance after the other party has substantially breached a construction contract and the builder has left the job.[19] Probably this is largely because of the duration of the arrangement and its relative complexity. It is not to be expected that a person will often breach or repudiate a contract which he knows is profitable to him. He sometimes does of course: after employing a man for a term at less than the going rate he discharges the employee because he no longer has need for the services or can no longer afford them; or a change in plans leads him to abandon construction of a building on his land after the builder has partly performed a losing contract.[20] In these examples and many others that could be given, the way in which the law will view profit and loss is quite different from the way in which the defendant views the matter when he makes his decision.

A feature of many of the building contract cases is that the final breaking point between the parties (when the builder leaves the job) is frequently reached only after a long history of disagreements, with each party insisting that the other is not living up to his part of the bargain. There are honest differences of opinion, the judicial problem of locating the essential breach is often extremely difficult, and when it is finally placed on the defendant no moral condemnation is attached to the finding. This suggests one reason why a defendant who has an advantageous contract sometimes repudiates it. It is not meant to suggest that the ethical quality of the breach has had much influence on decision;

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[18] For special reasons of policy restitution may be denied sometimes even though there is a recognized general ground. Two important illustrations of this are (1) the refusal of restitution because of the illegality of a transaction in connection with which a benefit was received, and (2) the refusal of restitution of money paid by mistake under the doctrine of Price v. Neal, 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

[19] This aspect of building contracts is discussed in an excellent article by Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 COLUM. L. REV. 1286 (1931).

[20] In Connolly v. Sullivan, 173 Mass. 1, 53 N.E. 143 (1899), the owner abandoned construction of a building because he failed to get the required public approval of his building plans.

it may have, but if so, this is not easy to discern.[21] There are cases granting restitution without limitation by the terms of the contract that are of the sort just described,[22] and there are cases limiting the plaintiff's recovery by the contract terms where no moral justification for the breach appears.[23]

In *Boomer v. Muir*,[24] a contract was made between Boomer and Storrie by which Boomer was to construct a large dam with materials to be supplied by Storrie. Friction developed between the two parties almost as soon as Boomer started work and continued until he left the job eighteen months later when the dam was nearing completion. Boomer left because of Storrie's failure to provide materials as rapidly as Boomer needed them and the court found that this was a breach which justified Boomer in putting an end to the contract and seeking restitution of the value of his part performance. By the terms of the contract Boomer was to receive monthly progress payments based on an agreed schedule of unit prices for work done the preceding month. Except for three months in which, by the terms of the contract, ten per cent of the progress payment was retained by Storrie because of Boomer's failure to place a specified minimum amount of material in the dam, Boomer had received the progress payments in full. When he quit performance all but $20,000 of the full contract price had been paid, but Boomer was given a judgment for nearly $258,000 in his quasi-contract action.[25]

The great majority of decisions grant restitution unlimited by the

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[21] The present view in New York is the same as that expressed in Boomer v. Muir (see note 24 *infra*) but an early New York case held plaintiff to the terms of the contract. Koon v. Greenman, 7 Wend. (N.Y.) 121 (1831). In the process of breaking away from this rule, emphasis was placed in a later case on the willfulness of defendant's breach. Merrill v. Ithaca & O.R.R., 16 Wend. (N.Y.) 586 (1837).

[22] United States v. Zara Construction Co., 146 F.2d 606 (2d Cir. 1944); Great Lakes Construction Co. v. Republic Creosoting Co., 139 F.2d 456 (8th Cir. 1943); Boomer v. Muir, 24 P.2d 570 (Cal. App. 1933); Pelletier v. Masse, 49 R.I. 408, 143 Atl. 609 (1928).

[23] Bailey v. Furleigh, 121 Wash. 207, 208 Pac. 1091 (1922).

[24] 24 P.2d 570 (Cal. App. 1933).

[25] Doubtless Boomer's costs were increased by Storrie's failure to keep him adequately supplied with materials, but there was no evidence as to the amount of such damage. The importance of the case is that Boomer was allowed to recover the market value of his labor and materials without the necessity of proving damages, without regard to whether they were commensurate with the recovery allowed, and especially without regard for the fact that this apparently was a losing contract for Boomer from the start.

contract price,[26] except as the price is evidence of value.[27] In addition to a wide range of construction contracts a sizable number of cases involve employment contracts. The problem rarely arises in connection with the sale of fungible goods at a unit price, but it was presented in a Missouri

[26] St. Paul-Mercury Indemnity Co. v. United States, 238 F.2d 917 (10th Cir. 1957) (excavating); Southern Painting Co. of Tenn. v. United States, 222 F.2d 431 (10th Cir. 1955) (plumbing and heating); United States v. Zara Contr. Co., 146 F.2d 606 (2d Cir. 1944) (airport landing strips); Michael Del Balso v. Carozza, 136 F.2d 280 (D.C. Cir. 1943) (services); Schwasnick v. Blandin, 65 F.2d 354 (2d Cir. 1933) (services); United States F. & G. Co. v. Robert Grace Contr. Co., 263 F.2d 283 (3d Cir. 1920) (road building); United States v. Brotherton, 106 F. Supp. 353 (S.D. N.Y. 1952) (metal work on building); Adams v. Burbank, 103 Cal. 646, 37 Pac. 640 (1894) (brickwork on building); Lessing v. Gibbons, 6 Cal. App. 2d 598, 45 P.2d 598 (1935) (services of lawyer); Liblin v. San Joaquin Agr. Corp., 60 Cal. App. 516, 213 Pac. 529 (1923) (construction of levee and reservoir); Valente v. Weinberg, 80 Conn. 134, 67 Atl. 369 (1907) (construction of building); Heitz v. Sayers, 32 Del. 207, 121 Atl. 225 (1923) (alteration of building); Bailey v. Marden, 193 Mass. 277, 79 N.E. 257 (1906) (services); Posner v. Seder, 184 Mass. 331, 68 N.E. 335 (1903) (services); Brown v. Woodbury, 183 Mass. 279, 67 N.E. 327 (1903) (services); Connolly v. Sullivan, 173 Mass. 1, 53 N.E. 143 (1899) (construction of cellar); Fitzgerald v. Allen, 128 Mass. 232 (1880) (construction of conduit); Hemminger v. Western Assurance Co., 95 Mich. 355, 54 N.W. 949 (1893) (salvage of sunken boat); Mooney v. York Iron Co., 82 Mich. 263, 46 N.W. 376 (1890) (sinking mine shaft); McQueen v. Gamble, 33 Mich. 344 (1876) (services); Kearney v. Doyle, 22 Mich. 294 (1871) (services). The Michigan situation is uncertain in view of a statement in Oakley v. Duluth Superior Dredging Co., 223 Mich. 478, 194 N.W. 123 (1923), that recovery could not exceed the "contract price." Plaintiff had undertaken to build a dike for 50¢ a linear foot and sought to recover on a common count for part performance after defendant breached. It is not altogether clear whether the court meant to limit him to the contract rate or to set the whole contract price as an upper limit. Among the earlier cases cited above the Kearney and Hemminger cases were quite explicit that "it would be unjust to confine [plaintiff] to the contract price." Stark v. Magnuson, 212 Minn. 167, 2 N.W.2d 814 (1942) (services); Johnston v. Star Bucket Pump. Co., 274 Mo. 414, 202 S.W. 1143 (1918) (construction of building); Ehrlich v. Aetna Life Ins. Co., 88 Mo. 249 (1885) (services of insurance agent); McCullough v. Baker, 47 Mo. 401 (1871) (masonry work on building); Smith v. Keith & Perry Coal Co., 36 Mo. App. 567 (1889) (sale of goods); Thompson v. Gaffey, 52 Neb. 317, 72 N.W. 314 (1897) (plumbing contractor); Clark v. Manchester, 51 N.H. 594 (1872) (services); *In re* Montgomery, 272 N.Y. 323, 6 N.E.2d 40 (1936) (services of lawyer); Matter of Tillman, 259 N.Y. 133, 181 N.E. 75 (1932) (services of lawyer); Wright v. Reusens, 133 N.Y. 298, 31 N.E. 215 (1892) (alteration of building); Smith v. Brocton Preserving Co., 251 App. Div. 102, 296 N.Y. Supp. 281 (1937) (construction); O'Dwyer v. Smith, 38 Misc. 136, 77 N.Y. Supp. 88 (1902) (construction); Philadelphia v. Tripple, 230 Pa. 480, 79 Atl. 703 (1911) (construction); Knapp v. Gaston Teyssier, 96 Pa. Super. 193 (1929) (services of architect); Pelletier v. Masse, 49 R.I. 408, 143 Atl. 609 (1928) (construction of building); Caldwell v. Meyers, 2 S.D. 506, 51 N.W. 210 (1892) (painter); Peist v. Richmond, 97 Vt. 97, 122 Atl. 420 (1923). In an earlier Vermont case there is some suggestion that restitution for part performance will not be allowed to exceed the contract price for full performance, Chamberlain v. Scott, 33 Vt. 80 (1860), but no such limitation was mentioned in Peist v. Richmond. Disregard

case which gave restitution in excess of the contract rate.[28] The contract called for sale and delivery of 120 tons of merchantable hay at approximately five dollars a ton. After the seller had delivered fifty-two tons and received partial payment therefor, the buyer rejected a shipment of several tons on the ground that the hay was not of merchantable quality. In the seller's action on the common counts it was found that the hay was merchantable and the buyer's rejection was a breach of contract which justified the seller in discontinuing performance under the contract and seeking restitution. The price of hay had gone up since the making of the contract and the seller was given judgment based on the market value of the fifty-two tons which the buyer had received, deducting of course the amount already paid.

In contracts of employment the problem usually arises under a contract calling for a single payment for the services, as in the case of a lawyer who had agreed to settle an estate for $5,000 and was granted recovery of $13,000 when he was discharged after performing five-sixths of the work,[29] or the architect who recovered $1,690 when he was discharged after part performance whereas his agreement to work for fifteen per cent of the construction costs would have meant a payment of only $490 for full performance.[30] Two cases have been found in which a person employed for a term at a fixed weekly or monthly wage was allowed to reopen the whole contract after wrongful discharge and recover the fair value of his work in excess of wages already received. In one case the work was seasonal and the court emphasized the fact that the services were performed during the season of high demand;[31] in the other the hours of work varied slightly from week to week and the court put some emphasis on the fact that the weekly pay was an averaging out of the compensation.[32]

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of the contract price in the quasi contract action can also work to the disadvantage of the plaintiff, as in Clark v. Mayor 4 N.Y. 338 (1850). The trial court had prorated the contract price but this was reversed because the amount was in excess of the market value of the labor and materials furnished by the plaintiff contractor.

[27] Spitalny v. Tanner Constr. Co., 75 Ariz. 192, 254 P.2d 440 (1953); Adams v. Burbank, 103 Cal. 646, 37 Pac. 640 (1894); Smith v. Brockton Preserving Co., 251 App. Div. 102, 296 N.Y. Supp. 281 (1937); Elwood Oil & Gas Co. v. McCoy, 72 Okla. 97, 179 Pac. 2 (1919).

[28] Smith v. Keith & Perry Coal Co., 36 Mo. App. 567 (1889). In Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N.E. 888 (1897), plaintiff agreed to supply coal to defendant at $1.90 a ton and, after he had supplied coal during the fall and winter months when the market price exceeded the contract price, the defendant repudiated the contract. Recovery in quasi-contract was given for the difference between the market price and the contract price, which already had been paid.

[29] *In re* Montgomery, 272 N.Y. 323, 6 N.E.2d 40 (1936).

[30] Knapp v. Gaston Teyssier, 96 Pa. Super. 193 (1929).

[31] Clark v. Manchester, 51 N.H. 594 (1872).

[32] Posner v. Seder, 184 Mass. 331, 68 N.E. 335 (1903).

There is substantial dissent from the position exemplified by *Boomer v. Muir*, which usually takes the form of limiting plaintiff to a proportionate share of the contract price.[33] In construction contracts this generally means prorating the contract price by valuing the work done in relation to the whole work called for by the contract.[34] In contracts

[33] Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548 (1891) (architect discharged after part performance was entitled to recover "such a proportion of the contract price as the work done bore to the whole work embraced by the terms of the agreement"). This was followed in Bailey v. Furleigh, 121 Wash. 207, 208 Pac. 1091 (1922), involving a contract to clear land. *Accord,* Folliott v. Hunt, 21 Ill. 654 (1859) (also a contract for services).

[34] Keeler v. Clifford, 165 Ill. 544, 46 N.E. 248 (1897) (road construction); Chicago v. Sexton, 115 Ill. 230, 2 N.E. 263 (1885) (iron work on a building); Dobbins v. Higgins, 78 Ill. 440 (1875); Rice v. Partello, 88 Ill. App. 52 (1899); Chicago Training School v. Davis, 64 Ill. App. 503 (1896); Clark v. Scanlon, 33 Ill. App. 48 (1888). The course of decision had been uniform in Illinois until broken by Baker v. Stover, 213 Ill. App. 571 (1919), which held that a builder who had been wrongfully discharged after partial construction of a house could recover in *quantum meruit* without regard to the contract price. Cleveland C.C. & St. L. R.R. v. Moore, 170 Ind. 328, 82 N.E. 52 (1907); Mug v. Ostendorf, 49 Ind. App. 71, 96 N.E. 780 (1911) (services). The position in Indiana is not wholly clear in view of French v. Cunningham, 149 Ind. 632, 49 N.E. 797 (1898), a suit by a discharged lawyer for the value of his services, in which the court said that recovery could not exceed the contract price and then upheld a judgment based on reasonable value with no further consideration of this limitation. It is not altogether clear whether the court meant to limit recovery to a pro rata share of the price or whether it was thinking of the *whole* price as a limit on recovery for part performance. Western v. Sharp, 53 Ky. (14 B. Mon.) 144 (1853) (construction of house); Kehoe v. Rutherford, 56 N.J.L. 23, 27 Atl. 912 (1893). Doolittle v. McCullough, 12 Ohio St. 360 (1861), is a leading case limiting plaintiff to the terms of the contract, there to a rate of eleven cents a cubic yard for material placed during the construction of a railway roadbed. The present authority of this case in Ohio is problematical. In Wellston Coal Co. v. Franklin Paper Co., *supra* note 28, the court in giving restitution in excess of the contract rate emphasized that there were seasonal variations in the price of coal and that defendant had repudiated when the "dull season" was reached. It seemed to suggest that restitution could exceed the contract price or rate except when the unperformed part of the contract would have been at a loss to the plaintiff measured by reference to the contract price or rate. This was pursued in Cleveland Co. v. Standard Amusement Co., 103 Ohio St. 382, 133 N.E. 615 (1921), where the court allowed recovery for newspaper advertising at the usual rate which was nearly double the rate agreed upon in a contract by the defendant to advertise in plaintiff's paper for a year, defendant having repudiated the agreement after about six months. The court said that it was competent for defendant to show that "the plaintiff would necessarily have lost more by performing the contract at the agreed price than by not performing." Presumably it referred to a showing that plaintiff's costs would have exceeded revenue for the balance of the contract term. It does not state what the consequences of such proof would be—it is difficult to see why it should result in holding plaintiff to the contract price. In Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co., 151 Ohio St. 522, 86 N.E.2d 782 (1949), the court stated without qualification that "plaintiff may elect to rescind the contract and sue for the value of the performance rendered." Ohio seems to be headed toward a repudiation of the *Doolittle* case.

specifying a rate of payment for units of performance, as for a month's work or for a ton of coal, it means limiting plaintiff's recovery to this contract rate.[35] At least one court has suggested that for part performance there may not be recovery in excess of the whole contract price,[36] whereas exactly this result has been reached in several cases following the prevailing view.[37]

A reason frequently advanced for the position taken in *Boomer v. Muir* is that the "defendant cannot refuse to abide by the contract and at the same time claim its protection when the other party is not in default."[38] This has obvious appeal but, since it is broad enough to cover the *Armstrong Rubber* case as well as the cases of full performance, it seems necessary to take a closer look. A closely related reason sometimes given stems from the concept of "rescission." Thus, the California court in *Boomer v. Muir* suggested that its decision followed from the fact that plaintiff had rescinded the contract for defendant's breach: "A rescinded contract ceases to exist for all purposes. How then can it be looked to for one purpose, the purpose of fixing the amount of recovery?"

The word rescission has been a source of many difficulties in the law of restitution. Some of them, though by no means all, seem to stem from the notion that a business transaction entered into by the parties has a physical reality that must be destroyed in order for the plaintiff to obtain restitution, and that plaintiff works this destruction by rescinding. The contract "ceases to exist." This of course is merely one of the many instances in which confusion is created by the analysis of a legal problem through the use of words descriptive of physical reality. So long as we can keep in mind that the words are only metaphorical perhaps no harm occurs, but this is very hard to do. The rescinded contract in *Boomer v. Muir* did not cease to exist for legal purposes. It was an event that formed part of the builder's case for restitution. He would not recover the value of a benefit conferred on the defendant merely by showing the benefit. He must also establish that the retention of the benefit was unjust and there he based his case on the fact that the benefit was given in the performance of a contract with the defendant.

A number of problems may arise when the defendant breaches his

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[35] In Farnum v. Kennebec Water Dist., 170 F.2d 173 (1st Cir. 1909), the court seems to have held that a contractor could not recover in excess of the agreed progress payments, a result not usually reached without a finding of "divisibility."

[36] Wuchter v. Fitzgerald, 83 Ore. 672, 163 Pac. 819 (1917); see also, Chamberlain v. Scott, 31 Vt. 80 (1860).

[37] *Supra* notes 29 and 30; see also, Boomer v. Muir, 24 P.2d 570 (Cal. App. 1933); Smith v. Brockton Preserving Co., 251 App. Div. 102, 296 N.Y. Supp. 281 (1937).

[38] WILLISTON, CONTRACTS § 1485 (rev. ed. 1937); KEENER, QUASI-CONTRACTS 299 (1893); Philadelphia v. Tripple, 230 Pa. 480, 487-88, 79 Atl. 703, 705-06 (1911).

contract after part performance by plaintiff. One is whether the breach is important enough in the circumstances to excuse further performance by plaintiff; another is whether the plaintiff, in addition, is entitled to restitution for benefits conferred, in specie or in value; and if restitution is to be in value the question may arise as to whether the terms of the contract set a limit on that value. The restitution problems can be worked out without even using the word rescission, nor does the word contribute anything useful to their solution. It will be better in this instance to hold the word to its minimum meaning: the parties have entered into a bargain transaction involving an exchange of values; because of defendant's breach it may be decided that plaintiff is entitled to a restitution of the values received by the defendant; if he obtains such restitution justice requires that he make restitution of the values he received; the ultimate result is a re-exchange of the values originally exchanged (often in the form of their money equivalents), and this may properly be called rescission.

Rejection of the rescission explanation does not mean that the solution of the problem is to be reached without regard to legal theory. On the contrary, the strength of plaintiff's case lies in a sense in the theory of his action. The theory is unjust enrichment and the central facts are (a) the benefit, (b) conferred at defendant's request in the performance of a contract with him, and (c) defendant's breach. It seems quite acceptable to describe the action, as Corbin[39] and other writers have done, as a remedy for breach of contract, so long as we do not jump from this to the conclusion that relief is to be measured as nearly as possible by the terms of the contract, as it is in the damage action or the suit for specific performance.[40] When it is realized that a plaintiff who has conferred benefits pursuant to agreement may be able to obtain restitution without defendant's breach, as where defendant's promise is unenforceable under the statute of frauds, or even when the plaintiff himself has breached the contract, it should become apparent that Corbin's description of the action is not the only way to look at it.[41] On the whole we may come closer to a satisfactory solution of the problem by regarding the action simply as one for restitution for unjust enrichment, with the defendant's breach important because of its bearing on the justice of the plaintiff's claim to recover the market value of the benefit. In restitution as a whole, market value is the usual measure of benefit where value restitution is given. This being true, it seems proper to ask for reasons justifying a departure from the usual measure of

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[39] CORBIN, CONTRACTS §§ 1102, 1104 (1951).

[40] It should be understood that Corbin does *not* jump to this conclusion. He concludes rather that plaintiff's recovery should not be limited by the contract price. *Id.* at § 1113. An example of the confusion is Doolittle v. McCullough, 12 Ohio St. 360, 368 (1861).

[41] See note 2 *supra*.

benefit, when it is sought to limit plaintiff's recovery by the price term of a contract that defendant has breached.

In *Kehoe v. Rutherford* plaintiff agreed to grade a street for a distance of 4,220 lineal feet at a price of sixty-five cents a foot, or a total price of $2,743. After he had done about three-fifths of the work he was directed by the defendant to stop, whereupon he sued in *quantum meruit.* The "fair cost" of the work he had done was $3,153 and of that remaining to be done $1,891. He had been paid $1,850, which meant that it would have cost him $1,891 to complete the contract and earn the balance of $893 that would have been due on such completion. The court held that he was entitled to recover only a proportionate part of the contract price and therefore denied relief since he had already received more than this.[42]

Among the arguments advanced for decisions like this there is one on which little time need be spent; that is, the argument that since the work was done pursuant to a contract "the law has respect to the actual contract, and will not presume or imply a different one; the object of courts being to enforce, not to make or change the contracts of parties."[43] This is an old error that keeps cropping up in quasi-contract, though with less frequency as the theory of the action comes to be better understood. Nonetheless, there is still the possibility that decision on important substantive questions will be influenced or controlled by the words first used in pleadings some three centuries ago which were not meant to state the facts of a case but only to bring the case within the formal structure of the writ of assumpsit.

Most of the cases limiting plaintiff by the terms of the contract are relatively old, as age is measured in this branch of the law, and some of them fail to discriminate between breach by defendant and by plaintiff, citing cases of the latter sort as authority for their conclusion.[44] Some courts see no difference between part performance and full performance by plaintiff, and, since it is everywhere agreed that plaintiff cannot obtain restitution after he has fully performed and the defendant's obligation is to pay money, they conclude that his recovery for part performance

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[42] 56 N.J.L. 23, 27 Atl. 912 (1893). A dictum in Stephen v. Camden & Philadelphia Soap Co., 75 N.J.L. 648, 68 Atl. 69 (1907), stated explicitly that the contract "could not be interposed by defendant so as to prevent a recovery for the reasonable worth of [plaintiff's] services," but this was later repudiated by the New Jersey court and the rule of Kehoe v. Rutherford was applied in Kitchell v. Crossley, 90 N.J.L. 574, 101 Atl. 179 (1917).

[43] Doolittle v. McCullough, 12 Ohio St. 360, 366 (1861). *Accord,* Noyes v. Pugin, 2 Wash. 653, 658 (1891).

[44] Keeler v. Clifford, 165 Ill. 544, 548, 46 N.E. 248, 249 (1897); Johnston v. Star Bucket Pump Co., 274 Mo. 414, 478, 202 S.W. 1143, 1165 (1918), where the dissenting judge said: "as I maintain, the law is the same as to recovery of damages for breach of a building contract, through the medium of an action of *quantum meruit,* regardless of whether the owner or contractor committed the breach."

also is regulated by the contract price.[45] If there is any justification for the refusal of restitution after full performance it lies in the fact that plaintiff has agreed to accept a certain sum for the very work on which he bases his action. But he has *not* agreed to accept a proportionate part of the price or a unit rate for the part performance, and it is undiscriminating to lump the two situations together.

The principal reason given for the decision in *Kehoe v. Rutherford* was that plaintiff "is to lose nothing, but, on the other hand, he is to gain nothing, by the breach of the contract, except as the abrogation of a losing bargain may save him from additional loss." Clearly the repudiation of the contract by the defendant was a stroke of good fortune for plaintiff, since otherwise he would have had to spend $998 more than the unpaid balance to which he would have become entitled on completion of the contract. In a sense this was a gain through defendant's breach, but only in the sense that he averted a *potential* loss, one that would have become actual on full performance. With respect to the work already done it seems to me that restitution free of the contract price also permits plaintiff to avoid only a *potential* loss.

A danger lurking in the analysis of the problem is that it is difficult to escape circular reasoning, whichever result one tries to support. According to the view expressed in *Kehoe v. Rutherford*, if plaintiff were to recover free of the contract price he would gain by the defendant's breach. This gain was derived from the fact that he had spent $3,153 for approximately three-fifths of the work, an expenditure of $1,507 more than a proportionate part of the contract price. The assertion of a gain rests therefore on the assumption that plaintiff is entitled to only three-fifths of the contract price, but that is the question up for decision. On the other side, the assertion that this $1,507 is only a potential loss also can be said to beg the question. There seems to be no profit in further exploration along these lines unless we can break out of the circle.

The $1,507 represents the prorated part of the gain defendant would have realized, by market standards, had the contract been fully performed. A basic presupposition in the law of contract gives him the right to the benefit of his bargain even though it may prove to be a hard bargain from the other party's point of view. The bargain is one entire contract however, and there is nothing in its *terms* which entitles one party to gains on an accrual basis. It cannot therefore be said that recovery free of the contract price will deprive defendant of a gain (with commensurate "gain" to plaintiff) to which he is entitled by the terms of the contract. Insofar as the matter can be worked out by reference to the terms of the bargain, they seem to favor the plaintiff's position.

In cases where the problem of *Kehoe v. Rutherford* arises there is

[45] Kehoe v. Rutherford, *supra* note 42; Noyes v. Pugin, 2 Wash. 653 (1891).

apt to be an element of hardship in holding plaintiff to the contract, which would have been felt even though defendant had not breached. Plaintiff's costs on the whole contract in that case would have been nearly eighty per cent more than the contract price for reasons that are unexplained there and frequently are left unexplained in the decisions. It could have been due to original miscalculation, inexperience, or bad judgment; to pressures of one sort or another, perhaps economic, which drove him into the agreement (he might, *e.g.*, lose less under the contract than by letting crew and equipment stand idle); or to unforeseen difficulties in performance or unforeseen changes occurring after the contract was signed.[46] In some situations there would be a judicial inclination to search for means of relief, through mistake, duress or on some other ground. In the cases under consideration I get the impression from reading them as a whole that the triers of the fact, whether judge or jury, sometimes use their extensive power of decision on where the major fault lies as a means of giving such relief. The technique can be fully exploited, of course, only if the contract price is not a limit on recovery when the finding is in plaintiff's favor.

One of the best statements in support of the result in *Kehoe v. Rutherford* appears in an early Kentucky case in which a carpenter was suing for the value of his part performance in building a house, after full performance had been prevented by the defendant.[47] If the suit was brought "upon the special agreement," the court said, recovery "must of course be limited by its terms" (a general acceptance of Judge Hand's position in the *Armstrong Rubber* case); and it was thought that the carpenter should "not have the option, by a mere variation in the form of his action, or in the statement of his claim, to determine whether he shall be entitled to recover more for the same work done under the same contract, and established by the same evidence."

There is obvious merit to the suggestion that the amount of recovery should not depend any more than necessary on the form or theory of action chosen, but this could just as well lead to the conclusion that plaintiff should recover the value of the benefit even though he sues for

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[46] A good example of unforeseen difficulties existing at the time the contract was made is United States v. Zara Contr. Co., 146 F.2d 606 (2d Cir. 1944). As to changes occurring after the contract is made, it is not helpful to try to generalize very broadly but certainly there are situations in which they work against relief from the terms of the contract. For example, where a purchaser of land under an executory contract seeks to rescind and obtain restitution of part payments on the price because of defects in vendor's title, the fact that there has been a general depreciation in land values has sometimes influenced courts to deny the relief sought in the belief that the purchaser should not too easily "escape the terms of what now appears to have been a bad bargain." Bonninghausen v. Hall, 267 Mich. 347, 255 N.W. 205 (1934).

[47] Western v. Sharp, 53 Ky. (14 B. Mon.) 144 (1853).

"damages."[48] The Kentucky court assumed a certain primacy in the action for damages, whereas, as Fuller has pointed out, the restitution interest presents a stronger case for protection than the reliance and expectation interests on which attention is focused in the damage action.[49] A similar problem of relative values arises in connection with restitution of benefits obtained through tort, where gains may in general be recovered even though they exceed loss to the injured party. One of the strongest cases for relief is presented when the wrongdoer has profited by his wrong at the expense of the injured party, and short work will usually be made of the argument that the injured party should not by "varying the statement of his claim" recover more than his loss caused by the tort.

The most interesting argument advanced by the Kentucky court rests on the circumstance that locating the essential breach after a breakdown in the performance of a contract is often a difficult question of fact and perhaps law. Similarly, the same uncertainties may face each party in deciding whether he is entitled to discontinue performance or otherwise put an end to the contract. "Considering the uncertainty of the questions which may often arise with respect to performance by one or the other," the court said, "it might be unjust as well as impolitic to increase the motives which the undertaker might have for abandoning a job for which he was to receive a compensation below the ordinary rate." There are instances in which uncertainty is a factor that should enter into the formulation of legal doctrine. It should here if the plaintiff is found to be in default, for it weighs heavily in favor of granting him a restitutionary remedy despite his default. In fixing the measure of recovery, however, it is difficult to see how any significant weight can be given to this element, whichever party is in default (though I would not suggest that it should always be ruled out completely). It is true that, under the view allowing restitution without regard to the contract price, sharp differences of result may turn on the resolution of the uncertainty. But the argument cuts both ways. There are strong claims in favor of (a) allowing restitution of benefits conferred on another at his request and (b) of holding parties to their contracts; which claim is paramount should depend on a finding as to which party bears the major fault for

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[48] In Bush v. Canfield, *supra* note 3, the court ignored the form of action in allowing recovery of the payment made by a buyer on goods never delivered. The action was not in indebitatus assumpsit but, as Judge Hosmer in dissenting observed, "on an express contract to recover damages for its breach." He objected to the allowance of restitution of the full amount paid in such an action, though he recognized that this would have been proper had plaintiff rescinded and sued for money had and received. The majority of the court concluded that plaintiff was entitled to recover his full $5,000 payment regardless of the theory of his action.

[49] Fuller and Perdue, *Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936).

the situation that has arisen. Were the case reversed, with plaintiff having the advantage of a profitable contract, his measure of recovery for part performance would depend on the same fact question. If the defendant were found to be in default the plaintiff could recover his expected profit, but if the fault lay with the plaintiff, even if restitution were available to him, and it might not be, the defendant would be entitled to limit recovery to the value of the benefit he received.

Divisibility

As mentioned earlier, if plaintiff has fully performed a contract he is universally limited to recovery of the contract price where it is payable in money. In actions based on part performance this may give rise to the question whether the part performance is of some divisible or separable portion of the contract which should be treated as subject to the rule governing full performance. Construction contracts normally call for periodic payments of the price measured by the amount of work done during the period. Almost without exception such contracts are treated as entire, so that the availability of restitution and the measure of benefit are determined by the rules applicable to part performance. This is true even though the whole contract price is based on a price for each unit of work done and the units are capable of precise measurement, *e.g.*, so much for each running foot of street graded or each yard of earth excavated.[50] It is evident enough that this recognizes the realities of the business arrangement—it is not likely that the contractor in *Kehoe v. Rutherford* would have arranged his working schedules and marshaled his labor force and equipment at the site to grade one hundred feet of street at the unit price agreed on for more than four thousand feet.

The chief potential source of difficulty on this problem is section 351 of the *Restatement of Contracts*, which, without using the word "divisible," says in effect that the rules applicable to full performance will govern part performance if for that performance "a definite part of the consideration was apportioned in the contract as its equivalent in exchange." There is room for wide difference in the application of this statement since application rests on an interpretation of the contract as well as of the statement itself. In *Boomer v. Muir*,[51] the contract for construction of a dam provided for monthly payments based on the amount of work done the preceding month according to an agreed schedule of unit prices. The court thought that these monthly payments came within the meaning of section 351 but then refused to follow it.

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[50] An example is Adams v. Burbank, 103 Cal. 646, 37 Pac. 640 (1894), where plaintiff contracted for the brick work on a building at $9.75 "per thousand, as per wall measure of twenty-one bricks to the foot." The contract was held entire and the price was not controlling on the measure of recovery. Similarly, in Bailey v. Marden, 193 Mass. 277, 79 N.E. 257 (1906), where the contract was to haul wood at $1.00 a cord.

[51] *Supra* note 24.

Very likely the court misconstrued the section (or at least construed it differently than the Restaters intended),[52] but the point at the moment is the very real difficulty involved in applying the provision. Take a case that comes about as close as we can get to any useful concept of divisibility: the agreement by a painter to paint ten houses "for $70 each—$700."[53] When the owner repudiated after four houses had been painted the painter sought to recover the reasonable value of his work, but the court limited him to the contract rate for each house. In trying to determine whether the contract apportioned seventy dollars as the "equivalent in exchange" for the painting of one house, the contract should be construed as a whole, and when this is done it would seem that the agreed equivalence was reached only in reference to full performance. Common experience supports the strength of the painter's offer to prove "that it was worth more to paint each of the four houses, than it would have been if the whole ten had been furnished."

Since the reasoning is by analogy from the rules governing full performance, divisibility should be found for the purpose at hand only if it is decided that the contract should be treated as the equivalent of a series of separate contracts. It will be a rare situation in which this is a proper construction. It would not be acceptable, I should think, to give this construction to an employment contract for a year at a monthly salary of $500. This does not mean that if the employee has been paid for ten months' work and then wrongfully discharged he should necessarily be able to recover the value of his services free of the contract price. The determination of such a question should not turn on an attempt to bring into operation the full performance rules through manipulation of a divisibility concept. Instead it should be resolved by considering the importance of the breach in the context in which it occurs.

When a question arises in the law of contract as to whether defendant's breach is "substantial" or "essential" so as to permanently excuse plaintiff from further performance and allow recovery of damages on this basis, there is no mathematical formula by which to measure the question of substantiality. The nature and extent of the breach must be judged in the whole context in an attempt to achieve substantial justice. The approach should be the same when plaintiff seeks restitution for defendant's breach. A breach which is significant enough to warrant plaintiff's putting an end to the contract is not necessarily enough to open up restitutionary remedies. In the one-year employment case, a refusal to pay the $500 salary due for the eleventh month would be reason enough for the employee to leave the job but it does not follow that it

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[52] This is indicated by Illustration 4 to section 351.

[53] Dibol & Plank v. Minot, 9 Iowa 403 (1859). Another case in which the contract price in a building contract was held decisive on a theory of divisibility is Rodemer v. Gonder, Hazelhurst & Co., 9 Gill (Md.) 288 (1850).

should suffice to make restitution available for the value of the eleven months of service, particularly if the employee has been paid the agreed monthly salary for ten months. There is no proper escape from the question: In the whole circumstances do considerations of fairness and convenience favor the allowance of recovery to the extent of the benefit received by defendant even though its value exceeds the contract price or rate? An answer to the question should take into account, *inter alia*, the nature and extent of the breach, the extent to which plaintiff has performed the contract, and the likelihood that parties in such a situation would regard payments made as a final settlement for that part of the performance. Without resort to any fixed idea of divisibility, the fact of payment or payments for part performance, perhaps extending over a long period, works against restitution. To use a more extreme example of the employment contract: Suppose it had been a ten-year contract, the employee had been paid his $500 a month salary for nine years and ten months and was then wrongfully discharged; is this a sufficient breach to lead to the conclusion that the employee can recover the value of his work for the entire 118 months of service, unlimited by the contract price? The policies favoring security and finality of transactions should be given their appropriate weight and doubtless would lead to the conclusion that the employee is remitted to his action on the contract.[54]

Similarly, this is a problem that should be faced in a case like *Boomer v. Muir* where there was no serious issue of divisibility. Plaintiff spent eighteen months in constructing a large dam and quit the job when it was nearing completion because of defendant's failure to furnish materials as they were needed. It was held that defendant's breach not only justified plaintiff in putting an end to the contract but also opened up recovery in quasi-contract for the value of plaintiff's entire performance free of the contract price. The court seemed to take it for granted that the second conclusion followed from the first, but the thesis here is that it does not. The plaintiff was clearly entitled to quit the job and recover as damages his increased costs due to defendant's breach,[55] but the availability of restitution was a much more serious matter and should have been judged by reference to whatever considerations of fairness could be brought to bear on the problem.

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[54] In Forbes v. Appleyard, 181 Mass. 354, 359, 63 N.E. 894, 895 (1902), Holmes expressed the opinion that in spite of "the entirety of the contract at the outset" there might be instances in which "performance and payment were so far set against each other as equivalent that the past could not be disturbed." Keener surely carried a similar idea too far when he approved the decision in Doolittle v. McCullough, *supra* note 34, on the ground that the builder had been paid at the unit rate fixed in a construction contract. KEENER, QUASI-CONTRACTS 312-13 (1893).

[55] Rather, it seems clear to me that he *should* be able to recover the increased costs as damages. Whether he could depends on the acceptance of and scope given to Judge Hand's decision in the *Armstrong Rubber* case, *supra* note 6.

THE RELIANCE INTEREST AND THE MEANING OF BENEFIT

If the position taken in the *Armstrong Rubber* case[56] is accepted, the meaning of benefit for purposes of restitution will sometimes become a central problem. That is, where there is an expenditure in reliance which is not treated as a benefit to the defendant, recovery for the expenditure can be reduced or wiped out by a showing that plaintiff would have lost on the contract; but this will not be true if the expenditure produces a benefit to defendant for which restitution will be given. Clearly the expenditure in *Armstrong Rubber* was of no benefit to the seller of the machinery, since it had nothing to do with the buyer's performance of the contract but pertained to his use of the machinery after the contract was completed. An expenditure in part performance, however, is generally regarded in modern cases as a benefit for purposes of the restitutionary remedies. Though it cannot be said that the attitude is uniform, the tendency of the cases is to place no emphasis on whether the defendant is better off, in an economic sense, by virtue of plaintiff's part performance. An architect who has prepared plans for a structure, under a contract which measures compensation according to the cost of the structure, can recover in quasi-contract the reasonable value of his services after defendant has repudiated, even though the plans are of no use to the defendant[57] or even though they have not reached the stage that there is anything useful on paper to turn over to defendant.[58] It is enough that plaintiff has rendered a performance called for in the terms of the bargain.

At times the plaintiff's expenditures in reliance will be connected with performance but not regarded as a part of the performance called for by the contract. The distinction is often a difficult one to make, but if the expenditures are only preparatory to performance they are usually excluded from the idea of benefit. Under an agreement to build a special piece of machinery for defendant, plaintiff had made some of the parts when defendant repudiated the deal. The court held that quasi-contract would not lie, construing the contract as one for the sale of the machinery after it was built so that the work done by plaintiff was "upon his own materials . . . for the purpose of effecting the sale."[59] If the contract were regarded as one to build a machine for defendant (as it should have been), it would be proper to allow recovery in quasi-contract for the value of the labor and materials. In many instances, of course, it will make little difference whether quasi-contract is available since plaintiff can obtain compensation for his expenditures in a damage action.

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[56] *Supra* note 6.

[57] Sterling v. Mitchell, 54 A.2d 353 (D.C. Munic. Ct. 1947); Parrish v. Tahtaras, 7 Utah 2d 87, 318 P.2d 642 (1957).

[58] Polak v. Cramer, 116 Conn. 688, 166 Atl. 396 (1933); see also, Planche v. Colburn, 8 Bing. 14, 131 Eng. Rep. 305 (1831).

[59] Hosmer v. Wilson, 7 Mich. 294 (1859).

Suppose, however, that the contract price for the machine was $10,000, that plaintiff had spent $4,000 before defendant repudiated, and would have had to spend another $8,000 in order to complete the machine. If plaintiff's expenditures were in part performance of the contract he will be able by most authority to recover $4,000 (assuming for convenience of discussion that the value of the part performance is equated to costs), but if he is limited to the damage remedy Judge Hand apparently would allow recovery of only $2,000.[60]

It should be observed that this limitation on recovery for reliance losses goes further than *Kehoe v. Rutherford.* If restitution were available, the formula of that case would produce a judgment for one-third of the contract price. The value of plaintiff's labor and materials would be reduced by in effect allowing the defendant one-third of his expected profit on the whole bargain. In an action based on reliance losses, however, the plaintiff's recovery is reduced, according to Judge Hand, by the *entire* expected profit to the contract-breaker. Thus the meaning of benefit remains critical in the case of a losing contract whichever measure of recovery is adopted in the restitution action.

This is not the place to explore the merits of the rule announced by Judge Hand as it pertains to reliance losses.[61] The restitution problem in any event is vitally different. The question in the *Armstrong Rubber* case was simply which party should bear a loss. If recovery was reduced because of plaintiff's potential loss on the contract this left a portion of the actual loss on the plaintiff and correspondingly reduced the amount of the loss to be borne by the defendant. But in any case where the contract-breaker has obtained a benefit, any lessening of recovery because plaintiff had a losing contract simply gives to one who breaches his contract a part of the expected profit thereon. The situation in *Bush v. Canfield* still serves to point up this central fact.

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[60] The discussion ignores the scrap value of the parts, or any other value they might have, which should in any event be charged against the plaintiff.

[61] There is not much satisfactory case law on the subject, but what there is casts serious doubt on Judge Hand's conclusion, at least as applied to a case in which the expenditures in reliance are also in part performance. Recovery of reasonable expenditures as damages, even though plaintiff stood to lose on the whole contract, is sanctioned by a fair reading of United States v. Behan, 110 U.S. 338 (1884), and Knotts v. Clark Constr. Co., 249 Fed. 181 (7th Cir. 1918), *cert. den.* 246 U.S. 666 (1918). It is of course difficult to separate these cases sharply from those in which plaintiff seeks restitution. The difficulty is exemplified by Philadelphia v. Tripple, 230 Pa. 480, 79 Atl. 703 (1911), where the court allowed recovery of plaintiff's expenditures under a losing contract. The opinion of the referee, George Wharton Pepper, never quite explains the theory of decision. In theory, at least, the plaintiff's expenditures would be a reliance loss whereas in a restitution action they would be only evidence of the value of the benefit. A few cases on the point are collected in Annot., 17 A.L.R.2d 1300, 1334 (1951). A good discussion appears in Fuller and Perdue, *The Reliance Interest in Contract Damages,* 46 YALE L.J. 52, 75-80 (1936), but there is need for a fuller exploration of the problem.