SOLVING STATUTE OF FRAUDS PROBLEMS

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A recent survey revealed that out of a group of 500 reported contract cases litigation was attributable to the fact of no writings in forty-six cases.[1] Apparently there was no competent legal advice at the formation stage in any of these cases. The statute of frauds[2] was used in disposing of nearly eight per cent of the 500 cases.

Unfortunately, no statistics are given which indicate whether the statute prevented a recovery or not. Furthermore, we have no way of knowing how many potential plaintiffs were denied relief because the attorneys they consulted were not aware of the myriad remedies available in a statute of frauds situation. Many of the court opinions dealing with this problem display confusion rampant among both the bench and bar. As long as the layman continues to "play lawyer" in the formation of contracts, he will cry to the nearest attorney for salvation from the rigors of the statute of frauds. There is much bread and butter to be earned by the attorney who can obtain the greatest recovery by avoiding the effects of the statute of frauds.

It is hoped that this article can serve the practicing attorney as a check-list of available theories by which a remedy can be obtained. A comprehensive study of all these theories could not be presented in less than a full-length book. Therefore, the article delineates briefly most of the theories likely to be used, and only analyzes in detail certain aspects that are unique. No attempt has been made to analyze the law of any single jurisdiction. Thus, conclusions drawn herein are of little practical value until checked against prior decisions in particular jurisdictions.[3]

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[1] Shepherd, *Contracts in a Prosperity Year,* 6 STAN. L. REV. 208 (1954).

[2] Unless otherwise stated, throughout the article it is assumed that a statute of frauds comparable to that of Ohio is in effect: "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage . . . of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in . . . or concerning them, . . . *or* upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing . . . and signed by the party to be charged therewith . . . or some other person thereunto by him or her lawfully authorized." OHIO REV. CODE § 1335.05 (1953).

[3] Student articles surveying the law of the jurisdiction in which their law school is located are helpful for this purpose. See Note, *Contracts, Specific Performance, Statute of Frauds, Part Performance of Oral Land Contracts,* 27 NEB. L. REV. 417 (1948); *Part Performance, Estoppel, and the California Statute of Frauds,* 3 STAN. L. REV. 281 (1951); *The Doctrine of Part Performance in*

ACTIONS ON THE CONTRACT

An action on the oral promise will often be the plaintiff's best remedy since it will probably place the plaintiff where he planned to be when he made the contract. In other words, through damages or specific performance protection will be accorded not only to the plaintiff's reliance and restitutionary interests, but also to his expectation interest.[4] The correct theory to achieve a recovery on the contract may be "execution," "fraud," "equitable estoppel," "part performance," "promissory estoppel," or "equitable fraud."

Execution

The cases abound with statements to the effect that the statute of frauds only applies to executory contracts and that the rights and obligations of the parties are controlled by the oral but executed contract.[5] This is a clean cut basis for allowing action on the contract. There is no need to talk of fraud prevention, part performance, and so forth. It is primarily a legal issue of whether the obligation being sued upon is within the descriptive language of the statute. The theory is equally applicable in a lawsuit for damages or an equity action for specific performance.

When both of the parties have fully performed, there is little problem. The executed contract is most likely to be used by a defendant to prevent the plaintiff from recovering compensation in addition to that which he received under the contract.[6]

The oft quoted statement that the statute has no application where there has been a full and complete performance by one of the contracting parties[7] is not true in and of itself. It is only when the promise which is protected by the statute has been fully performed that a court may be correct in holding that the contract no longer comes within the description of the statute.[8] This type of holding seems particularly appropriate where the protected promise was one to convey title to

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Ohio, 23 U. CINC. L. REV. 200 (1954); and forthcoming comment on the law of Ohio, OHIO ST. L. J., Autumn, 1959.

[4] For an analysis of these interests see Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 373 (1936).

[5] Stone v. Dennison, 30 Mass. (13 Pick.) 1 (1832); Price v. Felumlee, 60 Ohio App. 34, 19 N.E.2d 290 (1938); Radabaugh v. Lantz, 36 Ohio App. 423, 173 N.E. 308 (1930); Larsen v. Johnson, 78 Wis. 300, 47 N.W. 615 (1890); BROWN, THE STATUTE OF FRAUDS 138 (5th ed. 1895); 37 C.J.S. *Frauds, Statute of* § 235 (1943).

[6] Stone v. Dennison, *supra* note 5; *cf.* Radabaugh v. Lantz, *supra* note 5.

[7] C.J.S., *supra* note 5, at § 251.

[8] Negley v. Jeffers, 28 Ohio St. 90 (1875); Rutledge v. Hoffman, 81 Ohio App. 85, 75 N.E.2d 608 (1947); BROWN, *supra* note 5, at 139. No effort has been made to encompass statutory exceptions in this discussion.

interests in realty and the title has been conveyed.[9] Courts have ignored the reasoning which bottoms these cases when they have held that execution on one side removes the statute from the remaining promise regardless of its nature. However, these cases may be limited to situations where the plaintiff has given up title to realty or personalty.[10] Many cases[11] cited in support of the "execution" idea indicate that they are really decided on estoppel or part performance which will be discussed *infra*.

Broad statements have been made that a contract partly performed on only one side governs the rights of the parties, because it is voluntarily executed. The execution itself purports to be the basis of this statement. However, in practice, this is not true. The two cases cited as support in Law Reports Annotated, 1916 D, page 884, are both actions on the common counts (not on the express oral contract) in which the courts merely held that the contract amount would control as far as the rate of compensation was concerned.[12] Other cases sometimes cited in support allow the defendant to use the oral contract which the plaintiff has breached as a defense in quasi-contract actions.[13] Both of these situations are discussed *infra*. No cases were found in which a plaintiff succeeded in preventing the application of the statute of frauds solely on the ground that it did not apply to a partly executed promise. The plaintiff in this situation must look for some other route to a remedy.

Equitable Fraud

The ensuing discussion points out how the various theories of fraud, equitable estoppel, part performance and promissory estoppel are coalescing into one over-all theory which has been denominated "equitable fraud" for the purposes of this article. First it is necessary to analyze briefly each of the component theories.

1. Fraud

Very shortly after the original statute of frauds was enacted in England, chancery refused to allow the defendant to rely on the statute when he had deliberately tricked the plaintiff. A number of English and American cases held similarly in situations where the defendant

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[9] Bjornstad v. Northern States Power Co., 195 Minn. 439, 263 N.W. 289 (1935); Pettitt v. Cooper, 62 Ohio App. 377, 24 N.E.2d 299 (1939).

[10] Emerson v. Universal Products Co., 35 Del. 277, 162 Atl. 779 (1932); Boyce v. Miller, 15 N.J. Misc. 278, 190 Atl. 845 (1937); *cf.* Crabill v. Marsh, 38 Ohio St. 331 (1882).

[11] Fleming v. Dillon, 370 Ill. 325, 18 N.E.2d 910 (1939); Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146 (1933); Mossholder v. Wiggins, 33 Ohio L. Abs. 50, 36 N.E.2d 989 (1940).

[12] Murphy v. De Haan, 176 Iowa 61, 89 N.W. 100 (1902); Fuller v. Rice, 52 Mich. 435, 18 N.W. 204 (1884).

[13] Kriger v. Leppel, 42 Minn. 6, 43 N.W. 484 (1889); Philbrook v. Belknap, 6 Vt. 383 (1834).

actually intended to deceive the plaintiff.[14] At first it did not matter whether he accomplished his trickery by making merely a future promise or by misrepresenting a present fact.[15] The important facts which had to be shown were *scienter*, a reliance on some action of the defendant, and a harm to the plaintiff if the defendant did not perform his oral promise. It was in these cases that the idea was conceived that it would be fraud upon the injured plaintiff to allow the defendant to defend with the statute of frauds. The rationale for this conclusion was that the defendant's planned deception and trickery would be complete only if he did not have to perform the promise he made, thus injuring the plaintiff. It was often said that the fraud consisted of the repudiation of a contract which had been made with the intent to deceive. Of course, only equity was thought to have the power to relieve against this fraud notwithstanding the statute of frauds. This theory with the *scienter* requirement, but without factual misrepresentation, does not seem to be in use at the present time.

2. Equitable Estoppel

Very much in use today is the old chancery doctrine of equitable estoppel. It has often been used to estop a defendant from relying on the statute of frauds as a defense, and within the last half century it has been used increasingly in actions at law.[16] Thus, it is a boon to the plaintiff who wants money damages for defendant's breach of an oral promise. Traditionally, six elements must be present in order to invoke the protection of equitable estoppel: (1) a misrepresentation of a present fact by the person estopped (2) with knowledge of its falsity and (3) with knowledge that it will be relied on, plus (4) absence of

[14] Pound, *The Progress of the Law,* 33 HARV. L. REV. 929, 937 (1920), attributes all the fraud cases to Mullet v. Halfpenny, Prec. Ch. 404, 24 Eng. Rep. 181 (1699). BROWN, *supra* note 5 at 557-71, analyzes most of these cases, emphasizing at a number of places that an actual intent to deceive was required, *e.g.,* § 448(b). It is most interesting to note that Glass v. Hulbert, 102 Mass. 30 (1869), is extensively quoted. See p. 243 *infra.* It is believed that Pomeroy is referring to the same concepts in his discussion of fraud and a particular equitable doctrine confined to estates in land, 3 POMEROY, EQUITY JURISPRUDENCE §§ 807, 921 (5th ed. 1941).

[15] Pound, *supra* note 14 at 937, indicates that the line between statements of fact and promises was not clearly understood. However, in a very short time courts began efforts to draw the line. See fumbling efforts in Montacute v. Maxwell, 1 P. Wms. 618, 24 Eng. Rep. 541 (1720), referred to by Pound and by BROWN, *supra* note 5, at 558. It is believed that when the distinction was formulated part performance and equitable estoppel fulfilled most of the function that these early fraud cases handled.

[16] Diamond v. Jacquith, 14 Ariz. 119, 125 Pac. 712 (1912); Wolfe v. Wallingford Bank & Trust Co., 122 Conn. 507, 191 Atl. 88 (1937), *rehearing,* 124 Conn. 507, 1 A.2d 146 (1938); Artcraft Specialty Co. v. Realty Co., 40 Ohio App. 125, 178 N.E. 213 (1931); 3 POMEROY, EQUITY JURISPRUDENCE § 802 (5th ed. 1941); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds,* 79 U. PA. REV. 440, 444 n. 14 (1931).

knowledge of falsity by the person who (5) relies on the misrepresentation causing (6) an unjust loss to him if the contract in connection with which the misrepresentation was made is not enforced. Unlike the old fraud cases above it does not require any *scienter* or intent to deceive.[17] However, the first element, the misrepresented fact, is the source of much trouble and is often most difficult to supply. For the plaintiff who can provide all these elements equitable estoppel is a good way to recover on a profitable oral contract. The plaintiff who cannot do so must search for another theory.

3. Part Performance

It will suffice to point out the probable origins and main requirements of the part performance doctrine so that it can be seen as a factor in the development of "equitable fraud". Its exact origins may well have been connected with livery of seisin so that putting the purchaser in possession was thought to accomplish the conveyance and make the statute of frauds inapplicable.[18] On the other hand, it may have originated directly from the concepts applied in the fraud cases or from ideas of equitable estoppel.[19] The important point is that these fraud concepts were intertwined with ideas about possession of realty, thereby creating a new theory or basis for avoiding the statute of frauds. This is the theory that Pomeroy calls "equitable fraud,"[20] but is more widely known simply as the doctrine of "part performance". By twisting the fraud concept slightly a new definition of fraud was formulated: the fraud consists of the attempt to take advantage of that which has been done in performance of an agreement while repudiating its obligations under cover of the statute of frauds.[21] It is important to note that this doctrine required neither the element of intent to deceive, which was necessary for the fraud theory, or the misrepresented fact which was essential for the estoppel theory. Instead it had basic limitations of its own. The primary ones were that it usually applied only to realty and required possession and/or improvements by the plaintiff. Some courts stated this limitation as a requirement that the plaintiff must have done

[17] Hurst v. Thomas, 265 Ala. 398, 91 So. 2d 692 (1956); Ozier v. Haines, 411 Ill. 160, 103 N.E.2d 485 (1952); 19 AM. JUR. *Estoppel* §§ 33-151 (1939); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds, supra* note 16, at 449. Of course, an intent to deceive in addition to these other factors would be actual fraud, a firm basis for estoppel.

[18] Pound, *supra* note 14, at 939, 940.

[19] See discussion in Annot., 75 A.L.R. 651 (1931), and Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds, supra* note 16, at 447.

[20] 4 POMEROY, EQUITY JURISPRUDENCE § 1409 (5th ed. 1941); Pound, *supra* note 14, at 943. Pomeroy referred only to part performance cases when he employed this expression. The words have been given a much broader application by the courts and are so used in this article.

[21] Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274, 14 Johns. 15 (N.Y. 1814); Caton v. Caton, 1 Ch. L.R. 137, L.R. 2 H.L. 127 (Eng. 1866). See also, Annot., 75 A.L.R. 650 (1931).

acts in execution of the contract which were "referable" solely to a contract. Even though this may have been only an attempt to assure that fraud existed, the "referable acts" test formed a new rationale for the part performance doctrine, *i.e.*, that the existence of referable acts eliminates the possibility of the fraud which the statute of frauds was designed to prevent; therefore, there is no need to apply the statute.[22] The fraud and reference tests have led to the increasingly complex variety of acts which do or do not suffice as part performance. The abundance of material dealing with the requirements of part performance renders any further discussion here unwarranted.[23] The significance for the practicing attorney is that, if his case fits within the rigid requirements for the performed act, he has no worries about *scienter* or misrepresented facts. However, he is limited to an action in equity,[24] and being in equity he must show that there is no adequate remedy at law.[25]

4. Promissory Estoppel

A final doctrine, which is recent so far as the descriptive term appended to it is concerned, is promissory estoppel. It is utilized by the name of promissory estoppel primarily as a substitute for the requirement of consideration essential to the existence of a contract. The requirements

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[22] Hamilton v. Traub, 29 Del. Ch. 475, 51 A.2d 581 (1947); Burke v. Fine, 236 Minn. 52, 51 N.W.2d 818 (1952); Kufta v. Hughson, 46 N.J. Super. 222, 134 A.2d 463 (1957); Hughes v. Oberholtzer, 162 Ohio St. 330, 123 N.E.2d 393 (1954); Wilbur v. Paine, 1 Ohio 251 (1824); see also, Note, *Contracts, Specific Performance, Statute of Frauds, Part Performance of Oral Land Contracts, supra* note 3.

[23] Complete candor would compel substitution of "impossible" for the word "unwarranted." The law concerning part performance in any jurisdiction is in such disarray that it cannot be utilized intelligently *and* economically. Annot., 101 A.L.R. 923 (1936) was the last attempt to annotate this subject. Finding a specific precedent similar to the case at hand through use of a local or general digest is the practical, if possible, solution.

[24] Evans v. Mason, 82 Ariz. 40, 308 P.2d 245 (1957); Wolfe v. Wallingford Bank & Trust Co., *supra* note 16; annot., 59 A.L.R. 1305 (1929); *But see,* dictum in Hughes v. Oberholtzer, *supra* note 22.

[25] The same facts which establish reliance and loss to meet the "fraud" or "reference" tests often establish the inadequacy of the legal remedy. Thus, the courts tend to eliminate a separate discussion of each of these requisites for relief. The courts use the adequacy of the legal remedy extensively in order to deny specific performance relief in suits against a decedent's estate where personal services (usually of a domestic nature) in return for an alleged promise to convey or will property are involved. The courts obviously hesitate to give specific performance on the sparse evidence presented and this is the easiest way out. Murdock v. Swanson, 85 Cal. App. 380, 193 P.2d 81 (1948); Grindling v. Rehyl, 149 Mich. 641, 113 N.W. 290 (1907); Snyder v. Warde, 151 Ohio St. 426, 86 N.E.2d 489 (1949). The available legal remedy the courts have in mind is quasi-contract for the value of the services. Specific performance might be decreed if the services were of such a nature that they could not be valued in monetary units. See note 101 *infra.*

for its applications are: (1) a promise by the defendant (2) upon which he knew or should have known the plaintiff would rely, followed by (3) reliance in such a way that the plaintiff would be (4) unjustly injured if the defendant did not perform his promise.[26] Although this doctrine probably originated from equitable estoppel,[27] it differs markedly from that doctrine in that it does not require a misrepresented fact. The lack of *scienter* distinguishes it from the old "fraud" concept. The relatively few factors which are necessary for the application of this doctrine would make it an attractive one to employ as a means of by-passing the statute of frauds. It is very seldom used for this purpose under the name of promissory estoppel.[28]

5. Equitable Fraud

The coalescing of all four of these theories appears to have created a fifth and overriding theory which is rapidly, but rather secretly, expanding and which threatens to make obsolete all the former theories and the statute of frauds to boot! For lack of a better term and because it has already become a word-crutch to the courts, this theory is called "equitable fraud."

In 1869 the Supreme Judicial Court of Massachusetts decided the case of *Glass v. Hulbert*.[29] The plaintiff wanted a deed reformed to include some land which the defendant had misrepresented to be within a parcel which he orally promised to convey to the plaintiff. The court, treating the case as one for specific performance of an oral promise to convey, held, first, that there was no part performance such as would take the case out of the statute of frauds.[30] At the beginning of an analysis of equitable estoppel the court excluded as immaterial the question of whether misrepresentation existed because another element of estoppel was missing which would dispose of the case.[31] In a valiant effort to preserve the force of the statute of frauds the court stated that

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[26] Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927); Fried v. Fisher, 328 Pa. 427, 196 Atl. 39 (1938); WILLISTON, CONTRACTS § 140 (rev. ed. 1938); RESTATEMENT, CONTRACTS §§ 75-84 (1932).

[27] 3 POMEROY, EQUITY JURISPRUDENCE § 808(b) (5th ed. 1941).

[28] One apparent reason is that the rationalization could not be employed. The courts salved their consciences in the "fraud" cases by saying that the defendant was not charged on the contract, but only on the fraud. See Pound, *supra* note 14 at 936, for a discussion of the absurdity of this idea. Since the early promissory estoppel cases rationalized giving relief in the absence of a misrepresented fact by saying that the promise was binding as a contract, if at all, use of the doctrine to by-pass the statute of frauds would have been anomalous. Maddison v. Allerson, L.R. 8 App. Cas. 467 (1883). See note 53 *infra* for cases using promissory estoppel.

[29] 102 Mass. 24 (1869).

[30] *Id.* at 28.

[31] *Id.* at 30.

a defendant would not be estopped from relying on the statute unless there was present "some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement."[32] The holding of the court was that no such change of position had occurred here.[33]

The opinion should have stopped at this point. A very narrow holding in accordance with past views as to estoppel had been made. But the court added to the statement concerning the necessity of a change of position "or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated." Four pages later while striving to distinguish the requirements for rescission of a contract (which were present) from those for estoppel, the court said:

> The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds. . . .[34]

Although other courts may have made statements somewhat similar to this in part performance cases, no court had written such a marvelously quotable passage. At least, no court so well respected had done so in such a long and supposedly well-written opinion, dealing with estoppel.[35] It is very doubtful that the court wished to give impetus to the theory that no misrepresentation or intent to deceive was necessary in

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[32] *Id.* at 31.

[33] *Id.* at 35. The court felt that the plaintiff, having done no more than pay money, had suffered no change of position outside the contract. It is only on this point that later cases refused to follow Glass v. Hulbert. McDonald v. Yungbluth, 46 Fed. 836 (C.C.S.D. Ohio 1891); Beardsley v. Duntley, 69 N.Y. 577 (1877).

[34] Glass v. Hulbert, *supra* note 29, at 35.

[35] For example, the cases which the court cites for support are part performance cases which fumble at expressing the fraud idea. Also, they limit the concept to acts of *performance* or *execution* of the contract. Caton v. Caton, *supra* note 21; Parkhurst v. Van Cortlandt, *supra* note 21. Notice how the Glass v. Hulbert court has blended the reliance ideas of estoppel with the performance ideas of part performance in the language of this passage.

estoppel cases,[36] but that is what this dictum did. More miles of usage have been gleaned from these words than from any other single passage in reference to the statute of frauds. Lawyers and courts who felt the statute was becoming an anachronism,[37] and who were already familiar with the equitable doctrines giving relief when *scienter* or part performance was present (neither of which required a misrepresented fact) now had eminent authority upon which to build the theory of "equitable fraud." Unaware of the import of their words courts have asserted that it would be fraud to use the statute of frauds when the plaintiff had been injured through reliance on the defendant's oral (and supposedly unenforceable) promise.[38] Through the elimination of the necessity for *scienter*, or a misrepresented fact, or particular acts of part performance, the requisites for promissory estoppel became the basis for an estoppel against use of the statute of frauds. They became the basis under the label of "equitable fraud," the ultimate rationale being that equity would not allow the statute of frauds to shield a fraud.

The Equitable Fraud Theory in Practice

The first outward manifestation of equitable fraud ideas which plaintiff's and defendant's attorneys have to face is that of utter confusion. The equitable fraud ideas may have been glorified by characterizing them as a theory—they are developing into a theory—they are little more than a hazy uncomfortable feeling which frequently controls decisions. Consequently, many decisions to estop the defendant place no label upon the rationale for so holding; others designate it "equitable estoppel" or "part performance" in the absence of some of the elements of those theories; once in a great while the promissory estoppel flag is waved. There are jurisdictions where the courts do not follow one or more of these doctrines; or which require all of the elements of one

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[36] In addition to the fact that the court carefully excluded consideration of this point, it uses the words "fraud" and "deceit" throughout the opinion. Also, a genuine concern for the enforcement of the statute of frauds was evidenced. At page 38 the court comments: "Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernable. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead, if taken as the guide to judicial decrees." That the court was concerned only with establishing firmly the necessity of a change of position *in addition to* a misrepresentation is indicated by phrasing of this type at page 39: "It is not that deceit, misrepresentation or fraud, *of itself*, entitles a party to an equitable remedy. . . ."

[37] See Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, *supra* note 16, at 441, and articles cited therein.

[38] Glass v. Hulbert is listed in SHEPARD'S CITATOR as having been cited or produced fifty-seven times in Massachusetts, once by the United States Supreme Court, and fifty-nine other miscellaneous times. The number of judicial statements which could be traced to the passage cited at note 34 *supra* undoubtedly counts in the thousands.

before applying another doctrine.[39] For this reason plaintiff's attorney should plead facts which also support some other basis for recovery whenever possible. There is no reason why he must place all his eggs in this one basket of confusion.

A second consideration is that defendant's attorney must be sharper than ever. He will do best by breaking down the traditional doctrines and insisting that they be used only for their traditional purposes and only when their traditional elements are present. The policy argument to buttress this approach is extremely appealing to a court. In the face of strong arguments from plaintiff that it was the duty of the court to protect the more innocent of the two parties by not stringently requiring all the elements of equitable estoppel, the Illinois Supreme Court in 1952 insisted upon their presence, stating that not to do so would render the statute of frauds "useless and unmeaning." The court pointed out that the statute of frauds and estoppel should each be given a field of operation with neither effacing the other, that the requirement of the misrepresented fact is the point of counterbalance between the two doctrines and the factor which determines which doctrine should apply.[40] In 1957 the Chancery Division of the Superior Court of New Jersey refused an estoppel stating, "Clearly the mere making of the oral agreement or the refusal to abide by it cannot constitute the basis for an estoppel, for in such case the statute would be nullified."[41]

The third, and perhaps most significant, conclusion to draw from a consideration of equitable fraud is that plaintiff's attorney need not be frightened off by the confusion or by the possibility of a detailed attack from the defendant. In fact, he may well capitalize on the confusion. If the facts of his client's case can supply the few elements present in equitable fraud cases, the chances of estopping the defendant are very good. These cases reveal three primary ways in which plantiff achieves success.

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[39] The courts of Pennsylvania refuse to employ estoppel saying that it would blot out the statute of frauds. Beers v. Pussey, 389 Pa. 117, 132 A.2d 346 (1957); Muranville v. Silverthorn, 48 Pa. 147 (1864). The annotation in 101 A.L.R. 923, 944 (1936) listed Kentucky, Mississippi, North Carolina, and Tennessee as having repudiated the part performance doctrine. The Supreme Court of Texas said that a defendant would be estopped if there was a payment of consideration, possession of land, and improvements (all of which are part performance requirements). Maloy v. Wagner, 147 Texas 486, 217 S.W.2d 667 (1949). In Murdock v. Swanson, *supra* note 25, a California appellate court held the part performance doctrine inapplicable because there was no estoppel. The Oregon court speaks interchangeably of estoppel and part performance. Meads v. Scott, 193 Ore. 509, 238 P.2d 256 (1951); Young v. Neill 190 Ore. 161, 225 P.2d 66 (1950).

[40] Ozier v. Haines, *supra* note 17.

[41] Kufta v. Hughson, *supra* note 22. *Accord,* Hurst v. Thomas, *supra* note 17; Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953); Vogel v. Shaw, 42 Wyo. 333, 294 Pac. 687 (1930) (dissenting opinion).

One year after the Illinois Supreme Court spoke so strongly about the respective areas of estoppel and the statute of frauds it affirmed a judgment for plaintiff in a case where the defendant had been estopped even though he had not misrepresented a fact. Even though the court said there was sufficient part performance, it based its decision equally on estoppel.[42] In 1958 the Appellate Division of the New Jersey Superior Court estopped a defendant from relying on the statute of frauds even though he had done no more than make a promise.[43] Neither of these decisions referred to the contrary cases decided the previous year. How are the results explained? Both courts were convinced of the existence of the promise, and both were greatly influenced by the innocent plaintiff's reliance and the hardship which would be occasioned if the contract were not enforced. The explanation lies in the fact that in the absence of very strong arguments from defendant's counsel, the "equitable fraud" ideas prevailed. The Illinois court mentioned in its discussion that "forfeitures are not favored by courts of equity," while the New Jersey court asserted, "Additionally, we feel the respondent should prevail under the doctrine of equitable fraud." These cases illustrate the increasing tendency not to discuss the separate elements of the traditional equitable estoppel, which results in more and more decisions for the plaintiff where the defendant has not made a misrepresentation of fact.[44] Plaintiff's attorney can take advantage of this tendency throughout the proceedings by stressing the injustice which will be visited on the plaintiff if the promise is not enforced, and by emphasizing that it is only by estopping the defendant's use of the statute that this equitable fraud can be prevented.

Plaintiffs also achieve success by supplying the misrepresented fact element when it really does not exist. It has long been held that waiver of an existing right can be the basis for estoppel. Therefore, a waiver of the right to use the statute of frauds as a defense will supply the misrepresented fact element.[45] This is actually a form of promissory estoppel, which in these circumstances is "equitable fraud." It is seldom

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[42] Rose v. Dolejs, 1 Ill. 2d 280, 116 N.E.2d 403 (1953), noted 1954 U. ILL. L.F. 153.

[43] Carlsen v. Carlsen, 49 N.J. Super. 130, 139 A.2d 309 (1958).

[44] What the courts do is disarmingly simple. They are so influenced by the plaintiff's hardship that they allow a promise as substitute for the misrepresented fact requirement. This, *ipso facto,* eliminates the requirements as to knowledge of falsity by the person estopped and lack of knowledge by the asserting party. The effect of superceding all other modes of by-passing the statute of frauds is unnoticed because the courts have not considered the elements individually. For two good examples, see: Halton v. Reed, 193 F.2d 390 (10th Cir. 1951); Orlando v. Ottaviani, 148 N.E.2d 373 (Mass. Sup. Jud. Ct. 1958).

[45] Ravarino v. Price, *supra* note 41; Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds, supra* note 16, at 450; 19 AM. JUR. *Estoppel* § 36 (1939); 31 C.J.S. *Estoppel* § 61, at 246 (1942)

labeled as either of these, but is denominated an exception to the requirement.[46] Many statute of frauds cases, some purporting to be decided on other theories, are in fact based on waiver of right: a promise to make a writing;[47] a statement of future intention made to influence action;[48] a statement that the defendant will stand by his agreement;[49] the receipt of benefits from the plaintiff and/or allowing the plaintiff to proceed with knowledge that he is doing so.[50] This last group, especially, is an open-sesame to the imaginative attorney.

Some decisions ostensibly relying on the waiver of right cases, in fact accepted the breached promise as the basis of the estoppel. For example, a defendant was estopped who had been permitted to foreclose a mortgage on plaintiff's property in return for his promise to convey to plaintiff at a later time.[51] Another party was estopped who promised to assign a lease in return for a promise to buy the property leased.[52] In neither of these situations was there the relinquishment of a right to assert the statute of frauds as a defense. In the first case, no existing right at all was given up. Both of them involved merely the contractual promise upon which suit was brought and oral proof of which the statute of frauds supposedly barred.

These two decisions are a convenient bridge to those few cases which flatly recognize the breached promise as the foundation of the estoppel. At least three cases in recent years have knowingly done this. Two of

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[46] 3 POMEROY, EQUITY JURISPRUDENCE § 808(b) (5th ed. 1941), asserts that waiver of right cases are the widest application of promissory estoppel. WILLISTON, CONTRACTS §§ 139, 533(A), 692, indicates that promissory estoppel is the basis of the waiver principle. The dissent in Vogel v. Shaw, *supra* note 41, is in accord. Examples of the statement that waiver of a right is a limited exception to the usual estoppel requirement of misrepresented fact are: Ravarino v. Price, *supra* note 41; Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246 (1908); Union Mutual Ins. Co. v. Mowry, 96 U.S. 544 (1877).

[47] Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1910); Hazen v. Garey, 168 Kan. 253, 212 P.2d 288 (1949).

[48] Seymour v. Oelrichs, *supra* note 47, is an excellent example of "equitable fraud." The well-known passage from Glass v. Hulbert is quoted to set the tone for the court's opinion which struggles to find precedent for its decision, finally relying on a footnote from Pomeroy. (Incidentally, Pomeroy's footnote in the fifth edition relies on Seymour v. Oelrichs.) Although the facts involved a promise to make a writing the court emphasized the fact that this was a "representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct" of the plaintiff. *Accord,* Wilk v. Vencill, 32 Cal. 2d 23, 180 P.2d 35 (1947).

[49] See Murdock v. Swanson, *supra* note 25.

[50] Monarco v. La Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); McGrory v. McCormick, 400 Ill. 203, 79 N.E.2d 485 (1948); Dougherty v. Toomey, 189 Tenn. 54, 222 S.W.2d 197 (1949); Hazen v. Garey, *supra* note 47.

[51] Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 1 A.2d 146 (1938).

[52] Vogel v. Shaw, *supra* note 41.

them designate the theory promissory estoppel;[53] the other places no label upon it.[54] However, they have applied, as a theory, the ideas of equitable fraud in order to by-pass the statute of frauds.

The problems of reliance and loss which must be established in order to recover on the contract have not been discussed because neither of these elements is particularly difficult to supply. Reliance action, influenced either by the promise or the misrepresentation, can be action in preparing to perform, action in performance, or action wholly outside the contract. The loss should be of such a character as to require enforcement of the contract in order to prevent an injustice. This would indicate that the plaintiff must have been damaged as distinguished from only having conferred a benefit upon the defendant or having only failed to gain a profit from the contract. However, there is language to the contrary.[55]

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[53] Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954); Alaska Airlines v. Stephenson, 217 F.2d 295 (9th Cir. 1954) (if a promise to make a writing was present). These cases began a separate section pertaining to the statute of limitations and the statute of frauds in the A.L.R. promissory estoppel notes. See Annot., 48 A.L.R.2d 1069, § 6 (1956).

[54] Monarco v. La Greco, *supra* note 50. This decision might be the only one applying equitable fraud principles with a full appreciation of what it was doing. The language impresses one as that of a court which knowingly has determined to relieve hardship regardless of the limitations of the statute of frauds or equitable estoppel. See analysis of this decision in Comment, 3 STAN. L. REV. 281 (1951). Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds, supra* note 16, at 456, suggests that it might be better for courts to frankly grant relief on grounds of hardship. Of course, this suggestion is limited to relief in equity. Since that article was written, estoppel has been applied more and more at law. Ostensibly, a law court does not have the power to relieve against hardship in this fashion. Perhaps equitable fraud will be an area of actual law-equity merger. The two Wolfe v. Wallingford Bank & Trust Co. cases, *supra* notes 16 and 51, are an interesting example. The first suit at law asserting part performance was lost because part performance was held to be a doctrine applicable only in equity. The second suit at law asserted equitable estoppel on the exact facts of the first suit. These facts, including a mere promise, really did not constitute all the elements of estoppel. The court, relying on equitable fraud concepts, did no more than give relief at law against unconscionable hardship.

[55] Goldstein v. McNeil, 122 Cal. App. 608, 265 P.2d 113 (1954), holds that a loss of unusual profits is sufficient. The *Monarco* case, *supra* note 50, says that unjust enrichment from receipt of benefits is one of the bases for equitable fraud against which equity will give relief. This indicates a confusion with restitution principles. The equitable fraud cases traditionally bottom their relief on the plaintiff's loss and injury. Restitution seeks to prevent unjust enrichment by the defendant. If plaintiff's only loss is the benefit which the defendant received, there is no need to invoke equitable fraud to protect him. A recovery of the value of the benefit in a quasi-contract action will make him whole. Nothing justifies enforcing the contract in spite of the statute of frauds and giving the plaintiff his profit or expectation interest also. This is the reasoning employed by the court in Chahon v. Schneider, 117 Cal. App. 2d, 334, 256 P.2d 54 (1953), to avoid the *Monarco* rule.

It is recommended that plaintiff's attorney should strongly consider an action on the contract, relying on equitable fraud concepts to estop the defendant from using the statute of frauds when the three elements of promise, reliance, and loss are present, and the plaintiff has not done acts sufficient to constitute part performance or he would prefer to collect law damages rather than have the contract specifically performed.

ACTIONS NOT ON THE CONTRACT

Fraud and Deceit

An action in tort for fraud and deceit may appeal to the attorney whose client would prefer money damages but who is located in a jurisdiction where success in an action on the contract is doubtful.

The tort of fraud or deceit exists when there has been a misrepresentation of fact with an intent to deceive which has induced the plaintiff to act and has thus proximately caused the plaintiff injury.[56] In a majority of jurisdictions a misrepresentation of a present intention is considered a misrepresentation of fact. Ordinarily, this can be established by proof of a promise made with no intent to carry it out.[57]

When an oral contractual promise within the statute of frauds is the false promise upon which suit is brought, the defendant will assert that the statute bars proof of the promise. Ostensibly there is a definite split of authority on this question. At one extreme courts have held that the statute forbids any legal remedy for which proof of the oral promise would be necessary.[58] Diametrically opposed are assertions that the statute does not apply at all to actions *ex delicto*.[59] However, it seems that many cases can be grouped into these two camps only superficially. Usually, the facts are analyzed to determine whether the plaintiff is attempting indirectly to enforce the contract or the defendant is utilizing the statute to hide a fraud. When there are some facts collateral to the contract which indicate unfair dealing, the latter conclusion is more often reached. If a misrepresentation in addition to the false promise has been made, it is easier to hold that proof of the contractual promise "is not offered to enforce the agreement," but "simply as a fact in the history of the transaction"[60] or "to prove fraud."[61] However, when

[56] Royal Realty Co. v. Levin, 244 Minn. 288, 69 N.W.2d 667 (1955); 23 AM. JUR. *Fraud and Deceit* § 20 (1939).

[57] 23 AM. JUR. *Fraud and Deceit* §§ 38-41 (1939); Annot., 51 A.L.R. 46 (1927); 68 A.L.R. 635 (1930); 104 A.L.R. 1407 (1936). When the misrepresented fact is proved in this fashion and fraud is the basis for estoppel, the case resembles the original cases preventing use of the statute of frauds as a defense. See discussion and note 17 *supra*.

[58] Redlark Realty Corp. v. Menkin, 306 N.Y. 762, 118 N.E.2d 362 (1954); Dung v. Parker, 52 N.Y. 494 (1873).

[59] Mack v. White, 97 Cal. App. 2d 497, 218 P.2d 76 (1950); RESTATEMENT, TORTS § 530(b) (1938).

[60] Nanos v. Harrison, 97 Conn. 529, 117 Atl. 803 (1922).

[61] Schlesinger Company v. Wilson, 22 N.J. 576, 127 A.2d 13 (1956); Thieleman v. Burgdorfer, 153 Ore. 354, 55 P.2d 1122 (1936).

there are no misleading facts except the promise, the suit is more likely to be considered a mere evasion of the statute.[62] When the defendant's promised act is the only thing the plaintiff has lost, there may be a tendency to hold that the suit is on the contract rather than on the fraud.[63] The apparent unfairness of having caused a loss through acts in reliance on his promise creates a greater impression that the defendant is a defrauder.

Except in jurisdictions where there are extreme holdings favoring the fraud action, the probabilities are that the tort action will not be a favored alternative to other remedies. Recovery is most likely when a misrepresentation of fact and a loss in reliance are present. With these two items present, an action on the contract invoking equitable estoppel is possible. Therefore, it is when the facts are such that an attorney would have chosen tort as the better remedy even if the contract were enforceable that the fraud action, as a method of by-passing the statute of frauds, is recommended.

Restitution

Discouraging to plaintiff's attorney are the host of cases where neither contract nor tort provides a recovery for his client. Possibly there are not enough facts to fulfill the elements of any of the traditional means for obtaining relief on the contract in spite of the statute of frauds. Perhaps the decisions in the jurisdiction clearly preclude the use of one of these by-passing doctrines. The plaintiff might have to avoid a contract action because he may be in default.[64] Perhaps the contract was a bad bargain, so that recovery on it would be nil or so small as to render impracticable an attempt to recover on it.[65] Plaintiff may have done acts constituting part performance, but money damages would adequately compensate him; therefore, the risk of being denied specific performance is great. Maybe there is no foundation on which to build a tort action for fraud; or the tort statute of limitations may have run. Yet the plaintiff has done something for which he was not compensated. His attorney thinks, "He ought to get something; he deserves it; it isn't fair if he doesn't." When this type of thinking occurs, the time to examine "restitution" has arrived.

The term "restitution" refers primarily to an interest of the plaintiff

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[62] Cohen v. Pullman Co., 243 F.2d 725 (5th Cir. 1957); Canell v. Arcola Housing Corp., 65 So. 2d 849 (Fla. 1953).

[63] Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956).

[64] See, Nordstrom and Woodland, *Recovery by Building Contractor in Default,* 20 OHIO ST. L.J. 193 (1959), for an analysis of the defaulting plaintiff's problems.

[65] See, Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach,* 20 OHIO ST. L.J. 264 (1959), for an explanation of the advantages of restitution to the plaintiff in a losing contract.

which law and equity see fit to protect by means of various remedies. If the defendant unjustly retains a benefit which the plaintiff has conferred upon him, the plaintiff has an interest in being compensated for this benefit. Forcing the defendant to restore specifically the benefit or to pay its monetary value to the plaintiff, prevents the defendant's unjust enrichment and at the same time protects the plaintiff's restitution interest.[66] Restitution is an interest which can command a remedy for its sole protection. At law recovery is the monetary value of the benefit which the defendant received. The action is one derived from assumpsit, called "quasi-contract" or "*quantum meruit*," and treated procedurally as a contract action. This is the most commonly used restitution remedy. Equitable relief is also available through direct specific restitution, specific restitution involving tracing and/or constructive trust, equitable lien, and equitable accounting.[67] For any of these actions the two primary items to be proved will be "benefit" and "unjust retention." "Monetary value" will have to be established in the law action.

1. Restitution—Statute of Frauds—Rationale

An action for restitution is often successful in spite of the statute of frauds objection because the courts say that the action is not one to charge the defendant "on the contract" or does not seek to "found a claim on the contract," but rather seeks to recover only for the benefit bestowed on the defendant. Evidence of the oral contract is admissible not to prove a contract, as such, but to prove a transaction resulting in

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[66] Fuller and Perdue, *Reliance Interest in Contract Damages,* 46 YALE L.J. 52, 373 (1936); Jeanblanc, *Restitution Under the Statute of Frauds; What Constitutes a Legal Benefit,* 26 IND. L.J. 1, 3 (1950) (hereinafter cited as Jeanblanc, *Benefit).* Jeanblanc has written a scholarly trilogy which should not be overlooked by persons interested in a depth of understanding concerning restitution and the statute of frauds. In addition to the article cited above there are: *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention,* 48 MICH. L. REV. 923 (1950) (hereinafter cited as Jeanblanc, *Retention),* and *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained,* 15 MO. L. REV. 1 (1950) (hereinafter cited as Jeanblanc, *Measurement).* It is the purpose of this section of the instant article to provide as briefly as possible for the busy practicing attorney some insight into a few of the problems which he is most likely to face when relying upon restitution to by-pass the statute of frauds. Except where a difference of opinion is specifically indicated the writer agrees with Jeanblanc's analysis and refers all readers who are interested in a more comprehensive study to his trilogy.

[67] Although the word "restitution" indicates the plaintiff's protected interest, it is being used increasingly as a shorthand descriptive term for all the actions which protect that interest. For an analysis of many of the particular remedies, see Talbott, *Finding a Fiduciary to Gain a Remedy,* 20 OHIO ST. L.J. 320 (1959). The availability of constructive trust in situations where the defendant has orally promised to buy land for another, but retains it, is annotated in 42 A.L.R. 10 (1926), 54 A.L.R. 1195 (1928), 135 A.L.R. 232 (1941).

unjust enrichment of the defendant.[68] The import of such statements is that the restitution interest can be protected even though it is an interest which enforcement of the oral contract also would have protected. Since plaintiff usually incurs some reliance loss while conferring the benefit upon the defendant, the reliance interest is protected to the extent of the benefit. The only interests ordinarily protected in an action on the contract which are not protected by the restitution action are the reliance interest where a benefit is not gained and the expectation interest.[69] Perhaps, the lack of this protection does justify the conclusion that the statute of frauds is not applicable because it is not an action "on the contract." In addition, the policy of the statute apparently is not violated when there is no need to prove the oral promises and when the evidentiary guaranty of defendant's acceptance of the benefit is present.[70]

2. Benefit

There are very few cases in which the plaintiff would face a statute of frauds objection while attempting to establish that the defendant was benefited. Ordinarly, the defendant will have received something which is obviously "worth something" in money terms to him. Any legal encyclopedia will cite numerous cases where services, chattels, land, improvements to land, money, or the use of a chattel or realty was conferred upon the defendant with no question but that it was valuable.[71] These cases will include situations where the defendant benefited through the saving of an expense, prevention of loss, or elimination of compe-

[68] WOODWARD, THE LAW OF QUASI-CONTRACT 163 (1913). One court stated that the possibility of quasi-contractual recovery was "too plain a principle of justice to be disputed." Buck v. Waddle, 1 Ohio 358 (1824). Most of the other cases cited *infra* which allow recovery make assertions supporting the general proposition that the statute of frauds is not a bar to a restitution action. This is true even in jurisdictions where the statute is interpreted as making the oral contract void. In Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948), the court, after adamantly asserting that their statute of frauds affected the substance of the contract and, thus, prevented plaintiff's recovery on the contract, suggested that plaintiff try an action in quasi-contract. Whether the contract or oral promise may be *used* in the restitution action is another question to be discussed *infra*.

[69] Unlike the other methods of by-passing the statute of frauds there is no necessity of a reliance loss by plaintiff. Offeman v. Robertson-Cole Studios, 80 Cal. App. 1, 251 Pac. 830 (1926); Hughes v. Oberholtzer, 162 Ohio St. 330, 123 N.E.2d 393 (1954); RESTATEMENT, RESTITUTION § 1, comments (d), (e) (1937). For other comments on the interests which are protected, see also, Jeanblanc, *Benefit, supra* note 66, at 2, and Fuller and Perdue, *The Reliance Interest In Contract Damages*, 46 YALE L.J. 52, 53, 386 (1936).

[70] Fuller and Perdue, *The Reliance Interest In Contract Damages, supra* note 69, at 388, points out that these additional guarantees are not present in all possible restitution cases. Problems created because of this fact are discussed *infra*.

[71] 49 AM. JUR. *Statute of Frauds* §§ 556-67 (1943); 37 C.J.S. *Frauds, Statute of* §§ 256-61 (1943); 25 OHIO JUR. 2D, *Frauds, Statute of* §§ 274-83 (1957); See also, Jeanblanc, *Benefit, supra* note 66.

tition.[72] There will be a number of situations in which the defendant was directly and temporarily enriched by the acceptance of services or improvements which later were rendered valueless through a loss of profits or destruction, but in which the benefit was measured when received.[73] Whether the benefit was conferred by plaintiff's actions in reliance on the contract or in performance of it, none of these situations necessarily involves evidence of the unenforceable promise in order to establish the benefit.[74] Consequently, the rationale for allowing restitution recovery in spite of the statute of frauds appears sound.

When no apparent increment to the defendant's wealth is caused by plaintiff's actions in reliance on the contract, the recent tendency is to use the oral transaction itself to prove benefit. This is accomplished through equating benefit with the economists' definition of value: that which satisfies human wants. If the defendant requests a performance and promises something in return for it, he has manifested objectively that the performance is of value, *i.e.*, benefit to him. When that very performance is accomplished the defendant's wants, evidenced by the request and promise to "pay," have been fulfilled, and he is benefited or enriched.[75] This is the modern idea that bargained-for performance constitutes benefit. The few cases cited for support of this theory in the statute of frauds area deal with items bestowed upon a third party at the defendant's request, and improvements on premises which the defendant never enjoyed or which did not enhance its value but which were done at his request.[76] Prestige support from Williston and the

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[72] For example, in Matousek v. Quirici, 195 Ill. App. 391 (1915), the defendant was clearly benefited through reduction of competition where he orally leased but did not occupy a store premises suited for competition with his own store. In Matthews v. Continental Roll & Steel Foundry Co., 121 F.2d 594 (3d Cir. 1941), prevention of use by competitors was one of the factors constituting benefit where the use of a non-profitable invention was given to the defendant.

[73] Matthews v. Continental Roll & Steel Foundry Co., *supra* note 72; Fabian v. Wasatch Orchard Co., 41 Utah 404, 125 Pac. 860 (1912) (personal services where defendant did not make an overall business profit); Annot., 170 A.L.R. 980 (1947) (improvements were destroyed).

[74] A cursory glance at Jeanblanc, *Benefit, supra* note 66, reveals that he has separated these benefit cases into two groups: benefits conferred in *performance* of the defendant's request and benefits conferred in *reliance* upon the request. This approach is not utilized in the instant article because it tends to obscure the real issue under consideration—the effect of the statute of frauds. Attention should be directed toward use of the oral contract. If the defendant is clearly enriched he will be liable whether plaintiff enriched him while performing the contract or relying upon it.

[75] See Jeanblanc's explanation, *Benefit, supra* note 66, at 6.

[76] Minsky's Follies of Florida v. Sennes, 206 F.2d 1 (5th Cir. 1953); Huey v. Frank, 182 Ill. App. 431 (1913); Clement v. Rowe, 33 S.D. 499, 146

Restatements of Contracts and Restitution is such that plaintiff's attorney would do well to proceed on this theory when feasible.[77]

There are a number of defensive arguments which plaintiff may meet, including an outright attack upon the bargained-for performance concept of benefit.[78] The most likely is one which avoids such a head-on battle by asserting that the concept should not be applied in statute of frauds cases. This appeal to the court's duty to respect the statute of frauds would rest on the premise that the rationale for allowing restitution recovery in spite of the statute does not exist when it is absolutely *necessary* to use the unenforceable oral transaction as evidence of the benefit. It is only in this class of case that evidence which is *essential* to establishing benefit is also evidence of the oral request and promise.[79] This inherent necessity to prove the oral transaction leads one to conclude that the defendant is actually being "charged on the contract."

The suggestion has been made that acceptance of this concept of benefit may mean that protection of the reliance interest has become the

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N.W. 700 (1914); *cf.* Blank v. Rodgers, 82 Cal. App. 35, 255 Pac. 235 (1927); People's Nat'l Bank v. Magruder, 77 Fla. 235, 81 So. 440 (1919).

[77] WILLISTON, CONTRACTS § 536 (rev. ed. 1936); RESTATEMENT, CONTRACTS §§ 347-48 (1932); RESTATEMENT, RESTITUTION § 1 (1937).

[78] It is beyond the scope of this article to analyze the restitutionary benefit concept, as such. However, this is one means of attack which defendant could employ. Defendant can also attack the cases upon which plaintiff may rely. Kearns v. Andree, 107 Conn. 181, 139 Atl. 695 (1928), is not a statute of frauds case. Furthermore, the court says it is *not* finding benefit, but is relying on a different basis for liability. In Moody v. Smith, 70 N.Y. 598 (1877), the person benefited was the defendant's agent. Both Clement v. Rowe and Huey v. Frank, *supra* note 76, are strongly influenced by "equitable fraud" concepts. Minsky's Follies v. Sennes, *supra* note 76, relies solely on People's Nat. Bank v. Magruder, *supra* note 76, a case where defendant used and directly enjoyed the improved premises. There are also reported cases which refuse to accept this theory. Tramonte v. Rassmussen, 167 S.W.2d 566 (Tex. Civ. App. 1942); Rotea v. Izuel, 14 Cal. 2d. 605, 95 P.2d 927 (1939); Henrikson v. Henrikson, 143 Wis. 314, 127 N.W. 962 (1910); see also, cases cited by Jeanblanc, *Benefit, supra* note 66, at 22.

[79] It is feasible that a defendant could even argue that evidence of the request, promise, performance sequence establishes either an unilateral or an implied in fact contract [WILLISTON, CONTRACTS § 3 (rev. ed 1936); Costigan, *Implied-in-Fact Contracts and Mutual Assent,* 33 HARV. L. REV. 376, 387 (1920)] enforcement of which also is barred by the statute of frauds. Wikes v. Stacy Williams Co., 235 Ala. 343, 179 So. 245 (1938); Rains v. Patton, 191 Ala. 349, 67 So. 600 (1914); 37 C.J.S. *Frauds, Statute of* § 229 (1943). Plaintiff's answer to this argument is that the statute forbids enforcement of only oral bilateral *express contracts.* Since *both* express promises need not be shown, no forbidden express *contract* is being enforced. The answer is a bit shaky. It will be especially weak with courts which hold that no action can be maintained if it requires proof of any oral promise. See cases, 37 C.J.S. *Frauds, Statute of* § 224 (1943).

exclusive reason for judicial intervention in these cases.[80] Certainly, it is likely that a court's decision as to what constitutes benefit will be heavily influenced by its predilections toward enforcement of the statute of frauds and its impulse to alleviate the plaintiff's hardship—the same influences apparent in the equitable fraud and fraud and deceit cases.

A particular distinction exists which both plaintiff and defendant must attempt to make in the bargained-for performance cases. It is only performance which has been specifically requested by the defendant that will constitute benefit. Action taken for the plaintiff's advantage or taken in preparation for performance, although in reliance on the request and promise, will not suffice unless that particular action was requested.[81] This places an exaggerated importance upon the precise words of the defendant. Even then, it is often difficult to discriminate between preparatory and performing actions. Jeanblanc, who is enamored of the bargained-for performance concept, struggles with some of the cases to make the delineation.[82]

The existence of the bargained-for performance concept of benefit and the inherent difficulty of distinguishing performing actions from other reliance actions increases the likelihood of a merger of equitable fraud and restitution concepts in cases attempting to by-pass the statute of frauds. That this merger can occur is well illustrated by a Washington case in which the plaintiff sued in quasi-contract for the value of labor expended in plowing and weeding land which the defendant had orally promised to convey to the plaintiff.[83] The plaintiff

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[80] Fuller and Perdue, *The Reliance Interest In Contract Damages, supra* note 69, at 388-94. In most situations the bargained-for performance concept actually construes plaintiff's loss as defendant's benefit. See equitable fraud influences in Huey v. Frank and Clement v. Rowe, *supra* note 76. Contrast with Monarco v. La Greco, *supra* note 55, where defendant's benefit was construed as plaintiff's loss.

[81] See Jeanblanc, *Benefit, supra* note 66, at 26.

[82] *Id.* at 33-38. At page 7, he says, ". . . it is often difficult to determine when the acts done by the plaintiff cease to be preparation for performance . . . and become performance of the oral agreement itself. . . ." Dowling v. McKinney, 124 Mass. 478 (1878), is cited by Jeanblanc as a correct and leading case denying recovery for mere preparatory action. The defendant had requested a monument to be placed on a foundation on her land. The Court held that no recovery could be had because the defendant refused the monument before it was erected. The court says plaintiff may have been able to collect for the foundation which he put in place. But neither the court nor Jeanblanc makes mention of recovery for the one-third of the inscription "which defendant had given him to put on the monument" and which plaintiff had inscribed upon it. Since it is obvious that the inscribing must have been specifically requested, one would expect Jeanblanc to criticize the court for not permitting recovery for this bargained-for performance.

[83] Muckle v. Hoffman, 119 Wash. 519, 205 Pac. 1048 (1922). See also, note 80 *supra.*

alleged benefit to the defendant but there was no allegation of defendant's having used the improved land or of increased value as a result of these efforts. Furthermore, defendant had not requested the acts. A judgment for $340.00 was affirmed. The court stated that the action did not seek to enforce the contract, but was to recover the value of the labor. Yet, the court relied for precedent upon a case (*Johnson v. Upper, supra* note 55) where it was said that a contract could be enforced upon the equitable doctrines of fraud and estoppel, since the defendant would be charged upon the fraud, not the contract. The opinion interpreted a further statement from the *Johnson* case to mean that an allegation of damage to the plaintiff by reason of money expended in reliance on the defendant's promise would state a cause of action. The court evidently meant a cause of action for restitution, whereas the court in the *Johnson* decision certainly meant enforcement of the contract because of equitable fraud. The result is that the equitable fraud emphasis on protection from loss (reliance interest) is transferred to a restitution action where the emphasis should be on prevention of gain (restitution interest).

3. Unjust Retention

For plaintiff to be entitled to restitution, not only must the defendant have been benefited by plaintiff's action, but he must retain the benefit "unjustly." This means that plaintiff has to show that as between the two parties it is not just or fair for the defendant to escape paying or surrendering to the plaintiff the benefit he received.[84] Plaintiff's attorney may have difficulty with any one of three aspects of this problem. Defendant may assert that plaintiff was only a volunteer or officious intermeddler, or that plaintiff intended the benefit to be gratuitous. Secondly, plaintiff may be in default under the oral contract. Thirdly, the defendant may be ready and willing to perform the contract. Any one of these problems could arise in a situation not plagued with an unenforceable contract. The majority rule would deny recovery to the plaintiff because in any of these circumstances it is not thought unjust for the defendant to retain the benefit without reimbursement.[85] Assuming for the purposes of this article that this is the rule,[86] both plain-

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[84] RESTATEMENT, RESTITUTION § 1, comment (c) (1937); Jeanblanc, *Retention, supra* note 66, at 923.

[85] See cases cited *infra* notes 87-89, 91. See also, Stein v. Simpson, 37 Cal. 2d 274, 230 P.2d 816 (1951); RESTATEMENT, RESTITUTION § 2 (1937); WILLISTON, CONTRACTS § 1479 (rev. ed. 1936); Hope, *Officiousness*, 15 Cornell L.Q. 25, 205 (1929); RESTATEMENT, CONTRACTS § 355(4) (1932); Jeanblanc, *Retention, supra* note 66.

[86] There are differences of opinion as to the rule. DAWSON, UNJUST ENRICHMENT 128 (1951), posits the theory that "volunteer" and "officious intermeddler" are "merely a shorthand way of saying that there is no approved ground on

tiff's and defendant's attorney should consider what effect the statute of frauds has upon these situations, *i.e.*, whether or not it prevents use of the oral contract as evidence on any of these issues.

In jurisdictions where the words of the statute are that a defendant shall not be charged on the oral contract, they have been interpreted to make the contract only voidable, and evidence of the oral contract is used in all the situations. Proof of defendant's request negates officiousness and gratuity on the plaintiff's part.[87] Proof of plaintiff's default usually prevents recovery.[88] The use of plaintiff's default as a means of establishing defendant's justness of retention has the effect of treating one who refuses to perform an already unenforceable contract as a contract-breaker, and to that extent gives effect to the oral contract. However, the well-known case of *King v. Welcome* which allowed a defaulting plaintiff to recover on the theory that to refuse would be to charge him on the contract, stands almost alone and has been much criticized.[89] The presence or absence of unjustness on the defendant's part can also be proved through use of the oral contract. When defendant elects not to rely on the statute of frauds, but chooses to perform the contract, he is choosing to reimburse the plaintiff in exactly the manner the plaintiff bargained for. Therefore, it is not an unjust retention. It follows that plaintiff's chance of recovery is much greater when defendant is in default, thus, in effect, refusing reimbursement for the benefit.[90]

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which restitution of benefits can be awarded." Support for this conclusion is gained from cases like Dunnebacke v. Pittman, 216 Wis. 305, 257 N.W. 30 (1934), which Williston cites as authority for the rule that a volunteer is not entitled to restitution. The plaintiff had built a stone breakwater on defendant's property which the court found the defendant had not accepted. There was no *retention* present except to the extent that the wall was on defendant's property "against their will." For weaknesses in the default rules, see Nordstrom and Woodland, *supra* note 64 and Palmer, *supra* note 65.

[87] Evans v. Mason, 82 Ariz. 40, 308 P.2d 245 (1957); Himes v. Rickman, 17 Ohio L. Abs. 574 (1934); Ortman v. Ortman, 17 Ohio L. Abs. 525 (1934). *Cf.* Baugh v. Darley, 112 Utah 1, 184 P.2d 335 (1947). The Ohio Supreme Court has held that there must be proof of an express contract to pay for services rendered to a member of one's family in order to overcome the presumption that they were rendered gratuitously. Merrick v. Ditzer, 91 Ohio St. 256, 110 N.E. 493 (1915).

[88] Swanzey v. Moore, 22 Ill. 63 (1859); Kriger v. Leppel, 42 Minn. 6, 43 N.W. 484 (1889) (contract governs as far as parties have voluntarily acted); Massaro v. Bashara, 91 Ohio App. 475, 108 N.E.2d 850 (1952) (court says plaintiff waived statute of frauds); Philbrook v. Belknap, 6 Vt. 383 (1834) (contract governs as to executed part); Annot., 31 A.L.R.2d 19 (1953).

[89] 71 Mass. 41 (1855); KEENER, QUASI-CONTRACTS 234-38 (1893); Jeanblanc, *Retention, supra* note 66, at 935-37.

[90] Watkins v. Wells, 303 Ky. 728, 198 S.W.2d 662 (1946); Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938); Abbot v. Inskip, 29 Ohio St. 59 (1875); Annot., 169 A.L.R. 185 (1947); KEENER, QUASI-CONTRACT 231, 239 (1893); Jeanblanc, *Retention, supra* note 66, at 953.

The statute of frauds in a number of jurisdictions states that the oral contracts within it are "void" or "invalid."[91] In none of these jurisdictions is a restitution recovery for benefits conferred in reliance on the void contract completely forbidden. No cases could be found where evidence of the oral request was excluded when introduced to negate officiousness or gratuity; to the contrary, many cases permit such proof.[92] Jeanblanc suggests that there is a greater tendency among these jurisdictions to allow recovery to the defaulting plaintiff because it is not really unjust to refuse to perform a void contract. Unfortunately for plaintiff the only strong authority for this position is in Idaho, Wisconsin, and South Dakota.[93] All of these cases rely heavily on the idea that the void contract cannot be used for any purpose, even to show that the plaintiff has acted unfairly. There is nothing to indicate that other jurisdictions will accept these arguments. In fact, the language of decisions in the other jurisdictions indicates that evidence of the oral contract can be introduced not only by defendant to prove plaintiff's default or defendant's willingness to perform, but also by plaintiff to establish defendant's default.[94]

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[91] Jeanblanc, *Retention, supra* note 66, at 934 n. 44 and WILLISTON, CONTRACTS § 526 n. 2, 6 (rev. ed. 1936); list: Alabama, Alaska, California, Colorado, Idaho, Michigan, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Utah, Washington, Wisconsin, and Wyoming.

[92] Jenkins v. Jenkins' Estate, 241 Mich. 39, 216 N.W. 384 (1927); Laughnan v. Laughnan's Estate, 165 Wis. 356, 162 N.W. 169 (1917); Nastrom v. Sederlin, 43 Wyo. 330, 3 P.2d 82 (1931); Jeanblanc, *Retention, supra* note 66, at 939.

[93] Raff v. Baird, 76 Idaho 422, 283 P.2d 927 (1955); Reedy v. Ebsen, 60 S.D. 1, 242 N.W. 592 (1932); Draheim v. Evison, 112 Wis. 27, 87 N.W. 795 (1901). The *Draheim* case is weakened by the fact that it and later Wisconsin cases allow evidence of the contract to show lack of officiousness or gratuity. See, Laughnan v. Laughnan's Estate, *supra* note 92; Kirkpatrick v. Jackson, 256 Wis. 208, 40 N.W.2d 372 (1949). In the other cases upon which Jeanblanc relies, *Retention, supra* note 66, at 932, the court did not particularly consider the plaintiff's conduct. Furthermore, all of these cases are pre-1933. There is reason to believe that an increasing tendency to construe the statute of frauds as making contracts only voidable will result in fewer decisions of this type. The defaulting plaintiff who has conferred some benefit upon the defendant will probably be most successful relying upon "forfeiture" arguments. A good example is Lewis v. Peterson, 127 Mont. 474, 267 P.2d 127 (1953). Although the court stated the majority rule to be that a plaintiff in default of a void contract could not recover in ordinary circumstances, it allowed recovery to prevent "forfeiture." One concurring justice disagreed with the majority rule and relied on Reedy v. Ebsen. For a thorough analysis of the forfeiture argument see Nordstrom and Woodland, *supra* note 64. See also, Annot., 31 A.L.R.2d 19 (1953).

[94] The digests for all the jurisdictions listed in note 91, *supra,* were checked except those for Nevada and Utah which were not available to the writer. Johnson v. Maness, 241 Ala. 157, 1 So. 2d 655 (1941); Orella v. Johnson, 38 Cal. 2d 693, 242 P.2d 5 (1952); Gabarino v. Union Savings & Loan Ass'n, 107 Colo. 140, 109 P.2d 638 (1941); Bowen v. Chandler, 172 Mich. 678, 138 N.W. 247 (1912); Svoboda v. De Wald, 159 Neb. 594, 68 N.W.2d 178 (1955); Shapiro v.

The one exception to the use of the oral contract as evidence in restitution actions occurs in cases dealing with real estate brokers' commissions. Because most of these sections were added to the statute of frauds recently and, very likely, for the purpose of preventing such recovery, the majority of courts refuse to permit evidence of oral contracts to pay a commission for the sale of real estate in a restitution action.[95] Except in the real estate broker cases, either party will generally be able to use the evidence of the oral contract to aid in the determination of whether or not the retention of the benefit is unjust.

4. Monetary Value

Once plaintiff has established that the defendant is unjustly enriched he will want to know whether or not he can use the oral contract in measuring the monetary value of the defendant's benefit. The value of the thing which the defendant has promised to exchange for the benefit is clearly probative of the value of the benefit to him.

When the defendant has promised to pay money for the plaintiff's performance, this oral promise is almost always allowed into evidence. A few decisions have held that the contract amount is conclusive or controlling as to the amount plaintiff may recover.[96] Only a very few have refused to permit evidence of the promissory amount to aid in a determination of value.[97] The majority of jurisdictions permit the evidence to be introduced, many saying that it is proof of an admission rather than proof of the barred contract.[98]

If the defendant has promised to exchange property for the plaintiff's performance, most cases refuse to allow evidence of the value of

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Solomon, 42 N.J. Super. 377, 126 A.2d 654 (1956); Gallo v. Brengard Const. Co., 148 N.Y.S.2d 790 (1956); Di Gregorio v. Nicosia, 150 N.Y.S.2d 754 (1956); Graham v. Healy, 154 App. Div. 76 (1912); Hawkins v. Wright, 204 Okla. 55, 226 P.2d 957 (1951); Helgeson v. Northwestern Trust Co., 103 Ore. 1, 203 Pac. 586 (1922); Weaver v. General Metals Merger, 167 Wash. 451, 9 P.2d 778 (1932); Muckle v. Hoffman, 119 Wash. 519, 205 Pac. 1048 (1922).

[95] Clinkenbeard v. Poole, 266 S.W.2d 796 (Ky. 1954), noted 46 KY. L.J. 278 (1958); Pettigrove v. Corvallis Lumber Mfg. Co., 143 Ore. 33, 21 P.2d 198 (1933); Cushing v. Monarch Timber Co., 75 Wash. 678, 135 Pac. 660 (1913); Jeanblanc, *Retention, supra* note 66, at 942; RESTATEMENT, CONTRACTS § 355 (1932).

[96] Weaver v. General Metals Merger, *supra,* note 94; Murphy v. De Haan, 176 Iowa 61, 89 N.W. 100 (1902); Fuller v. Rice, 52 Mich. 435, 18 N.W. 204 (1884); Annot., 49 A.L.R. 1121 (1927); Jeanblanc, *Measurement, supra* note 66, at 6.

[97] Consolidated Products Co. v. Blue Valley Creamery Co., 97 F.2d 23 (8th Cir. 1938); McElroy v. Ludlum, 32 N.J.Eq. 828 (1880); Annot., 49 A.L.R. 1121 (1927); Jeanblanc, *Measurement, supra* note 66, at 5; *cf.* Himes v. Rickman, 17 Ohio L. Abs. 574 (1934).

[98] Oxborough v. St. Martin, 169 Minn. 72, 210 N.W. 854 (1926); Matthews v. Continental Roll & Steel Foundry Co., *supra* note 72; Offeman v. Robertson-Cole Studios, *supra* note 69; Annot., 49 A.L.R. 1121 (1927); Jeanblanc, *Measurement, supra* note 66, at 6.

the promised property as a means of determining the value of the benefit to the defendant.[99] The distinction from the cases where the defendant has promised money is that the property promised must itself be converted to money terms before it is usable as a measure of the value of the performance received by the defendant. Ordinarily, it is less confusing and just as accurate to convert the performance itself to money terms.[100] Also, most of the cases refusing to use the property value as a measure are cases involving personal services for a decedent who allegedly promised to convey or will the property to the plaintiff in return for the services. The danger of falsehood is so great in these situations that the courts hesitate to allow recovery of the property or its value, which is usually greater than the market value of the services. Only when the performance which constituted the benefit was of such a peculiar or personal character that it would be extremely difficult to measure its value to the defendant by the usual market value tests, is the value of the promised property used.[101]

Even though it is not strictly a problem of use of the oral contract, it is interesting to note that there is a tendency in the bargained-for performance as benefit cases to use the cost to the plaintiff or the reasonable value of his detriment as the measure of the defendant's benefit. This measure is sometimes used when neither the contract nor market value is a suitable measure.[102] In either situation it distorts the restitution action to the place where it becomes impossible to believe that the desire to make the defendant relinquish an unjust gain is the motivation behind the allowance of recovery; ". . . the courts are actually protecting the reliance interest, in whatever form their intervention may be clothed."[103]

When a plaintiff in default recovers at all, the promised value may be introduced for purposes of limiting his recovery to that amount. This rule emanates from the feeling that no one should profit by his own wrong, but is sometimes enunciated in terms of the contract having been executed and, thus, no longer within the statute of frauds. It is really

[99] Annot., 106 A.L.R. 753 (1937); Jeanblanc, *Measurement, supra* note 66, at 10.

[100] Market value, the usual mode of measuring recovery in contract actions, is the test used. Jeanblanc, *Measurement, supra* note 66, at 18.

[101] Waters v. Cline, 121 Ky. 611, 85 S.W. 209 (1905); Annot., 106 A.L.R. 754 (1937); 37 C.J.S. *Frauds, Statute of* § 262 (1943). The reasoning which permits such valuation is identical with that used in those few cases which find the legal remedy inadequate and decree specific performance. There is no adequate standard by which to value the services in monetary terms. See Newbold v. Michael, 110 Ohio St. 588, 144 N.E. 715 (1924); Annot., 69 A.L.R. 32 (1930). Compare note 25, *supra.*

[102] Huey v. Frank, 182 Ill. App. 431 (1913); Randolph v. Castle, 190 Ky. 776, 228 S.W. 418 (1921); Minsky's Follies v. Sennes, *supra* note 76; WILLISTON, CONTRACTS § 536 (rev. ed. 1936); Fuller and Perdue, *Reliance Iinterest in Contract Damages, supra* note 69, at 394; Jeanblanc, *Measurement, supra* note 66, at 18.

[103] Fuller and Perdue, *Reliance Interest in Contract Damages, supra* note 69, at 394.

a means of holding that the defendant is not unjustly enriched by the benefit he retains in excess of the price of the contract which the plaintiff has also breached. If only the defendant is in default it seems that this limitation should not apply.[104]

Ordinarily, the oral contract may be used by the defendant in order to reduce the amount of his benefit; *i.e.*, he uses it to prove that he has conferred some benefit upon the plaintiff which must be deducted from the amount which plaintiff can recover from him. The rationale, of course, is that defendant retains unjustly only the amount which is over and above the value of benefits he has conferred on plaintiff. This should be done by claiming restitution credit for benefits conferred, not by claiming damages on the contract. Although a court will be liberal in permitting the former, it will balk at a suggestion that it may be enforcing the oral contract by awarding damages.[105]

When either the amount of money which the defendant promised or the value of the property which he promised is used to determine the value of the benefit the defendant received, the effects of either party's having made an exceptionally good bargain are obliterated. The result is that the benefit to the defendant exactly equals what the plaintiff expected to gain from the contract. Therefore the recovery protects his reliance interest, his restitutionary interest, and his expectation interest. He obtains precisely the same protection he would have gained by a suit "on the contract." This is particularly apparent in cases where the plaintiff has paid the premiums on an insurance policy in return for a promise to pay him the proceeds of the policy. If benefit is measured by the amount of the premiums, plaintiff's reliance interest is protected; but when benefit is measured by the amount of the proceeds, plaintiff is given a complete protection of his expectation interest.[106] The realization that the same interests can be protected in a restitution action has prompted a few courts to give recovery even though plaintiff erroneously sued on the oral contract itself.[107]

It is recommended that plaintiff's attorney always consider a restitution action when his client's case involves a statute of frauds problem.

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[104] RESTATEMENT, CONTRACTS § 357 comment (g) (1932); Jeanblanc, *Measurement, supra* note 66, at 15-18.

[105] Nastrom v. Sederlin, *supra* note 92; 37 C.J.S. *Frauds, Statute of* § 263 (1943); Jeanblanc, *Retention, supra* note 66, at 950. It is interesting that the defendant is credited with an amount which he probably could not have recovered as a plaintiff because he was in default. Plaintiff may wish to argue this to prevent the deduction.

[106] Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938) (proceeds); Prudential Ins. Co. v. Olt, 70 Ohio L. Abs. 125 (1954) (premiums plus interest); *cf.* Katzman v. Aetna Life Ins. Co., 309 N.Y. 197, 128 N.E.2d 307 (1955), noted, 41 CORNELL L. Q. 472 (1956).

[107] Offeman v. Robertson-Cole Studios, *supra* note 69; *cf.* Diamond v. Jacquith, 14 Ariz. 119, 125 Pac. 712 (1912); Emerson v. Universal Products Co., 35 Del. 277, 162 Atl. 779 (1932).

Through the expanded bargained-for performance concept of benefit or through the rules which measure benefit as equivalent to plaintiff's cost or as equivalent to the contract price, plaintiff may be able to collect a handsome recovery which will more than make him whole.

Conclusion

Loss and benefit are the two keys by which plaintiff's attorney can nearly always gain some type of recovery for the client who has made an oral contract within the statute of frauds. Through equitable fraud considerations a strong emphasis on unjust loss may well achieve recovery on the contract with its full protection of all interests. An emphasis on unjust benefit can result in a recovery which will at least provide the plaintiff with an amount equal to whatever value the defendant has received. If requested reliance or plaintiff's reliance acts are construed as the benefit, he may recover for any and all loss he has incurred. Should the court use the defendant's promise as the means of valuing the benefit he received, plaintiff will collect the same amount he would have gained in an action on the contract. The only situation in which a potential plaintiff should find that the statute of frauds is a complete bar is where the contract is wholly executory and plaintiff has done nothing in reliance upon it. The judicial desire to relieve hardship has effectively emasculated the statute of frauds.