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QUASI CONTRACTUAL RECOVERY IN THE  
LAW OF SALES†

By ARTHUR ANDERSON\*

INTRODUCTION

THIS article falls into three divisions:—

First: A demonstration that there are a great many situations in the law of the sale of goods<sup>1</sup> where the seller or the buyer is given quasi contractual recovery against the other. That is, that many of the rules providing for a recovery by a buyer against a seller or by a seller against a buyer, which ordinarily are regarded as a part of the body of the law of sales, can also be regarded as the result of the application of quasi contract principles to the facts in question.

The reader may well say that he knows already that a seller or a buyer sometimes is given quasi contractual relief. But it is believed that he may be surprised at the number and variety of such situations and at the frequency with which courts actually have been granting such relief in the last twenty-four years.

Second: A demonstration that the courts in granting quasi contractual recovery in a sales case usually have not described it as being quasi contractual. The relief actually given, in the situations described hereafter, is believed to be quasi contractual, and in some of the cases cited the court designates the recovery as being in quasi contract or uses language belonging to the terminology of quasi contract. In the great majority of the cases cited, however, the court does not designate at all the type of recovery given, or at least does not describe it as quasi contractual.

Third: A discussion of certain incidental matters arising out of the first two parts of this article, and an expression of some of the writer's views concerning the general subject matter of quasi contractual recovery in sales cases.

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†The writer received valuable criticisms and suggestions in the preparation of this article from Professors Harry A. Bigelow, George G. Bogert, William W. Crosskey and Malcolm P. Sharp of the faculty of the University of Chicago Law School.

<sup>1</sup>In speaking of "the law of sales" or "the law of quasi contract" the writer in each case is referring to the general body of law commonly named in this way. This is done for convenience and without any belief that they have definite boundaries.

The method used in this article to demonstrate that there are a great many situations in the law of sales where quasi contractual recovery is given, is to state, in general terms,<sup>2</sup> the rule of the law of sales to the effect that under the given facts the buyer or the seller, as the case may be, can recover from the other, and then to state that this recovery is quasi contractual. There is usually no discussion of what the law of sales is in each fact situation, nor is there any discussion of the applicable rule of the law of quasi contract, but rather the writer adopts what the authorities have already said.<sup>3</sup>

As to most of the situations listed hereafter, it is expected that there will be general agreement that the plaintiff is entitled, according to familiar rules of the law of sales, to the recovery granted, and also that the recovery so given is in accordance with the familiar rules of the law of quasi contract. One of the contributions which it is hoped that this article will make is to call attention to the surprising variety of situations in which the courts in sales cases are giving quasi contractual relief. It is hoped that the "sales scholar" will get a new point of view towards his field and that the "quasi contract scholar" will have an opportunity to observe his principles operating in transactions involving the sale of goods.

The particular method used to collect the material listed below was to make a careful search through all of the reports of the American courts and of the common law courts of the British Empire from 1912 to 1935, both inclusive, for cases where a seller or a buyer was given quasi contractual recovery against the other. The year 1912 was chosen with the fact in mind that Professor Woodward's treatise on *Quasi Contracts* was published in 1913,

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<sup>2</sup>The rules of the law of sales are stated in general terms and the countless variations, exceptions and modifications, to which a general statement is subject, are not mentioned. It is hoped that the reader will understand that this was the writer's plan throughout.

<sup>3</sup>The Uniform Sales Act, Williston, *Sales*, 2d ed., Williston, *Contracts* and the Restatement of Contracts are principally relied upon for the law of sales; Bogert's Commentaries on Conditional Sales (1924 and 1935 Supplement) and the Uniform Conditional Sales Act are principally relied upon for the law of conditional sales; Woodward, *Quasi Contracts*, the Restatement of Contracts, and the Restatement of Restitution and Unjust Enrichment, Tent. Draft, 1935, and Proposed Final Draft, Part I, 1936 are principally relied upon for the law of quasi contract.

The Proposed Final Draft of the last named Restatement was approved at the annual meeting of the American Law Institute in May, 1936. Professor Edwin W. Patterson, one of the American Law Institute advisers on this restatement, has written an exceptionally interesting and valuable article on the Restatement in particular, and quasi contracts in general, in (1936) 1 *Missouri L. Rev.* 223.

and with the hope that there might be some use for a collection of cases decided since that time, even though the cases related to only a small part of his field.

The article does not purport, then, to list all the possible situations where a seller or a buyer might be given quasi contractual relief against the other, but only the situations actually litigated in appellate courts from 1912 to 1935. For that period, however, it does attempt to list every situation litigated in an appellate court in the United States, and in the common law jurisdictions of the British Empire. The writer, as well as the digest publishers and the reporters, has undoubtedly made oversights and mistakes, but the list may be regarded as reasonably accurate.

Other possible situations, not represented by cases, have occurred to the writer and doubtless will occur to the reader, but they have been omitted under the writer's plan of listing a situation only when it is represented by an actual case.

Since this article uses the term "quasi contractual recovery" with great frequency, it is proper that the writer explain the particular meaning with which it is used herein, and this can best be done by a short discussion.<sup>4</sup>

After *Slade's Case*,<sup>5</sup> the action of general assumpsit would lie whenever debt would lie, and to a great extent this use was to enforce a contractual and not a quasi contractual claim.

General assumpsit was also available, from early times, together with the action of debt, to recover money due to the plaintiff from the defendant under a statute or a custom which created a right of action, and to recover money due to the plaintiff on a foreign judgment or on a domestic judgment not of record, although in neither case was there a genuine contract obligation on the part of the defendant to pay. General assumpsit was also available to a victim of a tort where the commission of the tort enriched the tortfeasor, and here again there was no genuine contract obligation on the part of the defendant to pay. In these three cases, the plaintiff was using assumpsit without basing his case on a contract—he was suing, as far as the form of action was concerned, as if there were a contractual liability—quasi ex contractu—and he was spoken of as suing in quasi contract. It will be observed

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<sup>4</sup>For the historical background of the law of quasi contract, see Woodward, *Quasi Contracts* secs. 1-9; *Restatement, Restitution and Unjust Enrichment*, Tent. Draft 1935 pp. 14-18; Thurston, *Cases in Quasi Contract* 1-23.

<sup>5</sup>(1602) 4 Coke 92 b.

<sup>6</sup>(1760) 2 Burr. 1005.

that in none of these three cases was unjust enrichment the gist of the plaintiff's right of action—even in the tort cases, where enrichment was a necessary requirement, the gist of the plaintiff's right of action was the commission of the tort.

Commencing with Lord Mansfield's opinion in *Moses v. Macferlan*,<sup>6</sup> another use for the action of general assumpsit arose, which may have existed to a slight extent before that time. This use was to allow this action where events had caused the plaintiff to "enrich" the defendant under circumstances where the retention of the "enrichment" by the defendant would be "unjust" to the plaintiff. The event might be a mistake or misreliance upon a contract, or intervention by the plaintiff in the defendant's affairs, or compulsion of the plaintiff by the defendant. Legal relief was called for, and the convenient action of general assumpsit was called upon. Again there was no genuine contract obligation on the part of the defendant to pay, and again the plaintiff was using assumpsit without basing his case on a contract—he was suing, as far as the form of action was concerned, as if there were a contractual liability—quasi ex contractu—and he was spoken of as suing in quasi contract.

The four situations mentioned in the two previous paragraphs were dissimilar, except that general assumpsit was the form of action. The use of the term "quasi contract" to refer to all four of them was illogical, in that it collected four dissimilar situations, but on the other hand, it was logical in that it collected the four situations where a plaintiff was suing in general assumpsit without basing his case on a contract.

The term "quasi contract" has had a modern usage as including all four of these situations, although it also has had a usage in a narrower meaning as including only the unjust enrichment cases. The terminology has persisted in spite of the fact that the forms of action have been abolished under code pleading.

The term "quasi contractual recovery" is used in this article in the broader of these two senses—it is intended to mean a recovery of money due to the plaintiff from the defendant under a statute or a custom which created a right of action, or a recovery of money by a suit on a foreign judgment or a domestic judgment not of record, or a recovery of money from a tortfeasor who has been enriched by the commission of the tort, or a recovery of money under the doctrine of unjust enrichment.

One of the incidental observations made in reading the cases was that a court, in giving quasi contractual relief, rarely describes

the relief as being quasi contractual. In a small number of cases it uses language which is part of the vocabulary of the law of quasi contract, but in a great majority of the cases, the court says nothing about the nature of the relief it is giving.

The writer has attempted to demonstrate this tendency of the courts in two ways. The first is by quoting the court's language where it says anything about the nature of the recovery. This quotation appears in parentheses following the citation of the case in the footnote, and the absence of such a quotation indicates that the court was silent in this respect. The second is by tabulating all the cases cited where quasi contractual recovery was given to a seller or a buyer. This tabulation appears after the list of the situations, with an expression of the writer's views as to the importance of what it demonstrates.

### THE SITUATIONS

For the sake of convenience, each situation is given a number prefixed by the letter B or the letter S. The letter B indicates that a buyer is the plaintiff and the letter S indicates that a seller is the plaintiff. The writer's views, as to the existence of a "pattern" in the cases, appear later.

#### I. THE BUYER AS PLAINTIFF

*Situation B 1. No contract exists.* Sometimes the acts of the seller and buyer do not result in a sale or a contract to sell. The parties may have had an intent to do business, but a manifestation of mutual assent or consideration may be lacking, or there may be some other circumstance present which prevent a sale or a contract to sell from existing. If the buyer in such a case has paid all or a part of the price and has received no goods, he may recover what he has paid.<sup>7</sup> His recovery is quasi contractual.<sup>8</sup>

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<sup>7</sup>Hass v. Alpert, (1931) 111 Cal. App. 26, 295 Pac. 66 ("The contract was void for uncertainty, because it could not have been ascertained therefrom what merchandise the respondent agreed to purchase or what price he undertook to pay. . . . The contract being void and the consideration for the \$2,500 having wholly failed, respondent was entitled to reimbursement on his cross-complaint for money had and received.")

Aeronautical Corp. of America v. Franklin Motor Car Co., (1934) 49 Ga. App. 617, 176 S. E. 677 (" . . . there arose no contract between the parties for the sale of the undelivered aeroplanes . . . the money so deposited was held by the defendant without consideration, and the plaintiff was entitled to recover it.")

C. C. King Co. v. Aldrich, (1923) 81 N. H. 42, 121 Atl. 434 (" . . . there was a mutual mistake as to the subject matter . . . money paid by

*Situation B 2. Goods destroyed after contract is made.* Where there is a contract for the sale of specific goods, and the buyer pays all or a part of the price, and, while the risk of loss is still in the seller, the goods wholly perish, the contract is avoided,<sup>9</sup> and the buyer may recover what he has paid.<sup>10</sup> If the goods do not wholly perish, but perish or deteriorate to a substantial degree, then the buyer has an election to avoid the contract and recover what he has paid.<sup>11</sup> The recovery in each case mentioned is quasi contractual.<sup>12</sup>

*Situation B 3. Seller's performance becomes impossible.* Cases where a promisor's performance has become impossible may be classified in different ways.<sup>13</sup> One such classification is as follows:

- (a) The impossibility is of such a nature that the promisor is not discharged from liability under his promise, even though performance thereof has become impossible.
- (b) The impossibility is of such a nature that the promisor is discharged from liability under his promise.

Impossibility of the first class is apparently legally inoperative, but impossibility of the second class has legal effect, and one of such effects may be to give one of the parties a right to quasi contractual recovery.

Where a contract is made for the sale of goods and the buyer pays all or a part of the price, and thereafter it becomes impossible for the seller to perform (the impossibility being of the second class), the buyer may recover what he has paid.<sup>14</sup> The buyer's recovery is quasi contractual.<sup>15</sup>

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mistake may be recovered.")

*Factor v. Peabody Tailoring System*, (1922) 177 Wis. 238, 187 N. W. 984 ("... the minds of the parties did not meet as to the particular subject of the contract. . . . We hold the purported contract to be void, and the judgment of the circuit court is affirmed.")

<sup>8</sup>Woodward, *Quasi Contracts*, ch. IV; *Restatement, Restitution and Unjust Enrichment*, Tent. Draft, 1935, sec. 11.

<sup>9</sup>Uniform Sales Act sec. 8(1); 1 Williston, *Sales*, sec. 164.

<sup>10</sup>1 Williston, *Sales*, sec. 164; 3 Williston, *Contracts*, sec. 1974; *Restatement, Contracts* sec. 468 (2); *Bowers v. Dr. P. Phillips Co.*, (1930) 100 Fla. 695, 129 So. 850.

<sup>11</sup>Uniform Sales Act sec. 8 (2); 1 Williston, *Sales* sec. 164; 3 Williston, *Contracts*, sec. 1974; *Restatement, 2 Contracts* sec. 468 (2); *Kentucky Motor Car Co. v. Darenkamp*, (1915) 162 Ky. 219, 172 S. W. 524.

<sup>12</sup>Woodward, *Quasi Contracts*, secs. 127, 128.

<sup>13</sup>For a discussion of the rules of the law of contracts on the subject of impossibility of performance as a defense to a promisor, see 3 Williston, *Contracts*, ch. LIII; *Restatement, 1 Contracts*, ch. 14.

<sup>14</sup>3 Williston, *Contracts*, secs. 1972, 1974; *Restatement, 2 Contracts*, sec. 468 (2); *Panto v. Kentucky Distilleries & Warehouse Co.*, (1926) 215 App. Div. 511, 214 N. Y. S. 19; *William F. Mosser Co. v. Cherry River Boom & Lumber Co.*, (1927) 290 Pa. St. 67, 138 Atl. 85; *Heidner v. St.*

*Situation B 4. Buyer's performance becomes impossible.* The buyer's performance is ordinarily the payment of money. If a buyer cannot perform his promise to pay the price, which would usually be due to a mere lack of money, the standard rule is that the impossibility is of the first class mentioned in Situation B 3, and the buyer is not discharged. The seller can recover a judgment for the price, or for breach of contract, depending on the circumstances.<sup>16</sup> It follows naturally that if the buyer has paid a part of the price he cannot recover it.<sup>17</sup>

*Situation B 5. Breach of warranty.* Where the seller breaches an express or implied warranty of title or quality, the buyer has the privilege of rescinding the contract to sell or the sale and of recovering what he has paid.<sup>18</sup> The recovery of what has been

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Paul & Tacoma Lumber Co., (1923) 124 Wash. 652, 215 Pac. 1, cert. denied (1923) 263 U. S. 721, 44 Sup. Ct. 230, 68 L. E. 524; *Cantiare San Rocco v. Clyde Shipbuilding and Engineering Co., Ltd.*, [1924] A. C. 226 (The Earl of Birkenhead said in part: "The remedy now sought is not an action on the contract, but is independent of it.")

But see *Parker v. Hoppe*, (1931) 257 N. Y. 333, 178 N. E. 550, re-argument denied, (1932) 258 N. Y. 365, 179 N. E. 770.

<sup>16</sup>Woodward, *Quasi Contracts* sec. 127; *Restatement, Restitution and Unjust Enrichment*, Proposed Final Draft, sec. 108 (c).

<sup>17</sup>2 Williston, *Sales* 1656; 3 Williston, *Contracts*, sec. 1932; *Restatement, 2 Contracts*, sec. 455.

<sup>18</sup>But see *Clifton v. Coffey*, (Aus. 1924) 34 C. L. R. 434 where the contract obligated the buyer absolutely to pay the price, but also apparently contemplated that the buyer would be unable to raise the money to complete the purchase unless a certain third party loaned him a part of it. On the refusal of the third party to make the loan, the buyer sued to recover what he had paid on account of the price and was successful. The Court said, "We therefore read the words 'which is to be advanced by Resch's Ltd.' as the statement of an essential circumstance on the faith of which as a fundamental term and condition the purchaser entered into the bargain. This fundamental term and condition having failed, not only does the transaction end, but justice requires the return of what the vendor has in the meantime received." The buyer's recovery was quasi contractual.

<sup>19</sup>Uniform Sales Act sec. 69 (1d) (4); 2 Williston, *Sales*, secs. 608, 608a; *Restatement, 2 Contracts*, sec. 488. The cases found which allow recovery of the price paid are the following:

Express warranty of title: *Marin v. Reyes*, (1931) 147 Misc. Rep. 136, 262 N. Y. S. 577, 579, aff'd (1933) 263 N. Y. 550, 189 N. E. 692 ("... the defendant [buyer] is entitled to rescission of the contract of sale and to return of the . . ." part payment of price).

Implied warranty of title: *E. O. Barnett Bros. v. Brown*, (1919) 140 Ark. 636, 216 S. W. 1038; *McDonnell Motor Hauling Co. v. Morgan Construction Co.*, (1921) 151 Ark. 262, 235 S. W. 998 ("... warranty of title was implied, and appellant, the vendee, had a right to treat the contract at an end by refusing to make further payments and to recover damages resulting from appellee's breach."); *Wehrle v. D. E. McDaniel, Inc.*, (1929) 96 Cal. App. 356, 274 Pac. 421 (Buyer "... became entitled to a return of the money paid by him."); *Espe v. G. McClelland & Son*, (1929) 208 Iowa 512, 226 N. W. 130 (Court quotes in part as follows "... where the defendant has received money of the plaintiff upon a consideration which has failed, or where the defendant has money of the



paid is quasi contractual.<sup>19</sup>

plaintiff which, in equity and good conscience, he ought to refund, . . . the plaintiff in general is entitled to receive the money back. . . ."; *Bos v. Holleman De Weerd Auto Co.*, (1929) 246 Mich. 578, 225 N. W. 1 ("Plaintiff [buyer] was entitled to a judgment for the amount of money he had paid, . . . it having been paid without consideration."); *Boyer v. Garner*, (Mo. App. 1929) 15 S. W. (2d) 893 (" . . . the purchaser should be permitted to repudiate the contract and recover his money paid. . . ."); *Stein v. Scarpa*, (1921) 96 N. J. L. 86, 114 Atl. 245 (" . . . the consideration for the contract had failed. . . ."); *Kwiatkowski v. Hoislbauer*, (1920) 13 Ohio App. 202; *Hunt v. Dillon*, (1927) 123 Okla. 252, 253 Pac. 90 (the court quotes in part as follows: " . . . when a buyer is entitled to rescind the contract . . . he may recover back whatever part of the price he may have paid."); *Nilil v. Vilsack*, (1915) 247 Pa. St. 487, 93 Atl. 622; *Mann v. Rafferty*, (1930) 100 Pa. Super. 228 (" . . . such a suit is not on the contract but in disaffirmance of it by an action for the purchase money as for total failure of consideration."); *Smith v. Russ Mfg. Co.*, (1932) 167 S. C. 464, 166 S. E. 607.

Express warranty of quality: *Siegel, King & Co. v. Penny & Baldwin*, (1928) 176 Ark. 336, 2 S. W. (2d) 1082; *Lewis Supply Co. v. Galloway*, (1932) 185 Ark. 1164, 51 S. W. (2d) 983 ("If there was . . . a breach of the warranty . . . appellee [buyer] had the right to rescind the sale and to demand a return of so much of the purchase money as had been paid."); *Conlin v. Studebaker Brothers Co.*, (1917) 175 Cal. 395, 165 Pac. 1009; *Mahony v. Standard Gas Engine Co.*, (1921) 187 Cal. 399, 202 Pac. 146 ("In short, the action is for money had and received, which this court has held may be maintained whenever an equity or legal right arises from the circumstances that one person has money which he ought to pay to another"); *Coats v. Hord*, (1915) 29 Cal. App. 115, 154 Pac. 491; *United Motor San Francisco Co. v. Callander*, (1916) 30 Cal. App. 41, 157 Pac. 561; *Knight v. Bentel*, (1919) 39 Cal. App. 502, 179 Pac. 406; *Ray v. American Photo Player Co.*, (1920) 46 Cal. App. 311, 189 Pac. 130; *Lane v. McLay*, (1916) 91 Conn. 185, 99 Atl. 498; *Bankendorf v. Sevelovitz*, (1922) 28 Ga. App. 327, 111 S. E. 77; *W. Heller and Sons v. Illinois Traction Co.*, (1914) 186 Ill. App. 327; *Ballard v. Byerly*, (1924) 233 Ill. App. 522; *Burke v. The Instant Heat Co.*, (1925) 236 Ill. App. 275 (" . . . the plaintiff [buyer] was entitled to sue for the return of his money."); *Conroy v. Coughlin Auto Co.*, (1917) 181 Iowa 916, 165 N. W. 200; *Hoyer v. Good*, (1917) 182 Iowa 148, 161 N. W. 691 (" . . . the plaintiffs [buyers] have declared upon a rescission and have stood upon it on the ground of breach of warranty. . . ."); *Lahiff v. Keville*, (1918) 184 Iowa 1334, 169 N. W. 751; *Granette Products Co. v. Arthur H. Neumann & Co.*, (1925) 200 Iowa 572, 205 N. W. 205 ("But where the contract contemplates the furnishing of material for a particular purpose, as the erection of a structure, and the purchaser expends money in attempting to so use it, and later rescinds the contract because of the failure of the material to comply with the contract, he is entitled to be put in statu quo; and this includes the recovery of not only the money he has paid under the contract, but also the reasonable expense he was put to in attempting to use the material for the contemplated purpose."); *Vandermark v. Kansas Moline Plow Co.*, (1923) 114 Kan. 6, 216 Pac. 829; *Clark v. Linley Motor Co.*, (1928) 126 Kan. 419, 268 Pac. 860; *Huber Mfg. Co. v. Piersall*, (1912) 150 Ky. 307, 150 S. W. 341; *Debaun v. Weaver*, (1921) 190 Ky. 685, 228 S. W. 27 ("The plaintiff [buyer] . . . was entitled to recover the purchase price."); *J. I. Case Threshing Machine Co. v. Walters Brothers*, (1922) 197 Ky. 348, 246 S. W. 831 ("They [the buyers] were clearly entitled to a rescission of the contract and a return of their money. . . ."); *Borden Aicklen Auto Supply Co., v. Mid City, Inc.*, (1926) 4 La. App. 489; *Hutchinson Bros. v. Byrd & Jolliff*, (1927) 6 La. App. 367; *Munson v. Simon*, (1927) 6 La. App. 550; *Stewart v. Clay*, (1929) 10 La. App. 727, 123 So. 158 (The seller having breached a warranty " . . . can-

The English law is a little different in that facts which would, under the Uniform Sales Act, create a warranty, may, under the

not recover the balance of the price and in fact, must return what has been paid to him."); *Greer v. Whalen*, (1915) 125 Md. 273, 93 Atl. 521 ("... he [the buyer] may return the chattels . . . and recover back in assumpsit on the common counts the money paid. . ."); *Cromwell v. Chance Marine Construction Co.*, (1917) 131 Md. 105, 101 Atl. 623 ("It [the action of assumpsit for money had and received] lies to recover money in the possession of the defendant which in justice and good conscience belongs to the plaintiff. . ."); *W. H. Edgar & Son v. Imperial Ice Cream Co.*, (1923) 142 Md. 310, 120 Atl. 832; *Gottman v. Jeffrey-Nichols Co.*, (1929) 268 Mass. 10, 167 N. E. 229; *Gordon v. American Tankers Corp.*, (1934) 286 Mass. 349, 191 N. E. 51; *Taylor v. Belton*, (1915) 188 Mich. 302, 154 N. W. 149 (The plaintiff sued "on the common counts in assumpsit" and recovered in trial court. "We are of opinion that in this the learned trial judge was not in error."); *Wozniak v. Ford*, (1921) 216 Mich. 613, 185 N. W. 670; *Kawecki v. Stuber-Stone Co.*, (1922) 218 Mich. 25, 187 N. W. 272 ("The plaintiff, by rescission, treats the contract as terminated and sues to recover what he has paid defendant and for which he has received no consideration."); *Krzyszke v. Ohio & Michigan Coal Co.*, (1928) 241 Mich. 487, 217 N. W. 403; *W. W. Kimball Co. v. Massey*, (1914) 126 Minn. 461, 148 N. W. 307; *Cafferty v. Klatt*, (1920) 147 Minn. 245, 179 N. W. 1002; *Clifford v. Stewart*, (1922) 153 Minn. 382, 190 N. W. 613 (Court relies on Uniform Sales Act, sec. 69); *Fiterman v. J. N. Johnson & Co.*, (1923) 156 Minn. 201, 194 N. W. 399 (Court relies on Uniform Sales Act, sec. 69); *Tiffany v. Times Square Automobile Co.*, (1913) 168 Mo. App. 729, 154 S. W. 865; *Shannon v. Abell*, (1913) 169 Mo. App. 598, 155 S. W. 62; *Smith v. Means*, (1913) 170 Mo. App. 158, 155 S. W. 454 ("The petition in this case states facts which would entitle the plaintiff [buyer] to . . . a rescission of the contract and a return of the purchase price. . ."); *City Light, Power, Ice & Storage Co. v. St. Mary's Machine Co.*, (1913) 170 Mo. App. 224, 156 S. W. 83; *Peterson v. Barbero*, (1914) 180 Mo. App. 365, 167 S. W. 1180; *Sutherland v. Green*, (1914) 49 Mont. 379, 142 Pac. 636; *Murray v. Bailey*, (1923) 110 Neb. 114, 193 N. W. 259; *National Sand & Gravel Co. v. R. H. Beaumont Co.*, (1931) 9 N. J. Misc. 1026, 156 Atl. 441 (Court relies on Uniform Sales Act, sec. 69 (Id)); *Sterling Motor Truck Co. v. Schuchman*, (1932) 260 N. Y. 358, 183 N. E. 524, 260 N. Y. 698, 184 N. E. 151; *Dochtermann Van & Express Co. v. Fiss, Doerr & Carroll Horse Co.*, (1913) 155 App. Div. 162, 140 N. Y. S. 72; *Shimel v. Williams Oven Mfg. Co.*, (1916) 93 Misc. Rep. 174, 156 N. Y. S. 1060 ("... an action may be brought on the theory of a rescission of the contract and for a recovery of the amount paid. . ."); *Levy v. Chonavitz*, (Sullivan County Court, 1917) 163 N. Y. S. 658 ("... the plaintiff [buyer] was within his rights when he demanded the return of his money. . ."); *Glanzer v. J. K. Armsby Co.*, (App. Term 1918) 170 N. Y. S. 1055 ("... plaintiffs [buyers] would be entitled to recover back the purchase price paid"); *Feinman v. Weil*, (1918) 105 Misc. Rep. 298, 173 N. Y. S. 11; *Musso v. Ginzburg*, (App. Term 1918) 173 N. Y. S. 141; *Beeman Shoe Co. v. Carey*, (App. Term 1919) 176 N. Y. S. 435 ("... plaintiff [buyer] was entitled to the judgment . . ." for the price paid.); *Seligman v. Duff*, (1919) 109 Misc. Rep. 533, 179 N. Y. S. 419 ("Upon the rescission of the contract by the plaintiff's assignors they were entitled to the return of the consideration that they had paid upon the contract."); *Joannes Bros. Co. v. Czarnikow-Rionda Co.*, (1923) 129 Misc. Rep. 474, 201 N. Y. S. 409, aff'd (1924) 205 N. Y. S. 930 ("... the plaintiff has rescinded the contract of sale and can recover the price paid thereon. . ."); *Harrolds Motorcar Co. v. Gordon*, (1927) 129 Misc. Rep. 348, 221 N. Y. S. 486; *Jones v. Healy*, (1932) 237 App. Div. 264, 261 N. Y. S. 464 ("The plaintiff . . . rescinded the contract and offered to return the horse to the seller, who refused to accept the horse and became immediately liable for the price theretofore paid," citing Uni-

Sale of Goods Act, create either a warranty or a condition.<sup>20</sup> Under the Sale of Goods Act the effect of a breach of warranty is merely to give the buyer a right of action for damages for breach of warranty.<sup>21</sup> The buyer remains liable for the price, and naturally cannot recover any part of the price he may have paid. Under the same Act, the effect of a breach of a condition, is to give the buyer

form Sales Act, sec. 69 (1d); *Marin v. Francisca Reyes, Inc.*, (1931) 147 Misc. Rep. 136, 262 N. Y. S. 577, aff'd (1933) 263 N. Y. 550, 189 N. E. 692 ("... the defendant [buyer] is entitled to rescission of the contract of sale and to return of the . . ." part payment of price.); *Holden v. Advance-Rumely Thresher Co., Inc.*, (1931) 61 N. D. 584, 239 N. W. 479; *Couch v. O'Brien*, (1913) 41 Okla. 76, 136 Pac. 1088; *Kaiser v. Geis*, (1915) 52 Okla. 604, 153 Pac. 148; *Netter v. Edmunson*, (1914) 71 Or. 604, 143 Pac. 636; *Terrell v. Landrum*, (Tex. Civ. App. 1913) 153 S. W. 647; *Underwood v. Jordan*, (Tex. Civ. App. 1914) 166 S. W. 88; *Halff Co. v. Jones*, (Tex. Civ. App. 1914) 169 S. W. 906; *Avery Co. v. Staples Merc. Co.*, (Tex. Civ. App. 1916) 183 S. W. 43 ("This is . . . an action to recover money paid for a worthless machine. . ."); *Fuller v. Cameron*, (Tex. Civ. App. 1919) 209 S. W. 711 ("When the right to rescind was established, it was the further duty of the court to award appellant [buyer] judgment for all money paid on the contract, . . . and all special or consequential damages or expense incurred in respect to the contract as a result of the misrepresentation."); *Stevens v. Blood*, (1916) 90 Vt. 81, 96 Atl. 697; *Hayes & Porter, Inc. v. Wood*, (1915) 86 Wash. 254, 150 Pac. 1.

Implied warranty of quality: *Harriman v. Richardson*, (1921) 51 App. D. C. 24, 273 Fed. 752 ("... this is not an action upon a sealed instrument for a breach thereof, but is an action [on the common counts] for money had and received, upon the theory that the contract has been rescinded."); *Ideal Coated Paper Co. v. Samuel Cupples Envelope Co.*, (1912) 169 Ill. App. 484 (Set off by buyer. "... the paper delivered . . . did not comply with the conditions of the sale, and defendant was entitled to recover from plaintiff the money paid therefor."); *Burke v. Instant Heat Co.*, (1925) 236 Ill. App. 275 ("... the plaintiff [buyer] was entitled to sue for the return of his money."); *United Engine Co. v. Junis*, (1923) 196 Iowa 914, 195 N. W. 606 ("It is a universal rule that, where a party has paid a portion of the purchase price, and seeks a rescission of the contract, he can, in an action for rescission, recover the portion of the purchase price that has so been paid."); *Clark v. Linley Motor Co.*, (1928) 126 Kan. 419, 268 Pac. 860; *Dunbar-Dukate Co., v. Martin Fountain & Co.*, (1930) 171 La. 391, 131 So. 185 (Breach of implied warranty of quality. "Hence plaintiff was entitled, on returning the goods, to the restitution of the purchase price and the reimbursement of the amount paid for freight charges."); *Woodward Wight & Co. v. Cotonio*, (La. App. 1934) 152 So. 336 ("Defendant [buyer] was therefore entitled to . . . the return of his money."); *Cannon v. Page & Baker Co.*, (1933) 281 Mass. 533, 183 N. E. 892; *Reed v. David Stott Flour Mills*, (1921) 216 Mich. 616, 185 N. W. 715; *G. B. Shearer Co. v. Kakoulis*, (Otsego County Court 1913) 144 N. Y. S. 1077; *Wilson & Co. v. M. Werk Co.*, (1922) 104 Ohio St. 507, 136 N. E. 202; *Klinge v. Farris*, (1929) 128 Or. 142, 268 Pac. 748, 273 Pac. 954; *Long v. Five-Hundred Co.*, (1923) 123 Wash. 347, 212 Pac. 559.

<sup>19</sup>Restatement, Restitution and Unjust Enrichment Tent. Draft, 1935, secs. 13 and 23.

<sup>20</sup>Sale of Goods Act sec. 11 (1b, 1c) applicable to England and Ireland; secs. 12, 13, 14, 15.

<sup>21</sup>Sale of Goods Act sec. 62 (1) defines "warranty" as having this effect in England and Ireland.

“a right to treat the contract as repudiated.”<sup>22</sup> If the buyer does “treat the contract as repudiated,” he may recover any part of the price he may have paid,<sup>23</sup> and such recovery would be quasi contractual.<sup>24</sup>

More than one-fifth of the cases found from 1912 to 1935, where a buyer or a seller is given quasi contractual recovery, are breach of warranty cases. This might at first seem surprising in view of the fact that the majority of states recognize the remedy of rescission and recovery of the price, either as a matter of common law or under the Uniform Sales Act. It might seem that so much appellate court litigation in breach of warranty cases would be unnecessary. The reason for this large amount of litigation, however, is that the facts and not the law have been disputed. The seller has not been resisting the buyer's claim for repayment of the price on the ground that the buyer is wrong on the law. The seller takes the position either (a) that he made no express warranty, or (b) that circumstances giving rise to an implied warranty did not exist, or (c) that if there were a warranty he did not breach it, or (d) that, if there were a breach of warranty, the buyer, by his conduct, never acquired or has lost the privilege to rescind.

*Situation B 6. Seller delivers less than agreed quantity.* Where the parties contract for the sale of a quantity of goods at a certain price per unit, and where the buyer pays the entire price to which the seller apparently will be entitled, and the seller fails to deliver all of the goods, the buyer may recover the part of the price equivalent to the part of the goods not delivered.<sup>25</sup> This

<sup>22</sup>Sale of Goods Act sec. 11 (1b) applicable to England and Ireland.

<sup>23</sup>Implied condition of right to sell: *Rowland v. Divall*, [1923] 2 K. B. 500 (“It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money.”).

Express statements regarding goods which were designated by the Court as conditions: *Fisher, Reeves & Co., Ltd. v. Armour & Co., Ltd.*, [1920] 3 K. B. 614; *Fleming v. Wilkie*, (Sask. 1919) 12 S. L. R. 393, 49 D. L. R. 27 (Newlands, J. A., said in part that the buyer is “entitled” to recover the part payment of price.)

Implied condition of fitness for purpose: *Baldry v. Marshall*, [1925] 1 K. B. 260.

For the way the Scottish law deals with these cases see: *Edgar v. Hector*, [1912] Sess. Cas. 348; *Kyle v. Sim*, [1925] Sess. Cas. 425.

<sup>24</sup>The seller has made no contractual promise to repay the price, and, if he were allowed to retain it, he would be unjustly enriched.

<sup>25</sup>2 Williston, Sales sec. 600; Restatement, 2 Contracts, sec. 349, illustration 5; *Greenfield Box Co. v. Independence Veneer & Box Mfg. Co.*, (1927) 163 La. 86, 111 So. 608 (“This action does not arise out of a contract, but out of a quasi-contract. . .”); *Diamond City Beef P. & P. Co.*

situation concerns only the case where the amount paid by the buyer is the exact amount to which the seller will be entitled if he performs the contract. The amount of the buyer's recovery is ordinarily the contract price of the goods not delivered. The buyer's recovery is quasi contractual.<sup>26</sup>

*Situation B 7. Goods do not conform to contract.* Where goods are sold or contracted to be sold by description (meaning that the goods are to be identified by the description) there is an implied warranty that the goods shall conform to the description.<sup>27</sup> Where specific goods are described by the seller as having certain attributes, the accuracy of the seller's description is warranted.<sup>28</sup> In either case, if the goods tendered or delivered to the buyer do not conform to the description, the seller is guilty of a breach of warranty. The consequences of the breach of warranty are that the buyer may reject or return the goods and recover any part of the price he may have paid and his recovery will be quasi contractual.<sup>29</sup>

The cases discussed in the present situation are all cases which could have been handled by the court as warranty cases, as set forth in the preceding paragraph.<sup>30</sup> Actually the court said, in

v. Murdoch-James Co., (1921) 270 Pa. St. 455, 113 Atl. 556 ("... plaintiff was entitled to recover at least the amount which it had overpaid. . ."); Behrend & Co., Ltd. v. Produce Brokers Co., Ltd., [1920] 3 K. B. 530 (The buyer "must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion").

<sup>26</sup>Woodward, Quasi Contracts, sec. 179; Restatement, Restitution and Unjust Enrichment, Tent. Draft, 1935, secs. 13, 15, 16.

<sup>27</sup>Uniform Sales Act sec. 14; 1 Williston, Sales secs. 223 to 225.

<sup>28</sup>Uniform Sales Act sec. 12; 1 Williston, Sales sec. 205.

<sup>29</sup>Situation B 5.

<sup>30</sup>Associated Fruit Company v. Marone, (1924) 68 Cal. App. 358, 229 Pac. 868; Stella v. Smith, (1930) 109 Cal. App. 409, 293 Pac. 656; Snellgrove v. Dingelhof, (1920) 25 Ga. App. 334, 103 S. E. 418; Moyer v. Hyde, (1922) 35 Idaho 161, 204 Pac. 1068; Lake v. Western Silo Co., (1916) 177 Iowa 735, 158 N. W. 673 ("... we think the trial court properly instructed that plaintiff might recover, not only the money paid, but the expense he was put to in attempting to erect the structure"); Cardwell v. Bennett, (1919) 105 Kan. 114, 181 Pac. 602; Bradley Bros. v. Jones & Rogers, (1913) 153 Ky. 174, 154 S. W. 1091; Reynolds v. Cooper, (1922) 193 Ky. 763, 237 S. W. 667; Greenfield Box Co. v. Independence Veneer & Box Mfg. Co., Ltd., (1927) 163 La. 86, 111 So. 608 ("This action does not arise out of a contract, but out of a quasi-contract. . ."); Ray Motor Co. v. Stanyan, (1923) 123 Me. 346, 122 Atl. 874; Orr Felt & Blanket Co. v. Sherwin Wool Co., (1923) 248 Mass. 553, 143 N. E. 541; Gordon v. American Tankers Corp., (1934) 286 Mass. 349, 191 N. E. 51; Davis v. Aronow, (1921) 191 N. Y. S. 309; Smith v. Hellman Motor Corp., (1924) 122 Misc. Rep. 422, 204 N. Y. S. 229 ("If a person pays over money to another under a mistake of fact, the person receiving the money would be in possession of something to which he is not entitled, and thus he would become unjustly enriched."); S. Liebovitz & Son v. Rosenberg-Neugass

substance, that the seller had agreed to deliver a certain kind of goods and that he had failed to deliver proper goods.

The court further said, in substance, that the buyer need not accept or keep the goods and that the buyer could recover the price he had paid. Apparently the reason why the buyer could recover the price was not that the seller had breached a warranty but that the seller had failed to deliver or tender goods conforming to the contract.

The buyer, in recovering the price paid, was being given quasi contractual recovery.<sup>31</sup>

*Situation B 8. Seller commits material breach other than as to quality or quantity.* The fact that a buyer is given quasi contractual recovery where the seller's performance is defective as to the quality or the quantity of the goods tendered or delivered, has already been seen.<sup>32</sup> It likewise is true that if the seller commits a material breach of the contract in some other way, not relating to quality or quantity, the buyer may refuse to go on with the contract and may recover any part of the price he may have paid.<sup>33</sup>

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Co., (1925) 213 App. Div. 143, 210 N. Y. S. 145 ("Our conclusion is that, under the form of action brought here for money had and received, although the plaintiff was required to pay for the goods before inspection, if upon inspection the goods were discovered not to conform to the contract, it is entitled to recover the payment which it made."); *Bower-Venus Grain Co. v. Norman Milling & Grain Co.*, (1922) 86 Okla. 152, 207 Pac. 297; *Flatow, Riley & Co. v. Roy Campbell Co.*, (Tex Comm. App. 1926) 280 S. W. 517 (" . . . the original petition was, in effect, a suit, not for damages based upon the failure of the defendant in error to comply with a contract, but was a suit upon the implied promise of the defendant in error to repay to the plaintiffs in error the amount of the . . ." price paid by plaintiffs in error.); *Buck v. Racine Boat Co.*, (1923) 180 Wis. 245, 192 N. W. 998 (" . . . the plaintiff was within his legal rights in refusing to accept the boat, and he is entitled to recover the purchase price.").

<sup>31</sup>Restatement, Restitution and Unjust Enrichment, Tent. Draft 1935 secs. 13 and 23.

<sup>32</sup>Situations B5, B6, B7.

<sup>33</sup>2 Williston, Sales sec. 600; 3 Williston, Contracts, secs. 1454, 1457; Restatement, Contracts sec. 347.

*Connell Bros. Co. v. Diederichsen & Co.*, (C.C.A. 9th Cir. 1914) 213 Fed. 737; *Campbell Motor Co. v. Brewer*, (1924) 212 Ala. 50, 101 So. 748; *Sharp v. Osborne*, (1931) 38 Ariz. 452, 300 Pac. 1004; *Mettler v. Vance*, (1916) 30 Cal. App. 499, 158 Pac. 1044; *Gally v. Wynne*, (1929) 96 Cal. App. 145, 273 Pac. 825 ("Where, as here, one party to a contract admittedly breaches it, the other party is entitled to treat the vendor's breach as an abandonment and himself abandon the contract and sue at law to recover what he has paid in an action for money had and received."); *Spencer v. Brundage*, (1921) 69 Colo. 520, 194 Pac. 1104 (" . . . such actions can always be maintained wherever one has received money which, in equity and good conscience, he ought to pay over."); *Manning v. Chesky*, (1916) 90 Conn. 647, 98 Atl. 357 (" . . . whenever one person has in his possession money which in equity and good conscience he should not re-

The most common breaches among the cases cited were that the seller was late in tendering the goods or never tendered them or repudiated the contract or broke his promise to do some act in connection with the deal or asserted some privilege which he did not have.

tain from another, the latter may recover it in this form of action."); Remington Arms Union Metallic Cartridge Co. Inc. v. Gaynor Manufacturing Co., (1923) 98 Conn. 721, 120 Atl. 572 ("... the money cannot in equity and good conscience be retained..."); Haverly Furniture Co. v. Calhoun, (1914) 15 Ga. App. 620, 84 S. E. 138; Adams v. Gemes, (1921) 27 Ga. App. 66, 107 S. E. 373; Adams Tailoring Co. v. Thomas, (1924) 31 Ga. App. 787, 122 S. E. 246; Maxant v. Chicago Screw Co., (1912) 171 Ill. App. 481 (The buyers had "the right to cancel the contract and recover the money advanced by them to defendant thereon."); Vanselow v. Bender, (1912) 175 Ill. App. 460 ("Where the vendor has received part of the purchase money and is in default by reason of his failure to deliver the property sold... the law implies a promise on his part to repay the purchase money paid, and an action for money had and received lies against him for all money paid to, and retained, by him..."); Craven v. Stone Store & Office Fixture Co., (1915) 191 Ill. App. 566; Kabrick v. J. I. Case Threshing Machine Co., (1917) 180 Iowa 598, 163 N. W. 368; Stamper v. Foreman-Earle Co., (1914) 158 Ky. 324, 164 S. W. 937; Morgan & Lindsey v. Ellis Variety Stores, (1929) 168 La. 1073, 123 So. 717, 176 La. 198, 145 So. 514; Thomas v. Philip Werlein, Ltd., (1935) 181 La. 104, 158 So. 635 (Seller "... must return such partial payments as it has received..."); Brown v. Sallinger, (1913) 214 Mass. 245, 101 N. E. 382 ("To permit him [seller] to be enriched by that for which he has given no equivalent... would be to confer a legal right which the law does not recognize."); Martin v. James Cunningham Son & Co., (1918) 231 Mass. 280, 121 N. E. 21 ("And the consideration having entirely failed, they are entitled to recover back the money paid on account of the contract price."); Fisher v. Super Motor Sales Co., (1929) 247 Mich. 485, 226 N. W. 222 ("Plaintiff then had the right to treat the contract as at an end and recover the down payment under the common count."); Osterweil v. Consolidated Machinery & Wrecking Co., (1917) 165 N. Y. S. 366; Cohen v. Shecket, (1918) 170 N. Y. S. 372; Greenberg, v. Hurlburt Motor Truck Co., (1918) 170 N. Y. S. 441 ("Upon defendant's failure to fulfill its agreement the plaintiff was undoubtedly entitled to the return of the amount of his deposit."); Apex Chemical Co. v. Compson, (1918) 171 N. Y. S. 60 ("After such rescission it [buyer] was entitled, under section 150, subd. (d), to nothing more than the return of the purchasing price."); O'Kane v. North American Distilling Co., (1918) 171 N. Y. S. 275 (The seller was "bound to return to the plaintiff [buyer] the consideration paid by him."); Massey v. Becker, (1919) 90 Or. 461, 176 Pac. 425; Morley Auto Co. v. Pittsburg Machine Tool Co., (1913) 54 Pa. Super Ct. 223; Sterling Mint Co. v. Dellenbarger Machine Co., (1932) 107 Pa. Super Ct. 287; Seltzer v. Pugh, (R. I. 1927) 136 Atl. 765; Jahn & Co. v. L. A. Wright, (1919) 109 Wash. 164, 186 Pac. 262; Taylor v. Foster, (1921) 115 Wash. 249, 197 Pac. 21 (Seller's failure to deliver was "... a breach of the contract on his part, justifying respondent in going no further, and entitling him to a return of the money paid."); Barham v. Vickers, (1922) 122 Wash. 439, 210 Pac. 803 ("Having received \$3,000... for which he [seller] has never delivered, or tendered delivery of, any consideration, his liability for that amount follows as a logical and legal sequence."); Globe Manufacturing Co. v. Durland, (1929) 151 Wash. 243, 275 Pac. 705 (Buyers "... were entitled to a return of the money paid when the contract was executed."); Prah v. Ebner, (1929) 200 Wis. 40, 227 N. W. 256.

The recovery by the buyer, of the price paid by him, is regarded by the writer as quasi contractual.<sup>34</sup>

*Situation B 9. Seller induces contract by fraud.* If a seller by fraud induces a buyer to enter into a sale or a contract to sell, the transaction will be voidable by the buyer.<sup>35</sup> The nature of the seller's fraud may also be such as to prevent any sale or contract to sell from ever coming into existence.<sup>36</sup> In either case, the buyer may recover any part of the price he may have paid,<sup>37</sup>

<sup>34</sup>The buyer's recovery apparently is regarded as quasi contractual by Professor Williston, 3 Williston, Contracts, sec. 1454.

The Restatement, 2 Contracts, sec. 347 in stating the right of a party to get "restitution" in such a case as the present one, seems to regard the plaintiff's recovery as quasi contractual, but the Restatement does not use the word "quasi contract," nor a derivative thereof.

The recovery is regarded as quasi contractual in Notes and Comment, (1922) 7 Corn. L. Q. 166.

Professor Woodward takes the following position (Woodward, Quasi Contracts, sec. 260): "This right to restitution would seem to be in reality nothing more than an alternative remedial right arising from the violation of a contract. Accurately speaking, therefore, it is not a quasi contractual right. The only primary obligation is the obligation to perform the contract; the only primary right the right to such performance. As in the case of the action for restitution as an alternative remedy for certain torts (post, sec. 270 et seq.), however, it has been commonly regarded as quasi contractual, and for that reason may be considered in this treatise."

<sup>35</sup>2 Williston, Sales, ch. xxv; Restatement, 2 Contracts sec. 476.

<sup>36</sup>2 Williston, Sales, sec. 625; Restatement, 2 Contracts, sec. 475, Illustration 4.

<sup>37</sup>2 Williston, Sales, sec. 647; Restatement, 2 Contracts, sec. 488; Restatement, Restitution and Unjust Enrichment, Tent. Draft, 1935 sec. 23.

In the following cases, the fraud consisted of fraudulent misrepresentations by the seller concerning the goods or concerning his title to them.

In re Syracuse Gardens Co., (D.C. N.Y. 1916) 231 Fed. 284 ("The recovery of the money paid in all these cases rests on the proposition that it does not belong to the seller, who had no title to the goods purported to be sold, but to the buyer, who was parted with his money without consideration."); *Mooney v. Cyriacks*, (1921) 185 Cal. 70, 195 Pac. 922 (Buyer rescinded purchase of automobile for seller's fraud and recovered part payment of price plus money expended for license fee and automobile insurance.); *Knight v. Bentel*, (1919) 39 Cal. App. 502, 179 Pac. 406; *Macowsky v. Irvine*, (1925) 71 Cal. App. 77, 234 Pac. 839 ("The contract being rescinded, the proper action was by declaration of the cause in equity and suit on the implied promise to repay. . ."); *International Harvester Co. v. Edwards*, (1925) 76 Colo. 531, 233 Pac. 164 ("It seems to us it would be a reproach to the law if plaintiff was to be denied relief in this action."); *Consolidated Garage & Sales Co. v. Dilts*, (1922) 79 Ind App. 287, 137 N. E. 771; *Holt v. Richardson*, (1924) 116 Kan. 47, 225 Pac. 1086; *Bunch v. Paxton, Duke & Bradley*, (Mo. App. 1927) 295 S. W. 474 ("This is a suit to recover the consideration paid by plaintiff to defendant upon a secondhand automobile . . ."); *Cockrell v. Capital City Auto Co., Inc.*, (1926) 3 La. App. 385 (" . . . the absence of consent invalidates the contract and entitles plaintiff [buyer] to a rescission of the sale and return of the purchase price."); *Granlund v. Saraf*, (1928) 263 Mass. 76, 160 N. E. 408; *Gottman v. Jeffrey-Nichols Co.*, (1929) 268 Mass. 10, 167 N. E. 229; *Snyder v. Markham*, (1912) 172 Mich. 693, 138 N. W. 234; *Patterson v. Kasper*, (1914) 182 Mich. 281, 148 N. W. 690 (" . . . this is an action of



and his recovery is quasi contractual.<sup>38</sup>

*Situation B 10. Contract rescinded by mutual assent.* If a contract to sell is rescinded by the mutual assent of the parties and if the buyer has paid a part of the price, the problem will arise as to whether the buyer may recover what he has paid. The Restatements of Contracts<sup>39</sup> and Professor Williston<sup>40</sup> take the position that the buyer is entitled to recover the price paid only if the agreement of rescission includes a promise by the seller to refund it. The promise to refund, according to these authorities, need not be express, but may be found by "a fair interpretation of the words or acts of the parties."<sup>41</sup> If no such actual promise to refund can be found then they contend that the seller may keep the payment made.<sup>42</sup> The theory seems to be that the parties either manifest an intention that the seller shall refund the payment or else manifest a contrary intention that the seller shall retain the payment.

It is submitted that there is a third possibility, namely, that the parties manifest no intention at all with reference to the price paid. This failure on the part of the rescinding parties to manifest any intention as to what the seller is to do with the money in his hands may be an oversight or it may be due to craftiness on the part of each of them—each one may be anxious to terminate at once his future duties under the contract, with the intention of discussing or litigating the matter of the part payment of price later. They may be mutually willing to call off the deal—to stop where they are—to carry the performance no farther. Their

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assumpsit wherein plaintiff is seeking to recover his own money. . . ."); *Bucannan v. Raymond*, (1923) 224 Mich. 462, 194 N. W. 980 ("... he [the buyer] had the right to rescind and recover back."); *Clark v. Wells*, (1914) 127 Minn. 353, 149 N. W. 547; *Rice v. Levinger*, (1933) 141 Or. 413, 18 P. (2d) 221; *Southern Iron & Equipment Co. v. Bamberg, E. & W. Ry. Co.*, (1929) 151 S. C. 506, 149 S. E. 271 ("Upon rescission of the contract by railway company [buyer], it had a right to receive back this amount (part payment of price)."); *Way v. Siddall*, (Tex. Civ. App. 1927) 299 S. W. 313 (Affirmance of lower court judgment which allowed buyer, who rescinded for seller's fraud, to recover price paid plus the amount of money paid out by the buyer in attempting to use the machine.); *Stevens v. Blood*, (1916) 90 Vt. 81, 96 Atl. 697; *Hayes & Porter, Inc. v. Wood*, (1915) 86 Wash. 254, 150 Pac. 1; *Frahm v. Moore*, (1932) 168 Wash. 212, 11 P. (2d) 593.

In one case the fraud consisted of the corruption by the seller of the buyer's chauffeur: *Alexander v. Webber*, [1922] 1 K. B. 642.

<sup>38</sup>Restatement, Restitution and Unjust Enrichment, Tent. Draft 1935 sec. 23.

<sup>39</sup>Restatement, 2 Contracts, sec. 409.

<sup>40</sup>3 Williston, Contracts, sec. 1827.

<sup>41</sup>3 Williston, Contracts, sec. 1827.

<sup>42</sup>Restatement, 2 Contracts, sec. 406, Illustration 1.

mutual agreement to rescind will terminate their duties to perform their original promises. The original contract will cease to exist, but the seller will be holding the money which the buyer has paid.

It is further submitted that the application of quasi contract principles in such a case will result in a refund to the buyer. The seller has received a benefit which, if he were allowed to retain it, would result in his unjust enrichment. The objection may be made that the retention by the seller is not unjust. The answer to this objection will be found in examining the agreement of rescission. If the seller was willing to discharge the contract in exchange simply for the buyer's agreement to discharge the seller from the seller's duty to proceed, and without demanding that he, the seller, be allowed to keep the part payment, what claim can the seller have to the money in his hands after the rescission is complete? By hypothesis the agreement for rescission included no more than as just stated—there was no agreement as to retention or refund.

In the cases cited the buyer recovered the price he had paid and in each case there appears to be no agreement as to whether the seller should retain or refund the payment.<sup>43</sup> That the buyer's recovery in these cases is quasi contractual would seem to be shown by the quotations from them which appear in the footnote.

It is necessary to point out that this article does not purport to state that the law is that a buyer may recover a payment on account of the price in the situation where a rescission agreement contains no provision, expressly or by implication of fact, concerning the price paid. The contention is made, however, that the decisions herein cited which order the seller to refund the payment can be explained and justified as being the result of the application of quasi contract principles to the facts in question.

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<sup>43</sup>Green v. Darling, (1925) 73 Cal. App. 700, 239 Pac. 70 ("If the minds of the parties met on the proposition that they would rescind, it was not necessary that the defendant stipulate to return to the plaintiff the money he had received, for the law requires him to do this as a consequence of having agreed that the contract be abrogated. . . ."); Fisher v. Tauber, (1912) 174 Ill. App. 436 ("If the contract of exchange was rescinded, the law implied a promise on the part of the defendant that on the receipt of the horse he had traded to plaintiff, he would return to plaintiff the horse and money he had received from him . . ."); Drosdoff v. Fetzer, (1913) 178 Ill. App. 336 ("In case of such rescissions the parties should be put by each other as nearly as possible in the 'statu quo ante, etc.,' and the law will compel a final adjustment to this end. . . ."); Stella v. Lincoln Motor Co., (1917) 166 N. Y. S. 763; H. Muller & Co., v. Effangee Tobacco Co., (1920) 180 N. Y. S. 344 aff'd (1920) 229 N. Y. 594, 129 N. E. 922 ("A rescission accepted entitles the parties to be put in statu quo in respect of the contract and entitles the plaintiff to recover all moneys paid thereon.").

*Situation B 11. Rescinding buyer claims damages or expenses in addition to the price paid.* It has been seen that where a buyer rescinds a sale or a contract to sell for breach of warranty or avoids a sale or a contract to sell because of the seller's fraud, he may recover any part of the price he may have paid and his recovery is quasi contractual.<sup>44</sup>

There have been a number of cases decided in late years where the buyer who rescinds or avoids in such cases has asked for and been allowed to recover not only the payment of price, but also expenses and damages incurred. The buyer has been allowed, in addition to a recovery of the price, to recover freight charges,<sup>45</sup> cartage charges,<sup>46</sup> unloading charges,<sup>47</sup> installation costs,<sup>48</sup> erection costs,<sup>49</sup> automobile license fees and automobile insurance premiums,<sup>50</sup> money expended in trying to use the goods,<sup>51</sup> and for

<sup>44</sup>Situation B5 and Situation B9.

<sup>45</sup>McDonnell Motor Hauling Co. v. Morgan Construction Co., (1921) 151 Ark. 262, 235 S. W. 998 ("... warranty of title was implied, and appellant, the vendee, had a right to treat the contract at an end by refusing to make further payments and to recover damages resulting from appellee's breach."); Dunbar-Dukate Co. v. Martin Fountain & Co., (1930) 171 La. 391 131 So. 185 (Breach of implied warranty of quality. "Hence plaintiff was entitled, on returning the goods, to the restitution of the purchase price and the reimbursement of the amount paid for freight charges."); Crown Printing Co. v. Charles Beck Co., (1920) 73 Pa. Super Ct. 419 (Bailment lease—"The plaintiffs' action rests on the implied promises of the defendants to return the money received by them from plaintiffs when, the consideration therefor failed because of the unfitness of the thing leased.").

<sup>46</sup>Seligman v. Duff, (1919) 109 Misc. Rep. 533, 179 N. Y. S. 419 ("Upon the rescission of the contract by the plaintiff's assignors they were entitled to the return of the consideration that they had paid upon the contract.").

<sup>47</sup>McDonnell Motor Hauling Co. v. Morgan Construction Co., (1921) 151 Ark. 262, 235 S. W. 998 ("... warranty of title was implied, and appellant, the vendee, had a right to treat the contract at an end by refusing to make further payments and to recover damages resulting from appellee's breach.").

<sup>48</sup>United Engine Co. v. Junis, (1923) 196 Iowa 914, 195 N. W. 606 ("... upon rescission, appellant would have the right to recover the portion of the purchase price he had paid, and also the amount he had necessarily expended, in good faith, in the installation of the plant."); National Sand & Gravel Co. v. R. H. Beaumont Co., (1931) 9 N. J. Misc. 1026, 156 Atl. 441 (Court relies on Uniform Sales Act sec. 69 (1d) in allowing buyer to recover price paid on rescission, and on Uniform Sales Act sec. 69 (6) in allowing buyer to recover expenses incurred in installation of machinery. Court does not mention Uniform Sales Act, sec. 69 (2) which prohibits a buyer from being granted two kinds of relief.).

<sup>49</sup>Lake v. Western Silo Co., (1916) 177 Iowa 735, 158 N. W. 673 ("... we think the trial court properly instructed that plaintiff might recover, not only the money paid, but the expense he was put to in attempting to erect the structure.").

<sup>50</sup>Mooney v. Cyriacks, (1921) 185 Cal. 70, 195 Pac. 922 (Buyer rescinded purchase of automobile for seller's fraud and recovered part payment of price plus money expended for license fee and automobile insurance.).

loss of time.<sup>52</sup>

The recovery of such expenses and damages is quasi contractual in the sense that the buyer is recovering in a contractual form of remedy, but is not recovering on a breach of contract. He is not recovering on a breach of contract because there is no contract, it having been rescinded by the buyer for breach of warranty or avoided for the seller's fraud.

At the same time it seems that to allow the buyer to recover such expenses or damages is in violation of the principles of quasi contract. The seller is not enriched by the money which the buyer pays to the railroad company for freight charges nor by the other expenses incurred by the buyer. No other doctrine of quasi contract seems to justify a recovery. The cases under discussion seem therefore to be instances where quasi contractual recovery is allowed in violation of the principles of quasi contract.

*Situation B 12. Rescinding buyer does not return the goods.* In certain cases, a buyer who rescinds for breach of warranty or avoids for the seller's fraud, may recover the price paid even though he does not restore the status quo by returning the goods to the seller.<sup>53</sup>

In the cases cited, the buyer had resold some of the goods or had consumed some of them in testing, before learning of the breach of warranty or the fraud. The contract in each case was

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<sup>51</sup>*Granette Products Co. v. Arthur H. Neumann & Co.*, (1925) 200 Iowa 572, 205 N. W. 205 ("But where the contract contemplates the furnishing of material for a particular purpose, as the erection of a structure, and the purchaser expends money in attempting to so use it, and later rescinds the contract because of the failure of the material to comply with the contract, he is entitled to be put in statu quo; and this includes the recovery of not only the money he has paid under the contract, but also the reasonable expense he was put to in attempting to use the material for the contemplated purpose."); *Way v. Siddall*, (Tex. Civ. App. 1927) 299 S. W. 313 (Affirmance of lower court judgment which allowed buyer, who rescinded for seller's fraud, to recover price paid plus the amount of money paid out by the buyer in attempting to use the machine).

<sup>52</sup>*Fuller v. Cameron*, (Tex. Civ. App. 1919) 209 S. W. 711 ("When the right to rescind was established, it was the further duty of the court to award appellant [buyer] judgment for all money paid on the contract, . . . and all special or consequential damages or expenses incurred in respect to the contract as a result of the misrepresentation.").

<sup>53</sup>Restatement, 2 Contracts, secs. 349, 480.

There is a statement in 2 Williston, Sales, sec. 649 that if a defrauded party "is unable to restore what he has received, rescission is impossible," but this statement has probably been abrogated by sec. 480 of the Restatement of Contracts.

The law is complicated by the fact that the Uniform Sales Act, sec. 69 (3) requires a buyer who rescinds for breach of warranty "to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer."

separable. The buyer was allowed to recover what he had paid less a deduction for the part of the goods not returned.<sup>54</sup> The buyer's recovery was quasi contractual.<sup>55</sup>

*Situation B 13. Buyer defaults after paying a part of the price.* In a case where the buyer pays a part of the price and then wilfully refuses to go on with his performance, the seller not being in default, the majority rule is that the buyer cannot recover any part of the price paid.<sup>56</sup> There are some courts, however, which allow the buyer to recover the price paid less the amount of damages caused to the seller by the buyer's breach.<sup>57</sup>

<sup>54</sup>*Ideal Coated Paper Co. v. Samuel Cupples Envelope Co.*, (1912) 169 Ill. App. 484; *Dunbar-Dukate Co. v. Martin Fountain & Co.*, (1930) 171 La. 391, 131 So. 185; *Reed v. David Stott Flour Mills*, (1921) 216 Mich. 616, 185 N. W. 715; *Krzyszke v. Ohio & Michigan Coal Co.*, (1928) 241 Mich. 487, 217 N. W. 403; *Clifford v. Stewart*, (1922) 153 Minn. 382, 190 N. W. 613; *Fiterman v. J. N. Johnson & Co.*, (1923) 156 Minn. 201, 194 N. W. 399; *Rice v. Levinger*, (1933) 141 Or. 413, 18 P. (2d) 221; *Rowland v. Divall*, [1923] 2 K. B. 500 (Seller of automobile breached implied condition of right to sell, the automobile being a stolen one. Buyer recovered price paid, although the automobile was in the possession of the police and could not be restored to the seller.).

<sup>55</sup>*Woodward*, Quasi Contracts, sec. 23; Restatement, Restitution and Unjust Enrichment, Tent. Draft, 1935, sec. 58.

<sup>56</sup>2 Williston, Sales, sec. 599 j; *Woodward*, Quasi Contracts, sec. 177; *Goble*, Quasi Contracts—Right of Defaulting Plaintiff, (1927) 22 Ill. L. Rev. 315.

Restatement, 2 Contracts, sec. 357 (1a and 1b) recovery is denied where the buyer's breach is wilful except in certain special circumstances.

*Palmer v. Aeolian Co.*, (C.C.A. 8th Cir. 1931) 46 F. (2d) 746 cert. denied (1931) 283 U. S. 851, 51 Sup. Ct. 560, 75 L. Ed. 1458; *Alabama Tailoring Co. v. Judkins*, (1921) 205 Ala. 601, 88 So. 865; *Tomboy Gold and Copper Co. v. D. O. Marks*, (1921) 185 Cal. 336, 197 Pac. 94; *San Francisco Commercial Agency v. Widemann*, (1912) 19 Cal. App. 209, 124 Pac. 1056; *Foss-Hughes Co. v. Norman*, (1923) 32 Del. 108, 119 Atl. 854; *Loeb v. Yovin*, (1914) 187 Ill. App. 216; *Hanusin v. Materoh*, (1929) 255 Ill. App. 27; *Weatherman v. Reid*, (1922) 62 Mont. 522, 205 Pac. 251; *Ellinghouse v. Hansen Packing Co.*, (1923) 66 Mont. 444, 213 Pac. 1087; *E. H. Gallagher Trucking Co. v. Hudford Co.*, (1918) 169 N. Y. S. 83; *Bernzweig v. Hyman Levin Co.*, (1918) 172 N. Y. S. 437; *Karp v. R. Ritter & Co.*, (1920) 110 Misc. Rep. 668, 180 N. Y. S. 769; *Nelson v. Landesman*, (1922) 193 N. Y. S. 574; *Laufer v. Burghard*, (1932) 146 Misc. Rep. 39, 261 N. Y. S. 364; *Dluge v. Whiteson*, (1928) 292 Pa. St. 334, 141 Atl. 230; *Smith v. Brockway Motor Truck Corp.*, (1933) 310 Pa. St. 130, 165 Atl. 9.

<sup>57</sup>2 Williston, Sales, sec. 599 j; *Woodward*, Quasi Contracts, sec. 177; *Goble*, Quasi-Contracts—Right of a Defaulting Plaintiff, (1927) 22 Ill. L. Rev. 315.

*McCrea v. Ford*, (1913) 24 Colo. App. 506, 135 Pac. 465 ("Viewed from the standpoint most favorable to defendant, the record discloses that plaintiff has been guilty of breaching an executory contract, without in any manner occasioning defendant damages. Having admitted that he has \$2,500 of plaintiff's money, and making no counterclaim against him for damages, nothing remained for the trial court to do but enter judgment against the defendant for that sum."); *Foster v. Warner*, (1926) 42 Idaho 729, 249 Pac. 771, (1929) 47 Idaho 567, 277 Pac. 1117 ("While it would

The courts which allow the buyer to recover are granting quasi contractual recovery, in the sense that the buyer is suing in a contractual form of action, but is not suing for breach of contract. Professor Woodward believes that such quasi contractual recovery should not be given.<sup>58</sup>

*Situation B 14. Buyer overpays by mistake.* Where the parties contract for the sale of a quantity of goods at a certain price per unit and where the parties make a mistake as to the quantity of goods and where the buyer, because of this mistake, pays more than the seller is entitled to receive, the buyer may recover the amount of the overpayment. A similar result is reached where the contract specifies a method for fixing the price and the buyer by mistake or by the seller's trickery or otherwise pays more than the price-fixing method calls for. In these cases, the seller was entitled under the contract to receive a certain amount, but he actually received more.<sup>59</sup> The buyer's recovery of the over-

seem that respondent [buyer] in the instant case cannot maintain an action for breach of contract, due to his own failure of performance, he is not prevented from recovering the amounts advanced, less any damages sustained by appellant [seller]."); *Humphrey v. Sagouspe*, (1927) 50 Nev. 157, 254 Pac. 1074 ("The law abhors a forfeiture. . ."); *Crosland v. Sloan*, (1928) 123 Or. 243, 261 Pac. 701; *Breding v. Champlain Marine & Realty Co.*, (1934) 106 Vt. 288, 172 Atl. 625.

<sup>58</sup>Woodward, Quasi Contracts, secs. 162-177.

Restatement, 2 Contracts, sec. 357 (1a and 1b)—recovery is denied where the buyer's breach is wilful except in certain special circumstances.

Professor Williston apparently favors the minority rule allowing recovery by the buyer. 2 Williston, Sales, sec. 599 j.

Professor Goble favors recovery by the buyer—Quasi-Contracts—Right of a Defaulting Plaintiff, (1927) 22 Ill. L. Rev. 315.

<sup>59</sup>*Baker v. W. J. Kennedy Dairy Co.*, (C.C.A. 6th Cir. 1935) 77 F. (2d) 574, cert. denied (1935) 296 U. S. 634, 56 Sup. Ct. 157, 80 L. Ed. 451; *Barry v. Armstrong*, (1923) 161 Ark. 314, 256 S. W. 65; *Elijah v. Burkland*, (1923) 80 Ind. App. 359, 140 N. E. 915; *Bennett v. Saint Marys Grain Co.*, (1917) 100 Kan. 289, 164 Pac. 259 ("The plaintiff was entitled to his \$60.90."); *Howard J. Hodgson v. John Deere Plow Co.*, (1919) 104 Kan. 237, 178 Pac. 607; *Smith v. Hanson*, (1920) 106 Kan. 32, 187 Pac. 262; *Fielding v. Williamson*, (1925) 118 Kan. 44, 411, 234 Pac. 48, 1003; *Foster Machine Co. v. Covell Mfg. Co.*, (1922) 219 Mich. 455, 189 N. W. 228; *Bone v. Friday*, (1914) 180 Mo. App. 577, 167 S. W. 599 ("If the plaintiff paid in excess of the purchase price for the property and defendant received such excess . . ., equity and good conscience demand that she return it. . ."); *Smart v. Valencia*, (1927) 50 Nev. 359, 261 Pac. 655 ("While certain equity principles are involved, this is not an equity case, but a suit at law for money had and received."); *Freeman v. Ralph Realty Corp.*, (1921) 198 App. Div. 788, 191 N. Y. S. 72 ("Plaintiff sufficiently shows that he relied upon the erroneous estimate in good faith, and he is therefore entitled to be relieved from the mistake and to recover for the overpayment, which was made through mutual mistake of fact, as for money had and received for which the law implies a promise to repay."); *Haubert v. Navajo Refining Co.*, (1928) 129 Okla. 195, 264 Pac. 151; *Jewett State Bank v. Corsicana Nat'l Bank*, (Tex. Civ. App. 1914) 167

payment is quasi contractual.<sup>60</sup>

*Situation B 15. Seller compels buyer to pay more than the contract price.* This situation deals with the cases where a seller refuses to deliver the goods to the buyer unless the buyer will pay a sum in excess of the contract price. If the buyer pays the overcharge and later sues to recover it, some courts deny recovery, saying in substance that the payment was voluntary.<sup>61</sup>

But there are other courts which allow the buyer to recover such overcharge, taking the position that the payment was made under a form of duress, sometimes called business compulsion or duress of property.<sup>62</sup> The buyer's recovery in such a case is quasi contractual.<sup>63</sup>

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S. W. 747 (The representative of the seller "was in the possession of money of another, which in honesty and good conscience it ought not to retain. . . ."); *Midgley & Curtsinger v. Taylor*, (Tex. Civ. App. 1914) 171 S. W. 301 ("Reason and common sense plainly indicate that he was damaged in the sum of \$500. . . . He wanted his money back, and the court in justice and good conscience, gave it to him.").

<sup>60</sup>Woodward, *Quasi Contracts*, sec. 179; *Restatement, Restitution and Unjust Enrichment*, Tent. Draft, 1935, secs. 13, 15, 16.

<sup>61</sup>*Detroit Edison Co. v. Wyatt Coal Co.*, (C.C.A. 4th Cir. 1923) 293 Fed. 489; *Detroit Edison Co. v. Main Island Creek Coal Co.*, (C.C.A. 4th Cir. 1923) 293 Fed. 495; *Shell Oil Co. v. Cy Miller, Inc.*, (C.C.A. 9th Cir. 1931) 53 F. (2d) 74; *New Jersey Brick Co. v. A. M. Krantz Co.*, (1919) 94 N. J. L. 255, 109 Atl. 350; *Boss v. Hutchinson*, (1918) 182 App. Div. 88, 169 N. Y. S. 513; *Mandel v. National Ice & Coal Co.*, (1920) 180 N. Y. S. 429; *Mutual Sales Agency v. Hori*, (1927) 145 Wash. 236, 259 Pac. 712 (but see *contra Ferguson v. Associated Oil Co.*, (1933) 173 Wash. 672, 24 P. (2d) 82).

<sup>62</sup>*Gilmore v. Texas Co.*, (1930) 100 Fla. 169, 129 So. 587 (Buyer paid more than contract price but it is not clear whether seller compelled the excess payment or whether buyer did not know that he was being overcharged. The court quoted from another case as follows: "A common count for money payable to the plaintiff for money had and received by the defendant for the use of the plaintiff is applicable in all cases where the defendant has obtained money which, ex aequo et bono, he ought to refund."); *Pittsburgh Steel Co. v. Hollingshead & Blei*, (1916) 202 Ill. App. 177 ("It is a well-settled rule of law in this state that where one is compelled to pay money to another, who has no legal right to demand it, in order to prevent injury to his person, business or property, such payment is, in law, made under duress, and may be recovered back from the party receiving it, and it makes no difference that the payment was made with full knowledge."); *Brown v. Worthington*, (1912) 162 Mo. App. 508, 142 S. W. 1082 ("... the precepts of equity and good conscience suggest that money so obtained is wrongfully withheld from and should be returned to plaintiff."); *Ferguson v. Associated Oil Co.*, (1933) 175 Wash. 672, 24 P. (2d) 82 ("The rule is that, where money, illegally exacted, is paid to prevent the sacrifice of capital investments, and made under business compulsion, it may be recovered back, if paid under protest." This case reaches the opposite result from that in *Mutual Sales Agency v. Hori*, (1927) 145 Wash. 236, 259 Pac. 712 but the *Ferguson Case* does not mention the *Mutual case*.)

<sup>63</sup>See *Restatement, Restitution and Unjust Enrichment*, Proposed Final Draft, sec. 70.

Comment (1934) 47 Harv. L. Rev. 1413; comment (1933) 33 Col. L. Rev. 1030.

*Situation B 16. Conditional seller retakes goods on buyer's failure to pay.* Where a conditional seller retakes the goods because the buyer has defaulted in the payment of the price, there being no conditional sales statute, the courts differ as to whether the buyer may recover the payments he has made.<sup>64</sup>

There are a substantial number of common law cases which allow the recovery of either the entire price paid or else the entire price less the amount of depreciation of the goods or the value of their use.<sup>65</sup>

The theory of the buyer's recovery seems to be that there has been a rescission of the conditional sales contract.<sup>66</sup> The buyer's recovery is quasi contractual.<sup>67</sup>

*Situation B 17. Conditional seller wrongfully retakes the goods.* Under the ordinary contract of conditional sale, the possession of the goods is delivered to the buyer and the buyer is entitled to retain such possession as long as he continues to perform the obligations placed upon him by the contract.<sup>68</sup> If the seller does retake the goods at a time when the buyer is not in default, such retaking is wrongful, and the buyer may repudiate the contract and recover the price paid.<sup>69</sup> The writer regards the buyer's recovery of the price paid as quasi contractual.<sup>70</sup>

<sup>64</sup>Bogert, Commentaries on Conditional Sales, sec. 130.

<sup>65</sup>Bogert, Commentaries on Conditional Sales, sec. 130.

<sup>66</sup>*Sterchi Bros. Co. v. Harris*, (1933) 47 Ga. App. 772, 171 S. E. 457 ("... the plaintiff is entitled to restitution in the amount which the plaintiff had already paid upon the purchase-money of the property retaken."); *Moyer v. Hyde*, (1922) 35 Idaho 161, 204 Pac. 1068; *Quality Clothes Shop v. Kenney*, (1915) 57 Ind. App. 500, 106 N. E. 541 (The sellers "... having instituted this [replevin] suit and retaken the goods, they thereby abandoned the right to treat the sale as absolute . . . and they must account to appellee [buyer] on equitable principles for the amount paid on the purchase price less any damages to the property, together with the value of the use of the property by appellee.").

<sup>67</sup>Bogert, Commentaries on Conditional Sales, sec. 130.

<sup>68</sup>The argument that the buyer's recovery, of payments made under a contract which is later rescinded, is quasi contractual, is set forth in *Situation B 10*.

<sup>69</sup>Bogert, Commentaries on Conditional Sales, sec. 18.

<sup>70</sup>Bogert, Commentaries on Conditional Sales secs. 18, 30.

*Bray v. Lowery*, (1912) 163 Cal. 256, 124 Pac. 1004; *Anderson v. Van Camp Sea Food Co.*, (1929) 98 Cal. App. 787, 277 Pac. 1099 (The wrongful retaking by the sellers "... amounted to a rescission and abandonment of the contract by the appellants [sellers], and authorized the instituting of this suit in assumpsit against ..." the sellers to recover the price paid.); *Daskalopoulos v. Mulvanity*, (1920) 79 N. H. 533, 111 Atl. 832 (Upon the wrongful repossession by the seller, the buyer "... had an undoubted right to treat the contract as rescinded and recover the money he had paid."); *Paine v. Meier & Frank Co.*, (1933) 146 Or. 40, 27 P. (2d) 315, rehearing denied, (1934) 146 Or. 53, 29 P. (2d) 531.

<sup>71</sup>The comments cited in footnote 34 apply with equal force to this situation.



This situation could have been included in Situation B 8, entitled "Seller commits material breach other than as to quality or quantity," but it appeared better to set it up as a separate situation with the other conditional sales cases.

*Situation B 18. Conditional seller fails to comply with the redemption and resale provisions of the Uniform Conditional Sales Act.* Section 25 of the Uniform Conditional Sales Act provides that if the conditional seller fails to comply with sections 18, 19, 20, 21 and 23 of the Act, relating to redemption by the buyer and resale by the seller, "the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest."<sup>71</sup> The buyer's recovery under Section 25 is quasi contractual.<sup>72</sup>

A similar situation arose under section 65 of the New York Personal Property Law,<sup>73</sup> which provided in substance that if the conditional seller did not resell the goods within a certain time, the buyer could recover the amount paid.<sup>74</sup> The buyer's recovery

<sup>71</sup>Bogert, Commentaries on Conditional Sales Chapter XV.

Commercial Credit Co. v. Street, (1930) 37 Ariz. 204, 291 Pac. 1003 ("... plaintiff was entitled to recover from the defendant 'his actual damages, if any. . . .'"); Manhattan Taxi Service Corp. v. Checker Cab Manufacturing Corp., (1930) 253 N. Y. 455, 171 N. E. 705 ("The cause of action assumes the legality of the taking, and charges the omission of a statutory duty in failing to resell thereafter."); United States Taxi Corp. v. Mogul Finance Corp., (1931) 232 App. Div. 370, 249 N. Y. S. 509; Rost v. Wm. Knabe & Co., Inc., (1935) 154 Misc. Rep. 425, 277 N. Y. S. 896; Sheely Bros. v. International Harvester Co., (1934) 243 App. Div. 831, 278 N. Y. S. 134; Underwood v. Raleigh Transportation, Equipment & Construction Co., (1926) 102 W. Va. 305, 135 S. E. 4.

<sup>72</sup>This is an illustration of a right of recovery which exists because of a statute and is not based upon the consent of the defendant. The writer feels that the ordinary conditional seller makes no promise, express or implied, that if he fails to comply with the redemption and resale provisions of the Act he will pay to the buyer the amount of the buyer's "actual damages, if any, and in no event less than one-fourth of the sum of" the buyer's payments. The seller must pay because the statute so provides and not because he promised.

The non-consensual nature of the seller's obligation is emphasized by section 26 of the act which provides in substance that the buyer cannot, before or at the time of making the conditional sale contract, waive these rights against the seller and that the seller cannot contract himself out of these liabilities to the buyer. In view of this section, it might well be argued that even if the conditional seller did promise to pay what the Act required him to pay, his duty to do so would still not be consensual.

See also Keener, Quasi-Contracts 16-17.

<sup>73</sup>Laws 1909, ch. 45.

<sup>74</sup>Bogert, Commentaries on Conditional Sales, sec. 132.

Lanston Monotype Mach. Co. v. Curtis, (C.C.A. 2d Cir. 1915) 224 Fed. 403 ("Not having sold the machinery at public auction as required by that law, it was liable to Curtis [buyer] for the amount paid by him on ac-

under this section was quasi contractual.<sup>75</sup>

*Situation B 19. Buyer pays a draft to which seller had attached a spent bill of lading.* In an interesting case decided by the supreme court of Washington,<sup>76</sup> the facts were that the seller had been the owner of a carload of shingles and had received the shingles from the carrier without the surrender of the bill of lading. The report does not state whether the bill of lading was a straight bill or an order bill. The seller stored the goods in a warehouse to its own order. Later the seller contracted to sell "a carload of shingles" to the buyer, apparently as if the shingles were still in the hands of the carrier and this was the buyer's impression. The seller drew a draft on the buyer for the price and attached the spent bill of lading and the buyer paid the draft and received the spent bill of lading.

After the buyer learned all of the facts he sued to recover what he had paid and was successful. The court said:

"The appellant [buyer] did not receive what the respondent [seller] purported to sell it, and did not receive what it desired to purchase, or what the respondent [seller] led it to believe it was purchasing. There was thus a failure of consideration for the purchase money, and the appellant [buyer] is entitled to recover it. . . ."

The recovery granted to the buyer in this case was quasi contractual.<sup>77</sup> The case is simply a variation of a case of material breach by the seller and could have been covered in Situation B 8, but the facts are unusual and interesting and seemed to deserve separate treatment.

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count."); *Crowe v. Liquid Carbonic Co.*, (1913) 208 N. Y. 396, 102 N. E. 573; *Adler v. Weis & Fisher Co.*, (1916) 218 N. Y. 295, 112 N. E. 1049; *Hillelson v. Old Reliable Motor Truck Corp.*, (1924) 239 N. Y. 553, 147 N. E. 192; *Rivara v. James Stewart & Co.*, (1925) 241 N. Y. 259, 140 N. E. 851 aff'd (1927) 274 U. S. 614, 147 Sup. Ct. 718, 71 L. Ed. 1234 ("Its [the statute's] underlying thought is that a conditional vendor shall be made to do the fair thing by his conditional vendee. To avoid hardship and oppression, he must either put up for sale the retaken chattels, and give credit for the proceeds, or restore the payments made to him."); *Cee Bee Cee Waist & Costume Co. v. Borenstein*, (1917) 164 N. Y. S. 703; *Dean v. Bauer*, (1917) 101 Misc. Rep. 301, 166 N. Y. S. 983; *Goldberg v. Wisner Mfg. Co.*, (1918) 170 N. Y. S. 551; *Meyer v. Sherwood Automobile Corporation*, (1924) 123 Misc. Rep. 923, 206 N. Y. S. 645 ("... the vendor is liable in accordance with section 65 of that statute, and it was unnecessary to prove the vendee's damages.").

<sup>75</sup>The argument is substantially the same as is given in footnote 72 supra. The Personal Property Law, however, contained no prohibition against a waiver by the buyer of his rights.

<sup>76</sup>*C. A. Mauk Lumber Co. v. Miller Brothers Lumber Co.*, (1923) 126 Wash. 593, 219 Pac. 28.

<sup>77</sup>Restatement, Restitution and Unjust Enrichment, Tert. Draft, sec. 13.

*Situation B 20. Bank issuing a letter of credit overpays seller.*

It has been seen that if the buyer overpays the seller, he may recover the excess payment and his recovery is quasi contractual.<sup>78</sup>

A variation of this principle was involved in an unusual set of facts coming up before one of the district courts of appeal of California.<sup>79</sup> The seller sold \$11,500 worth of goods to the buyer and was to be paid by a letter of credit issued by a large New York bank. Because of a mistake, apparently on the part of the New York bank, the letter of credit actually issued was for \$13,500 and the New York bank paid the seller \$13,500. The assignee of the New York bank then sued the seller for the \$2,000 and recovered.<sup>80</sup> His recovery was quasi contractual.

The case is interesting also because of the fact that the defendant seller interposed one of the standard quasi contract defenses, namely, change of position. He alleged that he had paid over the \$2,000, but his defense failed because he could not prove such payment over as a matter of fact. The court did not indicate that it understood that it was passing on a quasi contract defense.

The scope of the present article does not include the quasi contract defenses, but it may be pointed out that the quasi contract defenses are important in the law of sales. It is clear that in a great many sales cases a seller or a buyer is given quasi contractual relief. It also is true that in some sales cases a seller or buyer will be denied relief because the defendant has interposed and sustained a quasi contract defense. In other words, the law of quasi contract not only may provide a seller or buyer with a cause of action—it also may provide him with a defense.

*Situation B 21. Buyer pays a sales tax to the seller who pays it to the government—it later is held that the taxing statute did not authorize the government to collect the tax on the goods in question—the government refunds the tax to the seller—the buyer now sues the seller for a refund.* This situation arose under an Act of Congress<sup>81</sup> which levied a ten per cent tax on the sale of certain beverages. In the cases mentioned hereafter, the buyer of cider paid the tax to the seller and the seller paid the tax to the government. It was later held that cider was not taxable under

<sup>78</sup>Situation B 14.

<sup>79</sup>*Burckard v. Smith*, (1926) 80 Cal. App. 104, 251 Pac. 663 ("It is now settled . . . that money paid under a mistake of fact may be recovered back. . .").

<sup>80</sup>Although the assignee of a bank, rather than a buyer or a seller, is the plaintiff in this case so that the case is strictly not within the scope of this article, the writer advisedly included it.

<sup>81</sup>Revenue Act of 1918, sec. 628 (a), 40 Stat. at L. 1117.

the statute,<sup>82</sup> and the seller in each of these cases recovered from the government the amount of tax he had paid. The buyer then proceeded to sue seller for a refund.

In 1925, in *Kastner v. Duffy-Mott Co.*<sup>83</sup> the New York supreme court, appellate term, denied the recovery by the buyer. In 1926 the court of appeals of the District of Columbia, in the case of *Heckman & Co. v. I. S. Dawes & Son Co.*<sup>84</sup> also denied recovery by the buyer, relying in part on the *Kastner Case*.

But in 1927, the New York court of appeals, in the case of *Wayne County Produce Co. v. Duffy-Mott Co.*<sup>85</sup> overruled the *Kastner Case* and held that the buyer could recover.<sup>86</sup>

The recovery by the buyer, granted by the New York court of appeals, was quasi contractual, although the buyer was really recovering a benefit conferred under a mistake of law.<sup>87</sup> The following quotation from Judge Cardozo's opinion seems to show that he regarded the recovery as quasi contractual:

"The distinction is unimportant, at least for present purposes, between mistakes of fact and those of law. The quality of the mistake did not prevent the defendant [seller] from recovering the money from the government. It cannot absolve from the duty of disposing of the money thus recovered as good conscience shall dictate."<sup>88</sup>

*Situation B 22. 'Seller bribes buyer's purchasing agent.* The present situation arises where the seller bribes the buyer's purchasing agent, apparently hoping that the purchasing agent will help the seller to get more business from the buyer or to get higher prices for the merchandise sold. Then when the buyer learns of the bribery, he goes to court on the theory that he has been overcharged and contends that the amount of the bribe has been added to the price he has had to pay. The terminology used is that the price had been "loaded" with the amount of the bribe.

The writer has found only three cases decided since 1912 in

<sup>82</sup>*Monroe Cider Vinegar & Fruit Co. v. Riordan*, (C.C.A. 2d Cir. 1922) 280 Fed. 624; *Casey v. Sterling Cider Co.*, (C.C.A. 1st Cir. 1923) 294 Fed. 426.

<sup>83</sup>(1925) 125 Misc. Rep. 886, 213 N. Y. S. 128.

<sup>84</sup>(1926) 56 App. D. C. 213, 12 F. (2d) 154.

<sup>85</sup>(1927) 244 N. Y. 351, 155 N. E. 669.

<sup>86</sup>The matter is discussed in Field, *The Effect of an Unconstitutional Statute* 223-225, but the author discusses the law on the basis of the *Kastner Case* and the *Heckman Case*, and fails to mention the *Wayne County Produce Co. Case*.

<sup>87</sup>Woodward, *Quasi-Contracts*, ch. 3; *Restatement, Restitution and Unjust Enrichment*, Tent. Draft, 1935, secs. 39, 40, 41 and Explanatory Notes, pages 284 to 291.

<sup>88</sup>(1927) 244 N. Y. 351, 354-355, 155 N. E. 669, 670.

which the situation was presented, and all of them were decided in New York.

In the first of them, the buyer had consumed the goods entirely before learning of the bribery and then sued to recover the total price paid. Judge Cardozo, writing the opinion of the Court, said in substance that the buyer could not recover the total price paid, but only the difference, if any, between the amount actually paid and the value of the goods. The buyer's complaint was held to state no cause of action.<sup>89</sup>

In the second case, the buyer sued the seller to recover a sum equal to the amount of the bribe, claiming that there was a presumption in such a case that the seller "loaded" the price to the extent of the amount of the bribe. The court said there was no such presumption, and that the seller would not be liable if he could show, as he was at liberty to do, that the price was fair and contained no "loading." The buyer's motion for summary judgment was denied.<sup>90</sup>

In the third case all of the judges concurred in Judge Pound's opinion, except Judge Cardozo, who was not sitting. The lower court had instructed the jury that even though the buyer proved the bribery, he was entitled only to nominal damages unless he proved a disparity between the value of the goods received and the price paid, and on this instruction the jury entered a verdict for the buyer in the amount of six cents.

Judge Pound distinguished the case where a buyer is suing for the return of the total price paid from the case where the buyer is suing only for a sum equal to the amount of the bribe paid. He said:

"The law does not go so far as to nullify the entire transaction where the vendee has received and used the merchandise. If, however, a vendor bribes a purchaser's agent it must be assumed that the purchase money is loaded by the amount of the bribe." The judgment on the verdict for six cents was set aside and the buyer was granted a new trial.<sup>91</sup>

The law of New York seems to be then, that the buyer can recover the amount that the price has been loaded, and that prima

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<sup>89</sup>Schank v. Schuchman, (1914) 212 N. Y. 352, 106 N. E. 127.

<sup>90</sup>Iserman v. J. E. Long Coal Co., (1924) 122 Misc. Rep. 822, 204 N. Y. S. 98, aff'd (1924) 209 App. Div. 882, 205 N. Y. S. 929.

<sup>91</sup>Donemar, Inc. v. Molloy, (1930) 252 N. Y. 360, 169 N. E. 610 ("The vendor has had and received money which belongs to the purchaser to the extent of the bribe which neither the vendor nor the unfaithful agent may in conscience and good morals retain.").

facie at least the amount of the loading is equal to the amount of the bribe.<sup>92</sup>

The writer is of the opinion that a recovery by the buyer would be quasi contractual.<sup>93</sup>

*Situation B 23. Buyer pays price to a person other than the seller.* In an unusual case,<sup>94</sup> the facts were that the plaintiffs, who were grain dealers, bought a carload of oats from one Decker. The plaintiffs made a mistake in their bookkeeping, however, and entered the oats as having been purchased from the defendant. The plaintiffs paid the defendant for this carload of oats and brought suit, when they learned of their mistake, for the amount so paid. The judgment entered for the plaintiffs upon a directed verdict was affirmed. The buyer's recovery was quasi contractual.<sup>95</sup>

*Situation B 24. Bargain is illegal.* The ordinary rule in the case of an illegal bargain for the purchase of goods is that the court will refuse to enforce it for either party.<sup>96</sup> The general reason for the court's refusal to enforce the bargain is that the plaintiff was blameworthy in entering into it. But if the plaintiff was not too blameworthy under all the circumstances, the court may enforce the bargain and treat it as a contract.<sup>97</sup>

The same general theory is applicable to a buyer who enters into an illegal bargain for the purchase of goods and who thereafter repudiates it and asks for the recovery of the price paid. The court generally will refuse to award restitution to the buyer, except in certain types of cases.<sup>98</sup>

Among the types of situations where the court will order the recovery of the price paid is where the bargain has not been executed and the illegal purpose has not been consummated.<sup>99</sup>

<sup>92</sup>Donemar, Inc. v. Molloy, (1930) 252 N. Y. 360, 169 N. E. 610.

<sup>93</sup>It will be observed from the quotation in footnote 91 supra that Judge Pound uses quasi contract phraseology in discussing the basis of the buyer's recovery.

<sup>94</sup>Stair v. Marquart, (1920) 45 N. D. 384, 178 N. W. 121.

<sup>95</sup>Woodward, Quasi-Contracts, sec. 15; Restatement, Restitution and Unjust Enrichment, Tent. Draft, sec. 11.

<sup>96</sup>3 Williston, Contracts, sec. 1630; 2 Williston, Sales, sec. 663; Restatement, 2 Contracts, sec. 598.

<sup>97</sup>3 Williston, Contracts, sec. 1631, 1632; 2 Williston, Sales, sec. 663; Restatement, 2 Contracts, secs. 599, 601, 602, 603, 606, 607.

<sup>98</sup>2 Williston, Sales, secs. 679, 680; 3 Williston, Contracts, secs. 1788-1791; Restatement, 2 Contracts, secs. 599, 600, 601, 604, 605.

<sup>99</sup>Kahn v. Rosenstiel, (D.C. N.Y. 1924) 298 Fed. 656; Brashears v. Giannini, (1933) 131 Cal. App. 706, 22 P. (2d) 47, cert. denied (1933) 290 U. S. 700 ("The contract . . . afforded no consideration for the money paid, and recovery could be had in an action for money had and received."); Harrington v. Boschenski, (1922) 140 Md. 24, 116 Atl. 836 (" . . . the plaintiff had the right . . . to sue for and recover the consideration paid

Another is where the buyer is not in *pari delicto* with the seller.<sup>100</sup> Another is where the bargain is illegal because of a statute enacted specifically for the protection of the buyer.<sup>101</sup> The recovery of the buyer in each of these situations is quasi contractual.<sup>102</sup>

## II. THE SELLER AS PLAINTIFF

*Situation S 1. No contract exists.* If a seller delivers goods to a buyer without there being any contract, express or implied in fact between them, a quasi contract situation may arise. In order for the quasi contractual relief to be proper it must appear both that no express contract exists and also that the buyer has not made an implied in fact promise to pay for the goods.

This situation appeared in a number of cases:

First: The parties entered into negotiations to form a contract but no contract resulted because of the lack of an expression of mutual assent. While the negotiations were pending the seller delivered goods to the buyer and the buyer apparently consumed or disposed of them before the non-existence of the express contract was discovered.<sup>103</sup>

Second: The seller's business was transferred by the original proprietor to a new proprietor without an assignment of the old proprietor's contract with the buyer if one existed—the new proprietor delivered goods to the buyer who thought the original proprietor was delivering them.<sup>104</sup>

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by him, not upon the contract, but independently of it."); Boyer v. Garner, (Mo. App. 1929) 15 S. W. (2d) 893 ("... the purchaser should be permitted to repudiate the contract and recover his money paid. . . .")

<sup>100</sup>Stacy v. Brothers, (1919) 93 Conn. 690, 107 Atl. 613; Groves v. Jones, (1930) 252 Mich. 446, 233 N. W. 375 ("Having determined that the parties are not in *pari delicto* . . . it follows that the plaintiff is entitled to recover on the common counts the money he paid for the cattle."); Grande v. Eagle Brewing Co., (1922) 44 R. I. 424, 117 Atl. 640 ("The plaintiff [buyer] . . . had an action . . . to recover back the money because it was received without consideration."); Haug & Nellerhoe v. Murdoch, (Saskatchewan, 1916) 9 S. L. R. 56, 26 D. L. R. 200.

<sup>101</sup>Badger Coal & Coke Co. v. Sterling Midland Coal Co., (1923) 180 Wis. 79, 192 N. W. 461; Haug & Nellerhoe v. Murdoch, (Saskatchewan 1916) 9 S. L. R. 56, 26 D. L. R. 200.

<sup>102</sup>Woodward, Quasi Contracts, ch. VIII; Restatement, 2 Contracts, secs. 598-609.

<sup>103</sup>National Rosin Oil & Size Co. v. South Atlantic Coal Co., (1918) 23 Ga. App. 87, 97 S. E. 559 ("... no valid contract existed between them . . . and . . . the plaintiff [seller] was entitled to recover the market value of the coal delivered. . . ." The court does not raise the question as to the possible existence of an implied-in-fact contract).

See Costigan, Implied-in-Fact Contracts and Mutual Assent, (1920) 33 Harv. L. Rev. 376; Woodward, Quasi Contracts, secs. 8, 52.

<sup>104</sup>Merkel v. St. Louis Hide & Tallow Co., (Mo. App. 1916) 190 S. W. 611 ("The action proceeds in quantum meruit for the recovery of the

Third: The buyer's business was transferred by the original proprietor to a new proprietor—the seller shipped goods as ordered by the original proprietor—the goods were received and used by the new proprietor.<sup>105</sup>

Fourth: Owing to mutual mistake the seller delivered the goods to the buyer and the buyer used them—but the seller and buyer actually had made no express nor implied in fact contract.<sup>106</sup>

In each of these cases, the seller could not recover from the buyer on a contract because there was no contract between them, or at least the Court decided that there was no contract between them. The seller did recover the value of the goods delivered to the buyer, however, and the seller's recovery in each case was quasi contractual.<sup>107</sup>

*Situation S 2. Buyer commits a material breach after part performance by seller.* Where the seller delivers goods to the buyer (the seller not having fully performed the contract nor a divisible part thereof) and the buyer thereafter commits a material breach of the contract, the seller has the privilege of repudiating the contract and of recovering the value of the goods delivered.<sup>108</sup> His recovery in such a case is quasi contractual.<sup>109</sup>

*Situation S 3. Buyer induces contract by fraud or misrepresentation.* If a buyer by fraud or material misrepresentation induces a seller to enter into a sale or a contract to sell, the trans-

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reasonable value of the goods accepted and retained by defendant [buyer], as being the extent of the benefits thus conferred upon defendant. And a recovery may be had upon what is termed a 'quasi-contract,' or a contract strictly implied by law."

But see contra: *Parker v. Dantzer Foundry & Machine Works*, (1918) 118 Miss. 126, 79 So. 82.

The classic discussion of this situation is by the late Professor Costigan in, *The Doctrine of Boston Ice Company v. Potter*, (1907) 7 Col. L. Rev. 32.

<sup>105</sup>*Cary v. Simpson & Harper*, (1914) 15 Ga. App. 280, 82 S. E. 918 (If the defendant partnership accepted and used the goods shipped ". . . there would be an implied promise to pay." The court does not raise the question as to the possibility of there being an implied-in-fact contract).

<sup>106</sup>*Turnipseed v. Burton*, (1912) 4 Ala. App. 612, 58 So. 959 ("Does Turnipseed, in equity and good conscience, owe Burton for the crates?").

<sup>107</sup>*Woodward*, *Quasi-Contracts*, Ch. IV; *Restatement, Restitution and Unjust Enrichment*, Tent. Draft, 1935 secs. 34, 11.

<sup>1082</sup>*Williston*, *Sales*, secs. 592-593; *Restatement*, 2 *Contracts*, secs. 347, 350, 351.

*O'Beirne v. Greenberg*, (1914) 86 Misc. Rep. 49, 148 N. Y. S. 85 (" . . . but defendant [buyer] violated . . . his agreement to give a chattel mortgage, and on that default plaintiff [seller] was entitled to recover the value of the goods sold and delivered. . . ." The case is unsatisfactory, however, because it does not appear whether the seller had delivered a part or all of the goods.)

<sup>109</sup>The comments cited in footnote 34 apply with equal force to this situation.



action will be voidable by the seller.<sup>110</sup> The nature of the buyer's fraud or misrepresentation may also be such as to prevent any sale or contract to sell from ever coming into existence.<sup>111</sup> In either case, the seller may recover the value of the goods he may have delivered to the buyer,<sup>112</sup> and his recovery is quasi contractual.<sup>113</sup>

*Situation S 4. Seller delivers less than the agreed quantity.*

The rights of a seller who delivers less goods than he agreed to deliver are stated in section 44 (1) of the Uniform Sales Act.

The first sentence of section 44 (1) provides that:

"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate."

The buyer's obligation to pay the contract price under this sentence is contractual, being based on a substituted contract.<sup>114</sup> The buyer cannot be held on the original contract, because the seller has committed a material breach thereof.

The second sentence of Section 44 (1) reads as follows:

"If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received."

The seller cannot recover on the original contract because he has committed a material breach thereof and he cannot recover on a substituted contract because there is no substituted contract. His recovery of the value of the goods under this sentence is quasi contractual.<sup>115</sup>

<sup>110</sup>2 Williston, Sales, Ch. XXV; Restatement, 2 Contracts sec. 476.

<sup>111</sup>2 Williston, Sales, sec. 625; Restatement, 2 Contracts, sec. 475.

<sup>112</sup>2 Williston, Sales, sec. 647; Restatement, 2 Contracts, sec. 488, Illustration 3; Restatement, Restitution and Unjust Enrichment, Tent. Draft, 1935 sec. 23.

*American Woolen Co. v. Samuelsohn* (1919) 226 N. Y. 61, 123 N. E. 154 ("The rescission of the contract of sale does not prevent the plaintiff [seller] from recovering as upon an implied promise to pay the value of the goods delivered to the defendants [buyers] and actually used by them. The plaintiff cannot, however, recover therefor upon the express contract of sale which it has rescinded." The value of this case is lessened by the fact that the seller's recovery was barred by the statute of limitations. The court decided that the statute commenced to run from the time of the delivery of the goods and not from the expiration of the four months' credit period.)

<sup>113</sup>Restatement, Restitution and Unjust Enrichment, Tent. Draft, sec. 23.

<sup>114</sup>2 Williston, Sales, sec. 460; Restatement, 2 Contracts, sec. 357, Comment j.

<sup>115</sup>Woodward, Quasi-Contracts, sec. 176; 2 Williston, Sales, sec. 460;

In the case cited, the court sustained the buyer's contention that where the seller delivers less than the agreed amount of goods and the buyer disposes of them before he knows that the seller's delivery will be insufficient as to quantity, the buyer is liable only for the value of the goods received.<sup>116</sup>

*Situation S 5. Seller delivers goods of defective quality.* When the seller delivers materially defective goods he ordinarily is guilty of a breach of warranty. The recovery of a seller-plaintiff who is guilty of a breach of warranty and whose litigation is handled by the parties and the court on a breach of warranty basis, is discussed elsewhere in this article.<sup>117</sup>

It may be true that the seller who delivers goods of materially defective quality made no express or implied warranty or that the litigation is handled by the parties and the court as if there were no warranty. In either event, we have the situation of a seller, who has delivered materially defective goods, suing for the price or the value of the goods. He cannot recover on the original contract because he has committed a material breach.<sup>118</sup>

Section 44 (1) of the Uniform Sales Act specifically covers the situation where the seller's delivery is deficient as to quantity, but (excluding the breach of warranty sections) there is no similar

3 Williston, Contracts, secs. 1473-1485; Restatement, 2 Contracts sec. 357.

It is interesting to note that section 357 of the Restatement of Contracts, entitled "Restitution in favor of a plaintiff who is himself in default," contains three additional provisions relating to the seller's quasi-contractual recovery not expressly included in the second sentence of section 44 (1). These three provisions are substantially as follows:

- 1) The plaintiff's breach or non-performance must not be "wilful and deliberate";
- 2) The plaintiff's recovery shall not exceed a ratable proportion of the contract price;
- 3) From the plaintiff's recovery shall be deducted the damages caused to the buyer by the seller's breach of contract.

The three provisions are common law rules applicable to the quasi-contract recovery in question. Since the second sentence of section 44 (1) is a codification of this same remedy, it would seem that these three provisions should be read into the sentence by implication. In other words, a seller who is suing under the second sentence of section 44 (1) probably must show that his breach was not "wilful and deliberate," his recovery will be limited to a ratable proportion of the contract price, and from his recovery will be deducted the damages caused to the buyer by the seller's breach of contract.

<sup>116</sup>Guaranty Trust Co. v. Gerseta Corporation, (1925) 212 App. Div. 76, 208 N. Y. S. 270 (The court quotes from 2 Williston, Sales, sec. 460 where Professor Williston describes the present type of recovery as quasi-contractual.).

<sup>117</sup>Situation S 6.

<sup>118</sup>2 Williston, Contracts, sec. 842; Restatement, 1 Contracts sec. 266 et seq.

section covering the situation where his delivery is defective as to quality.

The two situations are similar, however, and similar results should be reached. Thus, if the buyer accepts or retains the goods after he knows that they are materially defective as to quality and while he still is reasonably able to return them, he is liable for the contract price thereof or for a ratable proportion of the contract price, minus the damages caused by the seller's breach.<sup>119</sup> This liability is contractual, being based on a substituted contract.<sup>120</sup>

If however, the buyer has used or disposed of the goods before he knew that they were materially defective, and if the seller's breach or non-performance was not "wilful and deliberate," the seller can recover their value, not exceeding "a ratable proportion of the agreed compensation," minus the damages caused to the buyer by the seller's breach of contract.<sup>121</sup> This recovery is quasi contractual.<sup>122</sup>

In the cases cited, quasi contractual recovery of the type discussed was allowed.<sup>123</sup>

*Situation S. 6. Recoupment by buyer.* Where the buyer sets up a "breach of warranty by way of recoupment in diminution or extinction of the price," as he may under the Uniform Sales Act,<sup>124</sup> a quasi contract situation exists.<sup>125</sup> The buyer in such a case has accepted the goods in spite of the breach of warranty, but because of the breach of warranty "is allowed to avoid the contract which was made and substitute in its stead a quasi contractual obligation for the value of what he has received."<sup>126</sup>

It will be observed that the doctrine of a substituted contract, which was mentioned in Situation S 5, has no place where the

<sup>119</sup>Restatement, 2 Contracts, sec. 357.

<sup>120</sup>2 Williston, Sales, sec. 460; Restatement, 2 Contracts, sec. 357, Comment j.

<sup>121</sup>Restatement, 2 Contracts, sec. 357.

<sup>122</sup>Woodward, Quasi-Contracts, sec. 176; 3 Williston, Contracts, secs. 1473-1485; Restatement, 2 Contracts, sec. 357.

<sup>123</sup>Standard Growers Exchange v. Howard, (1921) 82 Fla. 97, 89 So. 345 (The tomatoes delivered by plaintiffs were defective and ". . . they cannot recover the contract price. There was a common count, however, for goods bargained and sold upon which the plaintiffs could recover on a quantum valebant for the value of the tomatoes, and as the defendant's own evidence . . . shows that it received something of value for the tomatoes, the plaintiffs should have recovered as much as the tomatoes were worth."); Monarch Metal Weather-Strip Co. v. Hanick, (1913) 172 Mo. App. 680, 155 S. W. 858.

See also Walls v. Tinsley, (1915) 187 Mo. App. 462, 173 S. W. 19.

<sup>124</sup>Sec. 69 (1a).

<sup>125</sup>2 Williston, Sales, secs. 605, 612.

<sup>126</sup>2 Williston, Sales, sec. 605.

buyer may and does treat the delivery of defective goods as a breach of warranty and sets up the breach of warranty by way of recoupment. In the recoupment situation, the buyer may accept or keep the goods,<sup>127</sup> even after he knows of the breach of warranty,<sup>128</sup> and not be liable for their contract price on the theory of a substituted contract, but only for their value on the theory of quasi contract.<sup>129</sup>

In the cases cited, the buyer was allowed recoupment for breach of warranty and the seller recovered the value of the goods delivered.<sup>130</sup>

*Situation S 7. Price fixing method fails.* If the sale or the contract to sell does not state the price of the goods, but rather provides that the price shall be fixed some time in the future by valuers or by some other price fixing machinery, then a quasi contract situation may arise if the price-fixing machinery fails to function.

In the first place, the buyer's obligations under the sale or the contract to sell are avoided if the price fixing method fails because his duty to pay the price is subject to the condition that the price be fixed in the specified way.<sup>131</sup> If the buyer accepts or keeps the goods with the seller's consent after they both know that the price fixing machinery is not going to function and while the buyer is still reasonably able to return them, the buyer would seem to be liable on a substituted contract for the value of the goods.

If, however, it appears that the buyer has used or disposed of the goods before he knew that the price fixing machinery was not going to function, then the buyer cannot be held on the original express sale or contract to sell nor on a substituted contract, but the buyer is still liable to the seller for the value of the goods received.<sup>132</sup> The buyer's liability in this case is

<sup>127</sup>Uniform Sales Act, sec. 69 (1a).

<sup>128</sup>But the buyer must give notice of the breach of warranty to the seller, Uniform Sales Act, sec. 49.

<sup>129</sup>2 Williston, Sales, secs. 605, 612.

<sup>130</sup>*Southern Gypsum Co. v. United Paperboard Co.*, (C.C.A. 4th Cir. 1926) 11 F. (2d) 58; *Elmer Brothers v. Carpenter*, (1919) 42 Cal. App. 206, 183 Pac. 566.

<sup>131</sup>Uniform Sales Act, sec. 10 (1); 1 Williston, Sales, secs. 174, 175; 2 Williston, Contracts, secs. 800, 801.

<sup>132</sup>Uniform Sales Act, sec. 10 (1); 1 Williston, Sales, sec. 175; 2 Williston, Contracts, secs. 800, 801.

*Merchants' Grocery Co. v. Talladega Grocery Co.*, (1928) 217 Ala. 334, 116 So. 356; *Keime v. Thum*, (1925) 238 Ill. App. 519 ("... the principle of quasi-contract . . . applies. . ."); *Spencer v. Treanor*, (1922) 79 Ind. App. 178, 137 N. E. 566 (The buyer "... has voluntarily received

quasi contractual.<sup>133</sup>

*Situation S 8. Statute provides that a customs duty, imposed after the contract is made, may be added to the price by the seller.* In the case of *G. G. Crespin & Son v. Colac Co-operative Farmers Ltd.*,<sup>134</sup> the plaintiff agreed to sell eighty bales of gunny sacks to the defendant, to be imported from India into Australia. At the time of the contract there was no duty on gunny sacks, but later a duty was imposed and the plaintiff was compelled to pay duty on the last fifteen bales. The Customs Acts<sup>135</sup> contained a provision that if a duty were imposed on goods after the contract was made and before they were imported into Australia, "the agreement shall be altered" and the seller might add the duty to the price. The plaintiff [seller], having paid the new duty, sued the buyer to recover the amount thereof and was allowed to recover. His recovery was quasi contractual.<sup>136</sup>

*Situation S 9. Contract is unenforceable because of a Statute of Frauds.* If a plaintiff has conferred a benefit upon a defendant under an oral contract which is unenforceable because of a statute of frauds, the ordinary rule is that the plaintiff can recover the value of his performance in quasi contract.<sup>137</sup> This situation will not arise under a statute which follows Section 17 of the English Statute of Frauds, nor under Section 4 of the Uniform Sales Act because each of these sections provides in substance that if the buyer pays a part or all of the price or if the seller delivers a part of all of the goods, then the statute is satisfied and the contract, though oral, is enforceable.<sup>138</sup>

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the other's goods, and derived a benefit therefrom, and ex aequo et bono ought to pay for them.").

<sup>133</sup>1 Williston, Sales, sec. 175.

For an extensive discussion of the greatly varied situations where the price is not fixed at the time when the sale or contract to sell is made, see Prosser, *Open Price in Contracts for the Sale of Goods*, (1932) 16 MINNESOTA LAW REVIEW 733.

<sup>134</sup>(Aus. 1916) 21 C. L. R. 205.

<sup>135</sup>See (Aus. 1916) 21 C. L. R. 205, 211.

<sup>136</sup>This is an illustration of a right of recovery which exists because of a statute and is not based upon the consent of the buyer. The writer feels that the ordinary importer-buyer of goods in Australia makes no promise, express or implied, that if the import duties are increased he will pay to the seller the amount of the increase. The buyer must pay the increase because the statute "alters" the agreement and not because he promised to pay it.

See also Keener, *Quasi Contracts* 16-17.

<sup>137</sup>Woodward, *Quasi-Contracts*, ch. VI; *Restatement, 2 Contracts*, sec. 355; 1 Williston, *Contracts*, secs. 534-537.

<sup>138</sup>If the statute provides that part payment of the price by the buyer, only "at the time" when the contract is made, is sufficient to satisfy the statute, then a buyer, who paid a part of the price after the contract was

If, however, the facts are a little different a quasi contract situation may arise. In the case cited,<sup>139</sup> the contract was for more than the statutory amount and also was not to be performed within a year. The majority of the court held that there was no sufficient memorandum of the contract, but there was acceptance and actual receipt of a part of the goods. The majority held that the plaintiff [seller] could not recover on the contract because the contract was not to be performed within a year<sup>140</sup> but that the seller could recover the "reasonable price" of the goods delivered and not paid for. The seller's recovery was quasi contractual.<sup>141</sup>

*Situation S 10. Bargain is illegal.* It has been seen that the ordinary rule is that a buyer cannot enforce an illegal bargain,<sup>142</sup> and the same rule is ordinarily true as to a seller.<sup>143</sup>

A seller, like a buyer, will ordinarily be denied quasi contractual recovery also.<sup>144</sup> But there are situations where a seller who has delivered goods to a buyer under an illegal bargain, will be allowed to recover their value;<sup>145</sup> among such situations is the one where the illegality is slight and does not involve "serious moral turpitude."<sup>146</sup> The seller's recovery of the value of the goods delivered under such an illegal bargain is quasi contractual.<sup>147</sup>

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made, could not enforce it and should be given quasi-contractual recovery of the amount paid; see 1 Williston, Sales, sec. 99 and *Stowe v. Fay Fruit Co.*, (1928) 90 Cal. App. 421, 265 Pac. 1042.

<sup>139</sup>*David Taylor Co. v. Fansteel Products Co.*, (1932) 234 App. Div. 548, 255 N. Y. S. 270, affirmed (1933) 261 N. Y. 514, 185 N. E. 718. The case is commented on in (1932) 17 MINNESOTA LAW REVIEW 107.

<sup>140</sup>To the effect that a contract for the sale of goods, of more than the statutory amount and not to be performed within a year, must comply with both sections 17 and 4 of the Statute of Frauds, see 1 Williston, Sales, sec. 51 and Restatement, 1 Contracts, (1932) sec. 178, Comment b.

<sup>141</sup>*Woodward*, Quasi-Contracts, sec. 95; 1 Williston, Contracts, secs. 534-537; Restatement, 2 Contracts, sec. 355.

<sup>142</sup>Situation B 24.

<sup>143</sup>1 Williston, Contracts, sec. 1630; 2 Williston, Sales, sec. 663; Restatement, 2 Contracts, sec. 598.

<sup>144</sup>Restatement, 2 Contracts, sec. 598.

<sup>145</sup>2 Williston, Sales, secs. 679, 680; 3 Williston, Contracts, secs. 1788-1791; Restatement, 2 Contracts, secs. 599, 600, 601, 604, 605.

<sup>146</sup>Restatement, 2 Contracts, sec. 600, Illustration 3.

*Penn-Allen Cement Co. v. Phillips & Southerland*, (1921) 182 N. C. 437, 109 S. E. 257 (The buyers are not liable ". . . upon the contract, which is unlawful, but upon a quantum meruit having accepted the shipment.")

<sup>147</sup>Restatement, 2 Contracts, sec. 600, Illustration 3, in speaking of a similar slightly illegal bargain, says:—"A [the seller] can rescind the bargain and recover the automobile or its value."

TABULATION OF ALL THE CASES CITED HEREIN WHERE A SELLER  
OR A BUYER HAS BEEN GIVEN QUASI CONTRACTUAL RELIEF  
AGAINST THE OTHER, SHOWING HOW THE COURTS  
DESCRIBE THE RELIEF THEY ARE GIVING.

	No. of cases	Per cent of all
The court does not in any way describe the nature of the recovery it is giving or at most says, in effect, that the plaintiff is "entitled to recover".....	203	73.0%
The court bases the plaintiff's right to recover on the fact that he has "rescinded." That is, the court says, in effect, "The plaintiff, having rescinded, is entitled to recover, etc.".....	17	6.2%
The court uses one of the following expressions: "equity and good conscience," "honesty and good conscience," "justice and good conscience," "good conscience," "ex aequo et bono," "equitable principles," or "justice".....	14	5.0%
The court says, in effect, that the plaintiff may recover because the defendant is holding the money or goods "without consideration".....	8	2.9%
The court describes the recovery as being in assumpsit on the common counts, or in assumpsit, or on the common counts, or on a quantum meruit, or on a quantum valebant .....	8	2.9%
The court says that the suit is on an implied promise or that the law implies a promise.....	7	2.5%
The court describes the action as being for money had and received .....	5	1.8%
The court says the action is not on a contract or not on "the contract" .....	5	1.8%
The court uses the expression "quasi contract" or a derivative thereof .....	4	1.4%
The court says, in effect, that "the law" requires that the plaintiff recover .....	3	1.1%
The court speaks of the defendant as being "enriched" or "unjustly enriched" .....	2	.7%
The court says, in effect, that the plaintiff is entitled to "restitution" .....	2	.7%
Total .....	278	100.0%

THE EXISTENCE OF A PATTERN RUNNING THROUGH THE CASES  
HEREIN COVERED

Since this article is a survey of the sales cases decided in the last twenty-four years in which the plaintiff has been given quasi contractual recovery, the question arises as to whether any thread of unity runs through them and whether the cases conform to any basic pattern.

In general, it can be said that since all of the recoveries granted in these cases were quasi contractual, they should fit into any pattern into which the entire body of the law of quasi contract fits. As has been seen in the situations set forth, these sales cases do adhere quite closely to the general rules of the subject.

Speaking now of the unjust enrichment cases alone, it will be seen that there is at least one unifying thread upon which they all may be strung. This thread can be expressed as follows: Where a sales transaction does not proceed in the orderly manner contemplated by the parties, but rather suffers some kind of a miscarriage, then the law of unjust enrichment will adjust the rights of the parties in accordance with an ordinary business man's idea of fairness. This adjustment may take the form of restoring the price paid by a buyer who has not received his goods or the form of restoring the value of the goods to a seller who has not been paid for them.

Another unifying thread appears to be that after the miscarriage has occurred, the transaction will be adjusted regardless of whether the miscarriage was the responsibility of the plaintiff, or of the defendant, or of neither, or of both. The only dispute here might be in connection with the case where the plaintiff defaults on his performance of the contract or is in some other way responsible alone for the miscarriage. Even here the plaintiff recovers if his breach was not wilful and there is some authority that even if his breach is wilful he may recover.<sup>148</sup> His recovery is the amount by which he enriched the defendant, minus the damages caused to the defendant by his breach.

The practice of the courts to step in and adjust the confusion left by the miscarriage of the sales transaction fills an important need in modern business. Business men are daily entering into a great number of sales transactions of the greatest variety as to subject matter, quantity, prices, and terms. Some transactions are represented by elaborate, counsel-prepared written contracts while others are to be found only in the face-to-face or telephone conversations of the parties. When a great volume of business possessing an infinite variety of detail, is carried on by ordinary humans, things are bound to go wrong occasionally. It is then that the right to sue for breach of contract is not adequate, and it is then that the courts are called upon to look over the situation and make an adjustment. In making the adjustment the courts do what ordinary business men would regard as fair, namely, they

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<sup>148</sup>See footnote 58 *supra*.



restore to the buyer-plaintiff, the price he has paid and they restore to the seller-plaintiff the value of the goods he has delivered. Because of the miscarriage the plaintiff will not get what he contracted for and the courts give him the next best thing under the circumstances.

#### MODERN TRENDS IN QUASI CONTRACTUAL RECOVERY IN SALES CASES

There are two aspects in which modern trends in quasi contractual recovery in sales cases are interesting:

First: As to the extent that quasi contract law has been changing as shown by the cases of the last twenty-four years; and

Second: As to the extent that the application of quasi contractual principles is different where a sales case is involved from where the subject matter is not a sales case.

Taking only the unjust enrichment branch of the law of quasi contract, it would seem that the principles of recovery should be the same regardless of the subject matter. The unjust enrichment is the gist of the action and if it exists recovery should be allowed. This has generally been true and the law of quasi contract has been regarded as a generally harmonious body of law. If, then, a discordant group of cases is encountered, it may represent a change in the law of quasi contract and it may be a respect in which quasi contract law is different in a sales case from what it would be if the subject matter were something else.

There have been two such discordant groups of cases. One was Situation B 11, where a buyer who rescinded for breach of warranty or the seller's fraud was allowed to recover not only his part payment of price but also expenses or damages incurred—the recovery of the expenses or damages cannot be justified on any doctrine of unjust enrichment because the expense or damage to the buyer does not enrich the seller. The other was Situation B 12 where a buyer who rescinded after having disposed of a part of the goods was allowed to recover what he had paid minus the proportionate part of the contract price for the goods not returned—this recovery violates the old rule that a party who wants to rescind must restore the status quo.<sup>149</sup>

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<sup>149</sup>A change in the attitude of the law toward this situation is shown by the fact that the restoration of the status quo is insisted upon in 2 Williston, Sales, sec. 649 and in the Uniform Sales Act, sec. 69 (3), while the Restatement 2 Contracts, sec. 480 makes rather broad provision for a recovery without such restoration.

The decisions in these cases may be dismissed as being merely "wrong" decisions, but the number of them perhaps indicates that two new rules of law are being created.

#### THE UNIFORM SALES ACT AS A CODIFICATION OF QUASI CONTRACT PRINCIPLES

It will be observed, from reading the thirty-four situations which constitute the main body of this article, that in five of them the recovery granted by the court is provided for in the Uniform Sales Act and that in the other twenty-nine situations there is no applicable Uniform Sales Act provision, other than as contained in the catch-all section 73. It would clearly be futile and unwise to attempt to cover all the law on a subject in any statute and least of all in a uniform act. The problem of how complete to make a uniform act undoubtedly is one of great complexity, but if a new uniform sales act were being drafted, the draftsman might well consider the inclusion of some definite coverage of the quasi contractual rights of the parties.

#### THE EFFECT OF THE ABOLITION OF THE FORMS OF ACTION ON THE LAW OF QUASI CONTRACT

If it were true that the law of quasi contract was created and existed only because of the early forms of action and had no substance other than that which arose out of the development of common law pleading, then it would seem that the passing of general assumpsit also means the passing of the law of quasi contract. But this idea is based upon a misunderstanding. The plaintiffs in the statute cases, judgment cases and tort cases sought an additional remedy to the one they already had—the plaintiff in the unjust enrichment case needed a remedy, not having one of any kind at the time—and the remedy of general assumpsit was given in all four cases. All four cases were unique as a matter of substantive law.

The law of quasi contract is spoken of as being the result of the application of equitable principles, but this probably means the principles of fairness and common sense justice, rather than the technical principles of equity jurisdiction. The courts of equity did not have jurisdiction to help the plaintiffs in these four cases mentioned.

It is true that under code pleading we can satisfy the plaintiff in the statute or in the judgment case by giving him an "action"

under the code and the substantive law of statutes or judgments is all that he needs. The plaintiff in the tort case, however, today needs the quasi contract substantive law principle that a victim of a tort can recover the amount by which the commission of the tort has enriched the tortfeasor, and the plaintiff in the unjust enrichment case today needs the quasi contract substantive law principle that he can recover the amount by which the defendant has been unjustly enriched. Orderly thinking still requires a distinction between the case where the plaintiff recovers on the defendant's promise and the case where the plaintiff recovers on the defendant's unjust enrichment.

The fact that the substantive law principles of quasi contract are still needed does not mean that we must keep the term "quasi contract." We can dispose of the plaintiffs in the statute and judgment cases by regarding them as having substantive rules of their own to rely upon. We can handle the tort plaintiff and the unjust enrichment plaintiff by abandoning the term "the law of quasi contract" and adopting the term "the law of unjust enrichment." This is substantially what the American Law Institute has done in the Restatement of Restitution and Unjust Enrichment.

We can change and abandon names—we can throw away old tools and get new ones just as a carpenter does—but the work still has to be done. Some may prefer the new tools to the old ones and vice versa, but the substantive law of quasi contract has no more been abolished by the passing of general assumpsit than the substantive law of contracts has been abolished by the passing of special assumpsit.

An idea of the present day importance of the law of unjust enrichment may be gathered from the fact that the Restatement of Restitution and Unjust Enrichment (Tent. Draft, 1935 and Proposed Final Draft, Part I, 1936) covers 581 printed pages.

#### THE ABSENCE OF DESCRIPTIVE TERMINOLOGY IN QUASI CONTRACT CASES

The tabulation hereinabove presented shows that the courts, in giving quasi contractual recovery in the sales cases covered herein, used the expression "quasi contract" or a derivation thereof in only 1.4% of the cases, that they used the expression "enriched" or "unjustly enriched" in only .7% of the cases and that they used language having some kind of a quasi contract connotation

in only 27% of the cases. In 73% of the cases quasi contractual recovery was given without the use of any quasi contract terminology whatever.<sup>150</sup>

It is submitted that these figures show a respect in which the courts have an opportunity to promote a better understanding, by the profession, of the law of quasi contract. The courts might make a particular effort, in quasi contract cases, to use quasi contract terminology and quasi contract analysis. The Restatement of Restitution and Unjust Enrichment is about to be promulgated, and, owing to the high standard of its preparation, it might well form the basis for the future development by the courts of quasi contract doctrine.

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<sup>150</sup>Patterson, *The Scope of Restitution and Unjust Enrichment*, (1936) 1 Mo. L. Rev. 223, 225:—"Even in the grist of current judicial decisions applying the doctrines of quasi contract, only a minority label them or analyze them correctly; and for this reason it is all the more important that the practicing lawyer should be able to recognize the thing without its proper label."