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QUASI-CONTRACT-IMPOSSIBILITY OF PERFORMANCE-RESTITUTION OF MONEY PAID OR BENEFITS CONFERRED WHERE FURTHER PERFORMANCE HAS BEEN EXCUSED

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QUASI-CONTRACT—IMPOSSIBILITY OF PERFORMANCE—RESTITUTION OF MONEY PAID OR BENEFITS CONFERRED WHERE FURTHER PERFORMANCE HAS BEEN EXCUSED*—In a recent Oklahoma case, *City of Barnsdall v. Curnutt*,[1] an attorney was retained by a city to prosecute a damage claim arising out of the pollution of a stream. The attorney was to receive a 40 per cent contingency fee. The defendant in the action made an offer in compromise of $25,000 which was rejected by the city on advice of the attorney. Before the action was brought to trial the attorney died. The counsel substituted by the city obtained a settlement in which the city received $35,000, out of which a fee of $10,500 was paid to the new counsel. The original attorney's personal representative brought an action to recover for the services rendered by the decedent. Measuring his services by the rejected offer in compromise, the court allowed recovery of $10,000.

The adjustment of these competing interests poses some of the most difficult problems in the field of Restitution. The attorney had not completed performance on which compensation was expressly made contingent. Yet he had expended time and skill toward the fulfillment of the contract. Should he be required to bear the loss involved in this partial performance? Or should his executor be entitled to compensation? If so, what should be the measure of the recovery? Here is a situation created by contract but not covered by it:

*This is the third in a series of related comments in the Law of Contracts and Restitution, to be published from time to time throughout Volume 46 of the REVIEW.

[1] (Okla. 1945) 174 P. (2d) 596.

a situation, further, in which someone, and possibly everyone, must lose.

It will be seen that there are three basic facts underlying this situation. First, there is a contract or agreement between the parties that was valid in its inception. Second, there is a change of position by one or both of the parties in reliance upon this contract. And finally, there is an intervening event substantially changing the character of the promised performance.[2] The problem can be simply stated: "The question is, on which side the burden is to fall."[3]

1. *Assumption of Risk*

If one of the parties is found to have undertaken the risk of the interrupting event, the incidence of the loss is determined by the agreement of the parties. But it is not always an easy task to determine just when the risk has been assumed. If the attorney in the *Curnutt* case had provided that "in the event of my death prior to the satisfactory settlement of this dispute no claim against the city shall arise by reason of my services," no question would be presented. But suppose the clause had read, "no claim against the city shall arise by reason of my services prior to the satisfactory settlement of this dispute." Is this promise essentially different? The failure to mention death as a probable cause of interruption cannot be said to have changed the nature of the promise: it still is an undertaking to complete the litigation successfully and to demand payment only on that condition. Then what distinction can be drawn? The first promise is somewhat more detailed, spelling out one possible contingency, but even it is not all-inclusive. It is entirely possible that the cause of the death might be totally unanticipated; nevertheless, the mention of the possibility of death would act as an assumption of the risk of death no matter how unexpected the cause might be.[4] Yet making the fee expressly contingent in the

[2] Unfortunately there is no single term, or for that matter a single phrase, which adequately describes the results flowing from the intervening event. Impossibility and frustration have done yeoman service, but both are inaccurate. Seldom is performance impossible in fact, nor is the purpose of the contract totally frustrated. Moreover, the discharge of a promise is not dependent on the degree of impossibility or impracticability. A promisor may bind himself to do the impossible and may be excused by changes merely making performance more difficult. The best that we can do is to attempt by indirection to avoid the use of confusing terms.

[3] Lord Ellenborough in Barker v. Hodgson, 3 M. & S. 267 at 270, 105 Eng. Rep. 612 (1814).

[4] Similarly in Shelton v. Tuttle Motor Co., 223 N.C. 63, 25 S.E. (2d) 451 (1943), plaintiff advanced $175 toward the payment of a new car, agreeing that the defendant was not to be liable for any delay in making delivery. After all sales of new cars were frozen by government order, the plaintiff demanded return of the money. The court by a 4-3 decision denied the claim on the ground that "the parties have contracted against the very contingency that arose."

Curnutt case, surely implying recognition of the fact that the attorney might fail to complete the case successfully, did not amount to an assumption of the risk of all causes of failure.[5] It is not often that human foresight enables us to anticipate the exact nature of the contingency which subsequently occurs. In view of this, how explicit must a promise be before it will act as an assumption of risk? [6]

A related problem exists when the parties were aware of the risk involved, but no mention of it is made within the contract. Should the promisor be conclusively presumed to have assumed the risk of his unconditional promise? [7] It would seem that it should not be necessary for the risk of the precise contingency to be both foreseen and expressly assumed, but the extent to which unexpected events will be covered by general assumption clauses, or the effect of failure to provide for an anticipated contingency is not easy to assess.

In any event it is true that in many situations it will be impossible to find any express or implied assumption of risk, the fact being that the parties simply did not anticipate the possibility of the event. Where this is true, the court's job becomes substantially more complex. Since the parties' agreement does not cover the contingency, the court must adjust the conflicting interests without this source of aid. The decision is made even more difficult by the fact that, by hypothesis, neither party is at fault. This absence of agreement or fault, of contract or of tort, calls for special treatment of a type not yet fully developed by the courts. It is a field of relatively recent recognition in which the factors to be considered have not yet been fully charted.[8]

[5] In Morton v. Forsee, 249 Mo. 409, 155 S.W. 765 (1913), an attorney died after securing a judgment in the trial court, the judgment being affirmed the following year in the Supreme Court. The personal representative was held to be entitled to a "proportionate part" of the promised fee despite the fact that it was expressly made contingent on the attorney's being "entirely successful."

[6] Surely a general covenant assuming all risk should not automatically place all loss on the covenantor. If the basic promise is absolute, such a covenant is merely repetition and whatever operates to excuse the promise, should also discharge the covenant. See Krause v. Board of Trustees, 162 Ind. 278, 70 N.E. 264 (1904); Baetjer v. New England Alcohol Co., 319 Mass. 592, 66 N.E. (2d) 798 (1946).

[7] Professor Williston would say that the promisor should not be excused. "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." If the circumstance should have been within the contemplation of the parties, performance is not excused. 6 WILLISTON, CONTRACTS, § 1931 at p. 5411 (1938). But see Tatem, Ltd. v. Gamboa, [1939] 1 K.B. 132, where further charter payments were excused by the seizure of the chartered vessel by the Spanish nationalists, although it was shown that the parties were aware of the risk of such seizure when the ship was chartered. And see MCELROY, IMPOSSIBILITY OF PERFORMANCE 246 (1941).

[8] "Once it is fully realized that general language in a contract is seldom used advisedly with reference to future contingencies, and that neither a court of law, nor

Before proceeding to a discussion of the problem, it should be pointed out that the distinction just drawn between situations covered by the intent of the parties and those not so covered is easy to make and exceedingly difficult to apply. The villain in the piece is naturally the word "intent," and the nature of the judicial inquiry is such that confusion is bound to arise.[9]

We are, of course, limited to a consideration of the outward manifestations of a party's intent as seen through the eyes of the "reasonable man." It is possible, perhaps, to select cases in which there unquestionably was an intent to assume the risk of this specific contingency and on the other hand there will be cases in which it is equally clear that no thought at all was given to the subject. But between these two poles will fall most of the cases. They present an infinite variety of situations in which it will be difficult in the extreme to say with assurance, "This was the intent of the parties."

Thus where one party has specifically stated that "I assume the risk of a particular contingency" no problem would normally arise.[10] And a reasonable man may be convinced that even in the absence of this express statement the circumstances are such that one party intended to assume the risk, the failure to express this intent being in the nature of an oversight. There will be other occasions in which the reasonable man will be convinced that, although the parties did not anticipate the contingency, if they had, one of them would have assumed the risk. Or again the court may fail to see the possibility of or the necessity for distinguishing between this *would have* and *did*, and simply conclude that it was the "implied" intent of the parties to asume the risk. Thus a building contractor in full control of the premises will be held by implication to have assumed the risk of any loss that may occur, it being unnecessary to determine whether the failure of the contract to provide for a result different from the general rule "implies" an *actual* assumption of risk, or whether the general rule may be used to "imply" that if the contractor had had the necessary foresight he *would* have assumed the risk. These methods of approach vary materially

a court of equity, can carry out the intention of the parties where none has in fact been entertained, there will be less reluctance to adjust the rights of parties. . . . on the basis of the equities of the particular case." GRISMORE, LAW OF CONTRACTS, § 176 at p. 281 (1947).

[9] See Fuller's excellent discussion of this problem in BASIC CONTRACT LAW 666 (1947).

[10] The insurance contract is, of course, the clearest example of this type of risk assumption. But it is not uncommon for other contracts to contain special clauses covering certain anticipated risks. In fact, the more imagination the draftsman displays the more detailed will be these provisions. Despite all precautions, however, events outside the scope of the agreement will continue to surprise the parties, and anticipated events will continue to be produced by unexpected causes.

from one another, but there is one connecting feature. In each instance the court is able to dispose of the problem by reference to the agreement of the parties.[11]

There is danger, however, in this concept of the "implied" assumption of risk since it can so easily be extended to cover situations in which our reasonable man would not be justified in saying either that one of the parties did assume the risk or that he would have done so. In inquiring into intent there are generally two questions which must be answered. First, was there any intent at all on the point? And second, if so what was it? Too often an affirmative answer to the first question is assumed and an inquiry made only into the second. When a court allocates the loss with a statement that there was an implied assumption of risk, it hides from itself the responsibility and difficulty of its task if in fact it is clear that the intervening event was not covered by the contract.[12]

While it is true that often a court will be justified in reaching its decision solely on the basis of the parties' intent, there will be many situations in which this intent will be of no assistance. And between these extremes will fall a large number of cases in which the contract only nominally or partially covers the interrupting event, so that, while of some aid, it cannot supply the entire foundation for the decision. Undoubtedly, the degree to which the decision may be shaped by the agreement will vary markedly from case to case, and often it will be impossible to distinguish sharply the part played by the agreement from the part played by factors outside it. More than likely in most cases there will be a substantial interplay between the two. Yet although separation may be artificial, the difference in the factors involved makes it profitable to analyze them separately. This comment will lay emphasis on the questions arising when the contractual undertaking, in whole or in part, fails to cover the supervening event.

[11] This is amply illustrated by the difficulty encountered with the "implied term" theory which gained prominence following Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (1863). See MCELROY, IMPOSSIBILITY OF PERFORMANCE, c. 3 (1941). Bown Bros. v. Merchant's Bank, 214 App. Div. 693, 213 N.Y.S. 146 (1925); Crane v. School Dist., 95 Ore. 644, 188 P. 712 (1920); Niblo v. Binsse, 1 Keyes (N.Y.) 476, 3 Abbot 375 (1864).

[12] This reluctance to recognize that many litigated disputes arise out of unforeseen and unprovided for events is of course understandable. Thus a court which has declared that the testator's intent is the pole star of construction and has then proceeded to construe a will to cover an obviously unanticipated contingency by reference to the testator's intent is likely to carry the same mode of analysis into a contract problem. See 2 SIMES, FUTURE INTERESTS, §§ 304-313 (1936). And it is important to remember that it is easier to explain a decision by placing the responsibility on the litigants themselves than to say, in effect, "You did not provide for this, but in considering all factors, we feel constrained to hold against you." This technique has appeal, but where it serves to deceive the court, it is decidedly dangerous.

2. *Allocation of Loss*

The cases with which we are concerned are relatively simple on their fact side, but the legal problems they generate are both complicated and elusive. Careful analysis is therefore indispensable. But analysis is handicapped by inadequate terminology. Until the later years of the Nineteenth Century, lawyers discussed these cases in terms of contract, express or implied, too often without any recognition of the double meaning they had given to the word "implied." Confusion was inevitable. Then came explicit differentiation of quasi-contract (the contract "implied in law") whereupon we seemed to have acquired a perfect instrument for dealing with these cases. Two distinct questions were identified: (1) Are the promises of the parties discharged by impossibility (or frustration or whatever it may be called) or, contrariwise, are the promises still enforceable by an action for damages for breach? (2) If the contract has been discharged, is there a quasi-contractual or equitable right of restitution to the status existing before the contract was made?

This analysis, however, places undue emphasis on purely remedial aspects. And, as we shall see, different remedies (for example, contract and quasi-contract) may be used to give substantially the same result on the same facts. Conversely, the same remedial device may give sharply different results on the same set of facts, depending on the manner of application. So, to be accurate, we are required to look behind the remedies and to analyze the interests they were designed to protect.

Our problem, as has been seen, consists of a contract in which the character of further performance has been substantially changed by an event of such nature that the adjustment of the competing interests must in some degree be achieved without the aid of the parties' agreement. The solution to the problem is to be found in an allocation by the court of the losses caused by this event;[18] the losses, specifically, being: (1) the loss occurring as a result of failure to continue performance; and (2) the loss entailed in performance already executed.

These losses can best be discussed in terms of two distinct contract interests. When speaking of the loss involved in the failure to con-

[18] In a sense it is helpful to speak of this as the court's allocation of the risk of loss to be contrasted with the assumption of risk by the parties themselves. Thus Fuller speaks of the "allocation of risk." Fuller and Perdue, "The Reliance Interest in Contract Damages: 2," 46 YALE L. J. 373 at 380 (1937). But the idea is not strictly accurate. Normally we think of risk in terms of an unknown. It is out of line with this usage to say that a court can "assign" or "allocate" the risk of an event which has occured and of which all the parties are aware. It is a certainty rather than a risk with which we are concerned. For this reason we will speak of the allocation of the loss rather than of the risk of loss.

tinue performance, we are dealing with the loss to the promisee resulting from the defeat of his contractual expectations.[14] When further performance is not forthcoming, he is in the position of not having something he had before, the expectation that he would receive the promisor's promised performance. On the other hand, the loss entailed in performance previously executed covers those expenditures made in reliance upon the contract.[15] Restated in terms of these interests, the problem of allocation of loss can be said to be: (1) shall the expectation interest be defeated or shall it be enforced by means of specific performances or damages; and (2) shall the reliance loss be left with the promisor or shifted to the promisee.

Another problem of terminology arises when an attempt is made to specify the parties with whose interests we are concerned. Where certain types of cases are involved we can fall back on well recognized terms such as contractor-owner (building contract), or employer-employee (contract for personal services). But satisfactory generic terms are not available. "Plaintiff" and "defendant" have obvious drawbacks —their application being in large degree a matter of happinstance. Likewise, "obligor" and "obligee" are stilted and, even worse, imply a continuing obligation which for our purposes would be grossly inaccurate since we will be dealing with many situations in which the obligation has been discharged.

Consequently, it has generally been necessary to fall back upon the term's "promisor" and "promisee." In using these terms, however, their artificiality should be kept in mind. Each bilateral contract has at least two parties, and each party is at once a promisor and a promisee. Thus both parties have expectation interests, and both parties may and probably do have reliance interests in the contract. It is important to recognize that when speaking of the promisor and the promisee we are dividing the contract and looking at the performance of only one party. If and when our attention is directed to the performance of the other party, these roles are switched.

a. *Expectation interest protected.* Even though the court has decided upon looking at the agreement that neither of the parties express-

[14] Obviously this is a loss only because we assume that a person will normally keep his promises or that he will be forced to do so. "In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a 'loss' only by reference to an unstated *ought*." Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 YALE L. J. 52 at 53 (1936).

[15] The term "reliance interest" has been used since, in general, it is more inclusive than the related "restitution interest" and since the latter presumes an enrichment of the opposite party. For a discussion of the distinction beween these interests see Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 YALE L. J. 52 at 54 (1936).

ly or by implication undertook to assume the risk of the contingency, it still may decide that the expectation interest is entitled to protection. In fact, the old rule of *Paradine v. Jane*[16] was to the effect that the promisor was always bound, that nothing short of performance would relieve him from liability under the contract. This tendency to make the promisor the insurer of his promise has long been recognized as requiring modification,[17] and Williston now states that the promisor should be excused if "an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties. . . ."[18] While this statement shows how fully the rule of absolute promises has been modified, it is of no substantial aid in determining when the expectations are to be protected. In the absence of help from the parties themselves, the decision as to whether the promise is to be enforced must rest in the end on considerations of policy and expediency.[19]

Suppose, for example, that a building contractor undertakes to construct a building. When nearly completed, the building is totally destroyed by fire without the fault of either party.[20] The contractor was in full control of the premises. The contract itself does not mention the possibility of such loss and there is no evidence that such an event was within the contemplation of the parties. By one of the most re-

[16] Aleyn 26, 82 Eng. Rep. 897 (1646). The case is discussed in the preceding comment in this series, 46 MICH. L. REV. 224 at 225 (1947).

[17] Hyde v. Dean and Canons of Windsor, Cr. Eliz 552, 78 Eng. Rep. 798 (1597), death of a party in a personal undertaking; Williams v. Lloyd, W. Jones 179, 82 Eng. Rep. 95 (1629), destruction of a chattel in a contract of bailment; Abbot of Westminster v. Exec. of Clerke, 1 Dyer 26b at 27b, p. 173, 28b, pls. 186-8, 73 Eng. Rep. 59 (1536/7). These cases antedate Paradine v. Jane and have continued to be recognized as exceptions to that rule. However it was not until 1863 that the general rule was developed that destruction of the specific subject matter of a contract would excuse performance even though the contract itself contained no provision to that effect. Taylor v. Caldwell, 2 B. & S. 826, 122 Eng. Rep. 309 (1863). The modern law of impossibility is said to date from this case. GRISMORE, LAW OF CONTRACTS, § 169 (1947).

[18] 6 WILLISTON, CONTRACTS, § 1931 (1938).

[19] "The outcome of the cases is in practice dictated by a shifting line of compromise between the impulse to uphold the sanctity of business agreements and the desire to avoid imposing obligations that are vain or unduly burdensome." Fuller and Perdue, "The Reliance Interest in Contract Damages: 2," 46 YALE L. J. 373 at 379 (1937).

[20] There seem to be an endless number of harrowing cases in which disaster has befallen building contractors. See, for example, Stees v. Leonard, 20 Minn. 494 (1874) where a three story building collapsed just before completion, was rebuilt and collapsed again due to soil conditions; School Trustees v. Bennett, 3 Dutch. (27 N.J.L.) 513 (1859), school building destroyed by tornado before completion, and when rebuilt, collapsed. See cases collected in 6 WILLISTON, CONTRACTS, § 1964 (1938). See also Patterson, "Builder's Measure of Recovery for Breach of Contract," 31 COL. L. REV. 1286 (1931).

liable of rules, the loss in this case will be thrown on the contractor. This result, as we have pointed out, might be explained on the ground of implied assumption of risk. But it is equally possible for the rationale of the rule to be sought outside the parties' agreement. There are strong policy arguments in favor of a uniform rule in such cases.[21] Or this may be a situation in which uniform commercial habits act as a type of precedent to be given recognition by the courts. And undoubtedly the element of control plays a substantial part in determining the incidence of the loss[22] either because the party in control is in the best position to prevent the loss or because of the interest in preventing any possible motive for the destruction of the building.

There is no doubt that the factors which can be and are considered in the attempt to allocate loss in such a situation are complex, but to attempt to use them, as Williston seems to, as a means of determining whether the event should have been within "the reasonable contemplation of the parties" does not help our understanding of the problem. In any situation we must reach back to these questions of policy and expediency for our solution, and to translate them first into the reasonable contemplation of the parties is a useless step.[23]

Just where, in the absence of an assumption of risk, the line should be drawn between those events which excuse further performance and

[21] This is particularly true because of the desirability of having insurance coverage, although this line of reasoning would apply equally well to the uniform assignment of risk to either party. While a uniform rule stimulates the shifting of risk to those in the business of assuming it, it does not follow that one who has taken out insurance necessarily has assumed the risk. The effect that insurance coverage has on the allocation of risk has arbitrarily been excluded from the scope of this note. It is perhaps not out of order, however, to note that an understandable desire to shift the actual loss to an insurance company will, consciously or not, have a substantial influence on most courts' decisions. The Law Reform (Frustrated Contracts) Act, however, expressly provides that this shall not be taken into consideration. 6 & 7 Geo. 6, c. 40, § 1 (5) (1943).

[22] Thus where it is determined that the contractor is not in control of the premises, his further performance is likely to be excused. Butterfield v. Byron, 153 Mass. 517, 27 N.E. 667 (1891).

[23] Professor Williston also states that "Supervening impossibility of a kind which usually operates as an excuse will not do so if the the terms of the promise, interpreted in the light of the surrounding circumstances and usages indicate that the promisor *assumes the risk*." CONTRACTS, § 1934 at p. 5418 (emphasis added). But that supervening impossibility is also said to be an unanticipated circumstance. Id., § 1931, see note 18, supra. It is somewhat difficult to conceive of one assuming the risk of unanticipated circumstance unless a general assumption clause would operate in this fashion. And this is not what Williston seems to have in mind. Id., § 1972A. And see note 5, supra. It appears that the method of approach here employed is reversed. It is submitted that the first question should always be whether one of the parties has assumed the risk, and only after this question has been answered can we consider whether an unanticipated circumstance operates to discharge the obligation.

those which do not is a question which has had the attention of the courts since it was first recognized that *Paradine v. Jane* did not contain a universally applicable rule. No universally satisfactory answer has yet been given.[24] Some of the factors which have been considered by the courts were discussed in the next preceding comment in this series[25] and no attempt will be made here to retrace this field.

Before passing to a discussion of the allocation of the reliance loss, there is one other item worthy of notice. Even though it has been determined that the expectation interest is to be protected, the measure of that protection may be such that the net result will be little different from that reached when the expectation interest is defeated.

It is pointed out below that when the expectation interest is defeated, most courts allow cross actions for "benefits" each party has conferred on the other. Superficially, this approach seems different and productive of great uncertainty. But it is well to recognize that the process has a resemblance to the measurement of the promisee's damages in the venerable field of contract law. In the first place, the promisee must deduct the value of the partial performance of the promisor.[26] This has the same effect as giving the promisor a cross action for the value of the performance—for the "benefit" conferred on the premisee. That benefit, however, is generally measured in terms of tangible gain to the promisee, and to the extent that this definition is modified when the expectation interest is defeated there will be a variation in the measure of recovery.

But even in the actual measurement of the expectation there is a similarity. Theoretically, the promisee is to be placed in the position in which he would have been had the contract been executed. But it is obvious that this ideal is never attained without specific performance,[27] a solution generally not available. The ideal, moreover, fails of attainment in other ways. Suppose the promisee—owner in a building contract planned to reap tremendous profits by using the building as a department store when it was completed. Could he recover those lost

[24] See, however, the very complete analysis of the problem in MCELROY, IMPOSSIBILITY OF PERFORMANCE (1941).

[25] 46 MICH. L. REV. 224 (1947).

[26] See MCCORMICK, DAMAGES, § 40 (1935).

[27] Even if this solution were adopted, of course, factors such as delay and expenses of litigation would make the decreed performance substantially different from the promised performance. And if the promise is in fact impossible to perform, such an order would be useless, except for compensatory damages in a contempt proceeding. In most cases it seems clear that specific performance is the last thing either party desires: when the supervening event occurs, they would like to get out of the contract with the minimum of damage to themselves.

profits, in the face of the rule of certainty?[28] This rule is of the most flexible and uncertain nature: combine it with the doctrine that savings to the plaintiff from the breach are also subtracted,[29] add the elasticity of the *Hadley v. Baxendale*[30] approach, and the court's leaway within contract doctrines becomes apparent. The result is that in order to recover damages, the promisee must support his claim of lost expectations by proof of tangible loss, in other words, justified reliance upon the contract. What he need not do is prove that this loss resulted in any gain to the promisor, and to the extent that such a requirement of proof exists in those situations in which the expectation interest has been defeated there may also be a substantial difference in the measure of recovery.

These results flowing from a decision as to the enforceability of a promise should be kept clearly in mind when that decision is being made. Because the decision itself often turns on a close question of policy, it may well be that the argument in favor of enforcing the promise will not justify the substantial difference in net recovery which could result from the decision. On the other hand, even though a decision to protect the expectation has been made, it is clear that the measurement of that protection will permit a further balancing of interests, even to the extent of cancelling the effect of the original decision. If the promisee's claim is reduced by means of the limitations on damages suggested above, and if the promisor's claim is extended to cover items other than those conferring tangible benefit on the promisee, a result essentially similar to the cross actions for benefit conferred, discussed below, is likely to result.[31]

[28] McCORMICK, DAMAGES, §§ 25-30 (1935); Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 119 N.E. 227 (1918). McCormick points out that the rule barring recovery of uncertain damages is subject to various exceptions and modifications when the court feels that injustice would otherwise result. But in cases where the court has already decided that the major loss must be borne by the promisor, justice surely does not require piling an estimate of profits on the already heavy recovery. See Professor Bauer's discussion, note 30, infra.

[29] McCORMICK, DAMAGES, § 143 (1935).

[30] 9 Ex. 341, 156 Eng. Rep. 145 (1854); 1 RESTATEMENT, CONTRACTS, § 330 (1932): Compensation is given "for only those injuries that defendant had reason to foresee as a probable result of his breach when the contract was made. . . ."

In criticizing Sedgwick's desire to make the above rule mechanical and exact, Professor Bauer states: "One important tendency of courts, as well as juries, both in contract and in tort cases, is to apply rules of causation so-called, of certainty of proof, and of measure of damages, more severe upon the defendant if he has clearly been guilty of wanton and wilful misconduct, and to apply less severe rules or to apply them in a less severe manner, if the defendant's fault seems unintentional." Bauer, "Consequential Damages in Contract," 80 UNIV. PA. L. REV. 687 at 699 (1932).

[31] Whether the courts shade into the restitution conception of benefit in cases where the total loss would otherwise fall on the promisor is a subject beyond the

b. *Expectation interest defeated.* If the court has determined that the intervening event excuses further performance, there remains the difficulty of allocating the loss occasioned by expenditures made in reliance upon the contract. By assumption those expenditures were justified; the promotion of reliance upon certain promises being one of the basic principles of our contract law. Since there will now be nothing forthcoming under the contract to compensate for those expenditures, it becomes incumbent upon the court to undertake the adjustment of these conflicting interests.

There are several approaches to this problem; we will begin with the one which now has everywhere been rejected. This might be called the policy of non-intervention made famous by the Coronation cases, particularly *Chandler v. Webster*,[32] in which the plaintiff was denied recovery for the advance rent paid for rooms along the route of Edward VII's coronation procession. According to this view, the entire loss for any performance executed or due on the cut-off date falls on the performing party. Although the court will not force him to complete performance due after the event, neither will it aid him by seeing that he is compensated for any performance already executed or due before the event. There is no shifting of loss; the loss rests where it first falls. In effect the contract is suspended in mid-air. Of course, if cross performance is due from the opposite party, the obligor's net loss may be reduced to that extent, and it is possible that these cross performances may be substantially equivalent, particularly where the contract has called for progress payments. But this is purely a fortuitous circumstance, and not the handiwork of the court.[33]

scope of this comment. It is possible that the decision on whether to excuse the promisor does not yield a black or white result in every case—that liberality in measuring the deduction of "benefits conferred on the promisee," or strict use of the rules for damage limitation, subtracts some color from the promisee's recovery of his total expectation interest. Fuller raises the converse question: if a party is excused from his promise, does this mean that he escapes all liability, or only that the liability imposed on him is lessened by the excusing circumstance? BASIC CONTRACT LAW 661 (1947).

[32] [1904] 1.K.B. 493. The other Coronation cases in which the plaintiff sought to recover money paid in advance were Blakely v. Muller & Co., [1903] 2 K.B. 760n; Hobson v. Pattenden & Co., [1903] 2 K.B. 760n; Civil Service Co-op. Soc., Ltd. v. Gen. Steam Nav. Co., [1903] 2 K.B. 756; Lumsden v. Barton & Co., (K.B. Div.) 19 T.L.R. 53 (1902). For a discussion of these cases see McElroy and Williams, "Coronation Cases—II," 5 MOD. L. REV. 1 (1941).

[33] Thus in Siegal, Cooper & Co. v. Eaton & Prince Co., 165 Ill. 550, 46 N.E. 449 (1897), plaintiff contracted to install an elevator in a building owned by defendant, the building being destroyed by fire after the engine had been installed. Plaintiff was allowed to recover a payment of one-half the price due before the date of destruction. The court managed to reach this result by calling the contract divisible. See also Krause v. Board of Trustees, 162 Ind. 278, 70 N.E. 264 (1904).

A substantial resemblance to the approach of *Paradine v. Jane* will be noted. In both cases, the court shrinks from making any adjustment of interests not sanctioned by the parties' agreement, even though in the latter case it is recognized that the agreement is not what it was intended to be. It is interesting to note that the result of *Chandler v. Webster* would have been less harsh had the rule of *Paradine v. Jane* been applied. The plaintiff would at least have been entitled to the value of the defendant's performance, whatever that might have been construed to be.

This rule seems to have been a unique development of English law.[34] It does not appear in the Civil Law[35] and even on the British Isles it was never the law in Scotland.[36] It has been generally rejected in the United States[37] although the approach has been reflected in a few scattered cases.[38] In England itself, the House of Lords in the *Fibrosa*[39] case finally put the doctrine to rest after a stormy forty years. And less than a year after this decision, the recommendations of the Law Revision Committee[40] were incorporated in the Law Re-

[34] The law prior to Edward VII's coronation did not clearly call for the rule laid down. While it is true that prepaid freight could not be recovered if the cargo was lost, De Silvale v. Kendall, 4 M. & S. 37, 105 Eng. Rep. 749 (1815), and premiums paid a master for an apprenticeship could not be recovered on the death of the master, Whincup v. Hughes, L.R. 6 C.P. 78 (1871), or the apprentice, In re Thompson, 1 Exch. 864, 154 Eng. Rep. 369 (1848). In Knowles v. Bovill, 22 L.T.R. (N.S.) 70 (1870), the Court of Exchequer had held that a person who had paid £ 150 for the use of a patent could recover this payment in an action for money had and received when the patentee died before making application for the patent. See also Rugg v. Minett, 11 East 210, 103 Eng. Rep. 985 (1809).

[35] The Roman antecedents of the Civil Law were thoroughly discussed in the Cantiare case, discussed note 36, infra.

[36] Cantiare San Rocco, S.A. v. Clyde Shipbuilding and Engin. Co., [1924] A.C. 226, 13 B.R.C. 673, in which it was said that the rule of Chandler v. Webster "works well enough among tricksters, gamblers, and thieves." (Lord Shaw at p. 259).

[37] See 6 WILLISTON, CONTRACTS, § 1972 (1938); 2 RESTATEMENT, CONTRACTS, § 468 (1932); RESTATEMENT, RESTITUTION, § 108 (c) (1937). An excellent annotation on this subject will be found in 144 A.L.R. 1317 (1943). See also WOODWARD, QUASI CONTRACTS, § 125 (1913).

[38] Pabst Brewing Co. v. Howard, (Mo. App. 1919) 211 S.W. 720; Jordan v. McCammon, 56 Ohio St. 790, 49 N.E. 1111 (1897), reversing McCammon v. Peck, 9 Ohio C.C. 589 (1895); Cowley v. N.P.R. Co., 68 Wash. 558, 123 P. 998 (1912). See also Siegal, Cooper & Co. v. Eaton & Prince Co., 165 Ill. 550, 40 N.E. 449 (1897), dictum.

[39] Fibrosa Spolka Akeyjna v. Fairbairn, Lawson, Combe, Barbour, Ltd., [1943] A.C. 32, annotated, 144 A.L.R. 1317 (1943); noted 56 HARV. L. REV. 307 (1942); 91 UNIV. PA. L. REV. 262 (1942).

[40] Great Britain Law Rev. Comm., 7th Int. Rep. (1939). It is interesting to note that Lord Wright, chairman of this committee was also one of the Law Lords in the Fibrosa case.

form (Frustrated Contracts) Act of 1943.[41] This act, discussed below, has provided a method of approach far removed from the let-the-chips-fall-where-they-may attitude of the Coronation cases.

The logical opposite to the rule throwing the loss of all executed performance on the promisor would be the shifting of that loss *in toto* to the promisee. Thus if the court is convinced that the intervening event has destroyed the purpose or possibility of further performance with the result that the promisee's expectations are not to be protected, it would be possible to take the next step and say that the promisor, having jusifiably relied on the contract which has been destroyed without his fault, is entitled to be compensated for his outlay made in such reliance. All that would be required would be proof of a contract and proof of loss in reliance upon it. Such a result would be the other extreme and would be no more defensible than the rule of *Chandler v. Webster*. The innocence of the promisor is not of itself a basis for the shifting of the entire loss to the promisee who is by hypothesis equally without fault. We must recognize that this is a situation in which someone stands to lose. And because there is neither fault nor agreement to guide the court some other method of approach must be substituted unless we are to resign ourselves to whim or to the arbitrary assignment of loss to one or the other of the parties.

It is submitted that the mode of analysis with the highest degree of value in these cases adds the requirement of proof of enrichment to the required proof of loss. In other words, one entertaining loss prior to the date of frustration should be allowed to shift that loss to the other party to the extent, but only to the extent, that corresponding gain shall have accrued to that party. Obviously this does not provide a ready made decision for every case; at best it only provides a useful state of mind. But it does supply a formula which is helpful in reaching those decisions.

It will be seen that the key to this position is the concept of benefit. If a party is limited in his attempt to shift the loss from himself to his opposite by the amount of benefit or gain flowing to the opposite from his loss, it becomes of vital importance to determine what will be taken to have benefited the defendant. Clearly, radically different answers can be obtained by the use of different definitions; this being merely another way of saying that the application of this formula does not remove all uncertainty from the law of impossibility of performance. The following comment in this series will be devoted to a general analysis of the concept of benefit, and for our purposes it will be enough to point out some of the possibilities and the results which follow from their adoption.

[41] 6 & 7 Geo. 6, c. 40.

The clearest case of benefit arises when money has been advanced for goods or services which are not forthcoming. Uniformly this has been held to be recoverable. Thus where the vendor is prevented from conveying because of the failure of title,[42] or condemnation of the premises,[43] the vendee has been allowed to recover advance payments. And where war made impossible the delivery of money intended for an enemy national, the sender was entitled to return of the sum delivered to the foreign exchange house.[44] In this country, as contrasted with the English rule,[45] advance freight is recoverable if the property is destroyed in transit.[46] An advance subscription to stock in a joint stock company to be organized for the purpose of operating a steam packet was returned when the venture was frustrated by the destruction of the vessel.[47] Payment for goods which are never delivered also falls within this category.[48] The *Fibrosa* case, mentioned above,[49] was of this type. Failure to render personal services paid for in advance also entitles the employer to reimbursement.[50]

Where the obligor has conferred economic gain on the opposite party in a form other than money the same rule applies. Thus a conveyance of land in consideration for a life pass on a railroad subsequently made illegal by legislative act entitles the grantor to compensation for the value of the land conveyed.[51] And partial performance of

[42] Hooe v. O'Callaghan, 10 Cal. App. 567, 103 P. 175 (1909); Smith v. McCluskey, (N.Y. S.Ct. 1866) 45 Barb. 610.

[43] Ogren v. Inner Harbor Land Co., 83 Cal. App. 197, 256 P. 607 (1927); Waldheim v. Englewood Heights Estates, 115 N.J.L. 220, 179 A. 19 (1935).

[44] Spira v. Eisen, 15 Ohio App. 511 (1922). But see Kerr S.S. Co. v. Chartered Bank of India, 292 N.Y. 253, 54 N.E. (2d) 813 (1944), where recovery on a draft drawn payable in Manila was denied on the theory that ownership and its attendant risks had passed to the drawee. See also Erdreich v. Zimmerman, 107 Misc. 508, 176 N.Y.S. 762 (1919); Sokoloff v. Natl. City Bank, 208 App. Div. 627, 204 N.Y.S. 69 (1924).

[45] The English rule is so firmly fixed that it was written into the Law Reform (Frustrated Contracts) Act as an exception to the general rule. 6 & 7 Geo. 6, c. 40, § 2 (5) (a).

[46] Briggs v. Vanderbilt, (N.Y. S.Ct. 1855) 19 Barb. 222; Reina v. Cross, 6 Cal. 29 (1856); Lawson v. Worms, 6 Cal. 366 (1856).

[47] Murray v. Richards, 1 Wend. (N.Y.) 58 (1828).

[48] See 6 WILLISTON, CONTRACTS, § 1974 (1938) and cases cited.

[49] Note 39, supra.

[50] Bucklin v. Morton, 105 Misc. 46, 172 N.Y.S. 344 (1918), payment to a physician for professional services not rendered because of physical inability of plaintiff to attend physician's office.

[51] Louisville & N. R. R. Co. v. Crowe, 156 Ky. 27, 160 S.W. 759 (1913); Bell v. Kanawha Trac. & Elec. Co., 83 W. Va. 640, 98 S.E. 885 (1919). Contra, Cowley v. N. P. R. Co., 68 Wash. 558, 123 P. 998 (1912). In Jones-Gray Const. Co. v. Stephens, 167 Ky. 765, 181 S.W. 659 (1916), plaintiff conveyed land for $100 and a promise by defendant to move a barn on the conveyed property to other land

a contract of employment entitles the employee to recovery for his services on a quantum meruit basis.[52]

A logical extension of this rule is the idea that the party claiming refund must deduct the value to him of defendant's partial performance—still thinking in terms of tangible benefit. Thus in the railway pass cases, the grantor was required to deduct the value of the passes received prior to the supervening illegality.[53] And a vendee demanding return of payments made on a land contract where conveyance has become impossible or has been excused must account for rents and profits when he has been in possession.[54] The clearest case, perhaps, is the contract of employment where partial payment has been received for services rendered,[55] although it is always possible that these cases may be explained by calling the contract divisible.

In all of these cases it is not too important whether the party seeking recovery is the one whose performance has been rendered impossible. When concerned with tangible benefit, there seems to be no reason for making a distinction since by hypothesis, the failure to continue performance has been excused. And the restitution interest is strongest when the plaintiff is seeking reimbursement for conferring something of substantial value on the defendant. Here the doctrine of unjust enrichment speaks in clearest terms.[56]

But suppose the party seeking recovery is the one whose performance has been interrupted, and, although the partial performance did confer tangible benefit upon him, the defendant can show damages suffered as a result of this interruption. Should defendant be allowed to deduct the amount of this loss from the value of the benefit received? Williston emphatically says "no," since the excuse of the failure to continue performance leaves the promisor totally blameless.[57] He criticizes such cases as *Patrick v. Putnam*[58] where the plaintiff worked thirty-two days rafting logs for defendant and was then forced to quit

of plaintiff. Barn destroyed by fire. Plaintiff allowed recovery of amount it would have cost defendant to move the barn.

[52] 2 RESTATEMENT, CONTRACTS, § 486, comment (a) (1932); 6 WILLISTON, CONTRACTS, § 1977 at p. 5554 (1938) and cases cited.

[53] Note 51, supra.

[54] Wilson v. Clark, 60 N. H. 352 (1880). On the general problem of allocation of losses in contracts for the sale of land see 22 A.L.R. 575 (1923); 41 A.L.R. 1272 (1926); 101 A.L.R. 1241 (1936).

[55] This is assumed when the administrator is held to be entitled to the "installments due" on the contract. Stubbs v. Holywell Ry., L.R. 2 Exch. 310 (1867).

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

[57] 6 WILLISTON, CONTRACTS, § 1977 (1938). See also WOODWARD, QUASI-CONTRACT, § 125 (1913).

[58] 27 Vt. 759 (1855). See also Clark v. Gilbert, 26 N.Y. 279 (1863); Walsh v. Fisher, 102 Wis. 172, 78 N.W. 437 (1899).

because of illness. The court there allowed the defendant to show that he was unable to obtain another employee at such favorable wages with the result that the additional cost attributable to plaintiff's failure to continue performance more than offset the value of plaintiff's services. Recovery was denied. Williston links this with cases of lost profits and argues that in any case of excusable impossibility the expectations of the promisee will be defeated. But this analysis misses the point. While in a sense any additional expenditure which the promisee may suffer as a result of the promisor's release may be considered as lost profits, there is a marked difference in degree between the out-of-pocket expenditures in the *Patrick* case and the pure lost expectancy where, for example, the contract was for the sale of goods.

The effect of the failure to allow such deductions is aptly illustrated by *City of Barnsdall v. Curnutt*[59] the facts of which were set out above. There, in computing the value of the deceased attorney's services, no consideration was given to the fact that because of the death, the city was required to pay an additional $10,500 in fees. Thus the city paid a total of $20,500 to recover a $35,000 claim. Surely it is harsh to measure the benefit to the city solely on the basis of the supposed value of the services rendered by the deceased without reference to the additional expenditure his death forced on the city. It would seem that this is a situation in which the net rather than the gross benefit to the defendant is the only just basis of recovery.

A related problem arises when the defendant has made a substantial expenditure by way of preparation for performance but has not yet conferred a tangible benefit upon the plaintiff. Should these expenditures be deductible from the amount of plaintiff's recovery? If the courts fail to take into consideration these expenditures, there is real danger that the result may be more unjust than denying recovery altogether. It is more than likely that it was this consideration that led to the rule of the Coronation cases. Thus in *Civil Service Co-operative Society v. General Steam Navigation Co.*[60] the plaintiffs had paid in advance for the use of a steamer in order to view the naval ceremonies connected with the coronation. The defendants had expended substantial amounts in preparing the steamer for use. The court recognized that both parties had a substantial stake in the contract, but felt itself unable to enter into a fine adjustment of these conflicting interests.

There are not many American cases in which this problem has been raised either directly or indirectly. But in the early Kentucky case of *Bibb v. Hunter*,[61] a Civil War draftee procured a substitute, promising

[59] (Okla. 1945) 174 P. (2d) 596.
[60] [1903] 2 K.B. 756.
[61] 2 Duv. (Ky.) 494 (1866).

$300 for his services. Fifty dollars was delivered in advance and the balance was placed in escrow. The substitute was accepted by the "local board" but the review board sent him back as being "over 60 years of age, [having] disease of the leg and entire loss of front teeth." In an action to recover the entire $300, the court ordered the return of the $250, but allowed the old man to keep the $50. "The appellee, John, was not finally and legally accepted as the appellant's substitute and did not, as contemplated, 'go through,' nevertheless, he may be entitled to retain the $50 advanced to him, probably on the ground that, whatever might be the final issue of the experiment, he would earn that much by his loss of time and services, even though abortive."

Often, this interest will be protected by the fiction that there has been no failure of consideration or that there was an implied assumption of risk of the contingency thus denying any recovery at all.[62] Such an approach may be satisfactory in individual cases where the amount of reliance practically cancels out the gross benefit conferred, but as has been pointed out above, its general application is dangerous and is to be avoided. It seems much more desirable to permit recovery for benefit conferred but to allow a deduction for expenses incurred in justifiable reliance upon the contract even though such expenses have conferred no tangible benefit upon the plaintiff. Again the idea of net benefit is helpful. Since recovery is predicated upon the unjust enrichment of the defendant, it is not unreasonable to allow those deductions which in fact have reduced the enrichment. Unfortunately, however, the *Restatements* make no provision for such deductions.[63] The applicable sections are not based upon any line of decisions and consequently it is hoped that they will not be a hindrance to the courts in dealing with this problem.

In determining the basis for promisor's recovery how far can we go in saying that the promisee has benefited from promisor's activity? Where the promisee has received money, obviously no question arises. But what of those situations in which recovery is sought for performance in the nature of goods or services? If the performance has present value to the promisee, there would have been benefit conferred on him under any definition. But suppose the services are totally worthless? Shall this fact make recovery impossible? There is substantial authority that such a restricted definition of benefit need not be adopted. Where a building contractor undertakes to make repairs on an existing

[62] Williams v. Butler, 58 Ind. App. 47, 105 N.E. 387 (1914).

[63] The applicable section in 2 CONTRACTS RESTATEMENT is § 468 (3) (1932). "The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price." The RESTITUTION RESTATEMENT merely adopts this statement. See § 108 (c) (1937).

building and performance is interrupted and made impossible by destruction of the building, the contractor is uniformly allowed to recover for materials expended in the repairs prior to the calamity as well as for his services.[64] It is a little difficult to say that the owner here has "benefited" from the contractor's performance in the sense of economic gain. The cases could be explained on the analogy to the case of a sale of chattels in which the transfer of title determines the incidence of the loss. Thus one might say that title to the materials (and services) had passed to the owner on being incorporated into the building.[65]

But the difficulty with this approach is aptly illustrated by the Kansas case of *Carroll v. Bowersock*,[66] in which the contract called for replacing a wooden floor with concrete. After the wooden floor had been torn out, the footings poured, and the temporary forms for the pillars erected, the building was totally destroyed by fire. Recovery was allowed for the labor involved in tearing out the floor, as well as for labor and material expended in pouring the footings, but was denied for the temporary forms and the reinforcing steel rods which were wired together within the forms, since they "were temporary devices . . . not wrought into the warehouse." Such a distinction scarcely seems justified by the realities of the situation. Since we are dealing with entire as contrasted with divisible contracts, and the plaintiff's performance is not complete as to any part of it, there is something wholly arbitrary in saying that recovery depends on whether materials have been affixed to the building.

On the other hand, recovery has been allowed for services where the "title" analogy offers no satisfaction at all. A mover was permitted recovery for services rendered in moving a house where the house burned in transit.[67] An attorney was allowed compensation for his services in preparing a case for trial where the preparations went for nought by reason of the accused jumping bail.[68] In neither of these cases did the plaintiff's performance have even momentary value to the defendant.

[64] Hayes v. Gross, 40 N.Y.S. 1098 (1896); Cook v. McCabe, 53 Wis. 250, 10 N.W. 507 (1881); Dame v. Wood, 75 N. H. 38, 70 A. 1081 (1908); Weis v. Devlin, 67 Tex. 507, 3 S.W. 726 (1887).

[65] This is the view taken by Williston. 6 WILLISTON, CONTRACTS, § 1976 (1938). But in view of the fact that the contract is entire, calling for one unit of performance, is it accurate to speak of title to that performance passing until it has been completed?

[66] 100 Kan. 270, 164 P. 143 (1917). Accord: Matthews Construction Co. v. Brady, 104 N.J.L. 438, 140 A. 433 (1928); Dame v. Wood, 75 N.H. 3870 A. 1081 (1908).

[67] Angus v. Scully, 176 Mass. 357, 57 N.E. 674 (1900).

[68] Moore v. Robinson, 92 Ill. 491 (1879). The attorney had been retained by a party other than the accused.

Yet is it not accurate to say that there was no benefit transferred. The defendant did, after all, receive something to which, without the contract, he would not have been entitled. The plaintiff's activity was induced by the defendant's promise, and the loss would not have occurred in the absence of this inducement.

Of course, if this idea that detrimental reliance may constitute benefit is accepted, a whole field of difficult questions is laid open. Should we include expenses encountered in preparation for performance when no performance has been "sent on its way"? If not, another line must be drawn. How about overhead expenses? Or gains foregone—other opportunities passed by because of reliance upon this contract. Once the relative security of the tangible gain concept of benefit is abandoned, the path becomes an obstacle course. And yet it is no more satisfactory arbitrarily to restrict recovery to tangible gain than it is to deny recovery entirely.

The very interesting recent legislation in England[69] has taken into consideration many of the problems just discussed. Where further performance has been excused each party is allowed to recover the amount of benefit conferred on the other party. And in broad and sweeping language, the act authorized the courts, in fixing the amount of recovery, to take into consideration "the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party. . . ."[70] It is expressly provided that overhead costs are, at the discretion of the court, to be considered when computing these expenses.[71] But if either of the parties has secured insurance upon the contract the courts are forbidden to give weight to that fact.[72]

As broad as it is, however, the act does not provide for recovery where there have been expenditures incurred in preparation unless there has been benefit received from which these expenses can be deducted. Thus a party's ability to recoup these expenses depends upon the fortuitous circumstance of receipt of partial performance. Professor Fuller suggests that this may be rationalized on the ground that it is normal to provide for down payments in order to cover these preliminary expenses and that it may not be unduly harsh to fail to provide recovery where the party himself has neglected to make provision for such a payment.[73] This, however, strikes one as penalizing

[69] Law Reform (Frustrated Contracts) Act of 1943, 6 & 7 Geo. 6, c. 40.

[70] Id., § 1 (3) (a).

[71] Id., § 1 (4).

[72] Id., § 1 (5).

[73] FULLER, BASIC CONTRACT LAW 703 (1947).

a party for failing to foresee the impossibility—after he has been told that his failure to do so has been excused.

The act has one cryptic statement that needs further clarification. It provides that the court when determining the amount of benefit may take into consideration "the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract." [74] Perhaps this is meant to give the court power to deal with those gray situations in which, while further performance has been excused, some moral responsibility for the failure rests with one of the parties. And perhaps it is meant to cover such cases as *Patrick v. Putman* [75] where the failure to continue causes additional expenditure to the promisee which continued performance would have obviated. It is at least true that by giving the courts the right to consider "the circumstances giving rise to the frustration of the contract," the act has vested sufficient discretion in the courts to deal with any conceivable situation.

Even with discretion as broad as this, one cannot help feeling that where there has been a catastrophic loss, where, for example, the building has burned down, it is unfortunate that we are still required to paint the picture only in black and white. The remedies which are available provide only for placing the burden on one or the other of the parties. Yet we begin with the assumption that both parties are equally blameless. In this situation it seems difficult to justify an approach which sends one party out of court bearing all or a majority of the loss.

There is an appealing quality to one of the answers considered by the Law Revision Committee for those cases in which recovery is sought for money advanced where there has been a total failure of consideration. Why not, it was asked, allow a deduction of one-half of the payee's expenses incurred for the purpose of performing the contract? [76] Why not, in fact, go further and divide the entire loss equally, one-half to the promisor, and one-half to the promisee? In light of our fixed legal concepts, the idea sounds fantastic,[77] and perhaps it is, but one wonders if there are not many cases in which such a result would be fundamentally more fair to both parties than the all-or-none approach to which we are now bound.

J. R. Swenson, S.Ed.

[74] 6 & 7 Geo. 6, c. 40, § 1 (3) (b) (1943).

[75] 27 Vt. 795 (1855). Supra, note 58.

[76] Great Britain Law Rev. Comm., 7th Int. Rep., p. 7 (1939). The suggestion was not adopted by the committee as a recommendation. Instead it was recommended that all expenses incurred by the payee for the purpose of performing the contract be deductible.

[77] We could, perhaps, draw an analogy from the admiralty practice of dividing the loss equally where both parties are equally at fault. It is unfortunate for the purposes of comparison that in case of loss by inevitable or "inscrutable" accident, admiralty law allows the burden to rest where it falls.