RESTITUTION OR DAMAGES?

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The remedies aimed at restitution of unjust enrichment have grown like Topsy. They could be better described as a diversified litter of Topsies, with a common parentage that was only recently discovered. In explaining their parentage and their strong impulses toward growth the Restatement of Restitution has rendered major service to the legal profession. Nevertheless, despite the attention they have thereby received, many lawyers still approach the restitution remedies with uncertainty and wonder. The reasons for this are easy to understand. The remedies take several different forms, their growth is still proceeding actively, and the competition between these relative newcomers and other standard remedies raises serious questions as to main objectives in our remedial system. At no point is there greater confusion over objectives than in the area selected for this symposium—the remedies for breach of contract.

This sketch must be brief. It aims only to provide an introduction to a literature that is now quite extensive. Citations will be kept to a minimum and in particular there will be no attempt to survey all the grounds for restitution that have been recognized in American law, for this would require a major treatise. The object will be merely to characterize the major types of restitution remedies and then to consider their interaction with damage remedies in cases of substantial breach.

THE RESTITUTION REMEDIES

Quasi-Contract

The common law liability now commonly described as quasi-contractual developed primarily through the action of general assumpsit, whose most notable feature was a brief and stereotyped form of pleading. The common counts—chiefly the counts for money had and received, goods sold and delivered and work and labor done—disclosed so few facts that the bases of liability were often left conveniently ambiguous. The ambiguity was convenient not only for plaintiffs' attorneys but to some extent for the courts themselves through the freedom thus acquired in extending relief in meritorious cases without much concern for general theory. Still in widespread use, the common counts do some of their most useful and important work in the enforcement of express contract. They can be joined as separate counts with pleadings that allege in all the required detail an express contract and its breach. In this context the common counts provide a helpful anchor to windward in the event that proof of contract or breach fails for some reason not wholly destructive of the plaintiff's claim. Or instead, the plaintiff's claim for money promised or for the contract price of goods or services

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may be stated exclusively by one or more of the common counts without further description of the underlying transaction. In either case, the remedy granted—always in the form of a money judgment—can be and often will be a remedy for breach of express contract, with recovery simply of the contract price.

The stereotyped allegations of the common counts, however, can also apply to a great variety of claims that have no connection with express contract or, if they have some connection, aim at objectives quite different from those of the standard contract remedies. This has been a source of confusion. Procedural ambiguities have no doubt helped to compound the confusion—not only the abbreviated language of the common counts, but the formal tie between special and general assumpsit which gave a specious appearance of "contract" to liabilities arising out of unjust enrichment. It is true that modern decisions contain elaborate statements by many courts drawing the distinction between contracts "implied in fact" (i.e., resting on actual intent inferred from conduct) and contracts "implied in law" (i.e. resting on liability to restore unjustified gains). These statements have helped somewhat to dispel the confusion, but the difficulty lies deeper and is to some extent inescapable. In many situations contract and unjust enrichment doctrines merge in application; a familiar illustration is the contract "implied in fact" from the conscious appropriation or retention of a valuable asset, under circumstances apprising the receiver that compensation was expected.\(^1\) Indeed when one begins to explore the whole field of contract law with the enrichment factor in mind, one soon discovers its ubiquitous effects on the framing and application of contract doctrines. This does not mean, of course, that the effort to distinguish the liabilities arising from express contract from those arising out of unjust enrichment is not worthwhile or should be relaxed. It rather suggests that the problems of clarification are serious and pervasive and that they are merely somewhat aggravated by the accidents of procedural history.

The conception of unjust enrichment as ordinarily defined includes not only gain on one side but loss on the other, with a tie of causation between them. This conception has been phrased in various ways—"enrichment at the expense of another," "gain through another's loss," or in Keener's phrase (used in connection with liability in quasi-contract) that there must be "not only a plus, but a minus quantity."\(^2\) Actually these components, appearing in an immense variety of situations, are highly variable both in their own content and in their interconnections. The "loss" need not involve any physical diminution or subtraction from the assets of the complaining party; the requirement of loss can be satisfied if a legally protected interest is invaded—e.g., the right of an owner to exclusive use of a chattel. The "gain" can consist of money,

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\(^1\) Corbin, Contracts \$ 75 (1950).

\(^2\) Keener, Quasi-Contracts 163 (1893), quoted with approval by Woodward, Quasi-Contracts \$ 274 (1913).
the discharge of an obligation, the use of a physical asset or an idea, or a desired course of action by another human being—the latter being described as "services" or "bargained for performance" and thereby made to seem almost as real as land or a shovel. The amounts of the gains and the losses will often be quite different. The connections between them can become extremely attenuated. In the terminology used in quasi-contract, the money-judgment remedy of the common law, all these complications are summed up—often they are simply submerged—in the key-word "benefit." In many discussions it is made to appear that both the grant of a quasi-contract remedy and the measure of recovery will depend merely on a process of definition: is there a "benefit" and if so, how much? Not much reflection is required for one to discover that at every point in this complex equation there are judgments of fairness and of social policy, even before one faces the critical question, when is enrichment "unjust"?

Yet it is the presence of some kind of gain-loss equation that explains the extraordinary progress of the unjust enrichment idea in most of its modern applications. For persons who have suffered loss, the loss alone is bad enough. But when it has produced an identifiable gain in another person, the sense of loss is greatly aggravated. Likewise, from the viewpoint of detached observers seeking a rational scheme for selecting the claims that will receive legal protection, the merit of a claim for loss is much reinforced when the loss is matched by the gain of another. Claims for restitution of unjust enrichment have therefore had a special appeal and favored treatment. This has been true in other legal systems as well as our own. Indeed, when one explores the subterranean workings of the idea of unjust enrichment, one suspects that it has long been at work under various disguises and in quite unlikely places. One recent writer has suggested, for example, that with suitable modifications the notion of unjust enrichment may help to explain tort liabilities of enterprises that create abnormal risks; liabilities might arise not from a gain that matches the loss incurred by others but from a gain made possible by increasing their risk of loss. Certainly in the law of property, the law of trusts and elsewhere notions of unjust enrichment have helped strongly to reinforce conclusions that partly depend on other factors. But this is merely to say in another way that the prevention of gain through another's loss is an objective that has a special appeal. In the law of restitution it becomes the central objective, even though necessarily mixed with other objectives. There is some point in restricting restitution remedies to situations in which one can find these primary elements: gain acquired through another's loss. The point in such restriction is not that we wish our concepts to be "pure," for a concept cast in such general terms must be qualified and limited in application and must absorb many elements from the various contexts in which it is

applied. The point is rather to avoid undue confusion, by marking out the elements that give restitution claims their special appeal and entitle them to their favored treatment.

It is easiest to visualize the nature of the problems if one examines quasi-contract as an alternative remedy for tort, wholly divorced from express contract. The great bulk of the cases in which quasi-contract has been used are cases of misappropriation of chattels and negotiable paper. Some have involved the mere use of chattels and a few have involved the use of land, though in the latter instance there survives in most states a requirement that occupancy must derive from actual agreement (including "implied-in-fact" agreement). The problem of determining whether grounds for restitution exist is enormously simplified in this whole group of cases by carrying over the tests for liability in damages established by the law of property and the law of tort. But not all the elements of loss that could be included in a claim for damages will constitute a "benefit" for the purposes of quasi-contract recovery. If the indemnity sought is for some interest in the plaintiff arising from his own special need or profit-making capacity, it will usually be excluded from consideration. Likewise if the only purpose of a money award would be to supply the cost of repairing injury, it will be considered one for damages only. On the other hand, gain to the wrongdoer can exist without any showing of ultimate profit or utility to him, provided the interest invaded is one that others commonly pay for or might conceivably pay for. In borderline situations there is a shifting and uncertain line that is not sharply defined in the decisions and that in some degree depends on the procedural or substantive advantages that the plaintiff seeks in adopting a restitution theory of recovery—e.g., proof in bankruptcy as compared with the privilege of filing a counterclaim in a "contract" action or the advantage of the longer statute of limitations allowed in "contract" actions.

An intermediate position is likewise adopted ordinarily on the related issue of measure of recovery, once a "benefit" has been found. In most situations the measure adopted is some form of "market" value, based on evidence of what other persons do or might pay. This measure has been departed from in one group of cases, where a tort-feasor has resold chattel property for money; a majority of decisions has restricted the owner's recovery to the money proceeds of the sale, even though evidence showed that these proceeds were less than "market" value. It seems probable that these decisions reflect nothing more than the misunderstanding as to the bases of restitution that appeared in some

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4 Comment, 30 Mich. L. Rev. 1087 (1932); Annot., 167 A.L.R. 785 (1947).
5 Reporters' Notes, Restatement of Restitution § 128 (1937). See Felder v. Reeth, 34 F.2d 744 (1929).
early decisions. Certainly they reflect a major shift from the assumption found in most situations where quasi-contract is used as an alternative remedy for tort—the assumption that the injured party should be relieved of the risk that the wrongdoer might fail to exploit the misappropriated asset to maximum advantage. But these decisions do suggest that “benefit” in quasi-contract is a term with variable content and that it can be redefined as tort-feasor’s net gain if reasons of convenience or policy should make this shift desirable.

There are some situations where this shift may be desirable. One type would be where the “market” used to supply standards of value is unorganized or non-existent. It will often be necessary, for example, to use money judgment remedies where the wrong consists of the misappropriation of commercially valuable ideas, or interference with contract relations. They may also be needed where advantages are secured through exploiting the “good will” developed for a commercial product though without direct competition, or perhaps in commercially profitable defamation or invasions of privacy. Whatever the form of action—even in an action for damages—the most practicable measure of recovery as well as the essential ground of complaint will often be the profit actually realized. If a money judgment is the only remedy needed, there seems to be no irresistible reason why quasi-contract should not be used and why defendant’s profit should not measure recovery. But it is not only in these new and expanding areas of modern tort liability that one will find the phenomenon of an injured person unable to realize at all, or as much, through his own sale or exploitation of the interest involved. In the well-known Kentucky cave case, defendant realized profits through underground trespass 360 feet beneath the surface of plaintiff’s land. Plaintiff, through lack of access to the cave, could not have realized anything, but nevertheless was allowed to recover a proportionate share of defendant’s profit. Are there general reasons of policy for recapturing the profit realized in these and other kinds of wrongs, even though the injured party was wholly disabled from realizing the profit himself? This is a question that has arisen in other types of restitutionary remedy. Surely the answer should not depend on the form of action.

It is primarily through the overworked concept of “benefit” that our courts in quasi-contract actions have tried to express the complex

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9 Edwards v. Lee’s Adm’r, 265 Ky. 418, 96 S.W.2d 1028 (1936). The plaintiff’s share of the profit was measured, however, by a most mechanical formula—in proportion to the ground area owned by each party in the portion of the cave used as a tourist attraction.
equation between losses and gains. In other restitution remedies the verbal formulas have been freer.

**Equitable Accounting**

The equitable accounting, like quasi-contract at law, ends in an order for payment of money, though in an appropriate case an equity court could no doubt give variant types of relief. The need for a money decree can of course arise in a great variety of equitable actions. Accounting for profits, as distinguished from damages for losses caused, was awarded in earlier equity cases as an incident to injunction against tort, even in such venerable torts as trespass to land. Similarly in cases of trade mark infringement and unfair competition, money decrees for profits realized have been awarded as an incident to injunction. Similar relief has been given in a variety of other situations where equity powers were exercised on independent grounds.

It is a more difficult question whether the need for an accounting provides in itself a sufficient basis for the exercise of equitable jurisdiction. Traditionally there have been three reasons recognized for equitable accounting—reasons that are distinct though they often appear together in particular cases to reinforce each other. One of these—the need for discovery—has been rendered obsolete in many states by the development of pre-trial discovery in legal actions. Another reason for resort to equity—the complexity of the accounting process itself—applies in a relatively small group of situations. In this context the decree may aim simply at restitution or it may, in appropriate cases, amount in effect to a remedy for enforcement of express contract. The most common reason for an equitable accounting is the presence of a "fiduciary" relationship. This phrase includes not only the express trust, but partnership, joint enterprise, attorney and client, even principal and agent. As one moves to the outer limits of this large group, it becomes more doubtful whether equity jurisdiction is needed—whether a money judgment at law is not adequate. Whether the "accounting" is in equity or at law, however, is for present purposes unimportant. In either event the liabilities of the fiduciary will be judged by similar tests. The high standards of honesty and disinterest that are imposed can often be explained as the product of agreement, so that compulsory surrender of gains received amounts in effect to enforcement of express contract. But as a rule the courts make no effort to explain results in these terms. The duty of the fiduciary to restore gains that were made possible by the faith reposed in him is a duty arising directly from the relationship.

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11 York, supra note 8, at 510-17.
12 Decisions on the matters discussed in this paragraph are collected in Dawson and Palmer, Cases on Restitution 77 (1958) ("Equitable Accounting in Claims Normally Cognizable at Law").
Unjustified gains he must restore, whether he promised to restore them or not.

The characteristic feature of the equitable accounting is that it aims to recapture profit. As against a defaulting "fiduciary" this aim will ordinarily be pursued with total disregard of the question whether the opposite party could have realized this profit himself or has suffered measurable loss. For example, where a public official accepts a bribe to influence his approval of an official transaction, the governmental agency that he serves can force him to surrender the money received without any showing that the transaction approved by him was improvident or that terms more favorable could have been secured. Similar where an agent of a private principal receives a bribe, the amount of the bribe can no doubt be recovered by his principal; it can be recovered, indeed, in a quasi-contract action at law.

There seems to be no reason why the basic liabilities in all such cases need any longer to be conceived as purely equitable if the accounting problems are simple and a money judgment will suffice. It is true that the element of loss involved in the unjust enrichment equation becomes extremely attenuated. On the side of the fiduciary there is a breach of duty; the duty not to extract profit from the relationship is imposed not only because the person he serves has reposed trust in fact, but because the functions that the fiduciary performs will be impaired if self-interest is allowed to deflect judgment. In order to remove the profit incentive, gains realized must be restored even though they cannot be shown to correspond with any disadvantage to the other party.

The question as yet unanswered is whether similar policies of deterrence will come to be recognized more broadly in other types of breach of duty. There has appeared some disposition, in New York at least, to extend the equitable accounting to cases of simple misappropriation. Other states have not followed this lead. If it is to be followed there seems to be no reason whatever for using the form of equitable accounting. If there is any general policy in favor of taking the profit out of the old-fashioned torts, it can be given effect just as readily in quasi-contract at law. Once a sufficient breach of duty has been established, "benefit" can be defined as market value or net gain, whichever is higher.

The Constructive Trust

The constructive trust emerged, like the equitable accounting, from the dark and unexplored recesses of the early Chancery. But the essential

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feature of the constructive trust is that it normally provides specific relief. It reflects the same basic policy against unauthorized gains by fiduciaries, a policy that was particularly clear and emphatic in regard to express trustees. In its original form, directed against express trustees, it was probably not thought of as "constructive." Assets acquired through the use of trust funds simply remained subject to the original trust. Third persons who acquired trust assets either with notice or without giving value were also required, from an early date, to surrender them. Orders for specific restitution, whether directed against the original trustee or against such third parties, could be viewed merely as normal machinery for enforcement of the express trust, even though default by the trustee set the machinery in motion. The remedial character of the constructive trust and its connection with the prevention of unjust enrichment did not become clear until fairly late in the nineteenth century when the constructive trust became available against persons who had never assumed any fiduciary obligations whatever. But it is now clear beyond doubt that the constructive trust is a generalized remedy that can be used to reach the product of assets wrongfully appropriated, secured through fraud, by mistake or duress, and even perhaps through breach of contract.

This is not the place to describe the rules of tracing by which funds subjected to constructive trust are followed through various transformations. The most artificial feature is the treatment of commingled funds, where the interest of the claimant will be preserved by a presumption that the wrongdoer intended to act rightfully, either by spending his own share first (if some part of the commingled fund is preserved) or by investing the beneficiary's share prudently (if the fund is later depleted). The declared object of these strange devices is, again, to prevent the constructive trustee from deriving personal profit, but the contest in most cases is not with him but with his creditors after his own financial collapse. The principal purpose of the constructive trust in its modern applications is to create preferences in the estates of insolvent persons, a purpose that our courts have pursued with remarkable ingenuity and firmness of purpose.

There are not many examples so far of the constructive trust used as a remedy for breach of contract in the absence of misrepresentation or other serious misconduct. But there are some examples. It is to be hoped that further developments in this direction will only occur after

16 SCOTT ON TRUSTS §§ 507-22 (2d ed. 1956) gives a full account.
17 Clark v. McCleery, 115 IA. 3, 87 N.W. 696 (1901); Orr v. Rose, 169 Okla. 387, 37 P.2d 300 (1934), discussed in 33 Mich. L. Rev. 1290 (1935); Matthews v. Crowder, 111 Tenn. 737, 69 S.W. 779 (1902). In Dietz v. Dietz, 244 Minn. 330, 70 N.W.2d 281 (1955), the court described its relief as a form of constructive trust but apparently its sole reason for this was to explain its circumvention of the statute of frauds in awarding cancellation of a deed for breach by the grantee of an oral contract to support the grantor.
a careful weighing of the competing interests involved, especially the interests of general creditors where the "trustee" is insolvent—interests that in other types of cases have been unduly neglected. Where no such interests appear and especially if an exceptionally high degree of confidence has been reposed in the contract-breaker (as in an employment relation), drastic measures may well be used to track down and recapture all assets acquired by breach of duty.  

The Equitable Lien

The equitable lien is another form of specific remedy, in the sense that it provides a claim enforceable against specific assets. The mode of enforcement normally will be public foreclosure sale, modeled on the practice in mortgage foreclosure. In many of its applications the equitable lien does not aim at restitution of gains but rather at enforcement of express contracts for security by way of mortgage or charge on particular assets. Even without a firm basis in proved intent of the parties, the main objective in employing an equitable lien will often be a kind of substituted specific performance, as in conveyances of land in consideration of care and support for the grantor, where a lien may be imposed on the land conveyed to insure that the physical needs of the grantor are met. Such uses of the equitable lien hover somewhere in a borderland between the consensual and purely remedial. In any event they do not aim at restitution.

As a device for accomplishing restitution the equitable lien has one of its most important applications as a form of constructive trust, the lien emerging as the end result of the tracing process. There are numerous situations in which, for reasons of fairness or convenience, assets reached through constructive trust are not restored directly but instead are subjected to a charge or lien. But restitutionary liens have also been used to enforce claims for expenditures made in improving or preserving assets. Modern courts are also free in awarding liens to buyers of land or chattels for the purchase price paid, after performance is terminated for seller's fraud or substantial breach; in the case of land, at least, enforcement of the buyer's lien will normally be by judicial foreclosure as usual.

Subrogation

Subrogation is of course a mere substitution of creditors, a form of involuntary assignment. Its earliest uses (probably still its commonest

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20 Republic Supply Co. v. Richfield Oil Co., 79 F.2d 375 (1935), and Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925), are instances out of many.
uses) have been in the field of suretyship as a means of providing sureties with indemnity against their principals. Again one might say of this remedial device, as of the others previously mentioned, that its earliest forms aimed to effectuate an actual or probable intent so that subrogation could be described as an enforcement remedy for breach of contract; to substitute the surety to the rights of the paid off creditor against the principal debtor was at once to give a kind of restitution to the surety and to carry out the principal's duty (inferred, if not expressly disclaimed) to save him harmless from any losses. The device of subrogation has the extra attraction that it adds no new content to liability but shifts it to the person on whom it should fall. In its normal functioning it is specific, in the sense that it revives discharged liens on specific assets or paid off claims against particular funds. But it is perfectly possible to subrogate to unsecured claims. The progress in modern times of the whole concept of assignability of contract rights has made subrogation seem a simple solution where the gain achieved at another's expense is such an obvious and definable advantage as the discharge of an enforceable obligation.

Subrogation in modern cases can be, like the equitable lien, the end result of tracing. Where assets have been misappropriated or secured through fraud or even mistake, their use to pay off an existing debt does not cut off the tracing process. The paid off debt can be merely revived, with a substitution as creditor of the person whose assets contributed. If the paid off debt was secured by a lien (e.g., a mortgage on land) it makes no real difference whether the process is called subrogation or the imposition of a remedial lien; the object in either case is restitution of the gain realized through discharge of the mortgage. On the other hand, there are numerous situations in which enforcement of promise and restitution of gain work together as parallel motives, as where money is lent to pay off a mortgage and is actually used to pay off the mortgage, but through the intervention of a junior lien the borrower is prevented from performing his promise to provide the lender a senior lien.

Altogether one can conclude that the prevention of gains through another's loss is a purpose that our legal system pursues by a variety of means. The restitution remedies differ from each other in important ways. Each carries the marks of separate historical origin. Each is used for purposes other than restitution; in transactions resting on express contract they can often be used as remedies for enforcement of promise. Nevertheless, despite these diversities and ambiguities the restitution remedies can now be seen as a group, tied together by the common objective to which they are now mainly devoted. This objective, the prevention of gain through another's loss, could not possibly be realized completely by any legal system the world has known or will ever know;

21 Hogan v. Cooney, 51 R.I. 395, 155 Atl. 240 (1931); Whalen v. Marling, 176 Wis. 441, 187 N.W. 169 (1922); Comment, 31 Mich. L. Rev. 826 (1933).
22 Annots., 151 A.L.R. 407 (1944); 70 A.L.R. 1396 (1931).
the verbal formula itself suggests this by requiring that the enrichment be "unjust." It is an objective not reserved exclusively for the remedies that have been described. The most one can say is that it is through the group of restitution remedies that the objective is most openly and consistently pursued.

**The Money Judgment Remedies**

In actions for damages for breach of contract it usually is taken for granted that the purpose of a money judgment is to indemnify for loss—i.e., the loss of the expected profit of the bargain. It has been said many thousands of times that the objective of the damage remedy in contract cases is to place the injured party, as nearly as a money award can do so, in the situation he would have been in if the promises exchanged had been performed. It is perfectly possible, however, to define the elements of loss, and thereby the objective, in different terms. Since the wrong for which indemnity is awarded is breach of promise, not the invasion of an interest or disruption of a relation that is independently protected, losses caused through reliance on the promise provide the nearest analogy to the damage recoveries allowed in tort cases. There have been some cases (so far, on the whole, not many) in which damages for such reliance losses have been given as a remedy for breach of contract and the objective has then become the restoration of the situation that existed before the contract was made. More numerous are the cases in which the injured party's losses have been sufficiently matched by gains to the defaulter, so that restitution remedies, usually the quasi-contract money judgment, have been awarded. However, restitution as a remedy for breach of contract is usually conceived as requiring a kind of imaginary surgical operation, the "rescission" of the contract. As a result, the situations in which restitution will be given are restricted and certain formalities are introduced, such as tender of restoration of benefits received, formal notice and demand, and a consistent course of conduct if an "election of remedies" is to be avoided.

In a well-known discussion of this subject, Professor Fuller described the interests protected in these various ways as the expectation, reliance and restitution interests. He suggested the superior claims of the restitution interest and its overlap with the reliance interest, but in general argued that the reliance interest deserves wider protection than it has so far received, even where reliance losses have not produced a gain to the defaulter so that the claim does not meet the tests for restitution. He also pointed to an anomaly: though it is commonly taken for granted that the expectation interest must be the measure of recovery whenever it can be ascertained, the expectation interest as compared with the other two presents the least impressive claim to legal protection and the grounds for protecting it are hardest to define.\(^{23}\) At least this seems

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true if one directs attention solely to the interests of the injured party without considering the effects of one or another measure of recovery on the position of the defaulter.

In this brief survey there will be no attempt to review or restate the main argument that Professor Fuller has presented so convincingly. But there is one further question—whether in damage actions, as distinguished from actions for restitution, attention is or should be directed to the gains to the defaulter, realized or made possible by his breach. In contracts for the sale of land, for example, there is some authority allowing the land contract purchaser to sue a defaulting vendor in equity and recover the money proceeds of vendor’s wrongful resale. This is explained by describing the vendor as a “trustee” of the land, accountable like other trustees for profits made through misappropriation of trust assets. The word “trust” is used in this context, of course, merely as short-hand to express the regularity with which specific performance is given to both parties in land contracts. The remedy given after vendor’s resale ends in a money judgment, but it is in equity and can be considered a sort of substituted specific performance.24

We can be quite sure that a similar claim presented at law in an action framed as a damage action would ordinarily receive a very short answer: damages are to cover the promisee’s loss, not the defaulter’s gain. For example, in Acme Mills & Elevator Co. v. Johnson25 the defendant had agreed to sell plaintiff wheat for a price of $1.03 per bushel. Before the date when delivery was due defendant sold his crop to another buyer at $1.16 per bushel. By the date for delivery under plaintiff’s contract, however, the market price of similar wheat had fallen below the contract price, so the plaintiff in a damage action was limited to nominal damages, his expectancy being a minus quantity. Similarly, in an ordinary damage action brought at law for breach of a promise to sell land or services, the whole question would be what advantage the promisee could have gained, not what profit was realized by the defaulting promisor. Any attempt to recapture this profit would have to be disguised, as it often is where the seller has resold to another, by laying great stress on the resale price as evidence of “market value.”

As one reflects on the matter, however, there seems to be no inherent reason why the technique of equity courts in land contract cases should not be more widely employed, not as a somewhat freakish by-product of a phantom “trust,” but as an alternative form of money judgment remedy. It could be used wherever the delivery of a specific asset or a defined course of action (a “service”) had been promised and

24 Timko v. Useful Homes Corp., 114 N.J. Eq. 433, 168 Atl. 824 (1933); POMEROY, SPECIFIC PERFORMANCE § 468 (3d ed. 1926). Cf. Colby v. Street, 146 Minn. 290, 178 N.W. 599 (1920), where similar reasoning was used to give the contract purchaser a second tract of land for which the land involved in the contract had been exchanged.

25 141 Ky. 718, 133 S.W. 784 (1911).
through breach and resale to another the promisor was enabled to secure a readily measured gain. It may well be that the obstacle is nothing more than that well-known ailment of lawyers, a hardening of the categories. It is true that this kind of recovery could not be explained as restitution under present-day tests; there would be a fatal break in the chain of causation, for the asset or conduct that was merely promised would not have come from the promisee. Perhaps another way to express the idea is that the prevention of profit through mere breach of contract is not yet an approved aim of our legal order, as it is with breach of "fiduciary" duties. As the matter stands, the contract damage remedies of the common law are so heavily focused on promisee's loss (whether loss of expectancy or loss through reliance), that money judgment remedies aimed directly at retrieving the defaulting promisor's gain would wander long in our legal universe before they could be expected to come into orbit.

It is another question whether the factor of potential gain through breach has worked indirectly, in unacknowledged ways. I suggest that it has, and that it has probably been a powerful factor in establishing the promisee's expectancy as the normal and accepted measure of damages for breach of contract. The point emerges more clearly if one considers the group of cases that most regularly adopt reliance loss as the measure and limit of recovery—i.e., the land contract with vendor defaulting in "good faith." If the vendor is unable to convey a clear title and had no reason to know at the inception of the contract that he would be thus disabled, a considerable number of states restrict the purchaser's damage recovery to purchase price paid plus cost of title search plus perhaps a few other types of wasted expenditure. A still larger number of states reject this limitation for various reasons. In the kaleidoscopic stream of reasons they give there constantly flicker into view two recurring reasons that really add up to one—this measure of recovery leaves the vendor free to "speculate without risk" and exposes the vendor to temptation if the land has subsequently risen in value.²⁶ It is especially interesting that in a 1958 case in Florida, the court purported to follow the "good faith" limitation but awarded the purchaser not only a return of purchase price paid and costs of title search but the money profit of the vendor's resale. The purchaser's action had been brought in equity for specific performance and the court invoked the notion of "trust" but the court's discussion indicated that it believed it was applying a rule of damages appropriate for "good faith" breach.²⁷ Where this case will come into

²⁶E.g., Doherty v. Dolan, 65 Me. 87 (1876); Beck v. Staats, 80 Neb. 482, 114 N.W. 633 (1908). CORBIN, CONTRACTS §1098 (1950), and MCCORMICK, DAMAGES 684-97 (1935), discuss the problems in this group of cases.

²⁷Gassner v. Lockett, 101 So. 2d 33 (Fla. 1958). It might seem strange that the vendor was able to convey and instead sold the land to another, but was found nevertheless to have acted in "good faith." This was because he was shown to be "old, senile and extremely forgetful" and unaware of his breach.
orbit in Florida it is still too soon to say. But the situation highlights one main objection to rules of contract damages that limit recovery to reliance losses. Where the performance promised can be resold to another, whether or not resale has as yet occurred, the difference-money formula (i.e., difference between the value of the promisee's performance not yet rendered and "market" value of performance due from promisor) will operate ordinarily to recapture most of the profit that the defaulting promisor can realize through breach—provided the values are measurable. So far as I know, this effect of recapturing defaulter's profit has not been mentioned at all in judicial decisions. The measurement of contract damages by the expectancy, where the expectancy is measurable, is ordinarily taken as so obvious a course as to need no justification. But assumptions that lie too deep for words can be the most influential.

There are some other situations where actual or potential gain through breach may have influenced the working of the damage remedy. For example, in contracts for construction, repairs or land development (including the drilling of oil wells) the cost of the performance promised by the builder or improver may exceed by a considerable margin the increase in value that the work will contribute. In valuing the expectancy in such cases there is a choice between awarding the cost of performance, disproportionately large as it is, and determining the value that would have been added if the performance had been rendered and the asset in question had been improved or developed. This situation has produced a sharp division of opinion in the decided cases. Among those that award the cost of performance, despite the fact that the expenditure appears to be wholly uneconomic, perhaps the strongest motive appears to be that of depriving the intentional defaulter of a reward for his breach of contract.28 In cases of this type a money judgment remedy in which recovery was measured by the defaulter's net gain would often encounter serious problems of valuation, especially where the gain consisted merely in a saving of the defaulter's own expenditure in a performance defectively rendered. There are not the same reasons, therefore, for measuring recovery directly by the defaulter's gain as there might be where a particular asset promised or a capacity to render particularized "service" has been resold to another. The purpose of preventing gain through breach of contract operates rather as a factor influencing the choice between two available means of measuring the promisee's expectancy.

One can also find a few cases in which requirements of certainty in the measurement of damages have precluded recovery of the expectancy and the defaulter's profit has crept in as a substitute measure. It is of course in situations of unmeasurable expectancy that recovery for reliance losses is now most commonly authorized. But if no reliance

losses have occurred, or if their amount is relatively small, the gain of the defaulting promisor could conceivably be used. For example, in a contract for an exclusive privilege of selling a particular commodity in a defined geographical area, a breach by the promisor through selling in the area may produce a measurable profit for him which can be used as a basis for damage recovery.\textsuperscript{29}

On the whole, however, the recapture of profit made through breach of contract, unaggravated by violation of "fiduciary" or "confidential" obligations, has been brushed aside as an objective of our remedial system, unless the gain can be somehow conceived as a performance or the product of some performance that the injured promisee himself has rendered under the stimulus of the promise. But to say this is not to say much. A statement cast at so high a level of generality can suggest only some outside limits. The promisee's "performance" which provides the minus quantity in the unjust enrichment equation is itself a variable, and can be differently defined—for example, in contracts that are fully enforceable, in contracts that are unenforceable, and in contracts suspended by impossibility or frustration of purpose. In any one of these situations the cost or value of the promisee's performance may not coincide at all with the gain produced. Here too, in other words, the operation of restitution remedies must be affected by many factors of policy and fairness that derive from the context in which they appear. But in this respect restitution as a remedy for breach of contract differs not at all from restitution remedies used elsewhere.

Restitution on the ground of substantial breach, like restitution on other grounds, can be accomplished through specific remedies, as where a grantor of land in a contract for care and support is given cancellation of his deed in equity after the grantee's breach. One could imagine rare cases in which replevin might be used and a few instances have been given earlier where the machinery of tracing was made available.\textsuperscript{30} But by far the most common remedy is the quasi-contract money judgment. Corbin and Woodward have argued that the term "quasi-contract" is improperly used in this connection since restitution is merely an alternative remedy for breach of contract.\textsuperscript{31} I find their argument obscure and mystifying. It is undoubtedly true that a money judgment measured by

\textsuperscript{29} Uinta Co. v. Ledford, 125 Colo. 429, 244 P.2d 881 (1952); Cincinnati Siemens Lungren Gas Illuminating Co. v. Western Siemens Lungren Co., 152 U.S. 200 (1893), cited by Fuller and Perdue, \textit{supra} note 23, at n.55. It is more common to admit evidence of such profit merely to help prove the profit that the promisee could have made if the exclusive privilege had been maintained. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N.W. 219 (1891); Brach & Son v. Stewart, 159 Miss. 818, 104 So. 162 (1925); Macan v. Scandinavia Belting Co., 264 Pa. 384, 107 Atl. 750 (1919); Buxbaum v. G.H.P. Cigar Co., 188 Wis. 389, 206 N.W. 59 (1925).

\textsuperscript{30} \textit{Supra} note 17.

\textsuperscript{31} CORBIN, \textit{CONTRACTS} \S 1106 (1950); WOODWARD, \textit{QUASI-CONTRACTS} \S 260 (1913).
“benefit” received is merely an alternative remedy for breach of contract, just as it is when available in cases of tort. It was therefore entirely appropriate for the Restatement of Contracts to include restitution in its review of remedies for breach of contract. But quasi-contract restitution on the ground of breach encounters the same kind of problems and aims at the same broad objective as restitution on other grounds. One needs only to keep in mind that the problems take on a somewhat different aspect when the “benefit” is secured under an enforceable contract as to which the receiver of the benefit is himself in default. The only virtue in insisting that restitution here is an alternative remedy for contract breach—and perhaps Woodward had this in mind—is that we might in this way eliminate some of the worst features of election of remedies doctrines, based on the notion that restitution necessarily involves a full-scale “rescission” and is thus inconsistent with a damage action.\(^{32}\)

In fixing the outer limits of quasi-contract restitution the key word, again, is “benefit” and its meaning, again, is shaped by the context. Where the contract is fully enforceable, its own terms provide the starting point in determining whether a benefit has been conferred. The question becomes whether something has been transferred, done or not done that was, in the language of the Restatement, “a part or all of a performance for which the defendant bargained.”\(^3\) It is assumed that in any event the injured party can insist on full indemnity in some form of action. No purpose therefore would be served by modifying the basic risks of gain or loss imposed by the original contract, as would occur if some kind of additional showing were required that the transfer, act, or abstention “requested” produced some net advantage to the defaulting promisor. There is transferred to the restitution remedy, in other words, an underlying assumption of a regime of free contract, that the reasons motivating private exchanges and the calculation of advantages to be secured thereby are left to individual determination. This assumption is strongly confirmed by adopting as the measure of benefit a market value standard, objectivized as far as possible. It therefore becomes unnecessary to inquire whether the performance “requested” or “bargained for” produced net gain of any kind. There are many illustrations. As instructive as any are the numerous cases where architects are promised reimbursement, usually on a basis of percentage-of-cost, for preparing plans for a structure that is never built, so that

\(^{32}\) That this is not necessarily so is suggested by Thomas v. Reece, 333 Mich. 598, 53 N.W.2d 505 (1952), where the court allowed a land contract purchaser to recover as “damages” the purchase price paid to a vendor whose title had failed, despite his failure to make formal demand which, in the court’s view, prevented the action from being one for “recession.” The real trouble with this whole machinery comes, of course, where the injured party has himself received from the defaulter some performance that he wishes to retain. But this is another large question.

\(^{33}\) Restatement, Contracts § 347 (1932).
the plans are useless. The line between performances "bargained for" and losses incurred in preparation for performance is a shifting line, derived in part from interpretation of the contract though only in part, for considerations of fairness also enter. As was pointed out by Professor Fuller, an important avenue for protection of the reliance interest has been extension of the concept of "benefit." Where the contract in question is fully enforceable, there is not much point in restrictive definition, though the question of definition may be important to the plaintiff's lawyer in choosing the proper labels to describe his cause of action. In any event, damages measured by reliance losses should be recoverable as damages for breach of contract if this remedy seems more attractive to the plaintiff than expectancy damages. On the other hand, if other "unbargained performance" has produced gain to the defaulter (as by improvements made by a purchaser of land on his own account), recovery on a theory of restitution will usually be available, though here the measure may be net gain to the defendant, rather than market value of labor and material or cost of improvements.

Somewhat different definitions of "benefit" have been used with unenforceable contracts and with contracts whose performance has been suspended by impossibility or frustration of purpose. Contracts unenforceable because of the statute of frauds or indefiniteness have placed courts in a painful dilemma. Under existing doctrines it is only through extension of quasi-contract restitution that reimbursement can be given for "requested" action, but as the gain to the promisor is reduced toward zero so that the claim is stripped down to promisee's loss, it becomes harder to view it as anything more than a damage action for breach of a promise assumed to be unenforceable by damage action or otherwise. It is no wonder that decisions in this area move in different directions and cannot possibly be reconciled. Even more difficult are the problems arising through unforeseen change of conditions, where the effect of the change is so drastic as to discharge both parties from duties of further performance but either or both have performed in part. In most of these cases it is poverty, not wealth, that must be shared. Where performance consists of contributions to an existing structure, an arbitrary limit—"incorporation" in the structure—is used as a means of dividing losses.

35 Fuller and Perdue, supra note 23, at 72.
36 44 Harv. L. Rev. 623 (1931).
37 Annot., 48 A.L.R. 12, 64 (1927).
38 Fuller and Perdue, supra note 23, at 386-96, deal with these cases very well. There are more cases cited in 23 Calif. L. Rev. 528 (1940), and Dawson and Palmer, Cases on Restitution 505-07 (1958).
Perhaps it would be wise, as Williston suggested, to abandon the concept of "benefit" in these cases altogether.\textsuperscript{40} Personally I do not think so. The argument for abandonment assumes a stability and permanence in the underlying concepts at work in restitution that they do not have and cannot acquire.

This is not meant to suggest that the results in this large group of cases depend merely on whim. We have a law of restitution. Its growth has been rapid and still continues. The remedial means are not only diverse, but extremely abundant, more so than those of any other recorded legal system. Our difficulties are increased by this abundance of means, but even if we relied on only one means—say, the money judgment—we would still have problems. For when a purpose so broad and attractive as the prevention of gains through another's loss is projected on a legal system, it will surely be refracted like light in a prism. If we study the angles of refraction closely they fall into patterns we can well understand. If the patterns are different in other sectors this is because the prism is most complex.

\textsuperscript{40} Williston, Contracts § 1977 (rev. ed. 1936).