

COMMENTS

RESTITUTION UNDER THE STATUTE OF FRAUDS IN OHIO

The Ohio statute of frauds provides that no action shall be brought to charge the defendant upon certain specified types of contracts unless the agreement upon which the action is brought or some note or memorandum thereof shall be in writing.¹ Unfortunately, too few laymen realize this and continue to make oral agreements within the statute, consulting their attorney only after trouble arises. They then demand relief from the harsh results the statute often produces.

Although the statute is quite explicit, there are means of avoiding its severity. A check-list of available theories by which a remedy may be obtained was presented and explained in a recent volume of this Journal.² That article, however, was general in scope and did not attempt to analyze specifically the law of Ohio. Often the plaintiff's most effective remedy will be an action on the oral contract, to place him where he would have been had the contract been performed. This is possible in Ohio where there has been a sufficient part performance to "take the oral agreement out of the statute." An analysis of Ohio cases on part performance sufficient to avoid the statute of frauds was recently presented by a comment in the University of Cincinnati Law Review.³ The present work is intended as a complement to these two articles, treating specifically the Ohio law applicable to the situation where the parties entered into an oral agreement which failed to comply with the statute, and restitution is sought for the benefit conferred in performance of or in reliance upon the unenforceable agreement.⁴

There are a number of reasons why the plaintiff might consider the possibilities of an action to protect his restitution interest. Among the most likely are: his part performance is insufficient or of a type which will not take the oral contract out of the statute permitting an action on the con-

¹ OHIO REV. CODE § 1335.05 (1953). Such types of contracts are: those to answer for the debt, default or miscarriage of another person; those of an executor or administrator to answer damages out of his own estate; agreements made upon consideration of marriage; contracts or sales of interests in land; and agreements not to be performed within one year from the making thereof.

² Krauskopf, *Solving Statute of Frauds Problems*, 20 O.S.L.J. 237 (1959).

³ *The Doctrine of Part Performance in Ohio*, 23 U. CINC. L. REV. 200 (1954).

⁴ For a general and quite comprehensive treatment of restitution under the statute of frauds, see the following three articles by Professor Jeanblanc: Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit*, 26 IND. L. J. 1 (1950); Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 MICH. L. REV. 923 (1950); Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 MO. L. REV. 1 (1950). See also, 25 OHIO JUR. 2d, *Frauds, Statute of* §§ 274-84 (1957).

tract; the plaintiff himself may have defaulted on the contract, removing the availability of an action on it; the contract may have been a bad bargain rendering recovery on it worthless; or, even though plaintiff has partly performed he could be adequately compensated by pecuniary damages, making specific performance unavailable. In any such case restitution should be examined.

THEORY OF RESTITUTION UNDER THE STATUTE OF FRAUDS

Restitution is generally available to restore a benefit defendant has obtained from the plaintiff which it would be unjust for him to retain without compensating the plaintiff.⁵ The action is not brought on the oral contract in spite of the statute of frauds, but rather, wholly independently of the contract. Evidence of the oral agreement is admissible solely to prove the elements of an action for restitution, "benefit" to the defendant and his "unjust retention."⁶ Whenever the defendant has been unjustly enriched, plaintiff is entitled to restitution, and the application of this principle cannot be prevented by the existence of a statute of frauds. In permitting restitutionary recovery for services performed under an oral contract unenforceable because not performable within one year, the Ohio Supreme Court said:

When one has received money, goods, or benefits from another, justice and equity demand that he should pay therefor, and the law will, if necessary, imply a promise to that effect. And although such benefits may have been rendered under a void contract, or one that can not be enforced, it can not be allowed that a defendant can retain his advantage without compensation. This would be unconscionable. . . . If this contract can not be enforced by reason of the statute, the law can imply a promise precisely like it. The defendant has received the benefit of the services . . . and it would be a reproach to the law if he were permitted to retain these benefits without just payment.⁷

The most commonly used remedy to effect restitution is an action at law in "quasi-contract" or, as it is more familiarly known in Ohio, *quantum meruit*. The measure of recovery in such an action is the reasonable value of the benefit received by the defendant. Restitutionary

⁵Rice v. Savings & Trust Co., 155 Ohio St. 391, 99 N.E.2d 301 (1951); Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938); Cleveland Co. v. Standard Amusement Co., 103 Ohio St. 382, 133 N.E. 615 (1921); Hossler v. Trump, 62 Ohio St. 139, 56 N.E. 656 (1900); Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N.E. 888 (1897); Towsley v. Moore, 30 Ohio St. 184 (1876); Buck v. Waddle, 1 Ohio 357 (1824); Southard v. Curson, 13 Ohio App. 289 (1920); Gallagher v. Billmaier, 79 Ohio L. Abs. 417, 154 N.E.2d 472 (Sixth Dist. Ct. Ct. 1958); Miner v. Greve, 30 Ohio L. Abs. 93 (Ct. App. 1939); Himes v. Rickman, 17 Ohio L. Abs. 574 (Ct. App. 1934); Ortman v. Ortman, 17 Ohio L. Abs. 525 (Ct. App. 1934); National Glass & Lens Co. v. Parsons, 28 Ohio Law Rep. 573 (Ct. App. 1928).

⁶RESTATEMENT, RESTITUTION § 1 (1937).

⁷Towsley v. Moore, *supra* note 5.

relief is also available under the equitable remedies of constructive trust,⁸ equitable lien,⁹ and equitable accounting.¹⁰

BENEFIT

In order to recover his restitution interest the first element which plaintiff must prove is that his performance has resulted in a "benefit" to defendant. What constitutes a legal benefit varies in different situations, but like the term "value" in economics, it is probably founded upon satisfaction of human wants. It is necessary only to show that defendant received something that is valuable to him.¹¹ The legal benefit to defendant, however, must usually be reduced to monetary terms so that a restitution judgment may be expressed as a pecuniary value. There is a clear objective manifestation of benefit when defendant has received from plaintiff money,¹² or items such as land or goods which he can exchange for money.¹³ Likewise, the benefit is fairly obvious where plaintiff has performed services for which defendant would otherwise have had to pay someone else.¹⁴ A benefit is conferred where one by performing an act saves another the expense of performing a duty.¹⁵ Where one uses another's property he is benefited to the extent of its reasonable rental value.¹⁶ Admission of proof of any such benefit in spite of the statute of frauds seems justified because none of these situations necessarily requires proof of the unenforceable promise to establish the benefit.

When there is no manifest advantage to defendant or increase in his wealth resulting from plaintiff's actions in reliance on the oral contract, there is a tendency to use the oral agreement itself to prove benefit.

⁸ *Bender v. Cleveland Trust Co.*, 123 Ohio St. 588, 176 N.E. 452 (1931); *Dean v. Dean*, 70 Ohio L. Abs. 216 (C.P. 1955); *Ward v. Ward*, 12 Ohio C.C. Dec. 59 (1901).

⁹ *Klaustermeyer v. Cleveland Trust Co.*, 89 Ohio St. 142, 105 N.E. 278 (1913); *Smith v. Fuller*, 86 Ohio St. 57, 99 N.E. 214 (1912); *Prudential Ins. Co. v. Olt*, 70 Ohio L. Abs. 125 (U.S. Dist.Ct. N.D. Ohio 1954).

¹⁰ *Dean v. Dean*, *supra* note 8.

¹¹ *Jeanblanc, Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit*, *supra* note 4.

¹² *Hummel v. Hummel*, *supra* note 5; *Buck v. Waddle*, *supra* note 5.

¹³ *Wellston Coal Co. v. Franklin Paper Co.*, *supra* note 5. A good discussion of benefit will be found in this case where restitution was sought by a plaintiff who had performed before breach of contract by defendant, and the contract price was less than market price, distinguishing *Doolittle v. McCullough*, 12 Ohio St. 360 (1861), where, because a less difficult portion of the contract had been performed, it was held no benefit was conferred.

¹⁴ *Hossler v. Trump*, *supra* note 5; *Towsley v. Moore*, *supra* note 5. The great majority of courts have held that services rendered in performance of an unenforceable agreement constitute a legal benefit irrespective of the character of the return performance promised by the defendant.

¹⁵ *Sommers v. Board of Educ.*, 113 Ohio St. 177, 148 N.E. 682 (1925) (parent performed a duty of the Board of Education by transporting his children to school).

¹⁶ *Gallagher v. Billmaier*, *supra* note 5.

Defendant's request and promise of return performance demonstrates his desire for that which plaintiff has given and shows he was willing to pay for it. Furthermore, defendant's accepting, retaining, or consuming plaintiff's performance, under the unenforceable agreement, is additional evidence of satisfaction of his desires.¹⁷ This is expressed as the "bargained-for performance" concept of benefit.¹⁸

At least some support for bargained-for performance as benefit may be found in Ohio. In *Himes v. Rickman* the court said, "the oral agreement . . . tends to show that defendant intended to compensate them."¹⁹ An intention to compensate is clearly indicative that the performance was thought by the defendant to be valuable or beneficial to him. It was likewise held proper, in *Ortman v. Ortman*,²⁰ to instruct the jury that evidence of the oral agreement was admissible if limited to the issue as to whether or not there was a promise to pay. It should be noted that in both of these cases plaintiff's performance was in the form of non-returnable services. The courts seem more likely in this sort of case to emphasize the defendant's request and his promise of return performance as a means of showing that he got what he wanted. Should plaintiff find it necessary to employ this theory to prove the defendant's benefit, he will find ample support from such authorities as Williston and the Restatements of Contracts and Restitution.²¹

A distinction which must be observed in the bargained-for performance cases is that such performance only constitutes benefit when done at defendant's request. Thus in *Welsh v. Welsh*,²² although the possibility of enforcing the oral contract in equity after a part performance was mentioned as the reason for refusing quasi-contractual relief, the principal argument was that improvements made by the purchaser were intended for his own benefit and were not "requested" by the vendor.

UNJUST RETENTION

The fact that plaintiff's performance has conferred a legal benefit on defendant does not alone justify a recovery in restitution. It must further be shown that his retention of that benefit is unjust. That is,

¹⁷ See Jeanblanc's explanation, *supra* note 11, at 6.

¹⁸ Krauskopf, *supra* note 2, at 254.

¹⁹ 17 Ohio L. Abs. 574, 577 (Ct. App. 1934).

²⁰ *Supra* note 5.

²¹ WILLISTON, CONTRACTS § 536 (rev. ed. 1936); RESTATEMENT, CONTRACTS §§ 347-48 (1932); RESTATEMENT RESTITUTION § 1 (1937). There appears to be no Ohio Supreme Court authority on the bargained-for performance concept of benefit, however, so plaintiff might anticipate a number of defensive arguments, including an outright attack on the concept. More likely, though, is the contention that the concept should not be applied in statute of frauds cases, appealing to the court's duty to respect the statute at least where it is necessary to use the unenforceable contract as evidence of the benefit. Defendant would claim that clearly in such case he is being "charged on the contract." See further in this connection, Krauskopf, *supra* note 2, at 255.

²² 5 Ohio 425 (1832).

plaintiff must show that upon examination of all the circumstances of the particular transaction and the conduct of both parties, the retention is inequitable or unjust.²³ Difficulty may arise for plaintiff's attorney in any of three facets of his case. Defendant may contend that plaintiff was merely an officious intermeddler, a volunteer, or that at the time of performance the benefit was intended to be gratuitous. Second, plaintiff may be in default under the parol agreement. Third, defendant may be ready and willing to perform the contract.

In any of these cases, recovery would likely be denied plaintiff on the ground that it is not unjust under the circumstances for defendant to retain the benefit without reimbursement.²⁴ Therefore it is desirable to consider whether, in any of these situations, the statute of frauds prevents use of the oral contract as evidence on any of these issues. In Ohio the words of the statute, that defendant shall not be charged on the oral contract, have been interpreted to make the contract only voidable,²⁵ and evidence of the oral contract is admissible in all the situations.

As to the first aspect of the plaintiff's possible difficulties, if defendant can successfully assert that plaintiff officiously conferred the benefit on him, recovery in restitution must be denied. Although there clearly may be an enrichment, it is not unjustly retained.²⁶ Proof, however, of the oral agreement is admissible in order to show that defendant intended to compensate the plaintiff and thus negative officiousness.²⁷ Of course, evidence relative to the oral contract is limited to the issue as to whether or not there was a promise to pay.²⁸

Similar to the problem of officiousness is that of gratuitous performance, an example of which is found in the family relationship doctrine.²⁹

²³ Jeanblanc has suggested that the determination should be based on a consideration of such variable factors as: (1) the effect of the repudiation of the oral agreement, (2) the willful or inadvertent character of the plaintiff's repudiation, (3) the effect of the statute of frauds upon the oral agreement, (4) the extent of performance rendered, (5) the failure to make restoration, and (6) the willingness of the defendant to be bound by the terms of the oral agreement. *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, *supra* note 4, at 924.

²⁴ See notes 26, 29-31, 34 and 39, *infra*.

²⁵ *Minns v. Morse*, 15 Ohio 568 (1846).

²⁶ *Prudential Co-op. Realty Co. v. Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928); *Cleveland v. Legal News Publishing Co.*, 110 Ohio St. 360, 144 N.E. 256 (1924); *Vindicator Printing Co. v. State*, 68 Ohio St. 362, 67 N.E. 733 (1903); *Columbus, H. V. & T. R.R. v. Gaffney*, 65 Ohio St. 104, 61 N.E. 152 (1901); *Phillips v. McConica*, 59 Ohio St. 1, 51 N.E. 445 (1898); *Cincinnati v. Gas Light and Coke Co.*, 53 Ohio St. 278, 41 N.E. 239 (1895); *Clark v. Lindsey*, 47 Ohio St. 437, 25 N.E. 422 (1890); *Brumbaugh v. Chapman*, 45 Ohio St. 368, 13 N.E. 584 (1887); *Williamson v. Cole*, 26 Ohio St. 207 (1875); *Mays v. Cincinnati*, 1 Ohio St. 268 (1853). See also, *RESTATEMENT, RESTITUTION* §§ 2, 112 (1937).

²⁷ *Himes v. Rickman*, *supra* note 5.

²⁸ *Ortman v. Ortman*, *supra* note 5.

²⁹ 25 OHIO JUR. 2D, *Frauds, Statute of* § 280 (1957).

Plaintiff may not recover compensation for services performed for another member of his family unless he can establish that there was an *express* contract on his part to perform them for compensation and on the part of the other to accept such services and pay for them.³⁰ In such a situation no obligation to pay will be implied under the doctrine of unjust enrichment, but rather, "services rendered between members of the same family shall be presumed to be gratuitously rendered even though such services may be performed at the express request of the person receiving the benefit."³¹ This doctrine, however, is inapplicable where there are significant other circumstances to counteract the presumption of gratuity.³² Consequently, in a quasi-contractual action to recover for services rendered to a family member under an unenforceable oral contract, where the defense of the statute of frauds is raised, the plaintiff may be able to introduce the oral contract to show an express agreement rebutting the presumption that the services were gratuitous.³³

Where the plaintiff himself has repudiated the oral agreement, a second problem arises. This conduct is generally considered sufficiently inequitable that the defendant's acceptance, consumption, or retention of the benefit is not regarded as unjust. Several Ohio cases have therefore denied quasi-contractual recovery to a party who was in substantial default on his contractual promise.³⁴ In *Abbott v. Inskip*, perhaps the leading Ohio case which sets forth this position, the plaintiff was denied recovery in *quantum meruit* for the performance actually rendered when he abandoned the service in violation of his oral contract for services not performable within one year. The court explained:

³⁰ *Lemunyon v. Newcomb*, 120 Ohio St. 55, 165 N.E. 533 (1929); *Merrick v. Ditzler*, 91 Ohio St. 256, 110 N.E. 493 (1915); *Hinkle v. Sage*, 67 Ohio St. 256, 65 N.E. 999 (1902); *Bemis v. Bemis*, 83 Ohio App. 95, 82 N.E.2d 757 (1948); *Sokolowski v. Lucey*, 47 N.E.2d 627 (Ohio App. 1941).

³¹ *Merrick v. Ditzler*, *supra* note 30, at 263.

³² *In re Estate of Bowman*, 102 Ohio App. 121, 141 N.E.2d 499 (1956) (absence of the reciprocal and mutual benefits which ordinarily exist within a family relationship); *Bemis v. Bemis*, *supra* note 30 (express agreement for such services between parties who did not live in same house). Another situation where the doctrine does not apply is where the person for whom the services were performed is not *sui juris*. *Scattergood v. Ingram*, 86 Ohio St. 76, 98 N.E. 923 (1912); *Markland v. Harley*, 107 Ohio App. 245, 158 N.E.2d 209 (1958).

³³ *Sokolowski v. Lucey*, *supra* note 30; *Miner v. Greve*, *supra* note 5 (holding that an abortive will, made to carry out an unenforceable oral contract to devise real estate to a brother in consideration of care and support rendered by him to the decedent, was properly admitted in evidence for the limited purpose of showing that such services were not gratuitous, in an action to recover the reasonable value of such services).

³⁴ *Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573 (1897); *Abbott v. Inskip*, 29 Ohio St. 59 (1875); *Massaro v. Bashara*, 91 Ohio App. 475, 108 N.E.2d 850 (1952); *Galagher v. Dettelbach*, 1 Ohio Cir. Ct. (N.S.) 598 (1902). See also *Tier v. Singrey*, 154 Ohio St. 521, 97 N.E.2d 20 (1951) (dictum to the effect that vendee may retain rents remitted by vendor under unenforceable contract subsequently repudiated by vendor).

The plaintiff . . . relied on an implied promise, on the part of the defendant, that he would pay the plaintiff the reasonable value of his services. The express promise contained in the agreement, under which the plaintiff assumed to render the service, excludes the presumption of the implied promise relied on.³⁵

It is submitted that the approach of *Abbott* is inconsistent with the traditional concept that a breach of contract does not constitute a tort, or give rise to a claim for punitive damages.³⁶ Any plaintiff should be entitled to recover for a benefit which he has conferred on the defendant and for which he has not been paid. To deny recovery on an *implied* promise because of the plaintiff's breach of his *express* promise smacks clearly of punishment for breach of contract. The plaintiff in *Kirkland v. Archbold*,³⁷ for example, defaulted after accomplishing about half of the agreed performance. In a well reasoned opinion of the Ohio Court of Appeals, recovery was permitted according to a determination of the "value of the work and materials expended on a *quantum meruit* basis" less damages caused by the plaintiff's breach.³⁸ This indicates a refreshing reorientation in Ohio legal concepts; instead of looking only to fault on the part of the plaintiff, the court also considered the unjust enrichment of the defendant.

Plaintiff's third area of difficulty is presented by a situation where defendant elects not to rely on the statute of frauds, but is willing, ready, and able to perform the oral contract. Defendant thereby chooses to reimburse the plaintiff precisely according to their bargain. This can hardly be unjust.

The default of a defendant, or his refusal to go on with a contract which falls within the statute of frauds, is an essential condition of the right to recover for services rendered under it. It is only in cases where the defendant, by reason of his own breach of such contract, is estopped from setting it up as a defense that an action for the value of the work done under it can be maintained.³⁹

The presence or absence of unjustness on the defendant's part may be proved by way of the oral contract because the only way to know whether or not defendant is willing or able to go on with the agreement, even though it is unenforceable, is to admit evidence of its terms.⁴⁰

³⁵ *Supra* note 34, at 61.

³⁶ MCCORMICK, DAMAGES 637-39 (1935).

³⁷ 113 N.E.2d 496 (Ohio App. 1953).

³⁸ *Id.* at 499. See a thorough analysis of this case in Nordstrom and Woodland, *Recovery by Building Contractor in Default*, 20 OHIO ST. L. J. 193, 202-05 (1959).

³⁹ *Abbott v. Inskip*, *supra* note 34, at 61.

⁴⁰ *Hummel v. Hummel*, *supra* note 5; *Massaro v. Bashara*, *supra* note 34; *Potts v. Potts*, 72 Ohio App. 268, 51 N.E.2d 226 (1942); *Prechtel v. Prechtel*, 16 Ohio Cir. Ct. (N.S.) 528 (1905); *Galagher v. Dettelbach*, *supra* note 34.

VALUE OF BENEFIT

When the defendant has been unjustly enriched and plaintiff seeks monetary restitution, rather than restitution in specie, the measure of recovery is usually stated as the reasonable value of the benefit conferred.⁴¹ "The fundamental duty of the defendant is restitution, and . . . the law gives money value generally, not because that is the plaintiff's primary right but merely as the equivalent of what he is entitled to."⁴² Where the defendant has received money under an unenforceable contract and he refuses to perform, asserting the statute of frauds, plaintiff may recover the money back, there being no problem as to the evaluation of legal benefit.⁴³ In many cases, however, the benefit is other than money, and the value of that which defendant has promised is certainly probative of the value of the benefit to him. Hence the question arises whether the oral contract may be used to measure the monetary value.

When the defendant has promised to pay money for the plaintiff's performance, a few Ohio cases have admitted evidence of the oral promise despite the defense of the statute of frauds.⁴⁴ Such decisions, though, are contrary to the leading Ohio case of *Towsley v. Moore*,⁴⁵ the rule of which they have apparently misconstrued, and on which they base their authority. The plaintiff in *Towsley*, a minor about eleven years old, orally agreed to work for defendant in his home until she arrived at the age of eighteen; for which defendant promised to board, clothe, and furnish her with schooling, and at the expiration of her period of service, pay her *what such services were reasonably worth*. The plaintiff remained with him during the time specified and performed her part of the bargain, and then was forced to sue for her pay. Although the court permitted recovery equalling the contract price stipulated in the oral agreement, this similarity does not indicate that the contract furnished the measure of recovery. The reason for the similarity is simply that "the express contract was just what the law would imply, namely, reasonable reward for services performed."⁴⁶ The court clearly pointed out that the express oral contract can not be of any avail to either party.⁴⁷ However, it seems that there is adequate justification for the minority Ohio view.

⁴¹ *E.g.*, *Weber v. Billman*, 165 Ohio St. 431, 135 N.E.2d 866 (1956) (services); *Cleveland Co. v. Standard Amusement Co.*, *supra* note 5 (services); *Kling v. Bordner*, 65 Ohio St. 86, 61 N.E. 148 (1901) (services); *Wellston Coal Co. v. Franklin Paper Co.*, *supra* note 5 (goods); *Reinheimer v. Carter*, 31 Ohio St. 579 (1877) (services); *Towsley v. Moore*, *supra* note 5 (services); *Moore v. Beasley*, 3 Ohio 294 (1827) (rent for use of land); *Gallagher v. Billmaier*, *supra* note 5 (rent for use of land).

⁴² WILLISTON, *CONTRACTS* § 535 (rev. ed. 1936).

⁴³ *Galagher v. Dettelbach*, *supra* note 34; *Buck v. Waddle*, *supra* note 5.

⁴⁴ *Kurz v. United States Fidelity & Guaranty Co.*, 7 Ohio N.P. 118 (1900); *Cowie v. Central Trust Co.*, 28 Ohio L. Abs. 536 (C.P. 1939) (dictum).

⁴⁵ *Supra* note 5.

⁴⁶ *Towsley v. Moore*, *supra* note 5, at 195.

⁴⁷ *Ibid.*

Evidence of the oral promise should be admitted, not as the conclusive measure of recovery, but as an admission regarding the amount of benefit the defendant derived from the plaintiff's performance. Professor Woodward argues:

Reasonably interpreted, the statute applies only to the enforcement of oral *contracts*. It does not relate to oral admissions against interest. If, then, the same transaction happens to amount to both an oral contract and an oral admission, the unenforceability or invalidity of the contract should not affect the competency of the admission as evidence of a non-contractual obligation.⁴⁸

When the consideration orally agreed upon for plaintiff's performance is property or a promise to will property, the cases exclude evidence of the value of the promised property as determinative of the value of the defendant's benefit.⁴⁹ This situation is clearly distinguishable from that in which the defendant has promised to pay money, for here the property would have to be converted to a monetary value before it could be used to measure the value of the plaintiff's performance. Furthermore, it is the benefit to *defendant*, not loss to the plaintiff, which is being evaluated.⁵⁰ There is no justification for resorting to the secondary evidence of the consideration anticipated by the plaintiff when reduction of the plaintiff's performance itself to pecuniary terms would be more orderly and give just as precise a measure. In addition, most of the cases where the alleged oral promise was to transfer property are those in which plaintiff has performed services for a decedent. Quite often the value of the property is obviously greater than the reasonable value of the services rendered and to use the value of the property as the measure would in reality tend toward protection of plaintiff's expectation, rather than his restitution, interest.⁵¹ This would manifestly be contrary to the entire concept of the statute of frauds.

⁴⁸ WOODWARD, QUASI CONTRACTS 166 (1913). See also Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, *supra* note 4, at 5-6.

⁴⁹ *Newbold v. Michael*, 110 Ohio St. 588, 144 N.E. 715 (1924); *Snider v. Rollins*, 102 Ohio St. 372, 131 N.E. 733 (1921); *Kling v. Bordner*, *supra* note 41; *Howard v. Brower*, 37 Ohio St. 402 (1881); *Struble v. Struble*, 42 Ohio App. 353, 182 N.E. 48 (1932); *Southard v. Curson*, *supra* note 5; *Walters v. Heidy*, 1 Ohio App. 66 (1913); *Himes v. Rickman*, *supra* note 5 (evidence of oral contract admitted, however, but limited to issue of whether or not there was a contract to pay); *Ortman v. Ortman*, *supra* note 5 (same as *Himes*); *Martin v. Dickey*, 9 Ohio L. Abs. 500 (Ct. App. 1930); *Norris v. Clark*, 7 Ohio Dec. Reprint 564 (Dist. Ct. 1878).

⁵⁰ This is implicit in *Towsley*, *supra* note 5. Plaintiff was permitted to recover on a *quantum meruit* for the reasonable value of the services rendered but not for damages for breach of contract. To like effect, see *Hummel v. Hummel*, *supra* note 5.

⁵¹ The various contract interests protected by the courts are very well presented in Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE

Although plaintiff may be precluded from charging the defendant on the oral agreement, the defendant himself may wish to introduce the contract (1) to limit the plaintiff's recovery in restitution to the contract price, or (2) to show he has conferred some benefit on plaintiff offsetting that which plaintiff can recover from him. On principle it seems that the oral promise should be available to limit recovery to the contract price where recovery is permitted to a defaulting plaintiff.⁵² This is so because, of course, no one should profit from his own wrong. Where the defendant is the defaulting party this limitation probably is inapplicable and restitution of the reasonable value of the plaintiff's performance is recoverable regardless of the oral contract.⁵³ An example is *Himes v. Rickman*, an action in *quantum meruit* for services rendered a defendant under an oral contract to devise or transfer real estate in return. The defendant argued that the value of the real estate was only \$4,000 and that he was alive with years of life expectancy remaining when plaintiffs left his property. Hence it was obvious that plaintiff's claim of \$4,000 was unreasonable inasmuch as that was all that could have been expected had the parties gone through with their oral contract. The court rejected this argument, stating its weakness was that "the action was not for specific performance of the contract but on quantum meruit."⁵⁴ Although no Ohio cases in point were found, the defendant probably may use the oral contract to offset plaintiff's claim by showing he also benefited the plaintiff.⁵⁵ This is so because enrichment is only unjust if obtained without compensation.

Sometimes even plaintiff's expectation interest is protected by an

L.J. 52, 373 (1936). These interests may be briefly summarized: (1) *The restitutionary interest*, that created when the plaintiff in reliance on the contract confers something of value on the defendant. (2) *The reliance interest*, that created by plaintiff's change of position in reliance on the contract, other than by conferring value on the defendant. Although there is a loss to the plaintiff, the expenditure has benefited not the defendant but a third person. (3) *The expectation interest*, that usually protected in an action "on the contract." To protect this interest is to place the plaintiff in the position in which he would have been had the contract been performed.

⁵² However, no Ohio cases were found on this precise point. See Krauskopf, *supra* note 2, at 261-62.

⁵³ RESTATEMENT, CONTRACTS § 357 comment (g) (1932); Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, *supra* note 4.

⁵⁴ *Himes v. Rickman*, *supra* note 5, at 576. It is questionable whether in Ohio even a *written* contract is available to limit plaintiff's recovery in restitution when defendant is in default. In *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.*, 151 Ohio St. 522, 86 N.E.2d 782 (1949), the court stated without qualification that "plaintiff may elect to rescind the contract and sue for the value of the performance rendered." For amplification of this point and an analysis of the Ohio cases, see Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264, 272 n. 34 (1959).

⁵⁵ Krauskopf, *supra* note 2, at 262.

action for restitution, and the effect is as though the action were brought "on the contract." This is true where the amount of money defendant promised is used to measure the value of his benefit. An example of such a situation is *Hummel v. Hummel*,⁵⁶ in which plaintiff orally agreed with defendant (his son) to pay the premiums on an endowment policy in defendant's life in return for defendant's promise to pay him the proceeds of the policy. This contract was unenforceable because it was not performable within one year. When, upon maturity, the defendant refused to turn over the money, restitutionary recovery was permitted of the entire proceeds of the policy, precisely what had been agreed upon. Perhaps believing that this result too nearly approximated enforcement of the contract itself in the face of the statute of frauds, some Ohio cases have disallowed recovery beyond the amount of the premiums paid plus interest, the cost to the plaintiff.⁵⁷ This, however, represents protection of the reliance interest only. The measure in *Hummel* appears proper for, although the effect is identical to enforcement of the unenforceable contract, the true measure of recovery in restitution has been employed, namely, the monetary value of the benefit unjustly retained by the defendant.

EQUITABLE REMEDIES

Having established a benefit to defendant and its unjust retention, the plaintiff may discover a further impediment in that the defendant does not have sufficient ready cash to pay a money judgment or that the money which represents the benefit has been commingled with other funds. Plaintiff need not be left without an effective remedy inasmuch as constructive trusts, equitable liens and equitable accounting are all available to alleviate his problems.

To impose a constructive trust does no violence to the statute of frauds.⁵⁸ Equity is in no sense attempting to compel performance of an oral trust, but is simply applying its remedial process to prevent unjust enrichment. Courts will not tolerate one party's being made richer through another's loss,⁵⁹ and it makes no difference that this enrichment arose through an oral transaction. "The constructive trust springs from the transaction not the contract."⁶⁰ It should be remembered that the constructive trust is not a trust at all but a remedial device, and there is

⁵⁶ *Supra* note 5.

⁵⁷ *Prudential Ins. Co. v. Olt*, *supra* note 9; *Septer v. Septer*, 19 Ohio L. Abs. 397 (P. Ct. 1935).

⁵⁸ RESTATEMENT, RESTITUTION § 202 comment h (1937).

⁵⁹ "For this by nature is equitable, that no one be made richer through another's loss." Digest of Justinian, lib. 12, tit. 6, s. 14, as quoted in DAWSON, UNJUST ENRICHMENT 3 (1951).

⁶⁰ Vanneman, *The Constructive Trust: A Neglected Remedy in Ohio*, 10 U. CINC. L. REV. 366, 401 (1936).

ample authority for its use as such in Ohio.⁶¹ An illustration of its use in the statute of frauds field is presented by *Topper Bros. v. Bohn*,⁶² in which the defendant orally promised to purchase certain property for the plaintiff for an agreed compensation, but after making the purchase refused to recognize the interest of his principal under the contract, keeping the property for himself instead. The court held that the agent under the oral contract held the property upon a constructive trust for the plaintiff, his undisclosed principal.

The remedy of equitable lien is likewise available in Ohio to trace funds which the defendant has unjustly obtained from the plaintiff.⁶³ An example is the *Olt* case,⁶⁴ in which a mother who had paid the premiums on an endowment policy on her daughter's life was entitled to a lien on the proceeds of the policy for the amount of the premiums paid plus interest.

Equitable accounting may be employed where there has been an unjust enrichment but the funds were received by the defendant under such a complex arrangement that the plaintiff cannot assert the precise amount of the benefit. Thus in *Dean v. Dean*,⁶⁵ the parties orally agreed to purchase a duplex apartment house in defendant's name, but that an undivided half interest therein would belong to the plaintiff, and that when a specified event occurred defendant would convey the half interest to the plaintiff. The house was purchased according to the agreement, each party moved into his half of the building, and the parties shared equally the mortgage payments, repairs, water bills and all other expenditures of ownership. Upon the happening of the event, defendant refused to convey. Instead, the defendant sold the realty and made various purchases with the proceeds. These facts were held to warrant an equitable accounting and a declaration of trust in partition of the other realty which the defendant had purchased with the proceeds of sale of the original property. The court said this was "not an action for damages for breach of an alleged oral agreement," but rather, it was "clearly an action . . . seeking restitution."⁶⁶

⁶¹ *Bender v. Cleveland Trust Co.*, *supra* note 8; *Seeds v. Seeds*, 116 Ohio St. 144, 156 N.E. 193 (1927); *Barnes v. Christy*, 102 Ohio St. 160, 131 N.E. 352 (1921); *Winder v. Scholey*, 83 Ohio St. 204, 93 N.E. 1098 (1910); *Newton v. Taylor*, 32 Ohio St. 399 (1877); *Mathews v. Leamon*, 24 Ohio St. 615 (1874); *Kent v. Mahaffey*, 10 Ohio St. 204 (1859); *Dean v. Dean*, *supra* note 8; *Ferguson v. Deuble*, 27 Ohio L. Abs. 533 (Ct. App. 1938); *Hays v. Warner*, 22 Ohio L. Abs. 56 (Ct. App. 1936); *Pearl-Market Bank & Trust Co. v. Woodward Co.*, 22 Ohio L. Abs. 328 (Ct. App. 1935); *Taft v. Guardian Trust Co.*, 17 Ohio L. Abs. 54 (Cleveland Munic. Ct. 1934); *Ward v. Ward*, *supra* note 8.

⁶² 12 Ohio N.P. (N.S.) 177 (1911).

⁶³ See cases cited *supra* in notes 9 and 57.

⁶⁴ *Prudential Ins. Co. v. Olt*, *supra* note 9.

⁶⁵ *Supra* note 8.

⁶⁶ *Id.* at 220.

CONCLUSION

When faced with the statute of frauds, the Ohio attorney should not fail to examine the desirability of a restitution action. Whenever the doctrine of unjust enrichment is applicable he can obtain recovery of at least as much as the benefit to the defendant. Probably he will recover for all the loss plaintiff has sustained, and if the court should employ defendant's promise as the measure of recovery he will obtain precisely what he could have received in a contract action. Despite its severe language, the statute of frauds is no bar to recovery when plaintiff has done something for which he was not compensated.

Robert E Lewis