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Recommended Citation

Joseph Perillo, *Restitution in a Contractual Context*, 73 Colum. L. Rev. 1208 (1973)

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RESTITUTION IN A CONTRACTUAL CONTEXT

JOSEPH M. PERILLO*

For close to a century almost all scholarly writing and a good many court decisions concerning claims for restitution have rested on two fundamental assumptions: first, that there is nothing contractual about quasi-contractual obligations, second, that quasi-contractual obligations are imposed by law to prevent unjust enrichment. These generalizations purporting to encompass all quasi-contractual obligations are of comparatively recent origin and are only partly correct. They were developed to free the law from technical strictures inherited from the system of common law pleading, and, to an extent, have accomplished this purpose. But unfortunately, as over-generalizations, they have tended to have a concomitant stultifying effect upon the comprehension and development of this area of the law.¹

Professor Corbin, writing in 1912, combined both assumptions in offering the following definition:

[A] quasi-contract is a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched.²

There was, he informed us, unanimity that quasi-contractual obligations are independent of agreement.³

The unanimity of which he spoke was of comparatively recent origin. Although there had been precursors,⁴ the idea that quasi-contract was totally separate from contract was not widely disseminated until Professor Keener published his first collection of cases on quasi-contract in 1888⁵ and his text in 1893.⁶ It soon achieved in this country the almost universal assent which

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1. But the solution of a problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikenesses. Hypnotized by a label which emphasizes identities, we may be led to ignore differences For, with its stress on uniformity, an abstraction or generalization tends to become totalitarian in its attitude toward uniquenesses.

Guisseppi v. Walling, 144 F.2d 608, 618-619 (2d Cir. 1944) (Frank, J.).

2. Corbin, *Quasi Contractual Obligations*, 21 YALE L.J. 533, 550 (1912) (emphasis in original).

3. *Id.* at 534.

4. *E.g.*, H. MAINE, *ANCIENT LAW* 332-33 (3d Amer. ed. 1883). Cases such as *Scava v. True*, 53 N.H. 627 (1873), recognized the fictitious nature of the contract, but nonetheless felt constrained to use the fiction of implied contract, referring to the "large class of cases where . . . [the remedy] can only be sustained by resorting to a fiction until some other is furnished to take its place." 53 N.H. at 633.

5. W. KEENER, *A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS* (1888) [hereinafter, *KEENER, CASES*].

6. W. KEENER, *A TREATISE ON THE LAW OF QUASI-CONTRACTS* (1893) [hereinafter, *KEENER, TREATISE*]. "A true contract . . . exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound." *Id.* at 4 (emphasis in original). On the other hand, quasi-contract

it has in American legal literature today.⁷ Doubters have been few.⁸ It is nevertheless generally agreed that quasi-contract is most often involved in a factual setting where there is an actual agreement: an agreement is made but is too indefinite,⁹ a contract is made but is unenforceable because of the Statute of Frauds,¹⁰ a contract is made but further performance is excused because of frustration or impossibility,¹¹ a contract is avoided for mistake,¹² etc. Indeed it is reasonably clear that "[m]odern restitutionary remedies are chiefly employed for the unwinding of contracts."¹³

... "is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent." *Id.* at 5.

7. Professor Corbin's views, *supra* notes 2-3, are expressed in essentially the same terms in 1 A. CORBIN, ON CONTRACTS § 19 (1963). See also G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS 7 (J. Murray ed. 1965) ("this type of obligation . . . has no relationship whatever to contract"); Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 CALIF. L. REV. 171 (1914); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 5 (2d ed. 1965); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 13 (3d ed. W. Jaeger, 1957); F. WOODWARD, THE LAW OF QUASI CONTRACTS (1913) ("It cannot be too strongly emphasized, therefore, that quasi contracts are in no sense genuine contracts. The contractor's obligation is one that he has voluntarily assumed. . . . But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable"). Several dozen additional examples could be submitted. The writer of this paper has subscribed in the past to the same views. See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 11 (1970) ("The crux is that a quasi contract is not a peculiar brand of contract. It is a non-contractual obligation that used to be treated procedurally as if it were a contract") (Emphasis in original).

8. The possibility that many obligations regarded as quasi-contractual may instead be contractual is at least alluded to in J. DAWSON, UNJUST ENRICHMENT 111-17 (1951), and further discussed by a perceptive reviewer of Dawson's work. Schlesinger, Book Review, 37 CORNELL L.Q. 120, 121-23 (1951). It seems to be recognized in the section headings of chapter 8 of S. STOLJAR, THE LAW OF QUASI-CONTRACT (1964), and is quite explicit in Stoljar, *The Great Case of Cutter v. Powell*, 34 CAN. B. REV. 288 (1956), quoted in note 70, *infra*. See also Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433 (1969).

9. *Kearns v. Andree*, 107 Conn. 181, 139 A. 695, 59 A.L.R. 599 (1928), noted in 26 MICH. L. REV. 942 (1928); *Varney v. Ditmars*, 217 N.Y. 223, 111 N.E. 822 (1916); RESTATEMENT OF RESTITUTION § 47, Comment *b*, and ill. 3, § 15, ill. 14 (1937); 1 A. CORBIN, *supra* note 7, §§ 99, 102; 1 S. WILLISTON, *supra* note 7, § 49; see also UNIFORM COMMERCIAL CODE § 2-305(4).

10. *Riley v. Capital Airlines, Inc.*, 185 F. Supp. 165 (S. D. Ala. 1960). The volume of cases in this area is enormous. See 2 A. CORBIN, *supra* note 7, §§ 321-34; 3 S. WILLISTON, *supra* note 7, §§ 534-38.

11. *Albre Marble & Tile Co. v. John Bowen Co.*, 338 Mass. 394, 155 N.E.2d 437 (1959), *aff'd on rehearing*, 343 Mass. 777, 179 N.E.2d 321 (1962); *Matter of Buccini v. Paterno Constr. Co.*, 253 N.Y. 256, 170 N.E. 910 (1930); RESTATEMENT OF CONTRACTS § 468 (1932); 6 A. CORBIN, *supra* note 7, §§ 1367-72; 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1972-78 (Rev'd. ed. 1938).

12. RESTATEMENT OF RESTITUTION §§ 15-69 (1937).

13. J. DAWSON, *supra* note 8, at 112 (1951). See also *id.* at 23: "The main work of quasi-contract is done in the field of express contract, . . ." Professor Patterson observes: The law of quasi contracts is the hospital of frustrated plans and expectations. The performance of a contract is prevented by the default of the contractor or by supervening impossibility, or the hopes and expectations aroused by the contract are frustrated by the discovery that they were aroused through fraud or mistake. The task of quasi contracts is to salvage from the wreckage that minimum of legal redress which is represented by restitution for unjust enrichment. Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 233 (1936).

A reexamination of the fundamentals of restitution may reveal that rules of quasi-contract, as well as rules governing other forms of restitution, when employed in the context of the "unwinding of contracts" are analytically, as well as functionally, contract rules akin to those governing contract damages rather than rules of the third member of a contract, tort, quasi-contract triumvirate. It is also submitted that reclassification of these rules may have important logical and practical consequences.

I. REMEDIAL NATURE OF RESTITUTION IN A CONTRACTUAL CONTEXT

A. *Contracts Implied in Law*

The history of quasi-contract prior to Professor Keener's epochal treatise has been exhaustively treated.¹⁴ It will not be repeated here, but one or two salient elements in that history are relevant to our purpose. Prior to the end of the writ system, except as highly abstract concepts, there was no law of contracts, torts or quasi-contracts.¹⁵ There were, instead, rules governing the various causes of action. Encompassed within the action of general assumpsit (the common counts) were actions based on consensual agreements as well as actions based upon facts where there was no agreement at all, as where a person who had no duty to do so arranged for the burial of a corpse and sought to hold the estate (or widowed spouse) liable for the value of reasonable funeral arrangements.¹⁶ Other clearly non-contractual actions brought in general assumpsit included actions upon a judgment¹⁷ and actions on statutory liabilities.¹⁸ After the abolition of the writ system it seemed necessary to adopt a new system of classification. Private law was seen as a great dichotomy between contracts and torts, but that left a gap.¹⁹ In order to supply the rationale

14. R. JACKSON, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* (1936). Perhaps better known, however, is Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888), revised and reprinted in *SELECTED READINGS ON THE LAW OF CONTRACTS* 33 (Assoc. Am. Law Schools ed. 1931). An excellent historical discussion is found in P. WINFIELD, *THE LAW OF QUASI-CONTRACTS* ch. 1 (1952) and a good deal of historical treatment is found in J. DAWSON, *supra* note 8.

15. For a comprehensive treatment of the writ system and its operation, see F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (1909).

16. *Jenkins v. Tucker* 1 H. Bl. 90, 126 Eng. Rep. 55 (C.P. 1788) (husband liable); *Tugwell v. Heyman*, 3 Camp. 298, 170 Eng. Rep. 1389 (K.B. 1812) (executors liable). This, of course, remains the law. *Estate of Kemmerrer*, 114 Cal. App. 2d 810, 251 P.2d 345, 35 A.L.R.2d 1393 (1952); see also Annot., 82 A.L.R.2d 873, 899-912 (1962); *RESTATEMENT OF RESTITUTION* § 115, Comment b (1937).

17. KEENER, *TREATISE*, *supra* note 6, at 16 (1893). Professor Woodward believed that actions upon judgments should be exiled from the field of quasi-contract inasmuch as they are not based upon unjust enrichment. F. WOODWARD, *supra* note 7, § 1. For more recent reverberations, see Note, *The Constitutional Protection of Contracts: Are Judgments Included?*, 19 HASTING L.J. 1405 (1968).

18. KEENER, *TREATISE*, *supra* note 6, at 16 (1893). Here, too, Professor Woodward argued that such obligations ought no longer to be deemed quasi-contractual as they are not founded in unjust enrichment. See F. WOODWARD, *supra* note 7, § 1. But old classifications die hard. See, e.g., *State v. Stone*, 271 S.W.2d 741 (Tex. Civ. App. 1954) (statutory burden upon parent to support incompetent adult son is *ex contractu*). For additional cases, see H. LAUBE, *CASES ON QUASI CONTRACTS* 12-28 (1952).

19. On this topic legal thought is, in my opinion, more generally advanced in

for the enforcement of certain non-consensual obligations which previously had been enforced by the writ of general assumpsit, such obligations came to be regarded as "contracts implied in law."²⁰

This characterization resulted in strained and artificial analysis.²¹ In an attempt to work out the consequences of the implication of a contract where there was no agreement in fact, the courts were much vexed by the problem of "privity,"²² a requirement which necessarily becomes unintelligible²³ in a context where liability may be thrust upon the defendant by a stranger. In England, where until recently the implied contract theory has maintained itself with tenacity, it has been held that a contract will not be implied if it would be *ultra vires*,²⁴ i.e., where an actual promise would be invalid.²⁵ An amusing recent example of this kind of reasoning appears in *Reading v. Rex*.²⁶ A

America than in England, where it is still considered a mark of legal orthodoxy to deny or ignore the distinction between contract and quasi-contract and say that there are only two categories, contract and tort.

Lord Wright, *Williston on Contracts*, 55 L.Q. Rev. 189, 192 (1939). On the tendency of nineteenth century lawyers to reduce all legal classifications to dichotomies, see 5 R. POUND, JURISPRUDENCE 5-13 (1959).

20. Thus if the plaintiff paid the funeral bill for the burial of defendant's spouse, the plaintiff could recover the expense because, it was posited, the law implied a contract between plaintiff and defendant. See note 16 *supra*.

Compare 1 J. CHITTY, JR., A TREATISE ON THE LAW OF CONTRACTS 79-80 (11th Amer. ed. 1874), where implied contract analysis is articulated at length, with an earlier work written with the forms of action as its focus, 1 J. CHITTY, A TREATISE ON PLEADING AND PARTIES TO ACTIONS *98-*108 (13th Amer. ed. 1859), where although contract is recognized as a basis of assumpsit, the following two sentences can still appear, jumbling together what to our eyes are contractual and non-contractual actions:

Assumpsit also lies for money due for port duties, and for *stallage*, where there is a legal liability to pay, although there has not been any express contract, and this although trespass might be sustainable, because the owner can waive the tort. So it lies for contributions to party-walls; or canal calls; or on promises to pay money in consideration of forbearance to sue the defendant, or a third person; . . . and against attorneys and solicitors, wharfingers, surgeons, inn-keepers, carriers and other bailees for neglect or other breach . . .

Id. at *101-02. (footnotes omitted; emphasis in original)

21. For some problems of application of the concept, see note 30 *infra*.

22. For a recent example, see *Paschall's, Inc. v. Dozier*, 219 Tenn. 45, 407 S.W.2d 150 (1966), noted in 34 Tenn. L. Rev. 518 (1967) (privity not a requirement).

23. It is so characterized in R. JACKSON, *supra* note 14, at 103, but the supposed requirement has not yet lost its capacity in England to obfuscate and confuse. See 8 HALSBURY'S LAWS OF ENGLAND 236-38 (3d ed. 1954), where the privity requirement is restated. See also *Transvaal & Delagoa Bay Investment Co. v. Atkinson*, [1944] 1 A11 E. R. 579, 584 (K.B.). For further critical discussion of privity in this context, see R. GOFF & G. JONES, THE LAW OF RESTITUTION 9 (1966).

24. *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.), involved a dissolution of a "building society" which, although not licensed to do so, had engaged in banking. The House of Lords held that in the dissolution depositors of the bank could not claim creditor status since the banking activities were *ultra vires*, but if depositors "could identify their money as earmarked they could follow it under what is called a tracing judgment" and thereby recover the sum. *Id.* at 412. The reasoning employed by the court has received mixed reactions. See G. CHESHIRE & C. FIFOOT, THE LAW OF CONTRACT 557-61 (5th ed. 1960), where academic and judicial comments on the case are described.

25. *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.).

When it [the English common law] speaks of actions arising quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed.

Id. at 415.

26. [1948] 2 K.B. 268, decided at the trial level by Denning, J., now Lord Denning,

British army sergeant received a great sum of money in bribes for having aided a smuggling operation. Did the Crown have a right to recover this sum of money from the sergeant on the theory of "implied contract?" Can the court imply that the Crown contracted to receive the receipts of his tawdry and illegal arrangement? These are the terms upon which the case was argued in the Court of Appeal²⁷ and House of Lords.²⁸ The Crown was successful but on reasoning best described as "highly artificial."²⁹ Many other instances of false issues which have been created by the implied contract fiction can be marshaled.³⁰ In addition, to the great confusion of the profession,³¹ the term "implied contract" was often indiscriminately applied to contract implied in fact and to contracts implied in law.

Towards the end of the nineteenth century Keener and other thoughtful scholars saw that the fiction of a contract implied in law impeded accurate analysis. "The fictitious promise is one of the many things which were a great help at one time, but which now operate as a clog on further progress."³² It was this desire to abolish the concept of a fictional contract that caused the scholars of the late nineteenth and early twentieth century to emphasize so heavily the need to divorce quasi-contract from contract.³³ But now that the ghostly "implied in law contract" has been exorcised, making only sporadic reappearances,³⁴ it may be appropriate to reexamine the still intimate connection between true contract and the quasi-contractual rules which function as rules for "unwinding contracts."

B. *Unjust Enrichment and Contract as Bases for Restitution*

Having exposed the fictional nature of the underpinnings of quasi-contract, Keener and his contemporaries sought to place the entire law of quasi-contracts on the foundations of the unifying principles of unjust enrichment.

one of England's ablest jurists, on the grounds of unjust enrichment rather than implied contract.

27. [1949] 2 K.B. 232 (C.A.).

28. *Sub nom.* Reading v. Attorney General [1951] A.C. 507 (H.L.).

29. So characterized in R. GOFF & G. JONES, *supra* note 23, at 460 n. 89. See also Lord Wright of Durlley, Book Review, 100 U. PA. L. REV. 612, 624 (1952) ("a curious picture of the fiction being clothed in real life").

30. *E.g.*, is a quasi-contractual obligation within the protection of the constitutional provision which prohibits the impairment of the obligation of a contract? State *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285 (1883). See also Note, note 17 *supra*.

Does an implied in law contract require consideration? See *Lelly v. Hays*, 5 Ad. & El. 548, 111 Eng. Rep. 1272 (K.B. 1836) where an affirmative answer is given. For a superb discussion, see R. JACKSON, note 14 *supra*, 42-46 (1936).

31. Examples of such confusion in cases and texts are discussed in detail in KEENER, TREATISE, *supra*, note 6 at 7-14.

32. 6 W. PAGE, THE LAW OF CONTRACTS § 3236 at 5698 (2d ed. 1922).

33. See the astute comments of Professor Glenn who points out that the primary concern of Professors Keener and Woodward was to place general assumpsit on the basis of unjust enrichment. His criticism, however, was that they failed fully to integrate their analysis of unjust enrichment by incorporating replevin, trover and detinue under that heading. Glenn, Book Review, 24 VA. L. REV. 828 (1938).

34. See, *e.g.*, 1970 DUKE L.J. 573.

Their efforts were remarkably successful. Practically all American writers have followed this lead.³⁵ A recent typical and emphatic expression follows:

The main substantive law basis [of restitution] and the remedial goal is implicit in the phrase "prevention of unjust enrichment." *As to this there is no argument in American law . . .* The substantive law of contract rights and liabilities is a matter of indifference. It is the enrichment of the defendant—a much different matter—which supplies the substance.³⁶

In divorcing quasi-contract from the notion of contracts implied in law, Keener and his allies distinctly helped the cause of clarification and development of this somewhat arcane area of the law; but in forcing all of the actions which formerly could be brought in general assumpsit, except certain clearly contractual obligations,³⁷ into the bed of unjust enrichment they erred analytically and thereby distorted the comprehension and development of some aspects of the law. They failed to note that while implied contract was an inadequate conceptual framework, true contract was an adequate basis for the explanation and development of rules for restitution in a contractual context. Moreover, they obscured the fact that in wide areas of the law of quasi-contract the concept of unjust enrichment plays no greater role than it has in other branches of the law. For example, when the law compels a borrower to repay a contracted for loan, the rationale of prevention of unjust enrichment is certainly as plausible an explanation for the applicable rule of law as the explanation of enforcement of promise.³⁸

While there is a great variety of quasi-contractual obligations and probably numerous sound ways to classify them, one great and fundamental dichotomy should be deemed essential: quasi-contract as a source of primary rights

35. Skeptics have included Samuel Williston who expressed doubt as to whether any one principle underlies the law of quasi-contract. See 1 S. WILLISTON, *supra* note 7, § 3A. Another has been Jackson, *The Restatement of Restitution*, 10 MISS. L.J. 95 (1938). It is curious that while some scholars have questioned whether restitution in a contractual context is truly non-contractual (*see* note 8 *supra*), and at least Williston and Jackson have questioned the exclusiveness of the unjust enrichment rationale, I have found none who have questioned both propositions. Historically the two propositions are intimately linked.

36. K. YORK & J. BAUMAN, *CASES AND MATERIALS ON REMEDIES* 26 (1967) (emphasis added).

37. It will be recalled that general assumpsit was an appropriate form of action to recover a true contractual debt created by goods sold and delivered:

If the Contract has been Fully Executed by the plaintiff and nothing remains to be done but the payment of the price in money by the defendant, the plaintiff may either declare in Special Assumpsit on the Contract or he may declare in General Assumpsit, at his Election, or he may join the Common Counts with Special Counts.

J. KOFFLER & A. REPPY, *HANDBOOK OF COMMON LAW PLEADING* 340 (1969).

38. Professor Fuller has identified unjust enrichment, along with private autonomy and reliance, as the substantive bases of contract liability. L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-13 (1941); *see also* J. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 177 (1959):

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.

versus quasi-contract as a remedy. This division is best clarified by illustration. If A, a stranger, unofficially pays the funeral bill for the burial of X's spouse, A may recover his reasonable costs from X.³⁹ There is no antecedent right-duty relationship between A and X. The law of quasi-contracts dictates, however, that X must reimburse A despite the absence of a pre-existing duty owed by X to A.⁴⁰ It is, then, the body of law known as quasi-contract that is the source of X's obligation, and the source of A's correlative primary rights, as well as of his remedy.⁴¹ If A and X had entered into a contract whereby A had agreed to render services requested by X, A's rights would stem from the law of contracts. These rights may be termed primary rights.⁴² In the event X breaches the contract, the law gives A certain secondary (remedial) rights which either supplement his primary rights or substitute for them entirely.⁴³ We generally think in terms of damages as the normal remedial right, with restitution and specific performances as alternatives in special situations. Two leading scholars—Woodward and Corbin—have recognized that in the context of *breach* of contract, restitution is not quasi-contractual but is a *contractual* remedy.⁴⁴ Other scholars have professed themselves mystified by this attempt to distinguish between restitution as a contractual remedy and quasi-contractual restitution,⁴⁵ perhaps because the distinction appears to them to lack practical significance. But the distinction between restitutionary rights which are primary and those which are merely secondary is sound and

39. See note 16 *supra*.

40. One theorist argues that the liability to pay is an official duty incumbent upon the estate or spouse, similar to the duty to pay taxes. S. STOLJAR, *THE LAW OF QUASI-CONTRACT* 177-78 (1964). This may be true, but it does not explain why the duty is owed to the stranger, A. For detailed criticism of Stoljar's thesis, see Wade, *Book Review*, 16 U. TORONTO L.J. 473, 476 (1966).

41. This was noticed in Wigmore, *A Summary of Quasi-Contracts*, 25 AM. L. REV. 695, 696 (1891) ("If a quasi-contract right is a right *in personam*, the difficulty seems to arise that . . . [it] is from its inception at once a principal and remedial right"). It is the contention here that while Dean Wigmore's observation is correct as to many rights usually classified as quasi-contractual it is inapplicable in the context of "unwinding contracts."

42. A duty is a legal relation that exists whenever certain action or forbearance is expected of an individual, and in default of it the representatives of organized society will act in some predetermined manner injurious to the defaulting individual The term *duty* describes one of the primary legal relations, existing from the moment a contract is made.

Corbin, *Does a Pre-Existing Duty Defeat Consideration?*, 27 YALE L.J. 362, 363 (1918), in *SELECTED READINGS ON THE LAW OF CONTRACTS* 504, 505 (Assoc. Am. Law Schools ed. 1931.) (emphasis in original).

43. With the occurrence of each subsequent operative fact, the existing legal relations change. One of this new group may be a duty to pay damages. This is a new legal relation, a *secondary* duty.

Corbin, *supra* note 42, at 363, in *SELECTED READINGS ON THE LAW OF CONTRACTS* 504, 505 (Assoc. Am. Law Schools ed. 1931). For a more thorough discussion of the distinction between primary and secondary rights and duties, see J. POMEROY, *CODE REMEDIES* §§ 1-2 (5th ed. W. Carrington 1929).

44. 5 A. CORBIN, *supra* note 7, § 1106; F. WOODWARD, *supra* note 6, § 260 (1913). For a fuller discussion, see Corbin, *supra* note 2, at 540-43.

45. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 189 (1959) ("I find their argument obscure and mystifying."); and see J. WADE, *RESTITUTION-CASES AND MATERIALS* 642 (2d ed. 1966).

has important practical consequences, which are reflected in the cases. The principal difference is that when the law of quasi-contract provides the sole basis of recovery (that is, when it is the source of the claimant's primary rights) its sole basis is very likely to be unjust enrichment. *When, however, restitution is merely a secondary, remedial right in a contractual context, unjust enrichment is merely one factor in the re-allocation of gains and losses between the parties.*⁴⁶

C. Restitution as a Contractual Remedy

The main purpose of this article is to point out that in contractual contexts other than total breach the law of restitution is a source of remedial (secondary) rights rather than a source of primary rights. It is a source of secondary rights when a judgment is given for the value of a performance rendered under a contract which is unenforceable under the Statute of Frauds; under a contract terminated by impossibility of performance or frustration of the venture or under the doctrine of *Britton v. Turner*,⁴⁷ and in other situations involving the "unwinding of contracts." This is all reflected in the cases, primarily by the measures of recovery.

We are attuned by custom and long usage to think in terms of a contract action for damages as an action on the contract and therefore based upon agreement. We are also attuned by custom and long usage to think in terms of an action for restitution, even in a contract setting, as an action which is not based on contract. In an action for damages in special assumpsit, as a matter of common law pleading, plaintiff had to plead, *inter alia*, the terms of the contract, especially the promise, and the breach.⁴⁸ In an action for restitution (general assumpsit) under the old system of pleading, the plaintiff did not plead the contract; instead he utilized the common counts which set out in the most general terms the existence of a debt, the cause of the debt,⁴⁹ and a promise (which could have been genuine or fictitious) to pay the debt. By way of illustration, let us assume the plaintiff performed services under an oral contract which provided for a two year term of employment. An action for damages would require the setting out of the contract in the declaration and would be met by a plea of the Statute of Frauds. Plaintiff, therefore, to avoid the plea would bring an action in general assumpsit for the reasonable value of his services. Such an action required a two act scenario. First, it is pretended that the contract made by the parties never existed. It is either ignored or retroactively avoided.⁵⁰ Then the plaintiff must state that he had

46. See discussion in text at notes 103-105 *infra*.

47. 6 N.H. 481 (1834).

48. J. KOFFLER & A. REPPY, *supra* note 37, at 322-34.

49. *E.g.*, "goods sold and delivered," or "money had and received."

50. Referring to a breach of contract claim in general assumpsit, a leading English scholar states, "the payment obviously must have been made in pursuance of a contract, but a claim for repayment cannot rest on that contract because that contract *ex hypothesi*

rendered work, labor and services at the request of the defendant and that the defendant had promised to pay him "so much money as he therefore reasonably deserved to have."⁵¹ The promise is not the contractual promise but a fictional promise.⁵² How, then, could one assert that the action was on the unenforceable contract? The answer is to be found not in the pleadings but in the actual trial of the action, where one will find constant reference to the oral contract itself. How does one prove the request for services? By introducing evidence of the oral contract.⁵³ What if the defendant wishes to show that, although plaintiff has rendered services, plaintiff has breached the oral contract and therefore should not recover? May he raise this defense based upon the terms of the contract? Indeed he may.⁵⁴ May the rate of compensation stated in the contract be put into evidence to establish the reasonable value of the services? Yes, say the vast majority of cases.⁵⁵ At every step and turn questions of fact and questions of law are definitively or partially resolved by reference to the contract. Yet we are still asked to believe that the action is non-contractual because in pleadings, but not in trials, centuries ago reference to the contract was taboo.

ceased to exist." R. JACKSON, *supra* note 14, at 86. As to the Statute of Frauds, the problem is that a contract in violation of the Statute does not exist for purposes of enforcement. On the absolute necessity for the non-existence of a contract by virtue of rescission or otherwise, before a quasi-contractual action could be brought, see P. WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 156-59 (1931).

51. J. KOFFLER & A. REPPY, *supra* note 37, at 346.

52. Although the counts recited an express promise by defendant to pay the indebtedness theretofore incurred, this promise was a fiction; it did not have to be proven and could not be traversed.

F. JAMES, JR., *CIVIL PROCEDURE* 120 (1965). Partly for this reason, our leading procedural reformer charged that the common counts were useless in apprising the parties, the court and the jury what the case was all about. "You might just as well require the parties to copy and file each a verse of the 'Iliad' . . ." 1 *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 242 (Sprague ed. 1884).

53. In order to rebut a presumption that the service was rendered and received as a gratuity, the plaintiff put in evidence tending to show an understanding between himself and the deceased that the latter would devise a certain dwelling to the plaintiff's children in return for what he should receive as a member of the family. For such a purpose this evidence was plainly legitimate Although the bargain between the plaintiff and the intestate contemplated payment to be made to the plaintiff's children, and not directly to himself, yet, as that bargain did not take the form of an actionable contract, it falls out of view as a ground of legal remedy, and appears only to give color to the conduct of the parties in furnishing and accepting the service rendered. It affords the means of determining that the service was not a gift, but a sale, and out of that determination the law deduces a right in him who sold the service to be paid its value by him who bought it.

Gay v. Mooney, 67 N.J.L. 27, 28-29, 50 A. 596, 597 (1901, *aff'd*, 67 N.J.L. 687, 52 A. 1131 (1902)); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); F. WOODWARD, *supra* note 7, at 163.

54. See *Watkins v. Wells*, 303 Ky. 728, 198 S.W.2d 662, 169 A.L.R. 185 (1946); *Bendix v. Ross*, 205 Wis. 581, 238 N.W. 381 (1931); *RESTATEMENT OF CONTRACTS* § 355(4) (1932); *RESTATEMENT (SECOND) OF CONTRACTS* § 217C (Tent. Draft No. 4, 1968); 2 A. CORBIN, *supra* note 7, §§ 332-34; 3 S. WILLISTON, *supra* note 7, § 538.

55. *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933); *Bennett Leasing Co. v. Ellison*, 15 Utah 2d 72, 387 P.2d 246, 21 A.L.R.3d 1 (1963); *Cochrane v. Bise*, 197 Va. 483, 90 S.E.2d 178 (1955); *RESTATEMENT OF CONTRACTS* § 217(2) (1932); *RESTATEMENT (SECOND) OF CONTRACTS* § 217E (Tent. Draft No. 4, 1968); 2 A. CORBIN, *supra* note 7, § 328; 3 S. WILLISTON, *supra* note 7, § 536.

The situation is not different in contractual contexts other than the Statute of Frauds. In *Buccini v. Paterno Construction Co.*,⁵⁶ decedent had contracted to paint decorative murals. The contract provided that “[a]ll questions that may arise *under this contract*”⁵⁷ would be subject to arbitration. The artist died before completion of the murals. It was held that his executrix’s claim for the reasonable value of his services was subject to the arbitration clause; the claim, therefore, would seem to be a claim arising under the contract. Chief Judge Cardozo, for the New York Court of Appeals, gave the following analysis:

[T]he controversy is one that has its origin in the contract and in the performance of the work thereunder, just as much as if the work had been completed under a contract silent as to price, and the controversy had relation to the reasonable value. Death of the contractor has not nullified the contract in the sense of emancipating the claimant from the restraint of its conditions. They limit her at every turn. She cannot stir a step without reference to the contract, nor profit by a dollar without adherence to its covenants The question to be determined is not the value of the work considered by itself and unrelated to the contract. The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract.⁵⁸

This quotation is persuasive proof of the contractual nature of the primary rights upon which the claim is founded. However, the court then turned and indicated that the remedial or secondary rights of the claimant were quasi-contractual:

The award will then conform to the principles of liability in *quasi-contract* and to the considerations of equity and justice by which that liability is governed.⁵⁹

Are there reasons, other than those attributable to extinct pleading taboos,⁶⁰ why restitution in a contractual context has been classified as quasi-contractual, rather than as a contractual remedy? A number of other factors are believed to have influenced the scholars who, at the turn of the century, developed the classification. Under the rule of *Hadley v. Baxendale*⁶¹ and its descendant, the “tacit agreement” test,⁶² it was believed that damages were payable for breach of contract only to the extent that the breaching party had agreed to pay in the event of breach.⁶³ Tacitly he agreed to pay the value

56. 253 N.Y. 256, 170 N.E. 910 (1930).

57. 253 N.Y. at 258, 170 N.E. at 91 (emphasis added).

58. 253 N.Y. at 258-59, 170 N.E. at 911.

59. 253 N.Y. at 258, 170 N.E. at 911.

60. In Maitland’s phrase, the forms of action should be made to stop ruling us from the grave. F. MAITLAND, *supra* note 15, at 2.

61. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

62. *British Columbia Saw-Mill Co. v. Nettleship, L.R. 3 C.P. 499* (1868); *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

63. It has been demonstrated that the rule of *Hadley v. Baxendale* was derived from

that he knew his promise had to the plaintiff. All contractual obligations, in fact, were deemed to be based upon will.⁶⁴ That theory precluded a contractual basis of restitution because frequently no tacit agreement could be found. Restitution in a context involving impossibility of performance is an example; there can be no tacit agreement because the whole impossibility doctrine is based upon unforeseen circumstances.⁶⁵ Nor could restitutionary recovery for the value of a performance rendered pursuant to an oral contract under the Statute of Frauds be based upon the contract, for a tacit agreement would render the Statute nugatory. Today, however, the tacit agreement theory of damages is discredited.⁶⁶ Damages, like restitution, is a remedy imposed by law.⁶⁷ As for the Statute of Frauds, today we are perfectly willing to estop a party entirely from raising the defense of the Statute,⁶⁸ and we can understand the remedy of restitution as based upon a partial estoppel.

Another factor in the employment of quasi-contractual theories to explain essentially contractual recoveries was the pleading and proof requirement of

the French writer Pothier. Washington, *Damages in Contract at Common Law*, 48 L.Q. REV. 90, 103-04 (1932); see 1 M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS 81 (Evans Transl. 1826) ("the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit.") The decision in *Hadley v. Baxendale* was preceded by a number of American cases in which the courts borrowed from and cited this great French author. See, e.g., *Blanchard v. Ely*, 21 Wend. 342, 348 (Sup. Ct. N.Y. 1839).

64. See generally Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1 (1954). At the turn of the century, legal thinkers had great difficulty in coping with those aspects of contract law which could not be ascribed to the will of the parties. For example, Keener described the duty of carriers and innkeepers to serve the public as quasi-contractual, but distinguished this duty from the generality of quasi-contractual duties on the ground that the duty to serve is not based on unjust enrichment. KEENER, TREATISE, *supra* note 6, at 18-19; accord, F. WOODWARD, *supra* note 7, § 1. Similarly, Williston regarded implied warranties as quasi-contractual because they are not assented to by the parties. 1 S. WILLISTON, THE LAW OF CONTRACTS § 3 n.9 (1920). The same assertion appears in the most recent edition. 1 S. WILLISTON, *supra* note 7, § 3A n.16.

65. See, e.g., *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) ("First, a contingency—something unexpected—must have occurred"). Compare *Phillips v. Alhambra Palace Co.*, [1901] 1 K.B. 59 (1900) (foreclosure of music hall not such an "unforeseen calamity" to justify invocation of the doctrine). One scholar, however, posits an implied in fact agreement to make restitution when a contract is discharged by impossibility. Costigan, *Implied-in-Fact Contracts and Mutual Assent*, in SELECTED READINGS ON THE LAW OF CONTRACTS 144, 159-60 (Assoc. Am. Law Schools ed. 1931). Although the bulk of Costigan's article first appeared in 33 HARV. L. REV. 376 (1920), the cited material does not appear in its original publication.

66. See 5 A. CORBIN, *supra* note 7, § 1010; 11 S. WILLISTON, *supra* note 7, § 1357; UNIFORM COMMERCIAL CODE § 2-715, Comment 2.

67. Indeed, an agreed upon measure of damages will not be given effect if it fails reasonably to preestimate the probable damages which would be imposed by law. See Crowley, *New York Law of Liquidated Damages Revisited*, 4 N.Y. CONT. L. ED. No. 1, 59, 63-66 (1966); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 503-04 (1962). Remedies are dictated by the state and parties have contractual freedom to vary them only to a very limited extent. See J. CALAMARI & J. PERILLO, *supra* note 7, at 366.

68. E.g., *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295 (4th Cir. 1954); *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950); *Boesiger v. Freer*, 85 Idaho 551, 381 P.2d 802 (1963); *Loeb v. Gendel*, 23 Ill. 2d 502, 179 N.E.2d 7 (1961); *Somerset Acres West Homes Ass'n v. Daniels*, 191 Kan. 583, 383 P.2d 952 (1963); *Bisbing v. Sterling Precision Corp.*, 34 App. Div. 2d 427, 312 N.Y.S.2d 305 (3d Dep't 1970); *Vogel v. Shaw*, 42 Wyo. 333, 294 P. 687, 75 A.L.R. 639 (1930), noted in 29 MICH. L. REV. 1075 (1931).

due performance of all conditions precedent,⁶⁹ something that cannot be done in the typical case of impossibility of performance and other pathological situations requiring the "unwinding of contracts."⁷⁰ Today, however, the power of the law to excuse the performance of conditions precedent is recognized in cases that are concededly purely contractual.⁷¹ The doctrine of substantial performance provides the outstanding illustration of a situation in which conditions precedent are excused.⁷² Thus, the reasons which may in the past have supported the notion that restitution in a contractual context is non-contractual creak with obsolescence.

II. THE AMBIGUITY OF RESTITUTION

"Restitution" is defined in the alternative:

The action of restoring or given back something to its proper owner, or of making reparation to one for loss or injury previously inflicted.⁷³

Lawyers as well as lexicographers use the word in this ambiguous fashion,

69. See J. KOFFLER & A. REPPY, *supra* note 37, at 328-32. Another pleading requirement in special assumpsit was the allegation of breach. *Id.* at 332-33. This allegation frequently cannot be truthfully made in a case involving impossibility of performance.

70. That this is the basis for the continued refusal in England, except as affected by statute, to award compensation to an employee who dies before complete performance of his contracted-for term of employment, see Stoljar, *The Great Case of Cutter v. Powell*, 34 CAN. B. REV. 288 (1956). This article is a brilliant demolition of that basis. The author takes note of American cases which allow recovery on a quasi-contractual basis, and argues:

Quasi-contract thus directly enforces payment for a part-performed bargain, so that the here applicable quasi-contractual rule is essentially of the same legal type as those rules in contract which try to eke out broken-down contracts. In other words, to say that quasi-contract can do what is impossible in contract merely means to rubricate our rules and their policies into compartments between which the relevant difference is illusory.

Id. at 299.

71. The law sometimes excuses the occurrence of conditions precedent under the doctrine of impossibility. When a condition (rather than a duty) is excused by impossibility, recovery is allowed on the contract, and not in quasi-contract. See RESTATEMENT OF CONTRACTS § 301 (1932). Another doctrine permits recovery on the contract despite non-performance of a condition to avoid extreme forfeiture. See RESTATEMENT OF CONTRACTS § 302 (1932); J. CALAMARI & J. PERILLO, *supra* note 7, at 276-77, discussing *Lelford v. Atkins*, 413 S.W.2d 68 (Ky. 1967); see also *Holiday Inns of America, Inc. v. Knight*, 70 Cal. 2d 327, 450 P.2d 42 (1969), 74 Cal. Rptr. 722.

72. The best known case is *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429 (1921), but the doctrine dates back to *Boone v. Eyre*, 126 Eng. Rep. 160 (C.P. 1779). While it may be argued that the doctrine of substantial performance merely excuses constructive conditions—those which are not in the contract but imposed by law—there are cases in which substantial performance is held to excuse express conditions. *Nolan v. Whitney*, 88 N.Y. 648 (1882).

It is of interest that at least one jurisdiction adheres to the view that an action based on substantial performance is quasi-contractual. *Allen v. Burns*, 201 Mass. 74, 87 N.E. 194 (1909) (issue of variance between pleading and proof). Nevertheless, the measure of recovery is the same as in other jurisdictions. Where the breach is capable of being remedied the measure of recovery is the contract price less the cost of repair. *Soares v. Weitzman*, 281 Mass. 409, 183 N.E. 763 (1933). Where the defect cannot reasonably be remedied the measure of recovery is the difference in value between the construction as promised and as received. *Divito v. Uto*, 253 Mass. 239, 148 N.E. 456 (1925); *Pelatoski v. Black*, 213 Mass. 428, 100 N.E. 831 (1913).

73. OXFORD ENGLISH DICTIONARY (1933 ed.) (emphasis supplied).

sometimes referring to the disgorging of something which has been taken and other times referring to compensation for injury done.⁷⁴ In both instances, though, what is referred to is the restoration of the *status quo ante*.

With the placement of all of what was deemed to be the law of quasi-contract upon a theory of unjust enrichment, it tended to follow that the allied term "restitution" would be used in this context to mean, in the words of the Restatement of Contracts, "that the defendant must give something back to the plaintiff."⁷⁵ The reporters of the Restatement of Restitution report that "the word 'restitution' was chosen, a word which has a connotation of the right to recover back something which one once had."⁷⁶ Professor Patterson has said that "the principle that no one shall be unjustly enriched at another's expense may be said to encompass almost all of the black-letter texts of the *Restatement of Restitution* . . ."⁷⁷

The harmful effect and, therefore, the failure of the unjust enrichment theory as the basis of the entire law of quasi-contract is that it has inhibited, but not killed, efforts by courts to restore the *status quo ante* to the extent appropriate by requiring, where just, defendants to compensate plaintiffs for expenditures under the contract which have not been received by the defendant, and has also inhibited efforts to award to a deserving party the reasonable value of his performance rather than the amount by which the defendant has been enriched. In short, it tended to obscure the need to protect a party from unjust impoverishment.

A rule stated by Joseph H. Beale typifies the dogmatic⁷⁸ kind of assertion which the unjust enrichment theorist in the restitution field is prone to make: "In a few cases, however, the amount of the enrichment and the value of the services are not the same; and in such cases the plaintiff's recovery is restricted

74. See BLACK'S LAW DICTIONARY 1477 (4th ed. 1951) ("restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification"). The ambiguity is not of recent vintage. In 1494 an English statute talks in terms of "recovery and restitution of the same debt, damages and costs. . . ." Anno 11 Hen. 7, 1 Rich. 3 & 31 Hen. 8, c. 21, § 21 (1494). A statutory obligation imposed upon violators of injunctions "to make immediate restitution" was held to encompass a duty to pay compensation for injury done by overflowing waters. *Holloway v. Peoples Water Co.*, 100 Kan. 414, 167 P. 265, 2 A.L.R. 161 (1917).

75. RESTATEMENT OF CONTRACTS § 348, Comment *a* (1932).

76. Seavey & Scott, RESTITUTION, 54 L.Q. REV. 29 (1938). The reporters hedged this language a bit in the Restatement itself. See RESTATEMENT OF RESTITUTION § 1, Comments *a, e* (1937).

77. E. PATTERSON, LAW IN A SCIENTIFIC AGE 55 (1963). He might have added that it also encompasses those provisions of the Restatement of Contracts which deal with restitution, which on the whole, are more dogmatically tied to the unjust enrichment theory than are those of the Restatement of Restitution.

Nevertheless, without irony, he had said, a page earlier,

[M]y point, then, is not merely that science is fallible, but that it is fallible in its most intellectually dazzling part, its theory.

Id. at 54.

78. Beale has been asserted to be a dogmatist in the field he later came to dominate: conflict of laws. See, e.g., D. CAVERS, THE CHOICE-OF-LAW PROCESS 5-8 (1965).

to the amount of the enrichment."⁷⁹ Woodward, more influential in this field, agreed:

Since the obligation under discussion is essentially an obligation to restore a benefit received and not to compensate for an injury inflicted, the value of the benefit to the defendant, and not the cost of the plaintiff's performance or the extent of the plaintiff's loss or damage as a result of the defendant's default, is the measure of the plaintiff's recovery⁸⁰

One difficulty with statements of this nature is that they do not accurately state the law. Another disturbing fact is that courts have tended to accept these generalizations as accurate but have, in a quest for justice, been forced to use obfuscating logic to explain their decisions. Particularly popular has been the "Pickwickian"⁸¹ technique of defining the plaintiff's reliance expenditures⁸² as a benefit conferred upon the defendant.⁸³ Only occasionally has a court utilized the forthright approach of declaring the inapplicability of the unjust enrichment theory.⁸⁴

Yet, without explicit recognition of their analytical basis, courts may be weighing factors other than unjust enrichment in quasi-contract cases. Case after case could be cited here to demonstrate Williston's thesis that the measure of restitution in a Statute of Frauds context is "the reasonable value of the detriment suffered by the plaintiff, thereby treating the party who relies on the contract as if he were a contract-breaker."⁸⁵ Fuller and Perdue, in their

79. Beale, *The Measure of Recovery upon Implied and Quasi-Contracts*, 19 YALE L.J. 609, 621 (1910). To the same effect, see KEENER, TREATISE, *supra* note 6, at 281.

80. F. WOODWARD, *supra* note 7, at 164. The context is the Statute of Frauds.

81. This phrase is Professor Patterson's. Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 MO. L. REV. 223, 230 (1936).

82. Reliance expenditures are those expended in reliance on the contract but which were not received by the defendant. See generally Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37).

83. The cases are legion. A casebook favorite is *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 P. 860 (1912), noted in 61 U. PA. L. REV. 330 (1913). This approach is mildly encouraged in the Restatement of Contracts. See § 348, Comment a (1932). But, it would be a mistake to believe that this approach is consistent. For a good illustration of a case where recovery should have been allowed on a broad definition of "benefit," but was not, see *Rotea v. Izuel*, 14 Cal. 2d 605, 95 P.2d 927, 125 A.L.R. 1424 (1939), noted in 28 CAL. L. REV. 528 (1940); *contra*, on a broad definition, *Clement v. Rowe*, 33 S.D. 499, 146 N.W. 700 (1914).

84. The best known of such cases are *Kearns v. Andree*, 107 Conn. 181, 139 A. 695, 59 A.L.R. 599 (1928), noted in 26 MICH. L. REV. 942 (1928) (indefinite agreement); *Albre Marble and Tile Co. v. John Bowen Co.*, 338 Mass. 394, 155 N.E.2d 437 (1959), *aff'd on rehearing*, 343 Mass. 777, 179 N.E.2d 321 (1962). Some additional cases are discussed in Comment, *The Necessity of Conferring a Benefit for Recovery in Quasi-Contract*, 19 HASTING L.J. 1259 (1968).

85. 3 S. WILLISTON, *supra* note 7, § 536, at 831. Even Williston, however, supports the thesis that expenses in preparation for performance are non-recoverable. *Id.* at 832. In accord as to the meaning of the cases, is Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, at 191 (1959) ("it becomes harder to view [an action for restitution in a Statute of Frauds context] as anything more than a damage action for breach of a promise assumed to be unenforceable by damage action or otherwise").

Williston similarly strikes a blow against the unjust enrichment theory in his discussion of impossibility of performance. 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1977 (Rev. ed. Williston & Thompson 1938).

landmark article, closely analyzing cases in the Statute of Frauds context, make this observation:

When the benefit received by the defendant has become as attenuated as it is in some of the cases cited and when this benefit is "measured" by the plaintiff's detriment, can it be supposed that a desire to make the defendant disgorge is really a significant part of judicial motivation? When it becomes impossible to believe this, then the courts are actually protecting the reliance interest.⁸⁶

Analysis by these scholars would seem to prove that although courts have tended to give their obeisance to the unjust enrichment theory of restitution, the undercurrent of their decisions has flowed into broader channels: the restoration of the *status quo ante*.⁸⁷ It cannot be said, however, that the unjust enrichment theory has had an insignificant effect upon the actual decisions of the courts. Many courts, in many decisions, have accepted the academic dogma and have limited recovery to the actual benefits received by the defendant although a broader recovery may have been justified.⁸⁸ Classification of restitution in contractual contexts as a quasi-contractual right based on unjust enrichment was intended to be more than merely descriptive; it was intended to influence the courts to base their decisions on the theory of unjust enrichment.⁸⁹ Not only was it designed "to clarify the views of lawyers," but also to have "a salutary influence on the law."⁹⁰ The development of the theory of unjust enrichment as the basis of what previously had been perceived as a conglomerate of odds and ends of the law⁹¹ undoubtedly had an unshackling effect upon the law by allowing the extension of remedies to situations previously remediless because of the lack of precedent or perceived principle.⁹²

86. *Fuller & Perdue*, *supra* note 82, at 394.

87. For a more recent analysis of the cases to this effect, see Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1135-54 (1971), where the author concludes that unjust enrichment "turns the liability issue, but not the scope of recovery." *Id.* at 1154. It is a conclusion which seems to share in the confusion which the author's analysis leading up to the conclusion ought to have dispelled.

88. A leading casebook illustration has been *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913) ("[P]laintiffs merely sustained a loss. Defendant received no benefit. Had he received a benefit the law would imply an obligation to pay"). 153 Ky. at 239, 154 S.W. at 903. More recent cases are discussed in Comment, note 84 *supra*.

89. KEENER, TREATISE, *supra* note 6, ch. 1.

90. This appraisal of the effect of Keener's book is made in F. WOODWARD, *supra* note 7, at vii. It is submitted here as evidence of Keener's intent.

91. It is, of course, arguable that Lord Mansfield's dicta in *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760) had already based on unjust enrichment that part of the law of quasi-contract which stems from the action for money had and received. That Mansfield was operating well within the long existing tradition of implied contract seems to be demonstrated in *R. JACKSON*, *supra* note 14, 117-19. A more clear-cut precursor of the unjust enrichment approach is W. EVANS, *On the Action for Money Had and Received*, in *ESSAYS* (1802). It does not appear to have been influential in its own time, although it may well have influenced Ames, Maine and Keener.

92. For an excellent recent decision reasoning from the principle of unjust enrichment, see *Bradkin v. Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970), a case in which there was no agreement between the parties.

Unjust enrichment was the newly perceived generalization and, like all generalizations, it also tended to shackle.⁹³

Unjust enrichment theory⁹⁴ has had a second effect on the law. Court decisions which pay lip service to the theory but which in fact do not carry it out⁹⁵ have, as always, an unsettling effect on the law, giving the sensitive a feeling of lawlessness, the logician a feeling of irrationality and the average lawyer a feeling of confusion.⁹⁶ When theory and practice conflict, "tension is produced by the contrary pulls of dogmatic prescriptions and the inherent requirements of individual cases."⁹⁷ It is very difficult, in a given case, to predict which of the competing vectors will prevail.

It is clear that restitution, when employed as a body of law to unwind contracts, has a contractual function.⁹⁸ Since functional and pragmatic considerations would dictate that restitution in a contractual context is best classified as contractual rather than quasi-contractual, the remaining question is whether analytical considerations permit such classification. It is hoped that this article indicates that these considerations not only permit, but dictate, such classification.

Although this discussion has focused upon cases in the context of im-

93. See note 1 *supra*.

94. There are, of course, varieties of unjust enrichment theories. For example, Dean Wade reports:

Woodward relied strongly on Keener, but disagreed with him in a number of respects. Instead of unjust enrichment, he spoke of inequitable retention of a benefit received from plaintiff. Benefit, he felt, was a broader term than enrichment.

Wade, *The Literature of the Law of Restitution*, 19 HASTING L.J. 1087, 1089 (1968).

95. The most recent text says:

Theoretically relief is based upon the gains of the defendant, not the losses of the plaintiff . . . [C]ourts continue to talk the language of restitution but in fact go considerably beyond it.

D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 792 (1973).

96. When the courts of a single jurisdiction alternately apply the strict restitutionary rule and its more liberal variations, inconsistent results may obtain. For example, if a contract has been discharged as burdensome in Texas, it appears that a builder may recover the value of his essential reliance losses without regard to benefit, while an auditor may not.

Comment, *Apportioning Loss after Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054, 1064 (1960). The statement of an Eastern sage may here be apposite:

Now, if names of things are not properly defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish. When the arts and institutions of civilization cannot flourish, law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do.

CONFUCIUS, THE ANALECTS, xiii, 3. I am indebted, for this reference, to Jackson, *The Scope of the Term 'Contract'*, 53 L.Q. REV. 525, 536 (1937).

97. A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 78 (1965).

98. Thus, the American Law Institute has recognized that restitution in this context is best discussed in the Restatement of Contracts, presumably because lawyers will look for it there and, probably because it would have been somewhat unsatisfying to the restaters to discuss, for example, the Statute of Frauds, without raising the question of what happens if one party performs in part despite the Statute. See J. DAWSON, UNJUST ENRICHMENT 112 (1951) ("but the arrangement of the Restatement was for the convenience of the restaters").

possibility of performance and the Statute of Frauds, the same analysis can be applied to cases where an agreement is believed by the parties to have been made but there is no contract because they had different reasonable understandings,⁹⁹ an agreement is made but it is too indefinite to warrant an award of damages for loss of expectancy,¹⁰⁰ an agreement is made but one of the parties is represented by an unauthorized agent,¹⁰¹ and diverse other contractual contexts.¹⁰² There should be a realization, however, that the measure of recovery in each of these situations need not be identical. Courts, freed from the myth that they are limited to granting restitution measured by the value of the benefits conferred, can continue, and refine, the process of balancing the factors previously, either covertly or overtly, taken into consideration. The goal is to determine the extent the *status quo ante* will be restored. Relevant factors include relative fault,¹⁰³ the risks agreed upon by the parties,¹⁰⁴ and the fairness of alternative risk allocations not agreed upon and not

99. *Estok v. Heguy*, 44 W.W.R. 167 (Brit. Colum. 1963); *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909); *Shapiro v. Solomon*, 42 N.J. Super. 377, 126 A.2d 654 (1956). In the last two cases recovery was based on the reasonable value of the plaintiff's services and not on the amount of the defendant's enrichment. Unfortunately, in later litigation in the Massachusetts case, the dogmatic separation between contract and quasi-contract led the court to refuse to subtract from plaintiff's recovery a deduction of \$10 per day as liquidated damages because such damages are contractual. *Vickery v. Ritchie*, 207 Mass. 318, 93 N.E. 578 (1911).

100. *Kearns v. Andree*, 107 Conn. 181, 139 A. 695, 59 A.L.R. 599 (1928) ("The measure of recovery is the reasonable value of the services performed, and not the amount of benefit which actually accrued from them to him for whom they were performed"), 107 Conn. at 187, 139 A. at 698; see *Coleman Engineering Co. v. North American Aviation*, 65 Cal. 2d 396, 420 P.2d 713, 55 Cal. Rptr. 1 (1966) (dissenting opinion). Compare *Douillette v. Parmenter*, 335 Mass. 305, 139 N.E.2d 526 (1957), a more typical case in which the measure of recovery is not made clear, the court in general terms speaks of "value of the benefit conferred upon the defendant." 335 Mass. at 308, 139 N.E.2d at 528. It does not appear to be significant that under the Massachusetts rule the action is in equity rather than in quasi-contract.

101. *Campbell v. Tennessee Valley Authority*, 421 F.2d 293 (5th Cir. 1969), *rehearing en banc denied per curiam*, 421 F.2d 307 (5th Cir. 1970). See 1970 DUKE L.J. 573, which lectures the court for failing to recognize that quasi-contractual liability is limited to unjust enrichment. See also *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2d Cir. 1946).

102. *E.g.*, non-occurrence of a condition precedent to the existence of a contract. *Abrams v. Financial Service Co.*, 13 Utah 2d 343, 374 P.2d 309 (1962) (cost of improvements not beneficial to vendee may be recovered).

103. That relative fault has been taken into consideration is demonstrated by the rule that a defaulting party may not have restitution even though he has the defense of the Statute of Frauds. See note 54 *supra*. It also has had an effect on the measure of recovery in specific cases. See RESTATEMENT OF RESTITUTION § 155 (1937). For an explicit judicial discussion of the effect of fault on the measure of recovery, see *Albre Marble and Tile Co. v. John Bowen Co.*, 338 Mass. 394, 155 N.E.2d 437 (1959), *aff'd on rehearing*, 343 Mass. 777, 179 N.E.2d 321 (1962). For an older case in which the defendant, in an action for money had and received was held to be estopped from denying the receipt of any money, see *Bullard v. Hascall*, 25 Mich. 132 (1872).

104. When restitution is awarded because of breach of contract, most courts have held that the contract rate does not set an upper limit. See *Palmer, The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264, 269-73 (1959). Such a result of course disturbs the allocation of risks made by the parties. For an outraged denunciation of this disturbance, see *Childres & Garamella, The Law of Restitution and the Reliance Interest in Contract*, 64 Nw. U.L. Rev. 433 (1969). *Palmer* justifies such results on the ground of fault. *Palmer, supra* at 277-79. *Childres & Garamella* consider this "bad man" characterization of contract-breakers as wrong-headed. See *Childres & Garamella, supra* at 449-50, 453.

attributable to the fault of either party.¹⁰⁵

While a reclassification of restitution in a contractual context will have its primary impact upon comprehension and formulation of measures of recovery, other consequences could well flow. It will aid in determining such questions as jurisdiction under the Tucker Act,¹⁰⁶ the rights of third party beneficiaries,¹⁰⁷ election of remedies,¹⁰⁸ questions of *res judicata*,¹⁰⁹ the appropriate

Another division of authority on the use of contractual risk allocation in restitution cases exists in cases of impossibility of performance because of death or disability of an employee prior to completion of the agreed upon term of employment. Although a number of cases have held that the recovery of the employee or his estate must be set off by the damages suffered by the employer because of non-completion, *Clark v. Gilbert*, 26 N.Y. 279 (1863); *Patrick v. Putnam*, 27 Vt. 759 (1855), a number of other cases have held that such a deduction is an improper contractual reference in a non-contractual action. See *City of Barnsdall v. Curnutt*, 198 Okla. 3, 174 P.2d 596 (1945), noted in 46 MICH. L. REV. 401 (1948). It is with regret that the writer of this paper acknowledges having subscribed in the past to this latter view. See J. CALAMARI & J. PERILLO, *supra* note 7, § 191, at 307-08.

105. See *Kinser Constr. Co. v. State*, 125 N.Y.S. 46 (Ct. Cl. 1910), *aff'd*, 145 App. Div. 41, 129 N.Y.S. 567 (3d Dep't 1911), *aff'd*, 204 N.Y. 381, 97 N.E. 871 (1912). The frequent failure of courts equitably to apportion losses in cases of impossibility and frustration is regretted in Comment, note 96 *supra*. For a context in which equitable adjustments are now routine, see J. CALAMARI & J. PERILLO, *supra* note 7, § 126 (obligations of restitution after disaffirmance by infants).

106. The Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), confers jurisdiction on the district courts and the Courts of Claims, *inter alia*, over cases based "upon any express or implied contract with the United States." The United States Supreme Court has held that "implied contract" means contract implied-in-fact and does not include quasi-contract. *United States v. Minnesota Mut. Invest. Co.*, 271 U.S. 212 (1926). The Court of Claims, relying on Corbin's analysis (see text at note 44 *supra*) has held that where restitution is sought as a remedy for breach the action is contractual rather than quasi-contractual. *Acme Process Equip. Co. v. United States*, 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138, *rehearing denied*, 385 U.S. 1032 (1967). The same analysis could be carried over to protect a contractor's restitutionary and reliance interests in claims for restitution in a contractual context other than breach. See, e.g., *Knight Newspapers, Inc. v. United States*, 395 F.2d 353 (6th Cir. 1968), where plaintiff was denied a day in court to prove its contention that it had mistakenly overpaid postal charges. The court characterized the action as quasi-contractual despite the existence of an express or, at least, implied-in-fact contract pursuant to which its postal rates ought to have been assessed.

107. On the ground that he has not provided a benefit, it has been held that the third party beneficiary of an oral contract within the Statute of Frauds may not obtain restitution for the value of the performance rendered by the promisee. *Pickelsheimer v. Pickelsheimer*, 257 N.C. 696, 127 S.E.2d 557 (1962), noted in 41 N.C.L. REV. 890 (1963); accord, *Graham v. Graham*, 134 App. Div. 777, 119 N.Y.S. 1013 (3d Dep't 1909); cf. RESTATEMENT OF CONTRACTS § 356 (1932). If, however, restitution for a performance rendered pursuant to an oral contract within the Statute of Frauds is regarded as a special measure of recovery designed to balance the policy bases of the Statute of Frauds and the need to restore some equilibrium between the parties, there seems no reason not to honor the allocation of risks and benefits made by the parties as is done in an action for expectation damages. If a further analytical basis is required to honor this allocation, it may be found in the doctrine of estoppel. See text at note 68 *supra*.

108. See three excellent studies by the New York Law Revision Commission. Acts, Recommendation and Study Relating to Election of Remedies, Legislative Document 65(F) (1939), in 1939 REPORT OF THE LAW REVISION COMMISSION 205; Act, RECOMMENDATION AND STUDY RELATING TO RECOVERY OF DAMAGES IN ADDITION TO RESTITUTION, Legislative Document 65(L) (1941), in 1941 REPORT OF THE LAW REVISION COMMISSION 283; Act, RECOMMENDATION AND STUDY RELATING TO RECOVERY OF DAMAGES IN ADDITION TO RESCISSION OF A SALE OF GOODS, Legislative Document 65(F) (1948), in 1948 REPORT OF THE LAW REVISION COMMISSION 271.

109. See Annotation, *Judgment in Action on Express Contract for Labor or Services as Precluding, as a Matter of Res Judicata, Subsequent Action on Implied Contract (Quantum Meruit) or Vice Versa*, 35 A.L.R.3d 874 (1971).

statute of limitations,¹¹⁰ and even the choice of law in multi-state transactions.¹¹¹ Myriad other issues would also be influenced, and properly so, by a new classificatory system. The obstacles to the recognition of the reclassification suggested here seemed genuine enough in the decades in which Keener and Woodward were expounding their ideas. It has almost gone unnoticed that these obstacles are no longer there.

110. See 51 AM. JUR. 2d *Limitation of Actions* §§ 101, 106 (1970), for the traditional view that quasi-contractual actions are governed by the contractual period of limitation whether they have their genesis in contract, tort, or some other branch of law.

111. A leading conflict of laws scholar warns us that

[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purposes, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.

Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933). It follows that a classification developed for local law purposes need not be carried over into choice of law analysis. This is not to say that such classification is not influential. See RESTATEMENT OF CONFLICT OF LAWS § 347, Comment *b* (1934), dealing with restitution in a contractual setting, which accepts as decisive then current local law classifications of certain actions as contractual and others as quasi-contractual. Less rigid thinking is current today. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 221 (1971); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 227 (1962); R. LEFLAR, AMERICAN CONFLICTS LAW § 157 (1968). Each of these authorities recognizes that the great variety of topics grouped under the heading of quasi-contract require individual analysis and, in particular, that there is a need to distinguish those obligations which arise out of a pre-existing relationship between the parties and those in which there is no such relationship.