

THE RELIANCE INTEREST IN CONTRACT DAMAGES: 2

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IN the first instalment of this article,⁷⁴ we presented an analysis of the motives which may lead a court to grant legal sanctions against one who has broken a promise. A distinction was taken between three contract "interests," the protection of which may furnish the basis for judicial intervention. In the present instalment, we have attempted to bring together for comparative study a series of situations in which judicial intervention has been (or in our opinion, should be) limited to a protection of what we have called the reliance interest.

As was pointed out in the first instalment, the complex of policies which dictates a judicial protection of the expectation interest is strongest in the case of a promise which forms part of a bargain or "deal" and which has for its subject matter some economic value dealt with on an open market, like the contract to sell 5000 pounds of sugar for a named price. It will be observed that the ensuing discussion is built on a classificatory scheme which marks, with some asymmetrical elements, a gradual departure from this typical bargain of commerce. The scheme of classification embraces, first, cases where, for various reasons, courts have refused to protect the expectation interest in the case of bargained-for promises; then takes in promises which are not the subject of bargains; and ends, finally, with situations which do not even involve promises, much less bargains. After the discussion of these particular situations has been completed, three concluding sections will deal with certain problems of significance for all of them.

CASES WHERE THE REQUIREMENT OF "CERTAINTY" EXCLUDES DAMAGES MEASURED BY THE EXPECTATION INTEREST

The objection that damages measured by the expectancy are too "conjectural" to be allowed can obviously have no application to a case

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74. (1936) 46 YALE L. J. 52.

where the subject matter of the contract has a market value and the plaintiff seeks only the difference between the contract price and the market value. The objection can arise only (1) where the contract relates to a subject matter of uncertain value, that is, having no "market;" or, (2) where the plaintiff seeks to recover business profits which were indirectly prevented by the defendant's default, for example, where the defendant breaks a contract to provide the plaintiff with premises needed for business purposes, or fails to furnish him with proper seed for the planting of his farm. In so far as the objection of uncertainty is considered in cases involving the first situation, it seems to have resulted in special measures of recovery for certain stereotyped situations, as, for example, in the case of the contract to adopt,⁷⁵ and the contract to sell land.⁷⁶ In these cases, the remission of the plaintiff to the reliance interest seems to be dictated in part, at least, by a feeling that the value of the expectancy is too uncertain to be safely measured in money. These cases may, therefore, represent a real application of the requirement of certainty, though they are generally not so classified.

The objection of uncertainty is raised in explicit form chiefly in cases involving the second situation described above, that is, where the plaintiff asks damages for profits prevented through the disruptive effects of the defendant's breach on the plaintiff's own business.⁷⁷ We have already cited numerous decisions which show that the inability of the plaintiff to establish his lost profits in cases of this sort does not necessarily prevent him from securing reimbursement for his expenditures.⁷⁸

If we consider only the cases which deny "conjectural" profits but grant reimbursement for reliance, and if we accept at face value the judicial rationalizations offered in those cases, we should have to say that they involve merely the substitution of a workable for an unworkable measure of recovery and that the policy exemplified in them is simply that of administrative convenience. Only a very little reading between the lines, however, will reveal the fact that administrative convenience is but one aspect of the problem involved in cases applying the "standard of certainty." In actual practice, the application of the requirement of "certainty" varies significantly with factors which have

75. See p. 65, *supra*, p. 399 *infra*.

76. See p. 377 *infra*.

77. "Even today, while the discussions in the opinions often assume that the standard of certainty of proof applies to the proof of damages generally . . . the principal field of its use remains the field of loss of commercial profits." McCORMICK, *DAMAGES* (1935) 105-106.

78. See the cases cited notes 63-65, *supra*. These cases suffice to show that the relief is not limited, as the *CONTRACTS RESTATEMENT* would limit it, to expenditures in performance of the contract, or in preparation to perform it (§333), or to the rental value of the property rendered idle by the defendant's breach (§331).

nothing to do with the ease of assessing damages. Thus, Bauer has shown that in determining whether in a given case lost profits are too conjectural to be compensated, courts are influenced by the character of the defendant's breach. Where his conduct is "wilful," the objection of uncertainty seems not to be taken seriously.⁷⁹

But other factors, beside the "wilfulness" of the breach, influence the application of the standard of certainty. Why, for example, is it applied almost entirely to cases where profits from the plaintiff's own business are prevented by the defendant's breach and not—at least in explicit form—to cases where the subject matter of the contract itself is of uncertain value? Why is it applied very liberally in suits for the profits lost when a partnership or agency agreement is broken, and very strictly in those cases where the plaintiff's business is independent of the defendant's, but happens in some way to be dependent upon performance by the defendant?⁸⁰ McCormick has given the answer. "Like the 'contemplation of the parties doctrine', the standard of 'certainty' was developed, and has been used, chiefly as a convenient means for keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise."⁸¹

What is principally revealed in the actual application of the standard of certainty is a judicial disinclination to impose on the defendant liability for those injurious effects of his breach which do not result "directly," but are due to the internal structure of the plaintiff's business. This disinclination finds a number of distinct doctrinal formulations, of which the requirement of "certainty" is only one, the others being the test of foreseeability (*Hadley v. Baxendale*),⁸² and the theory that liability rests on a tacit assumption of risk.⁸³ Where one of these tests fails to serve its purpose of restricting the scope of liability, another is usually available as a substitute. Thus, expenditures in reliance can usually be definitely proved, and the standard of certainty is therefore an unsatisfactory device for excluding claims founded on the reliance interest.⁸⁴ Yet losses through reliance, equally with lost profits, will

79. Bauer, *Moral Fault As Affecting Liability* (1933) 81 U. OF PA. L. REV. 586, 592.

80. The difference in attitude in the two kinds of cases is apparent from the review of the cases to be found in 1 SEDGWICK, DAMAGES (9th ed. 1913) §§ 182-200; see especially §§ 193-193a. The comparative liberality of the courts in cases involving commission sales agencies is also suggested in Comment (1933) 46 HARV. L. REV. 696, 698.

81. DAMAGES (1935) 105.

82. See p. 84, *supra*.

83. Most clearly enunciated in *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

84. It may, of course, be said that it is uncertain to what extent the plaintiff's expenditures would have been reimbursed through the operations of his business.

often be felt to be "remote," that is, too dependent upon a peculiar posture of the plaintiff's affairs. Where this is the case, a way may be found to deny recovery.⁸⁵ Again, the failure of the requirement of certainty to exclude from compensation the profits of a well-established business does not necessarily prevent a court from finding another way of denying a liability for the loss of such profits where it is felt that the liability would be disproportionate to the rewards which the defendant was to receive under the contract.⁸⁶ On the other hand, where notice of the plaintiff's peculiar dependence on the contract is present, the test of *Hadley v. Baxendale* will not serve, and the test of certainty is the most usual surrogate.

Concealed in the objection of "uncertainty," then, are a number of judicial impulses: (1) a desire not to broaden unduly the liability of the defaulter by making "remote" injuries compensable; (2) a desire not to impose on the defendant a liability felt to be disproportionate to the gains which he stood to make from the contract; (3) a desire to restrict the liability imposed on the "innocent" defaulter in comparison with that imposed on the "wilful" defaulter; (4) a desire for an easily administered rule. Where the last impulse is the controlling one, the reliance interest is often employed as a surrogate for the expectation interest. Where, on the other hand, the first objection ("remoteness") predominates, the reliance interest represents a midway station

Indeed, the same factors which make it uncertain whether the plaintiff would have made a net profit also make it uncertain to what extent the gross income of the business would have paid its expenses. This objection of uncertainty seems, however, not to be raised in the cases, and the courts seem to assume in favor of the plaintiff that he would have "broken even," unless, at least, the defendant is able to prove the contrary. See note 42, *supra*.

85. See the cases cited, notes 56-59, *supra*. In *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209, 31 N. E. 1018 (1892) the plaintiff, about to engage in the business of manufacturing lanterns, contracted with the defendant for a supply of steel dies. When the defendant failed to supply the dies on time, the plaintiff claimed reimbursement for expenditures (room rent, rent of business premises, salaries paid employees) rendered vain by the defendant's default. Recovery was denied on the ground that these losses "could not have been contemplated as the natural and proximate consequence of a breach of the contract." (*Id.* at 218, 31 N. E. at 1021). See also *Hooks Smelting Co. v. Planter's Compress Co.*, 72 Ark. 275, 79 S. W. 1052 (1904).

86. As in *Hadley v. Baxendale*, 9 Exch. 341 (1854); *cf.* *Raynor v. Valentin Blatz Brewing Co.*, 100 Wis. 414, 76 N. W. 343 (1898). The often repeated distinction between established businesses and new businesses (the profits of an established business may be recovered, those of a new business are too conjectural to be allowed) is believed to rest in part on a too ready acceptance of the "standard of certainty" at its face value, and in part on the circumstance that most of the suits for the profits of an established business involve acts of tortious interference, while those asking for the profits of a new business are principally breach of contract cases.

between no liability and a complete liability for the expectancy. As we have already recalled, losses through reliance are not immune to the objection of "remoteness;" yet because they make a stronger appeal to judicial sympathy than a claim for lost profits, the objection of remoteness is applied less strictly to them.⁸⁷

CASES WHERE DAMAGES MEASURED BY THE EXPECTANCY WOULD IMPOSE AN UNDUE BURDEN ON THE PROMISOR

The Contract to Convey Land. In about eighteen American states the courts have followed the English rule, first laid down in *Flureau v. Thornhill*,⁸⁸ which denies a recovery of the expectation interest in a suit for damages against the vendor who is unable to make out title to the land he has contracted to convey.⁸⁹ This rule finds its justification principally in two considerations: (1) the difficulty under which the court or jury would labor in estimating the lost profit, the "market value" of land being at best an uncertain standard;⁹⁰ (2) the hardship which the usual rule would impose on the vendor, in view of the uncertainties involved in real estate titles and the fact that contracts to sell land are usually entered without a preliminary study of the title.⁹¹

Where the vendee is denied the lost profit, his principal claim will usually be for sums paid on the contract. The relief granted by the courts following the English rule extends, however, beyond mere restitution, since it seems generally agreed that the vendee may also recover

87. "The debtor, however, is not to be subjected to indemnify the creditor for all the loss which may have been occasioned by the non-performance of the obligation, and still less is he answerable for all the gain which the creditor might have acquired, if the obligation had been satisfied." 1 POTHIER, LAW OF OBLIGATIONS (Evans' trans. 1826) 81 (italics supplied).

88. 2 W. Black. 1078 (1776).

89. The American cases will be found discussed in McCORMICK, DAMAGES (1935) 680 *et seq.*; 3 SEDGWICK, DAMAGES (9th ed. 1913) §§ 1001-1022; Note (1930) 68 A. L. R. 137. Where the vendor acts in "bad faith" a recovery of the lost profit is allowed both in England and in the American states following the English rule. A recovery of the expectation interest would probably also be allowed where the conduct of the vendor is blameworthy even though not in "bad faith" in the usual sense. McCORMICK, DAMAGES (1935) § 179.

90. In the case initiating the rule, *Flureau v. Thornhill*, 2 W. Black. 1078 (1776), the court spoke of the undesirability of awarding damages for "the fancied goodness of the bargain." Referring to this passage, Lord Chelmsford in the later case of *Bain v. Fothergill*, 7 Eng. & Ir. App. 158, 202 (1874) said, "'The fancied goodness of the bargain' must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject . . ."

91. *Sikes v. Wild*, 1 B. & S. 587, 596 (1861); *Engel v. Fitch*, 3 Q. B. 314, 331, (1868); *Bain v. Fothergill*, 7 Eng. & Ir. App. 158, 173, 194 (1874).

reimbursement for expenditures made in investigating the title.⁹² Whether recovery may be had for other items subsumable under the reliance interest (as, for example, for the cost of surveying the land, or of erecting improvements on it) is more doubtful. In some cases there is expressed a disinclination to extend recovery for expenditures beyond the cost of a title search, usually rationalized on the ground that such expenditures are not within the contemplation of the parties, or that it is unreasonable for the vendee to make expenditures of this sort before the state of title has been definitely determined.⁹³

The Grantor's Warranties of Title. The considerations which argue for a limitation on the liability of the vendor under a contract to convey land apply also in favor of the grantor who has warranted the title conveyed. A rule permitting a recovery of the lost profit against the warranting grantor contains, in fact, more possibilities of hardship than a similar rule applied to the man who has merely promised to convey land. If, on the one hand, the warranting grantor has normally more time than the vendor to investigate his title before entering an engagement with regard to it, this consideration is more than outweighed by the fact that his liability on the warranty may first accrue years after it was given, and after such a change in the value of the land has taken place as would make ruinous a liability for the advantage lost when the grantee is dispossessed. The courts have, accordingly, generally refused to impose on the warranting grantor an unrestricted liability for the value of the land lost through failure of title.⁹⁴ The relief generally asked for, and granted, is a return of the price received by the grantor. Whether the relief extends beyond mere restitution to embrace items classifiable only under the reliance interest is doubtful.⁹⁵

The uncertainties of title and of value which attach to land transactions are less marked in the case of chattels. Nevertheless, some courts have held, following the analogy of the real property cases, that the lia-

92. MCCORMICK, DAMAGES (1935) § 182; 3 SEDGWICK, DAMAGES (9th ed. 1913) § 1017.

93. See Note (1927) 48 A. L. R. 12, 64 *et seq.*; MCCORMICK, DAMAGES (1935) § 183; 3 SEDGWICK, DAMAGES (9th ed. 1913) § 1017.

94. MCCORMICK, DAMAGES (1935) § 185; 3 SEDGWICK, DAMAGES (9th ed. 1913) § 951 *et seq.* In the cases of covenants not "broken when made" four New England States and England and Canada grant the value of the land at the time of eviction.

95. Recovery for improvements is generally denied. 3 SEDGWICK, DAMAGES (9th ed. 1913) §§ 958-959. Expenses reasonably incurred in defending title may be recovered. 3 SEDGWICK, DAMAGES (9th ed. 1913) § 982; MCCORMICK, DAMAGES (1935) 707. The inclusion of these expenses extends the relief beyond mere restitution. On the other hand, it should be noted that the loss involved in these expenses would have been avoided either if no contract had been entered or if the contract had been performed. It is, therefore, a type of loss which may indifferently be subsumed under either the reliance or the expectation interest. See p. 75, *supra*.

bility of a seller of chattels on his implied warranty of title does not extend to the expectation interest.⁹⁶ Perhaps the conflict of the cases on this point reflects in part a difference in the kinds of chattels involved.⁹⁷

CASES WHERE PERFORMANCE OF THE CONTRACT IS INTERFERED WITH BY EXTERNAL CIRCUMSTANCES

Impossibility and Frustration. A defaulting promisor may be excused from liability because the performance of the contract has, through some event unforeseen by the parties, become difficult or impossible ("impossibility"), or because his adherence to the agreement has, in a manner unanticipated, become pointless ("frustration"). A similar excuse is sometimes extended in those cases where, unknown to the parties, there exists from the beginning some circumstance which hampers or renders futile the performance of the agreement. If we exclude a few fairly well defined situations,⁹⁸ it is virtually impossible to make useful generalizations concerning the circumstances under which the excuses of frustration and impossibility will be accepted. The outcome of the cases is in practice dictated by a shifting line of compromise between the impulse to uphold the sanctity of business agreements and the desire to avoid imposing obligations that are vain or unduly burdensome.

In such a field, where no technical rules serve to obstruct an insight into the purposes underlying contract law, it would seem inevitable that the cases would reveal a distinction between the three interests which have been described in this article. Such a distinction has definitely been taken in America⁹⁹ (though apparently not in England¹⁰⁰) between the expectation and restitution interests. Where a contract has become impossible of performance, or its object is frustrated, it has been recognized that the most equitable adjustment of the situation may call for relieving the party from liability for future performance (expectation interest denied), and at the same time imposing on him a duty to return benefits received under the contract (restitution interest protected).

96. 2 WILLISTON, SALES (2d ed. 1924) § 615a; 2 SEDGWICK, DAMAGES (9th ed. 1913) § 774; MCCORMICK, DAMAGES (1935) 678.

97. Of the nine cases cited in 2 WILLISTON, SALES (2d ed. 1924) § 615a, n. 84, as supporting the rule limiting recovery to the price received by the seller plus expenses incurred in defending title, the first two involved slaves; the next three, horses; the next two, land certificates. It is obvious that the uncertainty of the value of these chattels is such as to make the analogy of the real property cases peculiarly apt.

98. RESTATEMENT, CONTRACTS (1932) § 458, § 459, and illustration 1 to § 460.

99. RESTATEMENT, CONTRACTS (1932) § 468; WOODWARD, QUASI CONTRACTS (1913) §§ 109-131.

100. WOODWARD, QUASI CONTRACTS (1913) § 112; 7 HALSBURY'S LAWS OF ENGLAND (2d. ed. 1932) 214.

But in this field, where borderline cases are a normal phenomenon, it would seem that the reliance interest should also play an important rôle. Where the court is in doubt whether the excuse should be permitted at all, the most satisfactory solution of the difficulty may well be to relieve the promisor from his duty, at the price, not simply of returning benefits, but of making good the other party's losses through reliance on the contract. In Germany, the Civil Code expressly recognizes the usefulness of the reliance interest as a means of accomplishing the most equitable allocation of the risks involved in impossibility.¹⁰¹

There are, apparently, no American or English cases expressly recognizing a recovery measured by the reliance interest as the means of accomplishing a desirable compromise between the extreme demands of no liability and liability for the full expectation interest. Yet when we examine the cases cited in the texts as cases of "restitution," we find much reason to suspect that in some of them the reliance interest has received protection under an alias. There is exemplified in these cases the same attenuation of the requirement of "benefit" which will be discussed at length later in connection with contracts falling within the Statute of Frauds.¹⁰² When a housemover is permitted to recover for expenses incurred in moving a house which burned before it reached

101. GERMAN CIVIL CODE, § 307. This recognition of the reliance interest in impossibility cases is confined to impossibility existing at the time of the contract. As to supervening impossibility, the code apparently makes no provision for a possible claim for the reliance interest. See § 275, § 280, § 325, and the annotations to all the sections cited in BUSCH, DAS BÜRGERLICHE GESETZBUCH (1929). The explanation for this rather peculiar distinction between original and supervening impossibility lies, no doubt, in the fact that the recognition of the reliance interest in the Civil Code was due to the influence of Ihering's theory of *culpa in contrahendo* (see note 54, *supra*), a theory which dealt only with defects in the formation of contracts and had nothing to say concerning the effect of subsequent events.

The Roman sources on the basis of which Ihering constructed his theory recognized a liability for the reliance interest in certain cases of original impossibility. Thus, where a man sold a thing *extra commercium*, or sold as a slave a man who was actually free, he was held liable to reimburse the buyer's expenditures in reliance on the contract. (D. 18.1.62; I. 3.23.5). In at least one passage, furthermore, there is to be found a recognition of the claim to reimbursement for reliance in a case of supervening impossibility. If *A* paid money to *B* on condition that *B* make a trip for him, and the trip became impossible because of the state of the weather or *B*'s health, it was stated (D. 12.4.5.pr.) that if *A* sues to recover the money, *B* may deduct reimbursement for his expenditures in preparation for the trip. In the discussion of his theory, Ihering rejects this passage, not as laying down an improper rule, but as irrelevant to his theory. *Culpa in contrahendo* (1860), printed in 1 GESAMMELTE AUFSÄTZE (1881) 327, 349, n. 25.

102. See p. 386, *infra*. On the degree of seriousness with which the requirement of "benefit" is taken in impossibility cases, see generally, WOODWARD, QUASI CONTRACTS (1913) §§ 115-124; Comment (1931) 44 HARV. L. REV. 623, 625; RESTATEMENT, CONTRACTS (1932) § 468(3).

its new location,¹⁰³ or when a lawyer receives reimbursement for services rendered in preparing a case which never came to trial because the accused jumped his bail,¹⁰⁴ the fact that these cases are analysed in the texts as directed toward the prevention of "unjust enrichment" cannot remove a suspicion that their decision was influenced predominantly by the desire to reimburse a plaintiff who had made expenditures in reliance on the contract.¹⁰⁵

A covert influence of the desire to reimburse detrimental reliance is not only discernible in the "restitution" cases, where it is assumed that the party is excused from the contract, but also in the determination of the issue of excuse itself. When a court is faced with the question whether the circumstances of the case warrant excusing the defendant from his contract, there is every reason to suppose that the decision will be influenced by the type of relief demanded by the plaintiff, and particularly by the consideration whether the plaintiff seeks to recover anticipated profits, or seeks essentially only to obtain reimbursement (in the form of the promised price, or otherwise) for expenditures actually made in performing the contract. The cases of *Krell v. Henry* and *Nicol v. Fitch* furnish a useful contrast in this connection. In *Krell v. Henry*¹⁰⁶ the defendant had contracted to pay a large rental for the use, during a period of two specified days, of certain rooms from which to view the coronation procession of Edward VII. Because of the king's illness, the coronation was postponed. The owner of the premises sought to compel the defendant to pay the promised price of the rooms; the court denied recovery. Would the decision have been the same had the plaintiff generously waived any claim to the promised rent and asked only reimbursement for expenses incurred in fitting the rooms for the defendant's special use?¹⁰⁷ In *Nicol v. Fitch*,¹⁰⁸ the plaintiff agreed for

103. *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674 (1900).

104. *Moore v. Robinson*, 92 Ill. 491 (1879).

105. Of course, where the case is conceived by the court as founded on a theory of restitution, the court may, at an unpredictable point, balk at a further relaxation of the requirement of "benefit." Thus, where the contract is one for construction and repairs, and the plaintiff's labor and materials have not yet been incorporated into the defendant's structure, the general tendency is to deny recovery. *Mathews Construction Co. v. Brady*, 104 N. J. Law 438, 140 Atl. 433 (1928); (1931) 44 HARV. L. REV. 623, 635, n. 12.

106. (1903) 2 K. B. 740.

107. Of course, it did not definitely appear that any such expenditures had been made in the actual case of *Krell v. Henry*. In judging what would have been the judicial reaction to the case suggested, it should be recalled that while *Krell v. Henry* is today generally accepted as "the law" (Note (1936) 52 L. Q. REV. 168), the case was viewed at the time it was decided as a pioneering one, and the decision that the tenant should be excused from the contract was regarded as involving a considerable extension of existing doctrine. Note (1904) 20 L. Q. REV. 3. How a claim by the landlord to reimbursement for expenditures should be viewed "on principle," is a matter on which

a specified salary to act as agent for the defendant to secure freight for the defendant's vessel. After the plaintiff had partly performed his agreement, and after he had, apparently, become so situated that it was impossible for him to secure work elsewhere during the season, the defendant's vessel sank. The plaintiff was permitted to recover the promised salary, the court holding that the sinking of the vessel did not operate to excuse the defendant from his agreement. Would the same view have been taken if the plaintiff's claim had been entirely for the "lost profit," as it might have been, had the vessel sunk before the plaintiff entered upon his duties? Is it not reasonable to suppose that the primary object of the court in *Nicol v. Fitch* was to reimburse the plaintiff for his reliance on the contract, even though damages were measured by the promised price?

Impossibility Brought About by the Defendant's Act. Cases involving impossibility brought about by the act of one of the parties are

reasonable men may differ. Dividing the loss equally would perhaps be the most satisfactory solution of the problem. If this method of disposing of the case were regarded as inadmissible, then the reaction of the ordinary sense of justice to the landlord's claim would probably vary, depending on such factors as the character of the expenditures made and the question who took the initiative in the arrangements leading to the contract and the alteration of the premises. In any event, however doubtful the justice of the situation may be, there are certainly no "technical obstacles" to granting the landlord reimbursement for reliance. The assumption made in RESTATEMENT, CONTRACTS (1932) § 468, comment on Subsection (3), and in Comment (1931) 44 HARV. L. REV. 623, 628, that where performance of a contract is rendered impossible or frustrated without either party being "at fault," the contract is dissolved and there remains no basis for any liability other than that necessary to prevent unjust enrichment, overlooks a quite different and equally tenable construction of the situation. In the case suggested, though of course neither party was "to blame" for the king's illness, it can be said that it is the tenant, and not the landlord, who asks to be excused from the contract. Viewing the case in this way, there is no reason why the court should not impose as the price of the tenant's release from the contract that he reimburse the landlord for expenditures made on the faith of the agreement.

There are, of course, situations in which a court would feel no disposition to impose on one party a liability for the reliance interest of the other. A claim by the tenant in *Krell v. Henry* to reimbursement for his reliance would present such a case. Probably no one would doubt the propriety of the decision in the leading case of *Taylor v. Caldwell*, 3 B. & S. 826 (1863), which denied a claim to reimbursement for reliance on a contract later become impossible of performance. (Incidentally, that portion of the report of *Taylor v. Caldwell* which reveals the nature of the relief asked by the plaintiff is apparently not considered of sufficient importance to warrant its inclusion in the leading casebooks on contracts, which presumably conceive the problem in the case to be, not whether the plaintiff was entitled to the particular relief sought, but whether "the contract" had been dissolved).

108. 115 Mich. 15, 72 N.W. 988 (1897). For a case somewhat similar to *Nicol v. Fitch*, see *Retail Merchant's Business Expansion Co. v. Randall*, 103 Vt. 268, 153 Atl. 357 (1931).

usually classified under the rubric "prevention." Actually, they differ from the impossibility cases only in the fact that they involve a new factor, that is, a consideration of the "fault" of the parties with respect to the circumstance which inhibits performance of the contract. The complexity added by this new factor makes even less defensible than in "pure" impossibility cases the adoption of an inflexible measure of recovery.¹⁰⁹ Of course, where the act of prevention is wholly without justification, it is quite proper to impose on the preventing party full liability for the expectation interest. But the justification of the act of prevention is a matter of degree, and the obvious possibility of borderline cases on the issue of justification suggests the need for a flexible basis of recovery.

Particularly in one situation, an award of damages measured by the reliance interest would seem to furnish, in the run of cases, the most equitable compromise of the interests involved; that is, where an employer, by selling or discontinuing a part or all of his business, renders impossible further performance of a contract with an employee. To grant the employee in this situation the full expectation interest may seem to restrict unduly the employer's freedom in dealing with the exigencies of business. On the other hand, to leave the employee without remedy seems unduly harsh where he has incurred expenses (for example, in moving his residence) in reliance on the reasonable assumption that his employment would endure for the whole period of the contract. The appropriateness in this situation of damages measured by the reliance interest seems to have been overlooked by the courts, perhaps because it has been overlooked by counsel.¹¹⁰

A similar approach might also frequently offer the most satisfactory solution of the cases involving "output" and "requirement" contracts where one of the parties sells or discontinues his business during the term of the contract.¹¹¹

109. Here, as elsewhere, the attitude taken in the RESTATEMENT (§315) seems to be whole hog or none.

110. See, however, *Griffen v. Sprague Electric Co.*, 115 Fed. 749 (C. C. S. D. N. Y. 1902), a case in which a kind of joint venture participated in by the plaintiff and defendant was terminated when the defendant sold its business, and where the plaintiff was permitted to recover reimbursement for expenditures in reliance on the contract. There is also in *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. 502, 509 (C. C. A. 7th, 1900) an intimation that a claim by an employee to reimbursement for expenditures might be granted where a claim for the lost profit would be denied.

111. The courts seem to have assumed that the termination of the business either has no effect on the contract at all, or that it dissolves it completely. There is, however, little reason to doubt that when courts determine, by a process called "interpretation," whether the sale or discontinuance of a business constituted a breach of the contract, they are influenced by the consideration whether the plaintiff had changed his position in reliance on the contract. There were, for example, very serious acts of reliance

Insolvency. Where the performance of a contract is interfered with by the insolvency of the promisor, there arises not only the necessity (present in the impossibility and frustration cases) for re-examining, in the light of the new situation, what is fair between promisor and promisee, but also for determining what is fair between competing creditors of the promisor. In effecting a just settlement of an insolvent's affairs, there is no compelling reason why equal treatment should be accorded all claims which happen to be classified as "founded on a contract." There is, for example, an obvious difference in the immediacy of the appeal made to judicial sympathy, between the position of the creditor who asks the price of goods sold and delivered, and that of the creditor who demands compensation for the profit lost when the insolvent refused to take the proffered goods.

In bankruptcy cases, the chief obstacle to a discrimination between kinds of contract claims lies in the wording of the statute itself. The statute puts claims founded "upon a contract express or implied" in one class, and contemplates only one distinction between such claims—that giving a restricted priority to claims for wages.¹¹² Yet in borderline cases concerning such questions as the provability and release of claims there is obviously an opportunity to favor those types of contract claims which are regarded as possessing superior "equities." Thus, the one time reluctance of courts to treat bankruptcy as an anticipatory breach of executory contracts (and thus make "provable" the creditor's right to the lost profit) may very well have arisen from a realization that such a claim would normally come into conflict with the claims of other creditors who sought the price of performances already rendered.¹¹³ The persistence of this attitude in cases involving a landlord's claim to unaccrued rent may result from the same causes, and from the fact that where a long-term lease is involved the landlord's claim to the lost profit may virtually absorb the whole estate to the exclusion of those who were supplying the day-to-day needs of the lessee.¹¹⁴

shown in *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F. (2d) 117 (C. C. A. 3d, 1929), where the court held that the defendant's discontinuance of its business constituted a breach of an implied term of a contract, which, so far as its express terms were concerned, merely imposed a duty on the defendant to supply its needs, during a period of five years, by purchases from the plaintiff.

112. BANKRUPTCY ACT, §§ 63-64, 30 STAT. 562 (1898), 11 U. S. C. §§ 103-104 (1934).

113. The case of *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U. S. 581 (1916), finally settled the question in favor of the provability of the claim to lost profits on a contract executory at the time of the filing of the petition. For the history of the judicial treatment of this question prior to the *Central Trust* case, see Comment (1914) 27 HARV. L. REV. 469; 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1409.

114. The question of the landlord's claim to "unaccrued rent" (which means, since a deduction must be made of the present rental value of the premises, his claim to the

A distinction between contract claims may be achieved within the framework of the Bankruptcy Act not only, as has just been pointed out, by excluding the less favored claim as "unprovable," but also by converting the favored claim into a "property" interest. Britton has suggested that the device of the "equitable lien" is sometimes manipulated to secure a position of priority for the creditor who seeks the price of a benefit conferred.¹¹⁵

The judicial process is less hampered by legislative restrictions in receiverships than it is in bankruptcy, and we discover in that field, accordingly, a more effective tendency to stratify contract claims. Not only do we find the same covertly effected preference for the restitution interest discernible in bankruptcy cases, but also, in at least two decisions, a distinct recognition of the reliance interest and of its priority over the claim to the lost profit. In *Coy v. Title Guarantee & Trust Co.*,¹¹⁶ the receiver of an insolvent corporation, who had disaffirmed a contract to grant an extension of a lease to the plaintiff, was excused from compensating the plaintiff for the lost profit, but compelled to reimburse him for expenditures actually made in reliance on the contract. The case involves an especially clear recognition of the reliance interest because the plaintiff's expenditures were of no benefit to the corporation, but were actually detrimental in their effect on the value of the leased premises. In *Griffith v. Blackwater Boom & Lumber Co.*,¹¹⁷

lost profit on the lease) was finally settled against provability in *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U. S. 320 (1934). Since that decision Congress has attempted a compromise of the interests involved by providing that the landlord has a provable claim to damages but not to exceed "the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date." BANKRUPTCY ACT, § 63(a) as amended in 48 STAT. 923, 924 (1934), 11 U. S. C. (Supp. 1935) § 103.

115. Britton, *Equitable Liens—A Tentative Analysis of the Problem* (1930) 8 N. C. L. REV. 388.

116. 198 Fed. 275 (D. Ore. 1912). In this case the court limited recovery to the reliance interest, and implied that the plaintiff was without remedy for the lost profit. In *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 40, 55 Atl. 599, 604 (1903), however, the court said, "If . . . the condition of an estate was such that the allowance of a claim of this character [i.e., for the lost profit] would not encroach upon the assets necessary to satisfy other creditors, and there was to remain in the hands of the receiver a balance after the expenses of settlement and claims were paid, quite a different situation would present itself, to which other considerations would apply." (It should be noted that in so far as *Wells v. Hartford Manilla Co.* denies a claim to the lost profit it has been overruled by *Napier v. People's Stores Co.*, 98 Conn. 414, 120 Atl. 295 (1923).)

117. 55 W. Va. 604, 48 S. E. 442 (1904). See also *State v. Associated Packing Co.*, 195 Iowa 1318, 192 N. W. 267 (1923). The recognition of the reliance interest is less clear in these cases than in the *Coy* case. In the *Blackwater Boom* case and in the *Associated Packing Company* case, the services rendered were of benefit to the corpora-

the court also granted "compensation for outlay and expenses," and assumed that the receiver was under no liability to make compensation for anticipated profits.

There are, of course, a considerable number of cases contrary to the two cases just cited, and the general tendency seems to be toward treating the claim to the lost profit on a parity with other contract claims in the administration of receiverships.¹¹⁸ But it should be noticed that many of the cases in which this tendency is exemplified involve claims founded on contracts for the sale of commodities which, like sugar¹¹⁹ and oil,¹²⁰ are dealt with on more or less open markets. On the other hand, the strongest resistance toward the tendency to place the claim to anticipated profits on a parity with other contract claims is to be found in cases involving leases¹²¹ and contracts of employment¹²²—transactions which, it is significant to note, are less intimately parts of the credit system than are contracts to sell goods.¹²³ The conception of the parties as participants in a common adventure—utterly foreign, for example, to the contract to sell 50 barrels of sugar—colors these transactions and militates against the view that the right of the one party to the other's future performance is an immediate economic good deserving the full protection given any other "property" interest.

CONTRACTS IMPERFECT IN EXPRESSION OR IN LEGAL EFFECT

Contracts Within the Statute of Frauds. The effect of the Statute of Frauds, as it is construed by the courts, is not to obliterate the oral contract, but merely to lessen its legal consequences.¹²⁴ One consequence which the oral contract unquestionably has is that benefits conferred under it may be recovered from the recipient if he fails to perform his side of the agreement; in other words, the statute does not preclude a

tion, and there is a possibility of construing them as cases of restitution. In the *Blackwater Boom* case, however, the recovery seems to have been measured by the expenditures of the plaintiff, rather than by the value of his services.

118. See Comment (1931) 31 Col. L. Rev. 297; Note (1924) 33 A. L. R. 508.

119. As in *Napier v. People's Stores Co.*, 98 Conn. 414, 120 Atl. 295 (1923).

120. As in *Texas Co. v. International & G. N. Ry.*, 250 Fed. 742 (C. C. A. 5th, 1918) (fuel oil); *Samuels v. E. F. Drew & Co.*, 292 Fed. 734 (C. C. A. 2d, 1923) (cocoanut oil).

121. Comment (1934) 34 Col. L. Rev. 143.

122. Comment (1931) 31 Col. L. Rev. 297, 300.

123. Cf. the characteristics of the ideal contract from the standpoint of the credit system (outlined p. 65, *supra*); and the discussion of the influence of open markets on the conception of the expectancy as a present value, pp. 62-63, 74, *supra*.

124. This is generally true even though the particular statute purports to make the contract "void." 3 WILLISTON, CONTRACTS (2nd ed. 1936) § 531.

judicial protection of the restitution interest.¹²⁵ At the other extreme, it is equally clear that the statute does bar—subject to judicial ingenuity in circumventing the bar—any action founded on the expectation interest. The really doubtful question relates to the reliance interest. The man who has made actual disbursements of money, property, or labor in reliance on an oral agreement which is later broken by his co-contractor makes a strong appeal to judicial sympathy. There are, however, at least two possible obstacles to granting him relief where his disbursements have not operated to enrich the other party.

The first of these lies in finding a name for the action. To call it “contractual” would seem to throw it directly within the prohibition of the statute. It is, on the other hand, difficult to regard the defaulting party’s conduct as a tort—simply because it does not look like a tort. Quasi-contractual recovery is excluded because of the absence of “unjust enrichment.” There exists, therefore, no ready pigeonhole for the action, and this will create, for many minds, a doubt whether the action should be permitted at all—for the writ system finds its modern equivalent in a conception of legal method which demands that every action shall have a recognizable “nature.”

Worthy of more serious consideration is a second objection to permitting a recovery of the reliance interest, which lies in the argument that to grant reimbursement for reliance on the oral contract would be to violate the statute. So far as the language of the statute is concerned, there is no more violation of its terms involved in granting reimbursement for reliance than there is in effecting a restitution of benefits conferred. The argument that restitution is not a suit “on the contract,” but is founded on a rescission of the contract, can have little weight in interpreting a statute passed long before this “theory” of restitution had established itself.¹²⁶ On the other hand, if all that is

125. 3 WILLISTON, CONTRACTS (2nd ed. 1936) § 534; RESTATEMENT, CONTRACTS (1932) § 355; WOODWARD, QUASI CONTRACTS (1913) §§ 93-103. “While the defendant is not regarded as *altogether a wrongdoer* in refusing to perform his oral contract, if he fails to perform it he is [presumably, a little bit of a wrongdoer, and is, therefore] under an enforceable duty to make restitution of value received.” Comment *b* to § 355 of the RESTATEMENT (italics supplied). Restitution is permitted in spite of the fact that (1) the remedy requires proof of the oral agreement for the purpose of showing that the benefits conferred were not intended as a gift, and (2) may require a reference to its terms in order to show that the recipient has not rendered the promised exchange value. RESTATEMENT, CONTRACTS (1932) § 355(4); cf. *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257 (1892). Where doubt arises whether the defendant is in default, it may well result that all of the terms of the oral contract will come in issue.

126. “No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord Mansfield and Lord Kenyon at the end of the eighteenth century.” 3 WILLISTON, CONTRACTS (1920) § 1455, n. 1. In what appears to be the earliest case measuring damages by the defendant’s benefit. *Anony-*

needed is a way of conceiving of the suit which will avoid the appearance that it is brought "on the contract," the suit to obtain reimbursement for reliance may also be viewed as based on a rescission of the contract—at least the Supreme Court of Errors in Connecticut found no difficulty, and apparently experienced no juristic pain, in conceiving of the suit in this way.¹²⁷

Even though the language of the statute offers no more serious obstacle to reimbursing reliance than it does to granting restitution, it is of course possible that the two forms of relief stand in different relations to the policy of the statute. In determining whether the granting of a particular form of recovery would violate the "policy of the statute," the courts seem to be influenced, not only by the hardship produced if the action is denied, but by two other factors more directly pertinent to the apparent purposes of the statute: (1) To what extent will the action entail a reference to the terms of the oral agreement? (2) To what extent will the circumstances of the case afford evidentiary guaranties which may be regarded as a substitute for the required writing?

So far as the first question is concerned, it may be said that neither the suit for restitution nor the suit to obtain reimbursement for reliance is free from the possibility that it may involve a detailed reference to the terms of the oral agreement. This would, for example, be necessary where a dispute arose whether the defendant was in default—an issue which may be raised in either form of suit. On the other hand, one type of reference to the oral agreement might become necessary in a suit founded on the reliance interest which would not be involved in restitution cases, that is, in order to limit the plaintiff's maximum recovery to that measured by the expectation interest.¹²⁸ But since we have

mous, 1 Str. 407 (1721), nothing is said about a "rescission" of the contract. (Cf., however, Mansfield's discussion in *Moses v. Macferlan*, 2 Burr. 1005, 1011 (1760).)

127. See *Rabinowitz v. Marcus*, 100 Conn. 86, 123 Atl. 21 (1923), discussed in note 32, *supra* at 73.

128. It is not clear that the expectation interest would be regarded as limiting the plaintiff's claim to reimbursement for reliance. As was pointed out previously (pp. 75-80, *supra*), any limitation of recovery by the expectation interest may be viewed as an indirect enforcement of the contract for the benefit of the defaulter, and, in the case of an oral contract, it may be an enforcement which the court would regard as excluded by the statute. That a refusal to impose this limitation would have the consequence that the plaintiff would be more advantageously situated with an oral contract than with a written one, does not bring about a situation utterly without parallel. (Cf. *King v. Welcome*, 5 Gray 41 (Mass. 1857). On the other hand, if the plaintiff should claim a large sum, greatly in excess of "the contract price," for what we have called (p. 78, *supra*) "incidental reliance," it is probable that a court would balk at imposing a burden on the defendant greater than the performance of the contract itself would have involved. (See the discussion of cases where "the contract price" may properly limit recovery for "incidental reliance," p. 80, *supra*). There are, however, ready at hand

here only an additional possible use of the oral contract, over those uses which may be necessary in restitution, the difference involved is one of degree only, and by no means compels a distinction between the two kinds of relief.

So far as evidentiary guaranties are concerned, the suit to obtain restitution may seem to be distinguished from the suit asking reimbursement for reliance on the ground that in restitution cases the defendant's act of receiving the benefit constitutes corroborative evidence (emanating from "the party to be charged") of the existence of the contract. This argument is sound only in the sense that it may help to explain the usual or normal case; the remedy of restitution is, however, not confined to cases where the "receipt" of the benefit involves conduct on the part of the defendant.¹²⁹

There is, then, no distinction which requires a court to deny reimbursement for reliance, and, at the same time, permits it to grant restitution on a contract made unenforceable by the statute. A court which broadened its intervention to include a protection of the reliance interest might justify its stand on the ground that the admitted differences between the restitution and reliance interests are insufficient to warrant a difference in legal treatment, and might properly view the reimbursement of reliance, not as involving legal sanction for the unenforceable agreement, but as having the same *raison d'être* as restitution—that of remedying injustices left when the statute denies enforcement to the oral contract.

So far as the cases are concerned, there are at least two decisions granting reimbursement for the plaintiff's reliance on an oral contract, under circumstances such that it would involve considerable temerity to construe the relief granted as "restitution." In *McCrowell v. Burson*,¹³⁰ the plaintiff recovered for expenditures in preparing to perform an oral contract to build a house for the defendant when the defendant later refused to permit the plaintiff to undertake the actual work of construction. The recovery was rested on a contract "implied in law." In

other means of limiting recovery (the notions of causality and foreseeability, for example) which might render unnecessary a resort to any limitation giving the appearance of being too directly derived from the terms of the oral contract. The problem here discussed must be distinguished from the question whether the plaintiff's right to restitution is limited by the expectation interest. See 2 WILLISTON, CONTRACTS (2d. ed. 1936) §536.

129. "A renders services as a missionary in Africa in return for B's promise to educate A's children. B commits a total breach. A can get judgment [in a suit for restitution] for the reasonable value of his services . . ." RESTATEMENT, CONTRACTS, (1932) §348, illustration 2.

130. 79 Va. 290 (1884).

Huey v. Frank,¹³¹ after entering an oral contract for the lease of the plaintiff's premises, the defendant requested certain expenditures by the plaintiff (for "lettering," telephone connections, and window shades) to fit the premises for his occupancy. When the defendant refused to accept the premises under the oral contract, the plaintiff was permitted to recover reimbursement for these expenditures. It will be noted that both cases were decided before the profession had been penetrated by the modern learning of quasi contracts, with its emphasis on "unjust enrichment."

It must be admitted that the decisions just discussed stand opposed by a number of cases which have refused reimbursement for reliance on a contract made unenforceable by the statute.¹³² It would be a mistake, however, to judge the extent of the legal protection accorded the reliance interest exclusively by a reference to the cases in which the problem is made explicit. Here, as elsewhere, the reliance interest seems to prefer to travel incognito. It is probable that cases openly reimbursing detrimental reliance are rare simply because it is so easy to reach substantially the same result by other methods—methods which seem to involve less violence to traditional conceptions.

The first of these methods lies in the notion that "part performance" or reliance may "take the contract out of the Statute of Frauds." What this notion means in its broadest form is simply that when an oral contract has been seriously relied on, it becomes enforceable.¹³³ The notion that reliance or "part performance" may take the place of a writing finds application in the doctrine of equity that the vendee's going into possession and making payments or erecting improvements will take a

131. 182 Ill. App. 431 (1913). In addition to *McCrowell v. Burson* and *Huey v. Frank*, two rather numerous classes of cases might have been cited here as involving a recognition that the reliance interest on the oral contract is entitled to judicial protection: (1) cases which may somewhat dubiously be classed as "restitution" cases,—see notes 145-147, *infra*; (2) cases where a plaintiff who has relied on a contract for the sale of land is permitted to recover reimbursement for his change of position,—see note 141, *infra*. The first group of cases are here excluded because of the uncertainty of their classification; the second, because they represent a limitation on, rather than an extension of, judicial intervention in the case of oral contracts, since in most jurisdictions the plaintiff becomes entitled to specific performance where he has (in certain defined ways) relied on the oral contract.

132. *Butler v. Shehan*, 61 Ill. App. 561 (1895); *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900 (1913); *Dowling v. McKenney*, 124 Mass. 478 (1878); *Banker v. Henderson*, 58 N. J. Law 26, 32 Atl. 700 (Sup. Ct. 1895); *Cocheco Aqueduct Association v. Boston & Maine R. R.*, 59 N. H. 312 (1879).

133. It is recognized that when courts speak of "part performance" they do not necessarily use the term in a restrictive sense, and that they often actually treat as "part performance" acts of reliance which are not "performance" at all. See, for example, on the equity doctrine of part performance applied to land contracts, *RESTATEMENT, CONTRACTS* (1932) § 197, comment b.

contract to sell land out of the statute;¹³⁴ in the rule that a conveyance of land makes the vendee liable for the orally promised price;¹³⁵ in the view that an oral contract not to be performed within a year becomes enforceable so soon as one side is performed;¹³⁶ in the cases holding that an oral agreement fixing a disputed boundary becomes enforceable so soon as it has been acted upon;¹³⁷ in the rule that where an oral contract has altered a written contract within the statute, certain uses of the original written contract are excluded so soon as the oral agreement has been relied on;¹³⁸ and—so far as the decisions, at least, are concerned—in many other situations.¹³⁹ By classifying, and thus isolating, its individual applications, the textbooks make a strenuous effort to keep the notion that reliance may take the place of a writing from achieving an indefinite field of application—with what indifferent success even a cursory inspection of the digests will reveal.¹⁴⁰

Where the various doctrines of "part performance" are applied, the recovery is normally of the expectation interest.¹⁴¹ It is quite under-

134. RESTATEMENT, CONTRACTS (1932) § 197.

135. *Id.* § 193(3). This result is reached though the conveyance is made, at the request of the defendant, to a third person. *Birch v. Baker*, 85 N. J. L. 660, 90 Atl. 297 (1914).

136. RESTATEMENT, CONTRACTS (1932) § 198.

137. *Id.* at § 196.

138. *Id.* at § 224.

139. See, for example, the numerous cases extending "the equity doctrine of part performance" to acts in reliance on the oral contract which do not take the form of a taking of possession and making payment or erecting improvements. Cases of this sort will be found collected in AMERICAN LAW INSTITUTE, COMMENTARIES ON CONTRACTS RESTATEMENT No. 4 (1928) 13-30; (1933) 13 B. U. L. REV. 312; (1931) 16 IOWA L. J. 448.

See, also, cases holding that a contract to adopt is removed from the effect of the statute when the foster child is taken into the home. 2 C. J. S., title, "Adoption of Children" § 26(b).

See, further, cases holding that "part performance" of a contract to sell land takes the contract out of the statute "in law" as well as "in equity," thus making possible a recovery of damages. The cases are collected in (1932) 16 MINN. L. REV. 446. § 197 of the RESTATEMENT OF CONTRACTS limits the effect of the doctrine of "part performance" to equitable relief.

140. It is true that in these "part performance" cases the motive of protecting the party who has relied is sometimes mixed with, or even superseded by, other considerations. Obviously, in many of the cases there is the additional motive of preventing unjust gain. In some cases, furthermore, "part performance" is considered as serving an evidentiary function, thus offering a substitute for the required writing. Pound, *The Progress of the Law, 1918-1919, Equity* (1920) 33 HARV. L. REV. 929, 933 *et seq.* It is enough for our purposes, however, to note that in many of the cases the predominant motive is avowedly to protect the party who has changed his position, and that, in any event, the various doctrines of "part performance" are phrased broadly enough to furnish a substantial vent for the judicial impulse to compensate detrimental reliance.

141. In several of the southern states, however, the courts have limited their intervention in the case of "partly performed" land contracts to reimbursing the plaintiff

standable why this should be so. In the first place, the apologetics of judicial intervention here employed demands this result. If part performance does indeed "take the contract out of the statute," then there is no reason to deny the remedies which would be available if the contract were in writing. So far as the "equity doctrine" of part performance of land contracts is concerned, the fact that specific performance avoids all difficulties of estimation, and is, in any event, the normal remedy in equity, serves also to explain the readiness with which this relief is granted.

Closely allied to the various "doctrines of part performance," though enjoying less prestige with the textwriters, is the notion that reliance by one party on an oral contract may "estop" the other from "setting up" the statute.¹⁴² Here, even more clearly than in cases of "part performance," the fundamental motive is the protection of the reliance interest, though the recovery apparently is here also measured by the expectation interest—if for no other reason, because this result is again the one most consistent with the apologetics of judicial intervention.

The most interesting method which has been developed for protecting the reliance interest in the case of contracts made unenforceable by the statute lies, however, in an expansion of the notion of restitution.¹⁴³ We called attention earlier to the shifting line of division between the restitution and reliance interests.¹⁴⁴ The notion of restitution occurs in its "purest" form in the case of a tangible benefit conferred directly by the plaintiff on the defendant—as where A pays \$1000 to B for a conveyance of land, and, failing to get the land, is allowed to recover his \$1000. Here two motives for judicial intervention are inextricably

for his reliance. See Pound, *The Progress of the Law, 1918-1919, Equity* (1920) 33 HARV. L. REV. 929, 936; Wilhoit, *The Statute of Frauds and Part Performance of Land Contracts in Kentucky* (1934) 22 KY. L. J. 434; (1922) 1 N. C. L. REV. 48.

In *Reynolds v. Reynolds*, 74 Vt. 463, 52 Atl. 1036 (1902), the court held that a plaintiff who had, through "part performance" of a land contract, become entitled to specific performance might, if he chose, sue at law for the reasonable value of work done in performing the contract.

142. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds* (1931) 79 U. OF PA. L. REV. 440; (1931) 44 HARV. L. REV. 1147; (1931) 29 MICH. L. REV. 1075; (1932) 16 MINN. L. REV. 446.

143. It is true that an expansion of the concept "unjust enrichment," similar to that about to be described, has also enlarged the remedy of restitution where the contract is in writing. Since, however, in the case of written contracts the reliance interest receives abundant judicial recognition on its own account, the exact location of the line which separates the reimbursement of reliance from the restitution of benefits is here, at the most, a matter of definitional convenience. On the other hand, where the reliance interest has to be smuggled in under the cloak of restitution, the definition given unjust enrichment is a matter of real importance, since it actually marks the limits of judicial intervention.

144. See p. 71, *supra*.

mixed: making the plaintiff whole, and making the defendant disgorge. These two motives are, in varying degrees, present wherever the defendant through the breach of an agreement secures a gain for himself. But the notion of gain is capable of indefinite expansion, and by a process of diluting the concept "benefit" or "enrichment," it becomes possible to extend restitution over a very broad field. Though the remedy of restitution, however expanded, may thus be made to appear to remain the same—simply because its formal definition does not change—there is no reason to suppose that the controlling incentives to judicial intervention remain constant throughout this process of expansion. As the "benefit" received by the defendant becomes more ethereal, the rôle in the total judicial motivation which is properly assignable to a desire to prevent the defendant from keeping an unjust gain becomes increasingly less, until the point is finally reached where it must be assumed to disappear altogether. An attenuation of the concept "benefit" means, therefore, at least an increasing emphasis on the reliance interest (making the plaintiff whole), and it may mean that the protection of that interest has become the exclusive *raison d'être* of judicial intervention.

In cases of the type under consideration, an expansion of the scope of restitution has been accomplished principally in two ways; in the first place, by substituting for "benefit" the notion of "bargained-for act."¹⁴⁵ In some cases, this seems a very reasonable refinement, not at all inconsistent with the original purpose (or rather, *purposes*) of restitution. For example, if A contracts to have built on his land a house of fantastic design which actually decreases the market value of the lot, it seems fair to say that he has received a benefit, though his assets, as viewed by a banker, have actually diminished. But when we find that through this concept of the bargained-for act it becomes possible for the plaintiff to secure restitution because he remained idle,¹⁴⁶ or spent money in improving his own property,¹⁴⁷ we begin to doubt whether in cases of this sort the desire to take a windfall away from the defendant can really be a significant part of the motive for judicial intervention.

145. RESTATEMENT, CONTRACTS (1932) § 347 (" . . . performance . . . for which the defendant bargained").

146. *Randolph v. Castle*, 190 Ky. 776, 228 S. W. 418 (1921), (1921) 5 MINN. L. REV. 567. Actually, the court in this case did not proceed upon a theory of restitution, but went on the simple ground that the plaintiff's loss through unemployment should be "borne by the defendant, the one who caused it." For this reason, the case might very well have been cited along with *McCrowell v. Burson* and *Huey v. Frank*, at 389-390, *supra*, as a decision openly protecting the reliance interest. Since, however, it appeared by the terms of the oral agreement that the plaintiff's idleness could be regarded as a "bargained-for act," we have listed it conservatively with cases of restitution. As this case illustrates, the courts by no means make the sharp distinction between kinds of relief which is to be found in the textbooks and in the Restatement.

147. *Bank v. Magruder*, 77 Fla. 235, 81 So. 440 (1919).

The second extension of the notion of restitution, which is in some aspects a corollary of the first, is that where the plaintiff has performed a bargained-for act, his recovery is measured not by the defendant's enrichment, but by his own detriment.¹⁴⁸ If the purpose of restitution is indeed, as it is defined in the Restatement, to compel the defendant "to return to the plaintiff the value of any performance that he has received,"¹⁴⁹ it seems odd that this value should be measured at the point of departure instead of at the point of arrival.

This expansion in the scope of restitution has not escaped previous observation.¹⁵⁰ The comments elicited have been to the effect that the cases carry the remedy of restitution beyond the field of the "true quasi-contractual obligation,"¹⁵¹ and into the field of "indemnification sounding in tort."¹⁵² The question of the "true nature" of the obligation is, happily, not relevant to our purposes. Our concern is with a more mundane problem: 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, in whatever form their intervention may be clothed.

Indefinite Contracts. Where the terms of a contract are too indefinite to make it possible to grant the plaintiff the expectancy or its value, will

148. As Williston states it, the rule generally prevailing is that "the plaintiff's measure of restitution is based . . . on the reasonable value of what he has done," the "reasonable value" being in turn measured, not by the defendant's benefit, but by "the plaintiff's detriment from the performance which he has rendered." 2 WILLISTON, CONTRACTS (2nd ed. 1936) § 536. It should be noted that this method of measurement has been applied occasionally in cases where the acts done by the plaintiff were not bargained for, or even requested, by the defendant. Thus, it has been held that one in possession of land under an oral contract to purchase may recover against the defaulting vendor reimbursement for expenditures made on his own initiative, without reference to the enhancement in the value of the land which they effect. *Dreier v. Sherwood*, 77 Colo. 539, 238 Pac. 38 (1925); *Clark v. Davidson*, 53 Wis. 317, 10 N. W. 384 (1881); *Miller v. Metz*, 103 Wis. 220, 79 N. W. 213 (1899). But see *Bendix v. Ross*, 205 Wis. 581, 585, 238 N. W. 381, 382 (1931), (1932) 8 Wis. L. Rev. 87.

149. § 355, comment *b*; cf. § 347, comment *b*, and see p. 89, *supra*.

150. AMERICAN LAW INSTITUTE, RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT, TENTATIVE DRAFT No. 1 (1935) 272, speaks of "cases where a contract was unenforceable because of the Statute of Frauds and restitution was allowed to the person performing, some of which [cases] cannot be supported on the ground of unjust enrichment." See also Costigan, *Implied in Fact Contracts and Mutual Assent* (1920) 33 HARV. L. REV. 376, 392; (1928) 26 MICH. L. REV. 942; Comment (1931) 44 HARV. L. REV. 623; (1932) 8 Wis. L. Rev. 87.

151. (1932) 8 Wis. L. Rev. 87, 90.

152. Comment (1931) 44 HARV. L. REV. 623, 627.

a recovery measured by the reliance interest be permitted? The paucity of cases renders an answer in general terms difficult. There are to be discerned in this field, however, tendencies toward a protection of the reliance interest analogous to those discussed in connection with contracts within the Statute of Frauds. A close parallel to the various doctrines of "part performance" under the Statute of Frauds is to be found in cases in which it is held that reliance on a contract may remove the objection of indefiniteness.¹⁵³ Though this view of the effect of reliance is usually rested on the theory that reliance traces the contour of the contract (*cf.* the evidentiary function of "part performance" under the Statute of Frauds), it has also been placed on the simple ground that the need to reimburse detrimental reliance justifies a court in running a hazard of uncertainty which would otherwise be avoided.¹⁵⁴ There is also observable in the cases dealing with indefinite contracts the same extension of the notion of restitution found in the Statute of Frauds cases;¹⁵⁵ and at least one case granting reimbursement for expenditures made in reliance on a contract of indefinite terms has squarely repudiated the notion that the recovery must be rested on a "benefit" received. This is the case of *Kearns v. Andree*,¹⁵⁶ in which the vendor under a defectively drafted contract to sell a house and lot was permitted to recover against the defaulting vendee the cost of alter-

153. 1 WILLISTON, CONTRACTS (2nd ed. 1936) § 49.

154. *Morris v. Ballard*, 16 F. (2d) 175 (App. D. C. 1926). In the case cited the reliance involved (the making of improvements by a lessee on the faith of an option to purchase) had no tendency to remove the uncertainty of the contract (which related to the terms of payment under the option).

155. *Wyman v. Passmore*, 146 Iowa 486, 125 N. W. 213 (1910); *Von Reitzenstein v. Tomlinson*, 249 N. Y. 60, 162 N. E. 584 (1928); (1928) 26 MICH. L. REV. 942; Comment (1931) 44 HARV. L. REV. 623, 625.

156. 107 Conn. 181, 139 Atl. 695 (1928), 59 A.L.R. 599 (1929), commented on in (1928) 26 MICH. L. REV. 942. Though the court in this case repudiated the notion that unjust enrichment is a *sine qua non* of recovery, it stopped short of granting full protection to the reliance interest, since it excluded from compensation expenses incurred by the plaintiff in refitting the premises for a second purchaser after the defendant had refused to go on with the contract. If in fact these expenses would have been incurred had no contract with the defendant been entered, obviously they should not be included in the plaintiff's recovery. But there is some reason to suppose that they consisted at least in part of the cost of undoing the special alterations made for the defendant, and the court rested its objection, not on the ground that these expenses were not caused by the defendant's contract or his breach, but on the view that to allow such items "would be, in effect, to permit a recovery on an unenforceable contract."

In certain early Pennsylvania cases (cited and discussed note 167, *infra*) a recovery of the reliance interest was allowed on indefinite contracts to adopt or "treat as my own child." This rule has subsequently been swallowed up by a later rule that even when a contract to adopt is definite in its terms recovery thereon is limited to the reliance interest.

ing the premises to conform to certain requests made by the vendee after the contract had been entered.

The cases discussed later¹⁵⁷ where a contract is terminable at the will of one or both parties may also be considered as relevant to the subject of this section, since such contracts are indefinite with respect to the time of their duration.

BARGAINS RELATING TO A SUBJECT MATTER NON-COMMERCIAL IN NATURE

The fact that an arrangement entered into by two persons can be construed as a "bargain" throws little light on its social and institutional background. The notion of reciprocity permeates human society, and there are few relations entered voluntarily by individuals—whether economic, political, or "social"—in which an element of exchange or barter may not be discerned. That it would be inappropriate to apply to many of these relationships the rules developed to regulate commercial transactions is obvious. It is, however, a gross simplification of the problem presented by "social" and "moral" agreements to assume a clean split between those promises which are "legally binding" and those which are without legal effect.¹⁵⁸ Two complicating variables prevent any such sharp dichotomy. In the first place, the "binding" effect of a promise is a matter of degree, proceeding on an ascending scale which embraces, in order, the restitution, reliance, and expectation interests. In the second place, it is obvious that the commercial or non-commercial quality of an agreement is also a matter of degree. As we approach gradually the pattern of the business bargain, and as the need for legal intervention correspondingly increases, the judicial recognition of that need may be expected to reflect a hierarchic division of contract claims, the various interests finding recognition in the order of their urgency.

There are, no doubt, agreements so remote from the considerations which surround the bargain of commerce that any enforcement of them—even to the extent of the restitution interest—would properly be denied. To be placed in this class are probably many of the agreements made between husband and wife concerning their domestic affairs.¹⁵⁹ On the

157. See p. 414 ff., *infra*.

158. In dealing with the problem of "moral agreements," the texts make no distinction between contract interests; they assume that there either is, or is not, "a contract." See, for example, 1 WILLISTON, CONTRACTS (2nd ed. 1936) § 21.

159. The great variety of theories on the basis of which legal sanction has been denied such agreements stands in strange contrast to the regularity with which enforcement is refused. *Balfour v. Balfour* [1919] 2 K. B. 571 (the parties had no intention to create a legal obligation); *Ryan v. Dockery*, 134 Wis. 431, 114 N. W. 820 (1908) (consideration lacking); *Miller v. Miller*, 78 Iowa 177, 35 N. W. 464 (1887) (the

other hand, the special urgency of the restitution interest, and its priority over the other contract interests, seems to be reflected in certain cases where a defendant has promised some recompense in return for domestic services rendered by a member of his household. There is a tendency in these cases to compel the promisor to pay for benefits actually received. In many of the cases it is difficult to tell on which of two theories the court is proceeding: (1) that the liability is quasi-contractual, the defendant's promise of compensation serving merely to rebut the implication of a gift which would otherwise arise from the relationship of the parties;¹⁶⁰ or (2) that the suit is "on" the contract, the defendant's promise, whatever its actual terms, being construed as an undertaking to pay the reasonable value of the services received.¹⁶¹ Actually, of course, the scope of the defaulting promisor's liability remains the same whichever juristic construction is adopted—a circumstance which suggests that an analysis in terms of promissory interests is of greater significance than the conventional treatment in terms of the "nature" of the liability, and what it is "on."

Our concern here is primarily with those cases where judicial intervention is broad enough to include a protection of the reliance interest. The contracts about to be discussed stand, as it were, on the threshold of commerce. They are, on the one hand, too "social" in nature to be given the full legal sanction accorded business agreements. On the other hand, they are close enough to the pattern of the commercial bargain to demand that those who have relied on them be made whole. Before discussing these cases, however, it should be remarked that they probably do not adequately indicate the extent to which the reliance interest has received recognition—covertly—in the field of "moral" bargains. There are, for example, many contracts which are enforced, even to the extent of the expectancy, after they have been relied on, which would, in all probability, have been branded as mere "social arrangements" without legal effect had suit been brought on the executory agreement. This is probably true of cases like *Hamer v. Sidway*,¹⁶² where

agreement was without consideration and against public policy); *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271 (1888) ("the fellowship of the wife is not an article of trade between husband and wife").

160. Certain of the cases are so construed in WOODWARD, *QUASI CONTRACTS* (1913) § 51.

161. See the cases collected in Note (1908) 11 L. R. A. (N. S.) 873, 904-906. In his discussion of cases of this general type, Havighurst discerns as the factor most prominently influencing the judicial attitude toward a claim to payment for household services "the degree to which the work has benefited the defendant." Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations* (1932) 41 YALE L. J. 386, 390.

162. 124 N. Y. 538, 27 N. E. 256 (1891).

a nephew, who had, in reliance on a promise by his uncle, denied himself for five years the pleasures of alcohol, nicotine, and blasphemy, was allowed to recover the promised reward. It is certainly doubtful whether such a contract would have been enforced as an executory agreement.

Attorney-Client Contracts. The legal status accorded the attorney's claim to his fee will depend upon the attitudes which surround the legal profession itself. The rule adopted may vary all the way from that followed in England—that the barrister has no legal claim against his client for his fee, not even in quantum meruit¹⁶³—to that prevailing in the majority of the American states, which (so far as the measure of damages is concerned) treats the contract of attorney and client like any other business agreement. Out interest here lies in an intermediate view expressed in *Martin v. Camp*¹⁶⁴ and adopted in a number of jurisdictions. According to this view the client may discharge an attorney employed for a particular litigation at any time, with no other liability than that of reimbursing the attorney for what he had done at the time of his discharge. Though the decisions do not clearly define the scope of the client's liability, it apparently extends to the reliance interest of the attorney,¹⁶⁵ and remains restricted to that interest until the attorney

163. 2 HALSBURY'S LAWS OF ENGLAND (2d ed. 1931) 518.

164. 219 N. Y. 170, 114 N. E. 46 (1916). For a bibliography on the problems presented by *Martin v. Camp*, see ARANT, CASES ON THE AMERICAN BAR AND ITS ETHICS (1933) 357, note 12. The rule of *Martin v. Camp* is not applied to contracts of general retainer. *Id.* at 176, 114 N. E. at 48; *Greenberg v. Remick & Co.*, 230 N. Y. 70, 129 N. E. 211 (1920); *Roxana Petroleum Co. v. Rice*, 109 Okla. 161, 235 Pac. 502 (1925). It is obvious that such contracts more nearly approach the pattern of the ordinary contract of employment than does the agreement engaging an attorney for a particular litigation.

165. A suit by the discharged attorney would not usually involve any distinction between the restitution and reliance interests. However, in view of the rule generally prevailing in this country (which gives the attorney the lost profit), it seems a safe assumption that the relief granted under *Martin v. Camp* would, in a proper case, be extended to include items of reliance not benefiting the client. This is perhaps the intended meaning of the enigmatic dictum in *Martin v. Camp* to the effect that the rule limiting recovery to quantum meruit does not apply "where the attorney in entering into such a contract has changed his position or incurred expense." *Id.* at 176, 114 N. E. at 48. Probably the court meant merely to say that if there were items of reliance deserving reimbursement which were not subsumable under restitution ("quantum meruit"), the recovery would be broadened to include them. To attribute to the court's language the meaning that if the attorney has in any way changed his position in entering the contract, he becomes entitled to the expectation interest, would involve an absurdity condemned in *Comment* (1920) 30 YALE L. J. 514, 519, and embraced in *Roxana Petroleum Co. v. Rice*, 109 Okla. 161, 235 Pac. 502 (1925). Such an interpretation of the dictum would leave no field of application for the rule of the case in view of the fact that an attorney always "changes his position" in entering a contract with the client at least to the extent of foregoing the opportunity of representing the other side. (Whether reliance of this sort should be regarded as compensable on its own account is a debatable point; see p. 413, *infra*).

has, without meanwhile being discharged, fully performed his side of the agreement, when the client becomes liable to pay the promised fee.

Contracts to Adopt and to Marry. Reference has already been made¹⁶⁵ to the rule, firmly established in Pennsylvania, which limits recovery by the foster child on a contract to adopt to the reliance interest.¹⁶⁷

Apparently it is only in the common law that the betrothal has been given, among other attributes favorable to the plaintiff, the status of a business bargain. Civil law countries know nothing of our rule which defines the damages recoverable for breach of such a "contract" so as to include the lost profit—here euphemized as "the worldly advantage of the marriage."¹⁶⁸ There are signs that this rule is, even with us, due for

166. At p. 65, *supra*.

167. In the cases where this rule originated, the limitation of recovery to the reliance interest was rested in part on the fact that the particular contracts involved were indefinite in their terms. *Graham v. Graham's Executors*, 34 Pa. 475 (1859); *Pollock v. Ray*, 85 Pa. 428 (1877); *Krauss v. Rohner*, 172 Pa. 481, 33 Atl. 1016 (1896). Apparently the first application of the rule to a contract not subject to the objection of indefiniteness was in *Sandham v. Grounds*, 94 Fed. 83 (C. C. A. 3rd, 1899), a case purporting to apply Pennsylvania law. Since that decision, the rule has been treated by the Pennsylvania court as applicable to cases where the terms of the contract were definite. *In re Carroll's Estate*, 219 Pa. 440, 68 Atl. 1038 (1908); *Davies' Estate*, 289 Pa. 579, 137 Atl. 728 (1927). The holding in *Sandham v. Grounds*, *supra*, and the language in *In re Carroll's Estate*, make it clear that the relief is conceived of as extending to items of reliance not subsumable under the restitution interest. While apparently the only explicit recognition of this rule is to be found in Pennsylvania, there are, apparently, no cases squarely contrary to it,—that is, cases measuring money damages on a contract to adopt by the value of the expectancy. Though many states grant what Pennsylvania refuses; that is, "specific performance" of the contract against the dead foster parent's estate, this remedy is, as we have pointed out before (note 15, *supra*), subject to special considerations, and it by no means follows from the fact that this relief is given that damages would be measured by the expectancy if suit were brought against the foster parent during his life, or that specific performance would be granted if the foster parent had repudiated the contract during his life.

168. The GERMAN CIVIL CODE limits liability generally to reimbursement for expenses reasonably paid or incurred in contemplation of the marriage. The liability also extends to such losses as the giving up of an employment, but is held by the courts not to include the loss of other opportunities of marriage. Where seduction has taken place, recovery by the woman may include "non-property" elements, principally the damage to her prospects of marriage. BUSCH, *DAS BÜRGERLICHE GESETZBUCH* (1929) §§ 1298-1300, and the annotations thereto. The liability seems to be construed as contractual, but where the engagement was induced by fraud or other wrongful means a "tort" action may be brought under § 826. *Id.* at § 1298, note 6.

The Swiss law is substantially the same as the German, except that seduction is not necessary to broaden the recovery to include "non-property" elements, the wider recovery being permitted where the breach of the engagement works "serious injury" to the innocent party in his "personal relations." *ZIVILGESETZBUCH* §§ 91-93.

The FRENCH CIVIL CODE omits any mention of the contract to marry, but judicial practice gives the recovery about the same scope as in Switzerland. Where in Germany and Switzerland the breach is actionable, if it causes damage, unless excused, in France

an early demise. It is not clear, however, that the proper cure for the situation has been adopted by those legislatures which have recently abolished the action for "breach of promise" altogether.¹⁶⁹ A sensible compromise of the interests involved would suggest allowing the aggrieved person at least reimbursement for expenditures made in expectation of the marriage.¹⁷⁰ Whether the recovery should extend to the whole reliance

the breach itself must be reprehensible; the formula generally employed is that there be at least "*caprice ou légèreté*." The "theory" of the action seems not to be consistently defined by the courts. While often referred to as delictual, the Court of Cassation has applied to the recovery the (not inflexible) requirement of written proof contained in § 1341 of the Code, a Section generally applicable only to suits for breach of contract. The liability has sometimes been brought under the theory of the "*abus des droits*," the contract being viewed as terminable at the will of either party, the repudiating party being liable only for an abusive exercise of his power of termination. 2 *PLANIOL ET RIPERT, DROIT CIVIL* (1926) §§ 80-87.

The law of other civil law countries seems, where recovery is permitted at all, not to deviate radically from that of the three countries mentioned.

169. The statutes are reviewed in Feinsinger, *Legislative Attack on "Heart Balm"* (1935) 33 *MICH. L. REV.* 979. The author suggests that an action for "special damages" may possibly survive these statutes. *Id.* at 1000.

170. This proposal has often been made. See 1 *VERNIER, AMERICAN FAMILY LAWS* (1931) 29; Feinsinger, *Legislative Attack on "Heart Balm"* (1935) 33 *MICH. L. REV.* 979, 985; report adopted by the Association of the Bar of the City of New York, as reported in the *New York Times*, Feb. 14, 1935, p. 44, col. 2. New York Assembly Bill No. 1848, which passed the Assembly but was never voted on in the Senate, limited recovery to "actual expenses paid or incurred in contemplation of marriage." Feinsinger, *loc. cit. supra* at 985, note 38. A similar bill was carried in the House of Commons in 1879. White, *Breach of Promise of Marriage* (1894) 10 *L. Q. REV.* 135, 142.

McCormick proposes that we "eliminate as an item of damage the one contractual element" (*i. e.*, the lost profit) and place the liability "purely on the basis of compensation for harm inflicted by a tort." *MCCORMICK, DAMAGES* (1935) 405. In curious contrast to this proposal are criticisms of the common law because it "anomalously applied the tort rather than the contract rules of recovery" to breach of promise suits. Feinsinger, *loc. cit. supra* at 983; see also Wright, *The Action for Breach of the Marriage Promise* (1924) 10 *VA. L. REV.* 361, 370. Incongruous as these two lines of criticism may seem, there is an element of truth in both of them,—a circumstance which demonstrates that the real need is for a redefinition of the interests protected, without reference to the labels "contract" and "tort." If, however, one wishes to insist on assigning a "theory" to the liability, the preferable theory would seem to be that of a contractual liability for the reliance interest (excluding the loss of other opportunities to marry). By defining the action as contractual, the elimination of punitive damages could be accomplished without any backsliding from the demands of juristic elegance; with both punitive damages and the lost profit excluded, evidence of the defendant's wealth would become inadmissible, and the general atmosphere of the trial would be such as to restrain the much-feared wayward impulses of the jury. If it were thought wise to make compensable injury to the plaintiff's reputation, this would perhaps best be conceived as a distinct claim, in order to prevent the procedural implications of this item of recovery from contaminating the whole trial.

interest, including the loss of other opportunities of marriage, is more doubtful.¹⁷¹

Contracts Affecting the Right of Privacy. Still another type of contract on which recovery may properly be limited to the reliance interest is suggested by the French case of *Dumas v. Liébert*.¹⁷² In that case Alexandre Dumas père had posed for photographs in the company of *la demoiselle* Adah Menken. No charge was made by the photographer, and under the custom prevailing at the time there arose from Dumas' acceptance of copies of the photograph an implied agreement that the photographer might sell other copies to the public. The court held, however, that the agreement was subject to the condition that Dumas might withdraw his consent to the sale of his photograph on reimbursing the photographer for expenditures made in reliance on the contract. A note by the Reporter suggests that such a result is properly reached, because of the peculiar subject matter of the contract, even if it had been expressly agreed that the photographer might sell an unlimited number of copies to the public.

THE MEASURE OF RECOVERY UNDER SECTION 90 OF THE RESTATEMENT¹⁷³

Section 90 of the Contracts Restatement¹⁷⁴ provides in effect that serious reliance may under some circumstances make "binding" a promise for which nothing has been given or promised in exchange. The vital question of the precise extent to which the promise is "binding" is left without explicit answer in the Restatement. In a discussion before the American Law Institute, however, the Reporter took the position that the promise, if enforced at all, must be enforced to the full extent of the expectation interest.¹⁷⁵ Even without this insight into the legislative intention, one might perhaps have deduced this result from the systematics of the Restatement. The chapter on damages nowhere regards the reimbursement of detrimental reliance as offering in itself

171. See p. 417-418, *infra*.

172. Paris, May 25, 1867, Sirey, Lois et Arrêts, 1868, 2, p. 41.

173. For previous discussions of this problem see pp. 64, 69, 80, *supra* and 420, *infra*.

174. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Where an act or promise has been "bargained for and given in exchange for the promise" (§75), §90 has no application, and the promise is binding without reference to the equitable qualifications ("... of a definite and substantial . . .," "... if injustice . . .") contained in §90.

175. See the quotation given *supra*, at 64, note 14.

a proper concern for contract law.¹⁷⁶ Furthermore, when Section 90 itself states that the reliance which makes the promise "binding" must be of a "definite and substantial character," some criterion is obviously assumed by reference to which it may be decided whether the reliance in a particular case is sufficiently "definite and substantial." Since no other criterion is stated, the natural inference is that the reliance must be so "definite and substantial" as to justify an enforcement of the whole promise. If the intention had been merely that the reliance should be "definite and substantial" enough to justify a law suit, one would expect to find that meaning made explicit.

When we attempt to discover what measure of recovery has actually been applied by the courts to promises coming within Section 90, we encounter the difficulty that there was, prior to the Restatement, no recognition in judicial opinions that there was any such rule of law as that stated in Section 90. As the Reporter has recognized, Section 90 makes explicit a principle which had previously lain implicit in widely scattered groups of cases.¹⁷⁷ It is to these groups of cases, therefore, that we must turn to determine the "measure of recovery" under Section 90.

One line of decisions which entered into the synthesis achieved in Section 90 is that having to do with the situation where a man has acted in reliance on a gratuitous license concerning the use of land. On the one extreme, there are cases denying that the unbargained-for reliance of the licensee can give him any right to a continuance of the license, and at the other, there are cases conferring on the licensee a permanent easement.¹⁷⁸ Between these two extremes, however, are to be found a substantial number of cases in which an intermediate view has been taken. In addition to frequent judicial statements that the license may be revoked if compensation is made to the licensee for his change of position,¹⁷⁹ there are cases holding that the natural destruction of

176. § 333 provides for the reimbursement of expenditures in performing or in preparing to perform a contract, but this relief is construed as founded on the expectation interest (see p. 90, *supra*), and § 333 is, in any event, not so phrased as to include reliance of the type involved in cases coming under § 90, since such reliance can scarcely be considered "performance of the contract" or "necessary preparation therefor." (See p. 95, *supra*).

177. See the Explanatory Note to § 90 printed in AMERICAN LAW INSTITUTE, RESTATEMENT OF CONTRACTS, Chapters 1-7 (1928) 245 *et seq.*

178. The more important decisions are discussed in CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (1929) 46-51.

179. "Nor is it necessary, in order to do justice . . . to hold that the license is not revocable at the pleasure of the licensor; but in such cases equity may impose, as a condition of such revocation, that the licensee may remove his improvements, if that can be accomplished without material loss, or, if not, that the licensor shall make just compensation therefor, as the circumstances of the case may require." *Flick v. Bell*,

the structure erected by the licensee terminates the license,¹⁸⁰ and cases limiting the injunctive relief granted against the licensor to the natural life of the improvements made in reliance on the license.¹⁸¹ In these decisions the scope of judicial intervention is set by the reliance interest, or at least the relief granted represents the most feasible approximation of that interest.¹⁸²

Another ingredient of the synthesis in Section 90 consists of a "large body of cases ordinarily classified under the heading of 'Waiver.'"¹⁸³ Naturally, where waiver is involved the problem of the interest protected is not a matter of the measure of damages, since damages are not sought for "breach" of the waiver. The question is rather, how completely does a waiver dispense with the condition or defense waived; is its scope in this respect set by its terms or by the extent of the benefited party's reliance? The theory of the Restatement seems to be that the legal effect of a waiver is measured by its own terms so soon as it has given rise to a serious change of position.¹⁸⁴ It is very doubtful whether the cases bear this out. On the contrary, the scope which the courts give the waiver seems to be determined, not by the expectation it created, but by the need for saving the relying party from prejudice.¹⁸⁵

5 Cal. Unrep. 206, 210, 42 Pac. 813, 815 (1895). See also *Ferguson v. Spencer*, 127 Ind. 66, 68, 25 N. E. 1035, 1036 (1890); *Oster v. Broe*, 161 Ind. 113, 64 N. E. 918 (1902), (1903) 16 HARV. L. REV. 226; *Johnson v. Bartron*, 23 N. D. 629, 137 N. W. 1092 (1912), (1913) 26 HARV. L. REV. 376; and cases discussed in Note (1900) 49 L. R. A. 497, 525-526.

180. *Allen v. Fiske*, 42 Vt. 462 (1869); *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805 (1901); see *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102, 109 (1840); *Carleton v. Redington*, 21 N. H. 291, 307 (1850); Comment (1911) 11 COL. L. REV. 76, 78.

181. *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84 (1891); *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358 (1888); *Phillips v. Cutter*, 89 Vt. 233, 95 Atl. 487 (1915).

182. Of course, in informal arrangements of the sort here involved the exact scope of the expectancy may be difficult to determine, and it would be possible to reconcile the decisions cited in the last two notes with Professor Williston's view by interpreting the informal license as being intended only to last for the life of any structure which might be built, thus making the expectation interest identical with the reliance interest. This construction of the relief granted would, however, scarcely be consistent with the reasoning in the decisions cited, where the whole emphasis was placed on the need for compensating the plaintiff's change of position. Thus in *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358 (1888), the court gave as its reason for protecting the plaintiff's right during the life of the aqueduct that "no use short of that would give the oratrix the full benefit of her expenditure." *Id.* at 710, 15 Atl. at 362.

183. Quoted from the Explanatory Note cited note 177, *supra*.

184. "If the expression of willingness is or has become a binding promise before a retraction, the promisor's duty is determined by that promise. Any reliance thereafter is immaterial, though it may have been action in reliance on the promise that made it binding." § 297, comment a. See also §§(2); *cf.* § 300, illustration 2.

185. Thus, in contracts calling for a series of performances over a period of time, it is held that a waiver of defects or delays in performance, though binding to the

Tending in the same direction as the two groups of cases just discussed are those which have held that an estoppel *in pais* imposes only a liability for the reliance interest.¹⁸⁶ In view of the difficulty of distinguishing between promises and representations, and in view of the fact that it is doubtful whether such a distinction is, in any event, worth taking, those decisions are all relevant to the present discussion. Two of them, which involve "representations" clearly promissory in nature, are directly in point.¹⁸⁷

extent relied on, may be retracted as to the future by giving reasonable notice. See the cases collected in Notes (1920) 9 A.L.R. 996, 1002-1006, (1921) 14 A.L.R. 1209, 1233-1236, (1931) 75 A.L.R. 609, 620-623; and RESTATEMENT, CONTRACTS (1932) § 300, illustration 2. Of course, in these cases the waiver arises by implication from the repeated acceptance of defective or delayed instalments, and it is possible to argue that no expectation of a continuance of the indulgence for any particular length of time is justified. However, the reasoning in the decisions indicates that the courts are not, in any event, concerned with the question what expectation was justified, but entirely with saving the relying party from prejudice. Thus, in *Portland Ice Co. v. Connor*, 32 Pa. Super. Ct. 428 (1907), a provision for weekly settlement had for more than a year been, in the court's words, "a dead letter," until the seller attempted to revive it by notice to the buyer. The court did not inquire whether the seller's conduct justified the buyer in believing that the benefit of this provision had been permanently surrendered by the seller, but instead held that it was a question for the jury whether the seller had given the buyer sufficient time to accommodate himself to the situation created by the demand for weekly payments.

Furthermore, the same principle seems to be applied in cases where a definite time is set for the duration of the waiver. If a debtor's rights (in a pledge, for example) are subject to forfeiture upon failure to pay his debt by a stated time, even though the creditor in advance of the due date grants a definite extension of time, it has been held that the creditor may, by giving reasonable notice, demand payment before the period of extension has expired. *Thayer v. Meeker*, 86 Ill. 470 (1877); *Scheersschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34 (1898); *Rosenthal v. Brown*, 247 N. Y. 479, 160 N. E. 921 (1928). Here the debtor's prejudice through reliance (subjecting himself to a forfeiture) is cured, not by giving him the expectancy (a definite extension), but by giving him a chance to undo the effects of his reliance. § 311 of the Restatement seems, in its implications, contrary to the cases just cited. That section provides that a party granting an extension may revoke the extension by giving reasonable notice *where the extension granted was of indefinite duration*. The implication seems to be that if the extension is for a definite period, the waiver cannot be withdrawn. If, as his treatment of *Rosenthal v. Brown*, *supra* (see 3 WILLISTON, CONTRACTS (2nd ed. 1936) § 689, note 14) might indicate, Professor Williston's interpretation of cases of this sort is that there is really no detrimental reliance involved in subjecting one's self to a forfeiture if the court prevents that forfeiture by requiring reasonable notice, then the qualification contained in § 311 seems to lose intelligibility altogether. In other words, unless § 311 means to lay down a rule contrary to *Rosenthal v. Brown*, *supra*, it is difficult to find any explanation for the qualification it contains.

186. See note 193, *infra*.

187. *Decatur v. Cooper*, 85 N. H. 250, 157 Atl. 706 (1931), and *G. S. Johnson Co. v. Nevada Packard Mines Co.*, 272 Fed. 291 (D. Nev. 1920), discussed in note 193, *infra*.

There are, of course, many cases in which, without discussing the problem at all, courts have assumed that a promise made enforceable by unbargained-for reliance should permit as broad a recovery as any contract. In a good many of these cases, the reliance and expectation interests would yield the same measure of relief.¹⁸⁸ Where there is a discrepancy between the two interests, a court would wisely choose in many situations to protect the expectation interest.¹⁸⁹ Certainly one would not be disposed to quarrel with this result in the charitable subscription cases, or in those cases where by granting specific performance of the promise all difficulties of evaluation can be avoided.¹⁹⁰

What is needed is not a "rule of recovery" for Section 90, but a recognition that the remedy must be adapted to the needs of the particular situation. Certainly no inflexible measure is suggested by the decisions. Courts have, in fact, done at least four different things about promises which have given rise to unbargained-for reliance: (1) nothing, (2) granted restitution, (3) reimbursed the promisee's losses through reliance, (4) secured for the promisee the expectancy or its value. All of these possibilities are recognized in the Restatement except the third. Section 90 itself leaves the court a discretion to refuse relief altogether. Section 347(1)(b) provides for a restitution of benefits.¹⁹¹

188. As in *Devecmon v. Shaw*, 69 Md. 199, 14 Atl. 464 (1888), where the promise was, in effect, to reimburse reliance; and in *Siegel v. Spear*, 234 N. Y. 479, 138 N. E. 414 (1923), where the promise was to insure and the reliance consisted in not insuring.

189. It is difficult to agree with the position apparently taken by Gardner, that damages for breach of a promise coming within § 90 should always be limited to reimbursing reliance. Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 22-23; criticized in (1935) 49 HARV. L. REV. 336, 337. Also questionable is the historical observation made by Gardner, which attributes the previous reluctance of courts to interfere in cases of this sort to an erroneous assumption that they had to give all or nothing, and which attempts to explain the growth of the principle of § 90 as arising from a discovery that relief might be limited to the indemnification of loss. Certainly the six cases cited have little tendency to prove this thesis, in view of the fact that in all but one of them the expectation and reliance interests would yield the same measure of damages.

190. The most common case where specific performance is granted is where, in reliance on an oral gift of land, the donee has gone into possession and made improvements. Even in this situation, however, it has been held that the donee's only remedy is a suit to obtain reimbursement (*Usher's Ex'r v. Flood*, 33 Ky. 552 (1886)), the recovery being apparently measured by the cost of the improvements rather than the benefit to the donor (*Hamilton v. Hamilton*, 5 Litt 29 (Ky. 1824)). This view would perhaps generally be taken in those states which have held that part performance of a contract for the sale of land does not take it out of the Statute of Frauds. See note 141, *supra*. Even in jurisdictions granting specific performance, it has been stated that this relief will not be granted where compensation can be made in damages. *Ballard v. Ward*, 89 Pa. 358 (1879); see also the Massachusetts cases cited in 2 WILLISTON, CONTRACTS (2d ed. 1936) § 494, note 12.

191. In his discussion before the American Law Institute (PROCEEDINGS, Vol. IV, Appendix (1926) 91), Professor Williston recognized that a court would properly be

Only the reimbursement of losses through reliance is excluded—and that because this kind of relief is, forsooth, not “contractual.”

LIABILITY FOR MISREPRESENTATION

Estoppel in pais. Does the liability which results from an estoppel *in pais* extend to the expectation interest, or is it confined to the reliance interest? If the estoppel mechanism be taken at its face value, it leads to a recovery measured by the representee's expectation. There is, furthermore, a strong judicial impulse to take the mechanism at its face value. To adopt a measure of recovery inconsistent with the “theory” of the liability would tend to undermine faith in the doctrine of estoppel itself, and might place the court under the embarrassment of having to find a new explanation for the liability. The writers have generally assumed without discussion that the liability extends to the expectation interest.¹⁹²

On the other hand, an inquiry into the purposes underlying the mechanism reveals no reason why the liability should not, in a proper case, be restricted to the reliance interest, and in a substantial number of decisions the relief granted has been so limited.¹⁹³ It is probable, how-

more liberal in awarding restitution than it would be in “enforcing the promise,” and argued that the existence of this more generously granted relief justified limiting rather severely the recovery granted under § 90. Yet § 347(1)(b) provides that restitution may be had only where the promise might have been enforced under § 901 (It should be recalled, however, that Professor Corbin was Reporter for the chapter containing § 347).

192. 3 WILLISTON, CONTRACTS (1920) § 1514; Wigmore, *The Scientific Role of Consideration in Contract*, LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY (1935) 641, 650; BIGELOW, ESTOPPEL (6th ed. 1913) 710. Since the brief discussion in EWART, ESTOPPEL (1900) 191-195, there has been almost no recognition in the literature that any such problem as the “measure of recovery” in estoppel exists. Cf. the casual references to the problem in Comments (1913) 26 HARV. L. REV. 349, 350, (1924) 38 HARV. L. REV. 239, 243.

193. In the following cases, where a debtor was estopped to plead the defense of usury against an assignee of the claim, his liability was limited to reimbursing the assignee for the amount actually paid for the claim: *Campbell v. Nichols*, 33 N. J. Law 81 (Sup. Ct. 1868); *Payne v. Burnham*, 62 N. Y. 69 (1875); *Miller v. Zeimer*, 111 N. Y. 441, 18 N. E. 716 (1888); *Cross v. Smith*, 85 Hun 49, 32 N. Y. Supp. 671 (1895); *Verity v. Sternberger*, 62 App. Div. 112, 70 N. Y. Supp. 894 (1901).

In the following decisions (not involving usury) the effect of the estoppel was restricted to accomplishing a reimbursement for change of position: *G. S. Johnson Co. v. Nevada Packard Mines Co.*, 272 Fed. 291 (D. Nev. 1920); *Lindsay v. Cooper*, 94 Ala. 170, 11 So. 325 (1891); *Conway Nat. Bank v. Pease*, 76 N. H. 319, 82 Atl. 1068 (1912); *Decatur v. Cooper*, 85 N. H. 250, 157 Atl. 706 (1931); *Wormser v. Rubinstein*, 89 Misc. 388, 151 N. Y. Supp. 911 (1915); *Parsons v. Lipe*, 158 Misc. 32, 286 N. Y. Supp. 60 (1933), *aff'd*, 243 App. Div. 681, 277 N. Y. Supp. 426, 428 (1935), *aff'd*, 269 N. Y. 630, 200 N. E. 31 (1936).

ever, that in most of the cases where an estoppel is applied the representor has been compelled to make good the expectancy created by his assertion.¹⁹⁴ The factors which should influence the choice between the two measures probably do not differ radically from those discussed in the section on deceit.

The Agent's Implied Warranty of Authority. Whether the agent's liability on an implied representation of authority should extend to the expectation interest or be confined to the reliance interest is made de-

Dicta limiting the effect of the estoppel to the reliance interest are to be found in *Peacock v. Horne*, 159 Ga. 707, 727, 126 S.E. 813, 823 (1925); *Phillipsburgh Bank v. Fulmer*, 31 N. J. Law 52, 56 (Sup. Ct. 1864); *Green v. Stevenson*, 54 S. W. 1011, 1015 (Tenn. 1899); *In re Romford Canal Co.*, 24 Ch. Div. 85, 93 (1883); cf. *Baker v. Wood*, 157 U. S. 212, 219 (1894). In 2 SMITH'S LEADING CASES (8th Am. ed. 1885) 861, it is said that "equity will not carry the estoppel of an admission farther than is requisite to indemnify the person whom it misled," with a possible implication that the rule may be different in law. In Comment (1924) 38 HARV. L. REV. 239, 243, the assertion is made that the weight of authority "limits recovery to the amount lost by reason of the misrepresentation."

Statements are to be found in many cases to the general effect that the whole function of an estoppel is to prevent loss and that it cannot be made "an instrument of gain." But in most of the cases where this statement occurs there is in fact no showing of detrimental reliance and therefore no occasion for even a restricted application of the estoppel. See, for example, *Adler v. Pin*, 80 Ala. 351, 355 (1885); *Little v. Union Oil Co.*, 73 Cal. App. 612, 621, 238 Pac. 1066, 1069 (1925); *Llano Granite & Marble Co. v. Hollinger*, 212 S. W. 151, 153 (Tex. Comm. App. 1919).

The view that the scope of the estoppel should be limited by the reliance interest does not necessarily entail the conclusion that one who claims by transfer from the original representee can obtain no more than reimbursement for his own reliance. To protect adequately the original representee it may be necessary to confer on his transferee all of the rights he possessed, even though the result is to give the transferee more than is necessary to make him whole. Thus in *Gamble v. School District*, 146 Fed. 113 (C. C. A. 8th, 1906) (reversing 132 Fed. 514 (C. C. N. D. Iowa, 1904), (1905) 18 HARV. L. REV. 302), the plaintiff bought for \$50 an irregularly issued municipal bond for which his assignor had paid the par value, \$1000. It was held that since his transferor was entitled to assert an estoppel against the issuing school district to the full amount of the bond, he succeeded to all the rights of his transferor.

194. This result flows so naturally from the "theory" of the estoppel that in most cases it is reached without any discussion at all. Among the few decisions where the problem of the interest protected has been raised, and resolved in favor of the expectation interest, may be listed *Tobey v. Chipman*, 95 Mass. 123 (1866); *Fall River Nat'l Bank v. Buffinton*, 97 Mass. 498 (1867); *Colonial Theatrical Enterprises v. Sage*, 255 Mich. 160, 237 N. W. 529 (1931); *Park v. Hudson*, 154 Minn. 471, 192 N. W. 112 (1923); *Grissler v. Powers*, 81 N. Y. 57 (1880); *Ewing v. Dominion Bank*, 35 Can. S. C. 133 (1904) (criticized in Alward, *A New Phase of Equitable Estoppel* (1905) 19 HARV. L. REV. 113). In *Colonial Theatrical Enterprises v. Sage*, *supra*, however, the court said, "The doctrine [of estoppel], being equitable, is dependent upon the circumstances, and the relief ranges from mere reimbursement to putting the party entitled to its benefit in the same position as if the thing represented was true." (*Id.* at 171, 237 N. W. at 532.)

pendent by the German Civil Code upon the good faith of the agent.¹⁹⁵ Our own decisions yield a less explicit answer to the question.

The older cases tended to hold the agent whose promise failed to bind his principal as if he had made a contract on his own behalf, the principal's name being, in imagination, "stricken out as mere surplusage."¹⁹⁶ This view of the "nature" of the agent's liability would seem naturally to measure the third party's recovery by the expectation interest; but, as was remarked in one New York decision,¹⁹⁷ most of the cases proceeding on this theory were cases where the plaintiff had already performed his side of the contract. Granting the expectancy (the contract price) in such cases is, of course, the most natural and the most certain method of reimbursing the plaintiff's reliance.

The theory of the agent's liability now prevailing rests it upon a tacit contract by the agent, "the implied warranty of authority." From this "theory" of the liability, nothing follows automatically concerning the measure of damages. The implied contract may be merely a contract to make good out-of-pocket losses, or it may be viewed as a contract to assuage the third party's disappointment in not receiving the expected right against the principal. Though the view that the agent's liability on the implied warranty extends to the expectation interest has the support of the Agency Restatement,¹⁹⁸ and a considerable number of decisions,¹⁹⁹ at least one case, *Tedder v. Higgin*,²⁰⁰ has squarely lim-

195. § 172. The liability of the agent may not in any event exceed the expectation interest. See *supra*, p. 75, n. 36; p. 80. The reduced recovery applies in favor of the agent who ought to have known of his lack of authority, but who in fact believed that he was authorized to enter the transaction in question. See BUSCH, DAS BÜRGERLICHE GESETZBUCH (1929), annotation to § 172. In other words, good faith rather than negligence determines the scope of the liability—an approach which seems justifiable in view of the difficulty of applying the concept of negligence to the agent's mistakes concerning the extent of his authority.

196. The cases are collected in Notes (1926) 42 A. L. R. 1310, (1929) 60 A. L. R. 1348.

197. *Hegeman v. Johnson*, 35 Barb. 200, 206 (N. Y. 1861). The court remarks that the older cases in New York were either "cases of executed agreements—sales completed by delivery," or involved written contracts. Of course, many—probably most—of the cases involving written contracts (which would normally be promissory notes) were also cases of executed agreements.

198. RESTATEMENT, AGENCY (1933) § 329, comment *j*.

199. The cases will be found collected in (1915) 25 YALE L. J. 156; Note (1911) 34 L. R. A. (N. S.) 518.

200. 65 Fla. 153, 61 So. 244 (1913). In this case—significantly a suit for the lost profit on an executory contract—the court said that whether the agent's liability "be *ex contractu* or *ex delicto*, the gist of the action is the misrepresentation made by the defendant to the plaintiff's pecuniary injury; and the purpose of the action is compensation . . . Where a misrepresentation has been relied on by the plaintiff to his detriment, the measure of recovery is not the difference between the plaintiff's pecuniary

ited the third party's recovery to the reliance interest. A similar limitation may be implied in the Massachusetts view which rests the agent's liability on "tort."²⁰¹

Deceit. In view of the assumption, so frequently made, that any liability explicitly directed toward the reimbursement of reliance must rest on "tort" rather than "contract," it is a trifle disorienting to discover that in the case of the only tort which could possibly present a problem of choosing between the reliance and expectation interests, namely, the tort of deceit, the majority of the decisions have applied the "contract" measure of recovery.²⁰² Actually, the hierarchic order of the three interests—here we may call them "interests in an affirmation"—is nowhere more clearly exemplified than in the deceit cases. The restitution interest is, of course, the most liberally protected, restitution being granted even where the misrepresentation was innocent.²⁰³ The principle of hierarchic division is carried a step farther in California; in that jurisdiction the quality of the fraud involved may determine whether the defrauder is held for the expectancy or only to reimburse losses through reliance.²⁰⁴

condition if the representation had been true, and his condition under the actual facts, but rather the difference between what the plaintiff had before he acted on the representation and what he had afterward." *Id.* at 157, 61 So. at 245.

201. *Mendelsohn v. Holton*, 253 Mass. 362, 149 N. E. 38 (1925), (1926) 35 YALE L. J. 625. It has been held that the expectation interest cannot be recovered where the suit against the agent is in tort. *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788 (1888); *Flora v. Hoeft*, 71 Colo. 273, 206 Pac. 381 (1922).

202. *McCORMICK* cites seven jurisdictions as applying the out-of-pocket-loss rule, and twenty-eight jurisdictions as applying the loss-of-bargain rule. *DAMAGES* (1935) § 121. He urges that choice between the two rules be made discretionary. *Id.* at 454.

203. This rule is usually stated in the form that "rescission" may be had for innocent misrepresentations. The need for analysing the problem in terms of the interest protected, instead of in terms of the form of the remedy, becomes apparent, however, when the two quotations following are contrasted. "It is not necessary in order that a contract may be rescinded for fraud or misrepresentation that the party making the misrepresentation should have known that it was false . . . For . . . it would be unjust to allow one who has made false representations even innocently, to retain the fruits of a bargain induced by such representations." 3 WILLISTON, *CONTRACTS* (1920) § 1500. "In rescission, the plaintiff's expenditures under the transaction are naturally recoverable . . ." *McCORMICK, DAMAGES* (1935) 458, citing cases where on a rescission the plaintiff was allowed reimbursement for expenditures not benefiting the defendant. Actually, the whole notion that the suit to obtain restitution is founded on a "rescission" represents a superfluous visualization of the remedy which serves often to obscure the considerations of policy which ought to dictate the conditions and scope of legal intervention. (See pp. 72-73, *supra*).

204. In *Hines v. Brode*, 168 Cal. 507, 511, 143 Pac. 729, 730 (1914) the court declared that the loss-of-bargain rule is "the extreme rule" to be "applied only in clear cases and upon just terms." See, since that case, granting the expectancy, *Porter v. Hilton*, 214 Cal. 705, 298 Pac. 501 (1931); and limiting recovery to the reliance interest, *Williams v. Spazier*, 134 Cal. App. 340, 21 P. (2d) 470 (1933).

Probably other jurisdictions will come to this view in the course of time as "hard" cases, in both directions, arise to test their established standards. As in other fields of the law, various factors may properly influence the choice between the two interests: the degree of fault involved in the misrepresentation; considerations of administrative convenience; the extent to which the representations were made in "the course of business" and hence are subject to the considerations of policy surrounding business bargains; whether the representations were express or implied.

THE LEGAL EFFECT OF THE REVOCATION OF AN OFFER OR PROMISE

Corresponding to the notion that no middle ground is possible in the enforcement of promises, is the assumption that the revocability of a promise is a matter not subject to gradation. A promise is either revocable, or irrevocable. Which it is, will depend on whether it had become, at the time of the attempted revocation, a contract. Contracts are irrevocable; promises which have not become contracts are mere offers and are revocable.

A tacit acceptance of this simplistic conception of the problem of revocability lies at the root of a problem in legal theory much discussed in our law. This is the problem conceived to be presented by the case where A, without exacting any counter-promise, undertakes to pay a reward for some act by B, and then revokes his promise after B has begun, but before he has completed, the requested act. Because it is assumed that there can be no "contract" until B has completed the act, strict legal theory is supposed to dictate that A shall retain an unqualified power of revocation even after B has entered upon performance of the act. The conclusion thus deduced is so stupidly harsh that few commentators have been inclined to defend it.²⁰⁵

The cure prescribed by the Contracts Restatement for this hitch in legal theory is a radical one, which imports into the notion of revocability no unaccustomed nuances. According to Section 45, so soon as B has begun the requested act,²⁰⁶ A becomes bound to the full extent of the

205. "It seems difficult on theory successfully to question the [necessarily unqualified?] power of one who offers to enter into a unilateral contract to withdraw his offer at any time until performance has been completed by the offeree, but great injustice may arise if the offeror's power of revocation continues so long." WILLISTON, *CONTRACTS* (2d. ed. 1936) § 60.

206. The language of § 45 makes A's promise binding on him so soon as "part of the consideration requested . . . is given or tendered." The word "given" is, however, apparently not intended in any sense of physical transfer; "to give part of the consideration" seems merely to mean, "to begin the requested act."

expectancy, just as if the contract were bilateral. A's promise is no longer an "offer," but has become a "contract," with all the consequences (including irrevocability) thereto attaching.

In some situations, this solution of the problem may not be unjust. But where the promisee's reliance before revocation was not extensive, and is readily convertible into money, this treatment of the case will seem unduly drastic when it is recalled that the obligation imposed is unilateral, and that the promisor had no means of compelling the promisee to complete the act if he had chosen to abandon it. In such a case an obvious compromise of the interests involved suggests imposing on the revoking promisor a liability to reimburse the promisee's reliance. If this view were adopted, A's promise would remain "revocable" even after B had acted on it, in the sense that A might, by timely revocation, relieve himself from liability for the expectation interest; it would, on the other hand, have become "irrevocable" in the sense that A would, despite his attempted revocation, remain liable to reimburse B's reliance. Stated differently, A's revocation would operate simply to *reduce* the scope of his possible liability to B.²⁰⁷

The explanation for the failure of the Restatement to recognize this middle course does not lie in an oversight, since Professor Williston had previously considered this approach to the problem and had rejected it—not because it was necessarily unwise or inexpedient, but apparently because it was not "permissible," as lacking sufficient "warrant" in our law.²⁰⁸ It is true that there are apparently no cases involving situations

207. The value of the gross expectancy would properly be considered as limiting B's claim to reimbursement for reliance. See the discussion pp. 75-80, *supra*.

208. 1 WILLISTON, CONTRACTS (2d ed. 1936) §60AA. Professor Williston also intimates that this mode of treatment has been rendered superfluous by the more drastic cure adopted in §45 of the CONTRACTS RESTATEMENT. This is true only on the assumption that courts will be willing to adopt the cure there prescribed. (See p. 412 *infra*). In the section cited, Professor Williston associates what we have called "the middle course" with Ihering's theory of *culpa in contrahendo*. By calling Ihering's view a "tort" theory Professor Williston makes it seem very remote from anything in our law. Actually, Ihering was most insistent that his suggested liability for the reliance interest be classified as contractual. It is true that he rested the liability on the notion of "fault" (*culpa*), but this was merely because the civil law treats the liability resulting from breach of contract generally as founded on "fault." (If this notion of fault seems Pickwickian to the common lawyer, let him consider the "fault" which we often derive from the doctrine of *res ipsa loquitur*.) Curiously enough, Ihering would not have applied his theory to what we would call an offer for a unilateral contract where the offer was made to a single individual. In the civil law, such an offer would become a binding "contract" on "acceptance" by the promisee, *i.e.*, on his simply stating that he acceded to its terms. This notion of "accepting" a unilateral promise without either doing an act or communicating a counter-promise seems strained to common law lawyers, and has been criticized in Europe. Nevertheless, it was accepted by Ihering, and his analysis of the case where one individual promises a reward to another for

clearly falling within Section 45 where the liability arising on revocation has been measured by the reliance interest.²⁰⁰ On the other hand, the diversity in judicial treatment of the problem of Section 45—some cases denying liability altogether, others imposing it on a variety of grounds²¹⁰—renders it questionable whether our law on this point warrants any particular conclusion at all. Certainly it would be difficult to say that the

some act would, therefore, have been: (1) if the promisee "accepted" the promise, a contract yielding the expectancy would result; (2) if the promisee began performance without first "accepting," he would be acting unreasonably and would be entitled to nothing in the event of revocation. Ihering, *Culpa in contrahendo* (1860), printed in 1 *GESAMMELTE AUFSÄTZE* (1881) 327, 364. Ihering's theory could apply to the revocation of an offer for an act only in a situation where it would be unreasonable to expect the offeree to accept the offer before beginning the act. The principal situation of this sort recognized by Ihering was that of an offer to the public, and in the case of such an offer (*e.g.*, a prize contest) he proposed that the revoking offeror be made liable to reimburse the reliance of those who had acted on the promise. This suggestion was adopted in the SWISS CODE OF OBLIGATIONS § 8, but the GERMAN CIVIL CODE (§ 658) apparently provides that the offer becomes irrevocable (*i.e.*, yields the expectation interest) so soon as it has been relied on. (See, however, BUSCH, *DAS BÜRGERLICHE GESETZBUCH* § 658, n. 1, where the Section is interpreted to mean that the offeror may withdraw his offer at any time before completion of the act—an interpretation which seems to contradict directly the language of the section.) If its language be accepted at face value, the effect of § 658 of the GERMAN CODE corresponds to § 45 of the RESTATEMENT, except that it is, for reasons already stated, confined to offers made to the public.

209. Though, as Professor Williston himself states (*CONTRACTS* (2d ed. 1936) § 60AA, n. 4), *G. Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476 (1912) comes close to being in point. In that case the plaintiff had taken the defendant's order for a quantity of fertilizer and it was held that the exercise of an expressly reserved option to cancel the order imposed on the plaintiff a liability to reimburse the defendant for "the damages he had sustained up to the time he had notice that the plaintiff declined to fill his order, to wit, for the cost of preparing the plant bed, and for the higher priced labor employed and held in readiness." (*Id.* at 442, 76 S. E. at 478.) The situation involved in this case differs from that contemplated in § 45 only in the fact that the reliance was here, in the terminology adopted earlier (see p. 78, *supra*), "incidental" rather than "essential" in nature. It is difficult to see why this should make any difference in the treatment of the case.

210. See the cases discussed in 1 WILLISTON, *CONTRACTS* (2d ed. 1936) §§ 60-60A. In many of the cases imposing liability, a not particularly temerarious implication of fact will suffice to make the contract bilateral; in a good many others (particularly the real estate broker cases) it is arguable that the requested act had been completed before revocation. Furthermore, in the real estate broker cases considerations of administrative convenience might, in any event, justify measuring damages by the expectancy, *i.e.*, the promised commission.

Cf. "The courts have reached results [in the case of offers for unilateral contracts] which cannot be arrived at by applying the rule of Section 45. But they may be justified by considering the fair implication of each situation, custom included." Whittier, *The Restatement of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441, 451.

cases compelled either the theory,²¹¹ or the result, adopted in Section 45. One suspects that the middle course was excluded, not because specific decisions stood in the way, but because it would have introduced complexity into the notion of revocability, and perhaps also because, as in the drafting of Section 90, it was assumed that no liability measured by the promisee's reliance can be "contractual."

Outside the field covered by Section 45, a considerable number of cases indicates that a liability limited to the reimbursement of reliance may result from the timely revocation of a promise which, if it were left unrevoked, might have imposed a liability for the expectation interest.²¹² Even the repudiation of a bilateral contract may have this effect. Such a repudiation destroys the plaintiff's power to continue performance at the cost of the defendant; forfeits, in other words, his claim to the gross expectation interest, and remits him to compensation for reliance and the lost profit. If on ceasing performance, an opportunity to make a similar profit elsewhere is open to him, he is bound to embrace this, and, losing even his claim to the lost profit, is remitted entirely to the reliance interest.²¹³

211. The theory of § 45 (see comment *b*) is that the promisor makes an implied promise to keep his offer open pending performance, and that this promise becomes binding through the offeree's reliance in beginning the requested act. So far as the decisions are concerned, this theory finds support in only one or two judicial intimations. (See 1 WILLISTON, CONTRACTS (2d ed. 1936) § 60A, n. 6.) The theory of the implied promise not to revoke could, in any event, be made to yield the reliance interest—in two different ways: (1) Since the promise not to revoke is "implied" (that is to say, in this situation is a mere restatement of the justice of the case) it would be just as easy to imply a promise not to revoke without making compensation as to imply a promise absolute in terms. (Cf. the discussion of *Dumas v. Liebert*, *supra*, at 401); (2) Even if the promise be considered unqualified in terms, it is a promise made binding by unbargained-for reliance (since *beginning* the act can hardly be intended as a bargained-for equivalent) and hence may, under decisions discussed *supra*, at 402 ff., be considered as imposing a liability for the reliance interest only. This theory of the implied promise is, however, quite superfluous, since to escape it one needs only to recognize that a single promise may impose one liability, if left unrevoked, and a different liability, if timely notice of revocation is given. This analysis makes it unnecessary to imagine into existence two promises in order to explain two liabilities.

212. See, in addition to the cases discussed here, the previous reference to the New York rule concerning attorney-client contracts, p. 398, *supra*. Something roughly corresponding in effect to a qualified power of revocation might be recognized in actions of deceit. Thus, in jurisdictions applying normally the loss-of-bargain measure of recovery, it might be held that an early disclosure of the facts would operate to relieve the party guilty of misrepresentation from any liability beyond that of reimbursing reliance. In *Hines v. Brode*, 168 Cal. 507, 143 Pac. 729 (1914), the principal reason given for remitting the plaintiff to the reliance interest was the fact that he had discovered the fraud while the contract was still "in large part executory."

213. See p. 61, *supra*. The rule of avoidable consequences would, no doubt, also be applied to § 45, but with the difference that in the cases likely to arise under that

A power of revocation qualified by what is approximately the duty of reimbursing reliance is also recognized in cases like *Offord v. Davies*.²¹⁴ There the defendant promised to stand as surety during a period of one year for all advances made to X. After the plaintiff had, in reliance on this promise, advanced sums to X, the defendant revoked his promise. Although the advances which had been made could have been construed as furnishing a consideration to make the whole promise binding, the court took a middle course and held that the defendant retained the power of revocation, subject to a liability for advances already made. Cases like *Offord v. Davies* are usually analysed as involving "standing offers" to enter a series of "separate contracts," and are treated as involving nothing more than the proposition that an unaccepted and unrelied-on offer may be revoked. Yet the promise of the surety in *Offord v. Davies* was not an "offer" in the sense that it was what the French call an *avant-acte*; it did not look forward to a further exchange of intention between the parties.²¹⁵ It was an "offer" only in the sense that the court held it to be a revocable promise. So far as the contention that the promise "contemplated" a "series of contracts," rather than "one contract," is concerned, this may be a good way of describing the effect of the decision, but certainly it cannot be pretended that laymen really contemplate in terms like these.²¹⁶ Actually, any distinction between cases like *Offord v. Davies* and cases coming within Section 45 (the "offer" for a "single unilateral contract") lies not in any difference in the intention of the parties, but in the relative ease with which, in the former class of cases, the promisee's reliance may be cut into separately compensable units. This being so, why should not the principle of *Offord v. Davies* be extended to the case of the "single contract" where part performance of the act can be readily compensated in money?

A clear illustration of a liability limited to the reliance interest arising on the revocation of a promise is to be found in cases involving con-

section there will seldom be a chance for the plaintiff to "mitigate" the claim to the lost profit (this would hardly be possible in the real estate broker or reward cases, for example), so that in practice the plaintiff would be less frequently remitted to the reliance interest under § 45 than in the case of the ordinary bilateral contract.

214. 12 C. B. N. S. 748 (1862); see 1 WILLISTON, CONTRACTS (2d ed. 1936) § 58. Though the liability of the revoking promisor in *Offord v. Davies* cannot be said to be limited to the reliance interest (since he would be bound to pay at the contract rate for acts of performance before his revocation), it does not include the profit lost on prevented future acts of performance, compensation for which is apparently compelled by § 45 of the RESTATEMENT in the cases coming under that section.

215. The word "offer" appears neither in the opinion of the court nor in the argument of counsel.

216. Section 44 of the RESTATEMENT provides in effect that the decision in *Offord v. Davies* will be followed wherever the case involves a "revocable offer contemplating a series of independent contracts by separate acceptances."

tracts made expressly terminable at the will of the revoking party,²¹⁷ and in cases involving contracts of indefinite duration.²¹⁸ In these cases,

217. *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 161 S. C. 487, 159 S. E. 825 (1931), discussed and approved in (1932) 17 CORN. L. Q. 479, criticized in (1931) 45 HARV. L. REV. 378; *Watkins Co. v. Rich*, 254 Mich. 82, 235 N. W. 845 (1931); *Texas Co. v. Northup*, 154 Va. 428, 153 S. E. 659 (1930). See also *G. Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476 (1912), discussed note 209, *supra*. In all of these cases the exercise of a power to terminate the contract was held to create what was in effect a liability to reimburse reliance. (In the *Philadelphia Storage Battery Co.* case the exact scope of the recovery was not defined, but the implications of the majority opinion seem to confine it to the reliance interest.) With the possible exception of the *Northup* case, in all of the cases cited the "contract" involved might have been classified technically as a mere "offer" because of the reserved power of cancellation. Though in the first three cases there was talk in the opinions of "fraud," it seems a reasonable inference that the only "fraud" consisted in revoking a promise after it had been relied on. In the *Katzenstein* case nothing was said about fraud. These cases indicate how inadequate is the usual analysis of the problem of "mutuality" (does the fact that a promise is "illusory" prevent "a contract" from arising?), and suggest the necessity for a re-examination of the problem in terms of the various contract interests. In the classification of cases, a disregard of the role which these interests play in the judicial process leads to a placing of decisions in false opposition to one another. Thus in (1931) 45 HARV. L. REV. 378, *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, *supra*, which allowed a claim for the reliance interest against the terminating party, is stated to be "inconsistent" with *Randall v. Michelin Tire Co.*, 137 Misc. 570, 244 N. Y. Supp. 44 (1930), which denied a claim to the lost profit.

Confirming the general tendency of the cases cited, though not involving the problem of revocation, are those cases where courts have held that even an express stipulation against legal liability does not necessarily protect an employer against a suit by his employee where the employer's promise of a bonus or other benefit (such as "free" insurance) has induced the employee to forego other employment and remain on the job. See Comment (1936) 34 MICH. L. REV. 700; (1936) 36 COL. L. REV. 996; (1935) 49 HARV. L. REV. 148. These cases also confirm the inference that the relied-on bilateral contract may receive a radically different judicial treatment than would have been accorded the executory agreement. As in cases like *Hamer v. Sidway*, discussed p. 397, *supra*, the fact that recovery is here measured by the expectation interest (a share in the promised bonus, for example) is explained simply by the fact that it would be impossible in any other way to measure the promisee's reliance in money terms; to give the expectancy here is the most natural and effective way of repairing the loss through reliance.

218. *Courier-Journal Co. v. Miller*, 20 Ky. L. Rep. 1811, 50 S. W. 46 (1899); *Garlock v. Motz Tire & Rubber Co.*, 192 Mich. 665, 159 N. W. 344 (1916); see *Meyer v. Pulitzer Pub. Co.*, 156 Mo. App. 170, 177, 136 S. W. 5, 7 (1911); *cf.* RESTATEMENT, AGENCY (1933) §§ 452-454. (It is not clear in these cases, or in the first four cited in the last section, that the recovery extends to the *entire* reliance interest. The *Garlock* case, *supra*, limited the recovery to the loss involved in selling a stock of goods which the defendant had required the plaintiff to keep on hand. The peculiarity of these cases lies in the fact that the expectation interest here (being non-existent, or, at least, indefinable) cannot serve its usual function in limiting recovery for reliance. In such cases, one may expect courts to develop other means of restricting the scope of recovery for losses through reliance. See note 56, *supra*.)

courts have not hesitated to impose, as the price of terminating the contract, a liability to reimburse the other party's reliance, if hardship would otherwise result from the termination.

Just as no single measure of damages is wise or even possible for all contracts, so the legal effect of a revocation cannot be defined in the same way for all situations. Assuming that the unrevoked promise will, when certain conditions are fulfilled, subject the promisor to a liability for the expectation interest, a revocation before those conditions have occurred may be given four different effects. The revocation may be held (a) to have no effect on the promisor's obligation other than that which results from the promisee's "duty to mitigate damages," or, it may be held effective to reduce the promisor's obligation to (b) a duty to reimburse reliance, or to (c) a duty to make restitution, or, it may (d) be regarded as relieving the promisor from liability altogether. Choice between these alternatives will be dictated in part by factors already discussed in other connections, including considerations of administrative convenience. There are, however, two considerations peculiar to the problem of the promisee's claim to the reliance interest in cases of revocation which deserve brief mention here.

In the first place, if the promisee could, by "accepting" the promise, have destroyed (better expressed, have reduced to minimum effect) the promisor's power of revocation, then it may be unreasonable for him to rely on the promise (which is here legally an "offer") before he has accepted it. His course of action is to accept, then rely. For this reason one would not ordinarily expect a court to impose any liability on the offeror who revoked an offer for a bilateral contract before it had been accepted. In this light, even an offer for a bilateral contract which is stated to remain open for a definite period may present a weaker case for imposing a liability on the revoking offeror than do the cases coming under Section 45, since in the cases involving a promise for an act there is nothing the promisee can do to bind the promisor except to perform the requested act as rapidly as possible. Where a contract is concluded by correspondence, the need for protecting the offeree's reliance will depend in part on the rules concerning the time when acceptance takes effect. If, as in the civil law generally, a posted acceptance takes effect only on receipt, then there may be an interval of time before a revocation can be received during which the offeree may need legal protection in his reliance.²¹⁹ In our law, since the posted acceptance normally takes effect on dispatch, a similar need does not exist.

219. Ihering considered that one of the situations most urgently demanding for its cure his theory of *culpa in contrahendo* was that of the offeree who dispatched his acceptance by post and thereafter changed his position before receiving a revocation which became effective before his acceptance arrived. *Op. cit. supra* note 208, at 402.

In the second place, where a promise is expressly made revocable, or is understood as a matter of business practice to be revocable, the expectancy created by it may be regarded as too insecure to make reasonable the promisee's reliance on it. There is always the chance that a court will say that the man who acts in reliance on a revocable promise does so at his own risk. The cases indicate, however, that the courts will not be deterred by this argument from interfering on behalf of the promisee in cases of hardship and oppression.

THE COMPENSABILITY OF GAINS PREVENTED THROUGH RELIANCE

Except in one or two instances, we have not called attention in this instalment to the question whether gains prevented in reliance on a promise would be compensated in those cases where a recovery founded on the expectation interest would be denied. This was simply because in most of the cases discussed the problem of recovery for this kind of injury was not presented. Though, as we have already pointed out,²²⁰ the reliance interest may be conceived to embrace, in some cases, profits lost as well as disbursements, it should be recalled that it is in the field of gains prevented that the reliance and expectation interests tend to lose their separate identities.²²¹ In many of the cases discussed, it is obvious that to broaden the recovery for the reliance interest to include compensation for all the gains prevented in entering the contract would be to defeat whatever policy may have dictated an exclusion of the expectation interest from legal protection. This would be true, for example, of contracts falling within the Statute of Frauds. On the other hand, it is not clear that in all cases a denial of the expectation interest would carry automatically the conclusion that gains prevented through reliance on the promise might not be recovered. In some cases, a distinction would perhaps be taken between the loss of specific opportunities for profit, and gains prevented which were claimed merely as "general damages." For example, if some consideration of policy were conceived to exclude from compensation "the lost profit" on a contract to marry,

The curious result is, then, that the need for imposing on the revoking offeror a liability to reimburse reliance which was perhaps most acute in the modern Roman law is obviated with us by the rule that acceptance takes effect on dispatch; while, on the other hand, the case where with us the need is most pressing (the offer for a unilateral contract) is taken care of in the civil law by the rule that the "acceptance" of such an offer operates to make it binding. See note 208, *supra*.

The interrelation existing between the problem of the revocability of an offer and that of the time when a posted acceptance takes effect is brought out in Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine* (1936) 36 *COL. L. REV.* 920, where also appears (923-924) a summary of the law in civil law countries concerning the revocation of offers.

220. See p. 55, *supra*.

221. See p. 74, *supra*.

the same consideration would, no doubt, affect also a claim for a generalized and undefined loss of other opportunities to marry, but it would not necessarily carry over to a claim for the loss involved in turning down a specific proposal of marriage. The field where this distinction could present an issue is, however, greatly reduced by the circumstance that in the only situation where general damages for gain prevented through reliance would normally be inferable or capable of satisfactory proof (i.e., where the subject matter of the contract is available on an open market) the inclination to deny protection to the expectation interest is at a minimum.²²² In practice, the problem of recovery for gains prevented through reliance will naturally arise, therefore, chiefly in claims for "special damages," except in those situations where it is the form rather than the subject matter of the contract which precludes recovery of the expectation interest—as in contracts within the Statute of Frauds.

Even if it were assumed that an exclusion of the expectation interest from legal protection carried with it a similar exclusion of all gains prevented through reliance, whether "special" or "general" in nature, there would still remain the difficulty of distinguishing between "losses caused" and "gains prevented." No hard and fast line of division is here possible. Even the loss of property is, in a sense, a gain prevented, since property, in one aspect, is merely a protected expectancy. The giving up of an employment legally terminable at will would probably appear to most persons as the loss of a value once possessed, yet how shall we define the distinction between such a "loss" and that caused when one foregoes an opportunity to make a favorable purchase of wheat on the open market? The one case looks like a bird in the hand that was taken away; the other, like a bird in the bush that was never caught. Yet in both the bird involved was merely an expectancy.²²³

THE CONSEQUENCES OF A WIDER RECOGNITION OF THE RELIANCE INTEREST

The cases discussed in this instalment show, we believe, that the contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does in the textbooks. There can be little question that this judicial recognition would be much enlarged if the textbooks were to abandon their present treatment of contract claims ("all or nothing") in favor of an analysis in terms of distinct contract interests such as is proposed here. This makes it necessary to consider whether a wider recognition of the reliance interest would be desirable.

222. See p. 62, *supra*.

223. Cf. the section headed "*Future Deals, Property and the Spot Market*" in Llewellyn, *What Price Contract?* (1931) 40 YALE L. J. 704, 727.

Naturally, a proposal to abandon the theory that there is only one kind of contract claim is likely to engender certain fears. The first of these would be that a too cordial reception into contract law of what Gardner has called "the tort principle"²²⁴ would blur the lines of division separating the different branches of the law. We have already sufficiently intimated our opinion that the breaking down of these departmental barriers would represent a distinct service to legal thinking. If these ancient boundaries were erased, it would become possible to analyse the general problem of the legal sanction to be given expectancies created by words or conduct in terms of the policies involved, and it would be perceived that these policies cut across distinctions in the "nature" of the obligation. This would in turn promote a desideratum already recognized,²²⁵—that the obvious (though generally unexamined) interrelations of contract, deceit, estoppel, and warranty be brought into some coherent pattern. Even, however, if one wishes to preserve intact the familiar landmarks, is there any reason why a liability to reimburse reliance on a promise should be regarded as anything but "contractual"? If one means by "contractual" a liability imposed because a promise was made and broken, then a liability to compensate losses incurred on the faith of a promise is as "contractual" as any other.

A second fear might be that the adoption of the analysis here proposed would threaten legal certainty. The assumption is very commonly made that legal certainty is necessarily promoted by limiting the alternative courses of action open to judges. Though the all-or-nothing approach may be harsh, it at least allows a man to know where he stands. This comforting supposition can be preserved only so long as one ignores the psychological realities of the judicial process. In fact, more often than not, the all-or-nothing theory introduces stresses (and with them, a fortuitous element) into the process of decision which can be eliminated only by the adoption of a more flexible scheme of legal sanctions.²²⁶

224. Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 22. Gardner recognizes, of course, that this "tort principle" is an integral part of the present law of contracts.

225. Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415; Wigmore, *The Scientific Role of Consideration in Contract*, LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY (1935) 641. Williston seems to assume that the policies affecting liability for the use of words are always the same; Wigmore, on the other hand, seems to assume that distinctions in these policies coincide with the present lines of division in terms of the form of the remedy. It is difficult to agree with either of these views. In a criticism of Williston's view, Whittier writes, "That [two] obligations arise from the use of words is no more conclusive for uniformity in the bases of the obligation than if both obligations arose out of the use of gasoline engines, one in a mill, the other on the highway." Whittier, *The Restatement of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441, 442, n. 5.

226. Cf. Fuller, *American Legal Realism* (1934) 82 U. OF PA. L. REV. 429, 431 *et seq.*

Still another fear might be that a wider recognition of the reliance interest would unduly broaden the field of legal intervention. This was the danger that Kohler had in mind when he wrote, in criticism of Ihering's theory of *culpa in contrahendo*, "Not every fruitlessly paid coach or street car fare demands legal redress."²²⁷ That the principle of compensating losses incurred in reliance on promises cannot be given an indefinite field of application must be admitted. Inconvenience suffered when another changes his course of conduct is a constant feature of life in society, and no judicial system would be equal to the task of carrying out the literal implications of the maxim, *nemo potest mutare consilium suum in alterius iniuriam*. Nor is it an entirely adequate answer to this objection to point out that people generally have sense enough not to bring suit for fruitlessly paid street car fares. Some *serious* reliance incurred even in *reasonable* reliance on *some* promises must probably go unredressed—at least, unless the word "reasonable" be made to forfeit its ordinary meaning. Yet certainly this problem of inclusion and exclusion permits of a more rational answer (or set of answers) than to say, as Section 90 of the Restatement, for example, asks us to say: "Either your losses must have been so great as to justify us in enforcing the whole promise, or you go without remedy."

The objection just stated—viewed, as it were, from its reverse side—reveals what is the most pressing need for a wider recognition of the reliance interest, a need which extends through all the cases discussed in this instalment. The objection to the all-or-nothing attitude is not simply that it often results in the plaintiff's getting *all* when *a part* would have made him whole. The more serious objection is that in those cases where a court balks at giving him *all*, he may get *nothing* when he urgently needed and deserved *a part*.²²⁸ This need makes it obvious that we cannot solve the problem of reimbursing reliance simply by converting the relied-on promise into a "contract" like every other contract. The need for compensating reliance must be treated as a distinct promissory interest, deserving recognition on its own account.

227. *Ueber den Willen im Privatrecht* (1889) 28 IHERINGS JAHRBÜCHER 166, 229. See also Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553, 579.

228. In *Phillipsburgh Bank v. Fulmer*, 31 N. J. Law 52 (Sup. Ct. 1864), the plaintiff, in reliance on a representation by the defendant that he owed \$2000 to the plaintiff's debtor, had commenced a proceeding to have this debt applied to his claim. The defendant then pleaded that he in fact owed nothing to the plaintiff's debtor. The court said, "If the estoppel could be so used as merely to charge the defendant with costs . . . that would be a legitimate use of it; but so to apply it as to charge the defendant with the payment of a large sum of money he does not owe . . . is to make it the means of working, and not of preventing, a serious injury." (*Id.* at 56.) Should not the court's doubt be resolved in favor of saying, "It *can* be so used"?