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## Contracts: Restitution as a Remedy for Breach

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the several states. It seems to be a subtle avoidance of the rule of *Erie R.R. v. Tompkins*,<sup>23</sup> which would permit the federal courts, in any instance absent a very recent state decision, to acknowledge *stare decisis* as but a guide post, and then reverse the highest state courts according to their own determinations. By replacing the discretion of the state court with its own, a federal court can effectively reverse a state supreme court. This raises several final points of inquiry. Will federal courts follow their own precedents in the future? Will they extend *Caporossi* to avoid *Erie R.R.* entirely? Will we return to the chaos of *Tyson's* rule? Will state high courts be bound by federal court reversals of the judgments?

MICHAEL D. BAUDHUIN

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**Contracts: Restitution as a Remedy for Breach—Plaintiff,** a professional engineer, entered into an oral agreement to provide plans and specifications for a proposed motel on land owned by the defendant. Relying upon defendant's representations and a plot survey provided by him, the plaintiff submitted preliminary plans for the proposed building which incorporated land not belonging to the defendant. This land was needed to provide parking facilities required by the city building code. The defendant's attempts to purchase additional property and to obtain a building permit were unsuccessful, and the defendant was unable to secure the necessary financing. As a result, the project was dropped. Plaintiff submitted a bill for services performed, and upon defendant's refusal to pay, the plaintiff sued for services rendered. *Barnes v. Lozoff*.<sup>1</sup> The Supreme Court of Wisconsin affirmed the lower court allowing plaintiff to recover the reasonable value of his services. The court held that there was no fault on the plaintiff's part in preparing the preliminary sketches and that such sketches were a part of the bargained-for performance, thus bringing the case within section 347 of the *Restatement of Contracts*.<sup>2</sup>

The city authority relied on by the court in *Barnes* suggests that the decision rests on restitution as a remedy for a breach of contract.<sup>3</sup> Restitution in this sense lies as an alternative remedy to a suit on the contract for damages. The purpose of this remedy is to restore the injured party to as good a position as was occupied by him prior to

<sup>23</sup> *Ibid.*

<sup>1</sup> *Barnes v. Lozoff*, 20 Wis. 2d 644, 123 N.W. 2d 543 (1963).

<sup>2</sup> RESTATEMENT, CONTRACTS §347 (1932) *Restitution of Value of a Performance Rendered By One Party as a Remedy For Total Breach by the Other*.

<sup>3</sup> *Guenther v. Gragi*, 258 Wis. 383, 46 N.W. 2d 194 (1957); *Palak v. Kramer*, 116 Conn. 688, 166 Atl. 396 (1933); *Sterling v. Marshall*, 54 A. 2d 353 (Wash. D.C., Mun. Ct. of App. 1947); *Parrish v. Taltaras*, 7 Utah 2d 87, 318 P. 2d 642 (1957).

the making of the contract.<sup>4</sup> The availability of the remedy requires the presence of the following elements:

1. The contract must be enforceable, that is, an action must lie for damages in case of a breach.<sup>5</sup>
2. There must be a substantial breach so as to justify decision.<sup>6</sup>
3. The injury done to the plaintiff must be in the form of
  - (a) part performance for which the defendant has bargained, or
  - (b) a benefit which the defendant has actually received.<sup>7</sup>

There is a conflict among text writers on the question of whether or not this restitutional remedy is quasi-contractual in nature. The majority seem to feel that it is not strictly quasi-contractual.<sup>8</sup> In fact, restitution, as a remedy for contract breach, is clearly distinguishable from an action in quasi-contract based upon the theory of unjust enrichment, the elements of recovery being quite different. Recovery in quasi-contract, based on the theory of unjust enrichment, arises in non-contract situations and under a contract which is unenforceable where justice and conscience require compensation to be given for property or services rendered.<sup>9</sup> Recovery in this situation is allowed owing to the unjust enrichment of the defendant which is measured by the value of the benefit retained by the defendant. Unjust enrichment thus requires the actual transfer of benefit from the plaintiff to the defendant and an increase in the wealth of the latter. This concept of benefit differs from that in the case of restitution, as a remedy for breach, wherein recovery will be allowed even though there has been no actual transfer of benefit to the defendant if the part performance of the plaintiff was part of the bargained-for per-

<sup>4</sup> The remedy of money damages for breach is intended to put the injured party in as good a position as he would have been in had the contract been fully performed. See Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 53-54 (1937), wherein the authors define three purposes for which contract damages are awarded, thus defining the three basic contract interests—the expectancy interest, the restitution interest, and the reliance interest. The reliance interest is the one which is discussed in the *Barnes* case.

<sup>5</sup> 5 CORBIN, CONTRACTS §1102 (1951).

<sup>6</sup> 5 CORBIN, CONTRACTS §1104 (1951). Professor Corbin points out that the rescission requirements merely give evidence of the fact that the breach is, in the words of §347 of the Restatement of Contracts, a total breach.

<sup>7</sup> RESTATEMENT, CONTRACTS §348 (1932).

<sup>8</sup> 5 CORBIN, CONTRACTS §1106 (1951). SIMPSON, CONTRACTS §154 (1954). WOODWARD, *THE LAW OF QUASI-CONTRACT* §260 (1913). 5 WILLISTON, CONTRACTS §1454 (1937). Dawson, *Restitution or Damages*, 20 OHIO ST. L. J. 175, 189 (1959).

<sup>9</sup> An action in quasi-contract based on the theory of unjust enrichment will lie where the contract is unenforceable in the following instances: (The section citations are to WILLISTON, CONTRACTS (1937)) because of infancy §240, married women §270, or an insane person §255; where the right to recover benefits furnished under an *ultra vires* contract exists §271, where a contract is voidable under the Statute of Frauds §§534-538; when benefits are conferred under a contract unenforceable because of impossibility or frustration of purpose §1972 *et. seq.*; and in cases of fraud §1525, mistake §1542, duress §1623, or illegality §§1787-1791.

formance.<sup>10</sup> Benefit in this latter sense seems to rest on the principle that the law will acknowledge, as benefit, what the parties to the contract have called benefit, whether or not the performance of the promisor will increase the estate of the promisee.<sup>11</sup>

While the authority relied on in *Barnes* strongly suggests that recovery was allowed on the theory of restitution as a remedy for breach of contract, the court did not expressly make a finding as to the presence of the elements of this remedy. The court, therefore, left the door open to speculation on whether its decision was in fact made upon a finding of quasi-contract based upon the theory of unjust enrichment.

As has been pointed out, the enforceability or unenforceability of the engineer's contract is a vital question, for if the agreement is unenforceable, restitution will not lie as a remedy for contract breach. There are facts to suggest in the present case that the agreement made between Barnes and Lozoff was unenforceable. If the fault as to the lack of available parking facilities was equally shared by both the parties, then it may be argued that the contract was impossible of performance and, owing to this impossibility, was rendered unenforceable. This seems unlikely, however, since it would appear from the opinion of the court that the fault lay with the defendant. Another view of the facts in the *Barnes* case which could give rise to a finding of unenforceability is that the plans, as rendered, made the contract illegal. The building code of the city required that enough land be available so as to provide a parking space for every unit in the motel. The plan submitted by the plaintiff could thus be argued to have been illegal when applied to the proposed site, as a violation of the building code requirements. This theory upon further analysis also seems untenable, however, for the preparation of plans and specifications was not *malum in se*. The building as planned was simply *malum prohibitum*. Therefore, the agreement itself is not illegal so as to render it unenforceable.<sup>12</sup> A third view of the facts suggest that the contract in *Barnes* was unenforceable because of a mistake. It appears that plaintiff began his work relying upon a mistake of fact—namely, that the available land was that as represented by the defendant.

All three of the aforementioned theories of unenforceability also require another finding before the court, in a situation such as that presented by the *Barnes* case, could properly allow recovery in quasi-

<sup>10</sup> Note 2 *supra* and RESTATEMENT, CONTRACTS §348 (1932).

<sup>11</sup> See Dawson, *Restitution of Damages*, 20 OHIO ST. L. J. 175, 190 (1959), cited in *Barnes v. Lozoff*, *supra* note 1 at 651, 125 N.W. 2d at 547.

<sup>12</sup> See *Weiser v. Stadium of Carnarsie*, 244 N.Y.S. 61, 137 Misc. 881 (1930), wherein the court found that preparation of plans for a building did not render the agreement illegal even though, on its proposed site, it would have violated the zoning requirements.

contract upon the theory of unjust enrichment. The prevention of unjust enrichment requires that the defendant give something back to plaintiff, and this cannot be done unless he has received something of value. In the *Barnes* case, there was no actual transfer of benefit to the defendant. The defendant received nothing except bargained-for performance which in no way enriched his estate or increased his wealth at the plaintiff's expense.<sup>13</sup>

Based upon the preceding analysis of these two distinct remedies, it would appear that the only theory upon which the Supreme Court of Wisconsin could have allowed recovery in *Barnes* was that of restitution, as a remedy for breach of contract. A loss which was suffered by the plaintiff therein, where there has been no actual transfer of benefit to the defendant, is recoverable only when found to be suffered in part performance of the contract.<sup>14</sup>

The complexity of the law in the area of restitution can probably best be traced to the type of loss which was suffered by plaintiff in the *Barnes* case and the various treatments given to it by the courts. Some modern legal writers believe that this type of loss should be recoverable in a wider variety of situations than it is at present.<sup>15</sup> Further difficulty comes when the courts speak of benefit. This concept will of necessity take on a greater variety of meanings as the theory upon which restitution is allowed changes.<sup>16</sup>

Restitution as an alternative remedy for breach of contract is more than a mere backstop for an action for money damages; it stands in its own right as a form of relief available to a party injured by a breach. Assuming the presence of the elements of this remedy, the Wisconsin Supreme Court in *Barnes* has properly applied this restitutional theory to the facts. However, by ignoring necessary assumptions and applying other theories, which have been shown to fit the facts, the case gives rise to a situation wherein recovery should have been denied. It must be assumed, therefore, that the elements of the remedy of restitution for a contract breach are present in the *Barnes* decision; otherwise, the decision stands as an incorrect application of the law of quasi-contract.

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<sup>13</sup> However, see *Olephant v. Kalman*, 35 N.Y.S. 2d 354 (1942), wherein the court allowed recovery in restitution where the contract was unenforceable due to the intervention of a third party. The court awarded the plaintiff the reasonable value of his services even though the defendant in no way benefited from the plaintiff's performance.

<sup>14</sup> In both of the actions of restitution, as a remedy for breach and quasi-contract based on unjust enrichment, recovery will not be allowed where a promisee expends labor and materials in preparation prior to actual performance on the contract. However, in the alternative action for damages, in the former situation, this loss to the plaintiff will be considered consequential damages and, as such, recoverable. See 5 CORBIN, CONTRACTS §1107 (1951).

<sup>15</sup> See Fuller and Perdue, *supra* note 4.

<sup>16</sup> On the concept of benefit, see 46 MICH. L. REV. 543 (1948).