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RESTITUTION UNDER THE STATUTE OF FRAUDS: WHAT CONSTITUTES A LEGAL BENEFIT*

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I. PERFORMANCE OF ORAL AGREEMENT AS LEGAL BENEFIT

1. INTRODUCTION

Although the original English Statute of Frauds¹ was enacted over two hundred seventy years ago, its provisions, with minor variations, have been adopted in virtually all of the states and territories of the United States.² The amount of litigation concerning the Statute of Frauds continues to be tremendous.³ This study of restitution under the Statute⁴ involves an examination of the effect of the Statute of Frauds upon oral agreements which fail to comply with its requirements; but we are not concerned with the problem of determining what contracts must meet the requirements of the Statute to be enforceable,⁵ or what constitutes a satisfaction of its provisions.⁶

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1. 29 Car. II c. 3. It was passed and received the royal assent on April 16, 1677. 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 380-384 (1924); Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329-334 (1913).

2. See SMITH, THE LAW OF FRAUDS AND THE STATUTE OF FRAUDS c. 28-76 (1907), for a collection of these statutes. Although most of them state, in effect, that "no action shall be brought" on certain types of oral agreements, about one third of them provide in substance that such agreements "shall be void."

3. The Century Digest lists approximately 6,300 cases under the Statute-of-Frauds heading, the First Decennial approximately 2,200 cases, the Second Decennial approximately 2,300 cases, the Third Decennial approximately 3,150 cases, and the Fourth Decennial approximately 2,400 cases.

4. The expression of "restitution under the Statute of Frauds" is employed to describe the situation wherein the parties entered into an oral agreement which did not comply with the requirements of the Statute, and restitution is sought for the benefit conferred in performance of or in reliance upon the unenforceable agreement.

5. For a discussion of the various classes of contracts which come within the operation of the Statute of Frauds see: 2 WILLISTON, CONTRACTS §§ 449, 450 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 178 (1932); HARRIMAN, CONTRACTS §§ 595-605 (2d ed. 1901).

6. In the majority of jurisdictions the oral agreement may be taken outside the operation of the Statute of Frauds by partial performance. Many differences exist, however, as to what acts are sufficient to constitute taking possession, making permanent improvements, or partial payment, some or all of which are the elements that constitute

The oral agreement that does not satisfy the requirements of the Statute of Frauds is sometimes referred to as void,⁷ or voidable,⁸ but it is probably more accurate to call it unenforceable.⁹ The provisions of the Statute are usually construed to prevent any action for the specific enforcement of the defendant's promise in the oral agreement, as well as any action to recover the monetary equivalent thereof as damages. In other words, the Statute of Frauds is designed to deprive the plaintiff of any recovery which is based upon his expectation interest—what he expected to obtain from the defendant under the unenforceable agreement. The Statute may also prevent a recovery by the plaintiff for losses sustained while relying upon the defendant's oral

partial performance. RESTATEMENT, CONTRACTS commentaries § 194 (1928); Moreland, *Statute of Frauds and Part Performance*, 78 U. OF PA. L. REV. 51 (1929); Storke, *Part Performance and the Statute of Frauds in Colorado*, 2 ROCKY MT. L. REV. 209 (1930); Note, 17 MICH. L. REV. 172 (1918); Note, 2 WIS. L. REV. 46 (1928). The underlying principle by which the courts enforce the contract is "equitable fraud," which is injurious reliance by the promisor rather than unjust enrichment of the promisee. 4 POMEROY, EQUITY JURISPRUDENCE 3346 (4th ed. 1918-1919). Also see Asher, *The Statute of Frauds and Some Reasons for Taking an Oral Agreement Out of Its Operation*, 18 KY. L. J. 153 (1930); Cox, *Partial Performance as Validating Parol Contracts for the Sale of Lands*, 6 TEX. L. REV. 50 (1927); Gay, *Hardship as Taking a Parol Contract for the Sale of Land Out of the Statute of Frauds*, 2 TEX. L. REV. 347 (1924) (stating that hardship alone is not sufficient); Pound, *The Progress of the Law 1918-1919*, 33 HARV. L. REV. 929, 933-950 (1920). If the Statute of Frauds is satisfied by partial performance, restitution is ordinarily unnecessary, but it may be available in case of total breach by the promisor and incomplete performance by the promisee. RESTATEMENT, CONTRACTS § 347 (1) (b) (1932). In Kentucky, Mississippi, North Carolina, and Tennessee partial performance does not satisfy the Statute of Frauds, and the vendee is allowed restitution in lieu of specific performance. Wilhott, *The Statute of Frauds and Part Performance of Land Contracts in Kentucky*, 22 KY. L. J. 434 (1934); Note, 1 N. C. L. REV. 48 (1922); RESTATEMENT, CONTRACTS commentaries § 194 (1928).

As to the sufficiency of the written memorandum in satisfying the Statute of Frauds see: 2 WILLISTON, CONTRACTS §§ 567-600 (rev. ed. 1936); Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L. J. 528, 530-532 (1928); Kingsley, *Some Comments on the Section of the Minnesota Statute of Frauds Relating to Contracts*, 14 MINN. L. REV. 746, 757-760 (1930); Note, 20 CORN. L. Q. 226 (1935).

7. See *Sutton v. Rowley*, 44 Mich. 112, 113 (1880). Also see note 2 *supra* for statutory provisions to the same effect.

8. See *Chandler v. Wilder*, 215 Ala. 209, 210, 110 So. 306 (1926); *Luton v. Badham*, 127 N. C. 96, 98, 37 S. E. 143, 144 (1900); *City v. Manufacturing Co.*, 93 Tenn. 376, 379 (1893).

9. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169, 180 (1917) says, "The term unenforcible (sic) contract includes both void contracts and voidable contracts. It is customarily used so as to describe certain other legal relations also. . . . When a contract is unenforcible (sic) by reason of the statute of frauds, either party has the legal power to create rights as against himself (or to terminate his existing power of destroying the other's rights) by signing a memorandum, but he has no such power to create rights in his own favor. In these cases a legal relation exists that is different from that existing in the case of a void contract or of a voidable one." Thus, as was said in *In re Exeter Mfg. Co.*, 254 App. Div. 496, 497, 5 N. Y. S.2d 438, 439 (1938), "The statute of frauds here involved is not a ground at law or in equity for the 'revocation' (i.e. the contract is not voidable); nor does it make a contract within its purview void, but merely unenforcible." This view is generally accepted. Note, 16 CORN. L. Q. 390, 396 (1931). Also see Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L. J. 311, 321-323 (1923).

promise, providing such reliance action does not satisfy the requirements of the Statute and thereby render the agreement enforceable,¹⁰ or does not confer a benefit upon the defendant.¹¹ But even though the acts of the parties in entering into an oral agreement and in partially performing or acting in reliance upon it may not justify a recovery on the contract for the expectation or the reliance interests,¹² it is possible that the same acts of the parties which created the oral agreement together with their subsequent conduct may give rise to an action based upon the restitution interest¹³ (i.e., upon unjust enrichment). For, if the plaintiff's action in reliance upon or in performance of the oral agreement has conferred a benefit upon the defendant which is unjustly retained, it would seem that the plaintiff's interest is one of restitution, and most deserving of judicial protection. One writer expressed this idea in the following language:

The 'restitution interest,' involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest (or the expectation interest), since if

10. In *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909), for example, A was induced to resign from a "life time" position with a city in order to accept B's oral offer for ten years of employment, and it was understood that the oral agreement should be reduced to writing. B's death prevented the execution of the writing. Later, B's heirs breached the ten year agreement with A. In an action at law by A, however, they were not allowed to rely on the Statute of Frauds. The court did not emphasize A's partial performance, but rather his irrevocable change of position in reliance upon the subsidiary promise to put the ten year agreement into writing.

11. See pp. 27, 28 *infra*.

12. Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 373 (1936); 10 TENN. L. REV. 132 (1932); *cf.* RESTATEMENT, CONTRACTS § 90 (1932).

13. An analogous problem exists in the field of trusts. Stone, *Resulting Trusts and the Statute of Frauds*, 6 COL. L. REV. 326, 336 (1906) says, "The plaintiff in the case of a trust may assert either one of two distinct rights: one as the *cestui que trust* of an express trust created by the plaintiff's conveyance and parol declaration; the other in the event that the defendant repudiates the trust, as *cestui que trust* of a constructive trust of the property which in equity and good conscience should be restored to him, since the defendant has repudiated his express obligation and taken shelter under the statute.

"That the remedy in each of the cases supposed is identical, determines nothing as to the right asserted, nor does the fact that the bar of the statute prevents the assertion of the right in the first case and the consequent recovery, bar the assertion of the right in the second. It would certainly be a novel proposition to assert that a plaintiff in an action in quasi contract brought to recover the value of his performance given under a contract barred by the statute of frauds was enforcing the contract merely because it appeared that the amount of recovery by way of restitution in a given case happened to be the same as the amount of damages for breach of contract. . . ." Also see Madden, *Trusts and the Statute of Frauds*, 31 W. VA. L. Q. 166 (1925).

Cf. RESTATEMENT, CONTRACTS § 1, comment c. (1932), which points out that the word contract may refer to the acts which create the legal relation between the parties, to the writing which evidences those acts, or to the legal relations resulting from the operative acts. Thus, it would seem that even though a particular legal relation (i.e. an enforceable contract) was not created by the acts of the parties, the acts have occurred, and may have relevance to another legal relation, namely, the duty to make restitution.

A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.¹⁴

Since restitution merely requires the defendant to return the benefit conferred upon and unjustly retained by him, it is a less drastic remedy (i.e., one causing less net loss to the defendant) than one based solely upon the expectation or the reliance interests. Moreover, if restitution is sought by means of perjured testimony, it would be necessary to falsify not only the existence of the oral agreement, but also the plaintiff's subsequent performance thereof. For these reasons the policy of the statute that prevents contractual actions should not necessarily be applied to suits for restitution.¹⁵

In protecting the restitution interest, to what extent will the courts give legal effect to the terms of the oral agreement or to the acts of the parties which created it? In attempting to show that the defendant unjustly retained a benefit or to establish the monetary amount of that benefit are the terms of the oral agreement admissible for the purpose of proving that the defendant requested the plaintiff's performance which would constitute the benefit? May the terms of the unenforceable agreement be used to show that the defendant promised return performance as an inducement to the plaintiff? May they be employed to establish the nature, character, or value of the plaintiff's performance, or of the defendant's return performance? Are the terms of the oral agreement admissible to provide an upper limit upon the amount of the plaintiff's recovery? What effect is accorded to the terms of the oral agreement if they are admissible? Are they merely evidence, prima facie evidence, or conclusive evidence of the point to be established? Finally, even though the terms of the unenforceable agreement are not admissible as such for any of the above purposes, may some or all of the acts of the parties which created the agreement be used in a suit for restitution as an admission against interest or as an explanation of the subsequent conduct of the parties?

As will be observed throughout this study, most of the courts have ad-

14. Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L. J.* 52, 56 (1936).

15. In this connection, it should be mentioned, the first drafts of the original English Statute of Frauds provided that all agreements should be in writing "provided that this act shall not extend to such actions . . . grounded upon . . . any *quantum meruit* or any other assumpsits or promises which are created by the construction or operation of law . . ." The scope of the Statute was curtailed in committee and the above proviso, being no longer needed in many of the sections, was eliminated from those paragraphs of the final bill. See Hening, *The Original Drafts of the Statute of Frauds* (29 *Car. II c. 3*) and *Their Authors*, 61 *U. OF PA. L. REV.* 283, 286, 305-307 (1913).

On the other hand, if restitution is sought under circumstances wherein there is a particular likelihood of perjured testimony being used, such as under oral agreements within the real estate brokers' statutes, courts generally find the retention by the defendant is not unjust, and restitution is denied. This problem is discussed more fully in Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 *MICH. L. REV.* 923 (1950).

mitted the terms of the oral agreement in evidence for at least some of the purposes mentioned above; but there is considerable conflict as to the legal effect of such agreements, especially in the cases which involve defaulting plaintiffs and in those concerned with the measurement of the amount of benefit conferred. The two groups of cases just mentioned are discussed in other articles.¹⁶ The purpose of this article is to examine the benefit concept as it operates in the cases of restitution under the Statute of Frauds.

2. PERFORMANCE AS BENEFIT—IN GENERAL

Although a recovery in restitution is allowed only if both benefit and unjustness exist,¹⁷ the controversy in some cases centers upon whether or not a benefit exists,¹⁸ while in other cases it is concerned with the relative unjustness of the retention.¹⁹ To obtain an understanding of restitution, the opera-

16. Jeanblanc, *Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. REV. 1 (1950); Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 MICH. L. REV. 923 (1950).

17. RESTATEMENT, RESTITUTION § 1 (1937) provides as follows: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." See also Patterson, *The Scope of Restitution and Unjust Enrichment*, 1 Mo. L. REV. 223 (1936); Seavey and Scott, *Restitution*, 54 L. Q. REV. 29 (1938); Winfield, *The American Restatement of the Law of Restitution*, 54 L. Q. REV. 529 (1938).

The early cases involving restitution allowed the plaintiff to recover because the defendant "in equity and good conscience" should not be permitted to retain that which he had received. In *Moses v. Macferlan*, 2 Burr. 1005, 1012 (1760), Lord Mansfield said, "In one word, the gist of this kind of action (money had and received) is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." See Bishop, *Money Had and Received, An Equitable Action at Law*, 7 So. CAL. L. REV. 41 (1933). Many of the courts and legal writers agree with Mansfield's view, but some courts allow recovery upon the recognized fiction of an implied promise by the defendant to pay for that which he received. This view is approved by Holdsworth, *Unjustified Enrichment*, 55 L. Q. REV. 37 (1939). But see Winfield's reply to Holdsworth in Note, 55 L. Q. REV. 161 (1939). Also see WINFIELD, *THE PROVINCE OF THE LAW OF TORTS* 125 (1931) and JACKSON, *HISTORY OF QUASI-CONTRACTS IN ENGLISH LAW* § 30 (1936). For a further examination of the basis for recovery in restitution see Corbin, *Quasi Contractual Obligations*, 21 YALE L. J. 533 (1912).

Also see WOODWARD, *QUASI CONTRACTS* § 94 (1913). He expresses the view that the basis of restitution is misreliance, but the cases apparently do not deny restitution to one who confers a benefit while believing the oral agreement is unenforceable. Woodward also points out that the general rule which denies restitution to one who confers a benefit under mistake of law, is not applied in the state-of-frauds cases.

18. In *Dowling v. McKenney*, 124 Mass. 478 (1878), for example, the court's decision in the defendant's favor was based upon the fact that the defendant received no benefit from the plaintiff's labor in preparing a monument for delivery to the defendant. The oral agreement provided that the defendant should convey land to the plaintiff in return for the completed monument. The defendant's conduct in repudiating the oral agreement before the monument was delivered to him seems to have been unjust, but he thereby prevented the plaintiff from conferring a benefit upon him, and thus defeated the plaintiff's action for restitution.

19. In *Hoagland Allum & Co. v. Allan-Norman Holding Corp.*, 228 App. Div. 133, 239 N. Y. Supp. 291 (1930), for example, the plaintiff loaned money to the defendant for five years under an oral agreement whereby the latter was to pay off a mortgage held by a third person on land that the defendant had purchased subject thereto. When the plaintiff sued to recover the money loaned, the defendant entered a counterclaim for the money

tion of both benefit and unjustness, and the interaction of each upon the other must be studied. Though realizing the difficulty of attempting to study one of these concepts without at the same time considering the other, it is believed that a clearer presentation can be achieved by first examining separately the individual operation of each.

It is often assumed in restitution cases that benefit is an established term with a definite meaning for all situations, but such is not the case. Since the typical action for restitution in value, as distinguished from restitution in specie, if successful, ends in a judgment for the payment of money, it is necessary to find as a basis for the action a benefit of pecuniary value. To the extent that a benefit cannot be expressed in terms of money, it is beyond the scope of restitution in value as a means of legal redress. Hence there is a suggestive parallel between the concept of "benefit" as used in restitution in value cases and the term "value" as used in economics. But value is attributed to an article or service by economists, to a considerable extent, because of its utility—its ability to satisfy human wants.²⁰ Most economists feel that the demand for an article or service in the market is merely a collection of the wants of individuals, and the market value of that article or service, at least in part, is a monetary expression of the extent to which the article or service satisfies human desires. Since courts frequently employ the market value of articles or services in determining and measuring the pecuniary amount of legal benefit that the defendant derived from such items, it seems reasonable to infer that the same principle of satisfaction of human wants underlies both legal benefit in restitution and value in economics. If this is true, it would follow that a legal benefit could also be found, even without the assistance of market value, providing it can be shown objectively in money terms that the desires of the individual defendant have been satisfied. The oral agreement, which is unenforceable because of the Statute of Frauds, is frequently employed to establish such an objective manifestation by the defendant.

A problem may arise as to whether or not the parties actually entered into an oral agreement. But, it would seem to be difficult, at least in many

he had paid to the third party mortgagee under the terms of the oral agreement with the plaintiff. The court held that neither the plaintiff's complaint nor the defendant's counterclaim should be allowed. From the facts of this case it may be argued that the plaintiff received a benefit from the money which the defendant paid to the third party mortgagee in that the transaction requested by the plaintiff was carried out. The defendant also received a benefit from the money advanced by the plaintiff, for even though he passed it on to the third party mortgagee, his property was thereby cleared of an incumbrance. Thus, as might be implied from the opinion of the dissenting judge, the complaint and the counterclaim were both denied on the ground that neither the plaintiff nor the defendant was unjustly retaining any benefit he had received from the other. For a discussion of the various factors which enter into the determination of what constitutes an unjust retention see Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 MICH. L. REV. 923 (1950).

20. For a good brief discussion see "Value and Price," 15 ENCYC. SOC. SCI. 218.

cases, to explain the conduct of the plaintiff in rendering and the defendant in accepting performance in the absence of some sort of a prior agreement. And, if an agreement is found, it should be observed that the defendant's request in the agreement is for the particular type of performance which the plaintiff rendered and for which restitution is sought. The defendant's request not only eliminates any objection that the plaintiff was an officious intermeddler, but also serves as an admission by him that he regarded the plaintiff's prospective performance as beneficial, at least at the time when the oral agreement was formed. Since the unenforceable agreement also embodies the defendant's promise of return performance as an inducement to the plaintiff, it seems clear that the plaintiff did not intend to make a gift, but rather expected compensation for his performance. Finally, it will be noticed that the defendant's request plus his promise of return performance in the oral agreement shows, if there is no fraud on his part, that he expected to pay for the plaintiff's performance of the unenforceable agreement. But, it may be argued, the defendant merely expected to pay for *complete* performance of the oral agreement, and to apply this principle to *partial* performance is to assume not only that the partial performance confers a benefit upon the defendant, but also that the defendant expected to pay the plaintiff for that partial performance. Although this assumption may be true in many cases, the delivery of an article that is usually sold in pairs, such as a shoe or a glove, may furnish an example of possible exceptions. Again, however, the defendant's conduct after the formation of the oral agreement is frequently such as to establish that the plaintiff's partial performance was beneficial to him. Thus, although the defendant's request and his promise of return performance are present in many of the cases discussed in this article, their role in demonstrating that the defendant is retaining a legal benefit becomes more prominent as the discussion progresses from types of performance by the plaintiff where the legal benefit is more obvious to the cases where it is less obvious.

The cases collected in part I of this article involve action by the plaintiff in response to an express request plus a promise of return performance by the defaulting defendant, while the cases discussed in part II involve action by the plaintiff in reliance upon the unenforceable agreement, but not in response to any express request by the defaulting defendant. The divisions are not air-tight compartments; for it is often difficult to determine when the acts done by the plaintiff cease to be preparation for performance (i.e., merely reliance action) and become performance of the oral agreement itself;²¹ nevertheless, they do allow an examination of the benefit concept as it operates upon different types of acts done by the plaintiff (e.g., where the plaintiff parted with money, goods, land, or services). They also permit

21. See p. 30 *infra*.

the cases to be arranged and discussed in the order of increasing difficulty in obtaining a recovery. Further, they facilitate a comparison of the cases in part I wherein a given type of action by the plaintiff in *performance* of the oral agreement constitutes a legal benefit, with the cases in part II wherein a different conclusion is often reached regarding the same type of action merely rendered in *reliance* upon the unenforceable agreement.

3. PERFORMANCE AS BENEFIT—PLAINTIFF PARTED WITH MONEY

*Ford v. Stroud*²² illustrates a group of decisions wherein the plaintiff transferred money to the defendant under the provisions of an oral agreement that did not comply with the requirements of the Statute of Frauds. In that case, after the defendant had defaulted by not perfecting his title to land that he had orally promised to convey to the plaintiff, the latter sued to recover the money paid to the defendant as part of the purchase price. A judgment for the plaintiff was affirmed.

This result is universally accepted²³ and it has been reached irrespective of the particular provision of the Statute of Frauds which has been violated²⁴ or of the character of return performance promised by the defendant. Thus the plaintiff has been allowed to recover money paid under an unenforceable agreement wherein the defaulting defendant had promised to convey land,²⁵

22. 150 N. C. 362, 64 S. E. 1; 9 COL. L. REV. 561 (1909).

23. 2 WILLISTON, CONTRACTS § 534, note 6 (rev. ed. 1936); cases cited notes 24-26 *infra*.

24. For cases allowing recovery of money paid under oral agreements in consideration of marriage, see *Glazebrook v. Glazebrook's Ex'r.*, 227 Ky. 628, 13 S.W.2d 776 (1929); oral guaranty agreements, *Rockett v. Edmundson*, 164 Ala. 478, 51 So. 143 (1910); oral agreements for sale of an interest in land, note 25 *infra*; oral agreements not performable within one year, *Swift v. Swift*, 46 Cal. 267 (1873); *Quinn v. Stark County Tele. Co.*, 122 Ill. App. 133 (1905); *Weber v. Weber*, 25 Ky. L. Rep. 908, 76 S. W. 507 (1903); *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938 (1905); *Van Schoyck v. Backus*, 9 Hun 68 (N. Y. 1876); *Butler v. Dinan*, 65 Hun 620, 19 N. Y. Supp. 950 (1892); *Hummel v. Hummel*, 133 Ohio St. 520, 14 N. E.2d 923 (1938); oral agreements within the goods provision of the Statute of Frauds, see *Stowe v. Fay Fruit Co.*, 90 Cal. App. 421, 265 Pac. 1042 (1928).

25. *Dudley v. Hayward*, 11 Fed. 543 (1882); *Chandler v. Wilder*, 215 Ala. 209, 110 So. 306 (1926); *Littell v. Jones*, 56 Ark. 139, 19 S. W. 497 (1892); *Reynolds v. Harris*, 9 Cal. 338 (1858); *Dreier v. Sherwood*, 77 Col. 539, 238 Pac. 38 (1925); *Gilson v. Boston Realty Co.*, 82 Conn. 383, 73 Atl. 765 (1909); *Mayer v. First Nat. Co.*, 99 Fla. 173, 125 So. 909 (1930); *Dodgen v. Camp*, 47 Ga. 328 (1872); *Amonson v. Idaho Development Co.*, 25 Idaho 615, 139 Pac. 352 (1914); *Collins v. Thayer*, 74 Ill. 138 (1874); *Barickman v. Kuykendall*, 6 Blackf. 21 (Ind. 1841); *Frey v. Stangl*, 148 Ia. 522, 125 N. W. 868 (1910); *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640 (1911); *Zanone v. Tashgian*, 231 Ky. 454, 21 S. W.2d 825 (1929); *Purves v. Martin*, 122 Me. 73, 118 Atl. 892 (1922); *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275 (1910); *Cook v. Doggett*, 2 Allen 439 (Mass. 1861); *King v. Bird*, 245 Mich. 93, 222 N. W. 183 (1928); *Schultz v. Thompson*, 156 Minn. 357, 194 N. W. 884 (1923) (*sub. nom.* *Schultz v. Johnson*); *Milan v. Paxton*, 160 Miss. 562, 134 So. 171 (1931); *Devore v. Devore*, 138 Mo. 181, 39 S. W. 68 (1897); *Malone v. Romano*, 95 N. J. Eq. 291, 127 Atl. 91 (1923); *Marquat v. Marquat*, 7 How. Pr. 417 (N. Y. 1853), *rev'd on other grounds*, 12 N. Y. 336 (1855); *Grant v. Brown*, 212 N. C. 39, 192 S. E. 870 (1937); *Welsh v. Welsh*, 5 Ohio 425 (1832); *Schechinger v. Gault*, 35 Okla. 416, 130 Pac. 305 (1913); *Smith v. Dunn*, 165 Ore. 418, 107 P.2d 985 (1940); *Durham v. Wick*, 210 Pa. 128, 59 Atl. 824 (1904); *Miller v. Healey* 39 R. I. 339, 97 Atl. 796 (1916); *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S. W. 677 (1898);

to deliver goods,²⁶ or to repay money.²⁷

The plaintiff's performance, in parting with money, is already expressed in the pecuniary terms employed by courts in the rendition of judgments, a factor which facilitates the finding of a legal benefit. An economist also regards money as beneficial, not so much for its ability directly to satisfy human wants, but because its power as a medium of exchange enables the recipient to obtain the various items or services that are capable of satisfying his individual desires.

4. PERFORMANCE AS BENEFIT—PLAINTIFF PARTED WITH GOODS

If the plaintiff has delivered goods in return for the defendant's oral promise to pay money, the agreement is generally enforceable, and restitution under the statute of frauds is not involved.²⁸ But, if the defendant's oral promise is to convey land in return for the plaintiff's goods,²⁹ or if the oral agreement cannot be performed within one year from the time of its forma-

Strickland v. Strickland, 276 S. W. 795 (Tex. Civ. App. 1925); Welch v. Darling, 59 Vt. 136, 7 Atl. 547 (1886); Lewis v. Wisconsin Banking Commission, 225 Wis. 606, 275 N. W. 429 (1937).

26. In *Stowe v. Fay Fruit Co.*, 90 Cal. App. 421, 265 Pac. 1042 (1928), the buyer was allowed to recover in a cross complaint \$250 paid for oranges under an oral agreement that fell within the peculiarly worded California Statute of Frauds: Section 1624 (4) provided that "An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels, . . . or pays *at the time* some part of the purchase money . . ." (italics added), must be in writing. Thus the plaintiff's payment of \$250 *after the oral agreement had been formed* did not satisfy the quoted section of the California statute. This section was changed however, in 1931 when California adopted the Uniform Sales Act. See CALIF. CIV. CODE § 1624a (1941).

27. *Swift v. Swift*, 46 Cal. 267 (1873) (plaintiff was allowed to recover money which the defendant had borrowed from him under an oral agreement obligating the defendant to repay the money after the expiration of one year); *Weber v. Weber*, 25 Ky. L. Rep. 908, 76 S. W. 507 (1903); cf. *Salisbury v. Credit Service*, 39 Del. 377, 199 Atl. 674 (1937) (plaintiff recovered money paid for bonds under an oral agreement whereby the defendant was bound to repurchase them at the expiration of one year). It should be noticed that these courts allowed recovery in restitution even though the result happened to be the same as though the oral agreement had been enforced. Also see the discussion of oral agreements to reconvey land, p. 12 *infra*.

28. Section 4 of the Uniform Sales Act, which has been enacted in 34 states, the District of Columbia, and several territories, provides in part, "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Cf. *Stowe v. Fay Fruit Co.*, 90 Cal. App. 421, 265 Pac. 1042 (1928).

29. Restitution under oral agreement that did not comply with the land provision of the Statute of Frauds was allowed in the following cases: *Singletary v. Ginn*, 153 Miss. 700, 121 So. 820 (1929); *Jelleff v. Hummell*, 56 N. D. 512, 218 N. W. 227 (1928). Also see cases cited note 34 *infra*.

tion,³⁰ the problem of restitution under the Statute of Frauds may be raised even though the goods provision of the Statute has been satisfied.³¹

To the extent that the goods parted with by the plaintiff are marketable, they possess a power of exchange that enables the recipient to obtain money which justifies the finding of a legal benefit.³² An economist would agree that marketable goods possess value because of their utility or ability to satisfy human wants. The utility of the goods is reflected to a considerable extent in the demand for the particular goods, which in turn frequently finds expression in their market value.³³

As the marketability of the goods decreases, however, there is less justification in assuming that some one is ready and willing to pay money for the goods received by the defendant, and it becomes more difficult to demonstrate objectively, by means of market value, that the desires of the recipient have been satisfied. But, if it is sufficiently evidenced by the defendant's admissions or otherwise that his desires were satisfied by goods, even though not readily marketable, the courts have correctly found that he was legally benefited.³⁴

30. Restitution under oral agreement that did not comply with the one year provision of the Statute of Frauds was allowed in the following cases: *General Paint Corp. v. Kramer*, 68 F.2d 40 (10th Cir. 1933), *cert. denied*, 292 U. S. 623 (1934); *Consolidated Products Co. v. Blue Valley Creamery Co.*, 97 F.2d 23 (8th Cir. 1938); *Winchester v. Brown*, 264 Mich. 421, 250 N. W. 277 (1933).

31. In *David Taylor Co. v. Fansteel Products Corp.*, 234 App. Div. 548, 255 N. Y. Supp. 270 (1932), *aff'd*, 261 N. Y. 514, 185 N. E. 718 (1933), the oral agreement for sale of ore was in excess of value allowed in the Sales Act, and not performable within one year. Although part performance satisfied the Sales Act, the oral agreement was unenforceable under the one year provision. The plaintiff was allowed to recover in restitution for the reasonable value of the ore delivered. Also see Note, 17 MINN. L. REV. 107 (1932).

32. The courts found a legal benefit had been conferred upon the defendants in each of the following cases: *Montague v. Garnett*, 3 Bush 297 (Ky. 1867) (corn and pork loaned for three years); *Richards v. Allen*, 17 Me. 296 (1840) (brick and oxen for land); *Dietrich v. Hoefelmeier*, 128 Mich. 145, 87 N. W. 111 (1901) (parol agreement whereby plaintiff parted with 20 sheep and defendant agreed to return 40 similar sheep at the end of four years); *Bennett v. Phelps*, 12 Minn. 326 (1867) (oxen for land); *Wyvell v. Jones*, 37 Minn. 68, 33 N. W. 43 (1887) (furniture for land); *Devore v. Devore*, 138 Mo. 181, 39 S. W. 68 (1897) (horse for land); *Boyden v. Crane*, 7 Alb. L. J. 203 (N. Y. 1873) (horse for land—abstract of decision); *Miller v. Jones*, 3 Head 525 (Tenn. 1859) (wagon for land); *McDonald v. Whaley*, 244 S. W. 596 (Tex. Civ. App. 1922), modifying 228 S. W. 313 (Tex. Civ. App. 1921) (auto for land); *Hawley v. Moody*, 24 Vt. 603 (1852) (watch for oral lease); see *Keath v. Patton*, 2 Stew. 38, 41 (Ala. 1829) (horses for land); *Kieth v. Patton*, 1 A. K. Marsh. 23, 24 (Ky. 1817) (horses for land); *Holbrook v. Armstrong*, 10 Me. 31, 38 (1833) (plaintiff parted with six cows to be returned or paid for at the end of two years if defendant was satisfied with a prior land trade).

33. See note 20 *supra*.

34. *Sears v. Ohler*, 144 Ky. 473, 139 S. W. 759 (1911); *Singletary v. Ginn*, 153 Miss. 700, 121 So. 820 (1929); *Wood v. Shultis*, 4 Hun 309 (N. Y. 1875). In each of these cases the plaintiff was allowed to recover the value of timber parted with under an oral agreement which fell within the Statute of Frauds.

Booker v. Wolf, 195 Ill. 365, 63 N. E. 265 (1902) (stock of groceries for land);

Legal benefits have also been found if the goods transferred to the defendant were perishable,³⁵ or intangibles such as patent rights,³⁶ the relinquishment of a claim,³⁷ or even good will.³⁸ Although the evidence of a legal benefit in such cases is perhaps less convincing than in those involving marketable goods, the persuasiveness of the defendant's request and his promise of return performance in showing that he got what he wanted is not diminished.

Albea v. Griffin, 2 Dev. & B. Eq. 9 (N. C. 1838) (goods for land); *Jelleff v. Hummel*, 56 N. D. 512, 218 N. W. 227 (1928) (stock of shoes for land); *Chrisenberry v. Wylie*, 54 S. W. 49 (Tenn. Ch. App. 1899) (stock of goods for land); see *Winchester v. Brown*, 264 Mich. 421, 423, 250 N. W. 277, 278 (1933) (equipment to operate a milk route, not to be paid for within one year).

35. *Consolidated Products Co. v. Blue Valley Creamery Co.*, 97 F.2d 23 (8th Cir. 1938). This case involved an oral agreement for the sale of buttermilk which was not performable within one year. Although the court reversed a judgment in favor of the plaintiff for the contract price (a contract implied in fact), it intimated that the plaintiff could recover the market value of the buttermilk delivered. Thus the court found a legal benefit.

36. *General Paint Corporation v. Kramer*, 68 F.2d 40 (10th Cir. 1933), cert. denied, 292 U. S. 623 (1934) (assignment of patent rights to defaulting defendant under oral agreement within Statute of Frauds was held to constitute a legal benefit); cf. *Cohen v. Stein*, 61 Wis. 508, 21 N. W. 514 (1884) (plaintiff, who was employed as cloak designer under an oral agreement not performable within one year, sought to recover for patterns retained by defendant. Although the court did not deny that patterns would constitute a legal benefit, they felt that the contract price, which the defendant had already paid, was intended by the parties to include the value of the patterns).

37. In *Sinclair Refining Co. v. Vaughn*, 135 Kan. 82, 9 P.2d 995 (1932), Vaughn, a manager of a gasoline depot for the company was wrongfully discharged for certain shortages which were later traced to leaky storage tanks. Vaughn had also assigned certain claims to the company, and upon default of the obligors, Vaughn had reimbursed the company. The Sinclair Company failed to reassign these claims to Vaughn. In settlement of this dispute the parties entered into an oral agreement whereby Vaughn relinquished whatever rights he had against the company in return for the latter's promise of continued employment for five years. Later the Sinclair Company repudiated this oral agreement, and sued Vaughn for certain money which he had collected from the sale of their products. Vaughn admitted in his answer that he held the company's money as alleged, but sought restitution for that which he had parted with under the oral agreement. The finding of a legal benefit and verdict for Vaughn in the lower court was affirmed upon appeal.

38. In *Bethel v. Booth & Co.*, 115 Ky. 145, 72 S. W. 803 (1903), the plaintiff parted with a store, consisting of \$1,200 assets and considerable good will, in return for defendant's oral promise of employment for ten years. The plaintiff sued for breach of this agreement. The lower court gave a peremptory instruction to find for the defendant. The appellate court reversed and remanded because they felt the defaulting defendant was unjustly retaining a legal benefit, namely, "the difference between the amount paid for the assets of the store which it (defendant) had purchased and its actual value on the day the contract was made, and . . . for the loss which he sustained of the good will of the business." One would not question the plaintiff's right to restitution for a stock of goods parted with, minus the amount the defendant had paid thereon, and many would agree that the good will of a business, when bargained for, might also constitute a legal benefit to the defendant. But the court's suggestion, in the *Bethel* case, that the benefit should be measured by the loss sustained by the plaintiff is certainly questionable. This point is discussed more fully in *Jeanblanc, Restitution Under the Statute of Frauds: Measurement of the Legal Benefit Unjustly Retained*, 15 Mo. L. Rev. 1 (1950).

Although the court in *Whipple v. Parker*, 29 Mich. 369 (1874), did not expressly mention good will, they allowed a recovery for an interest in a business which the plaintiff had parted with under an unenforceable agreement not performable within one year.

In addition, and after the formation of the oral agreement, the defendant accepted and retained the plaintiff's performance. Or if he consumed³⁹ or dissipated such performance, his acts would add further to the evidence which justified the above decisions that found a legal benefit was conferred.

5. PERFORMANCE AS BENEFIT—PLAINTIFF PARTED WITH LAND

Many of the principles discussed in connection with the cases involving goods are also applicable to the cases wherein the plaintiff parted with land under the terms of an oral agreement that did not comply with the Statute of Frauds. It takes a longer time and is perhaps more difficult to exchange land for money than it is to exchange many types of goods for money. The assumption of a ready buyer, which is applicable in the case of marketable goods, therefore, is less reliable when applied to land. Yet it is generally conceded that the monetary value of the defendant's estate is enhanced by the plaintiff's conveyance of the title to the land. Moreover, the plaintiff's conveyance usually constituted full performance of his portion of the oral agreement and, therefore, the defendant requested and promised return performance for the exact and full performance which the plaintiff rendered. Thus, the defendant got what he wanted and was legally benefited. Although the transfer of title to the defendant should constitute a legal benefit in and of itself, in most of the cases it is also followed by the defendant's taking physical possession of the property. Such a manifestation by the defendant after the formation of the oral agreement, and in addition to his request and promise of return performance embodied therein, would seem to provide a further justification for treating the land as a legal benefit.

In view of the fact that there was no common law count for land sold and conveyed,⁴⁰ and that land is unique in character, in many instances the plaintiff was allowed restitution in specie. Specific restitution of land is based upon principles of constructive trusts and is sometimes allowed against a defaulting defendant who orally agreed to *reconvey* land to the plaintiff.⁴¹

39. In *Crenshaw v. Bishop*, 143 S. W. 284 (Tex. Civ. App. 1911), for example, the owner of cattle was held to have received a legal benefit from having them fed and pastured under an oral agreement that was not performable within one year. Similarly, in *Gifford v. Willard*, 55 Vt. 36 (1883) board and lodging rendered under an oral agreement within the land provision of the Statute of Frauds was held to constitute a legal benefit.

40. RESTATEMENT, RESTITUTION, Introductory note (1937).

41. A constructive trust will usually be imposed if the plaintiff has been fraudulently induced to part with his land, or if a confidential relationship exists between the parties, or if the land was conveyed under an absolute deed intended as security. In *Young v. Young*, 251 Mass. 218, 146 N. E. 574 (1925) the plaintiff was allowed to recover land conveyed to a defaulting defendant under an oral agreement to make mutual wills.

Where there is simply an oral agreement to reconvey, however, the decisions are not in harmony. While the prevailing view in the United States is to deny the plaintiff any relief, either for restitution in value or for restitution in specie on the ground that relief in this situation would seem to "fly in the teeth" of the Statute of Frauds, the

These decisions, which are similar to those wherein the plaintiff parted with money or goods which the defendant orally agreed to return after one year,⁴² seem to "fly in the teeth" of the Statute of Frauds because the result is often the same as though the action had been brought to enforce the oral agreement itself. But, it is possible for a single set of facts to furnish a basis for two separate causes of action.⁴³ Professor Scott expressed this view as follows:

If the transferee were allowed to retain the land he would be unjustly enriched; a constructive trust is imposed in order to prevent this unjust enrichment. The Statute of Frauds prevents the courts from enforcing the intention of the parties as such; it does not prevent them from putting the parties *in status quo*. The statute forbids going forward; it does not forbid going back. It is true that the results of going forward and of going back may be, although they will not necessarily be, the same, but that should not affect the result.⁴⁴

In other situations where the plaintiff conveyed land, the courts have held that the defendant was legally benefited irrespective of the particular provision of the Statute that was violated, or of the character of return per-

plaintiff was allowed to recover the value of the land conveyed in the following cases: *Long v. Woodman*, 65 Me. 56 (1875) (absolute deed intended as security); *Peabody v. Fellows*, 177 Mass. 290, 58 N. E. 1019 (1901) (land for defendant's oral promise to pay off mortgage and later reconvey); *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433 (1906) (land for defendant's oral promise to reconvey if plaintiff returned from a certain voyage). In *Kemp v. Kemp*, 248 Mass. 354, 142 N. E. 779, 780 (1924) (land for oral promise of grantee to reconvey upon grantor's request), the court said, "Recovery is allowed in such a case, not as an indirect way of enforcing the contract, which would be contrary to sound principles, but on the ground that the refusal of the defendant to perform constitutes a failure of consideration, and he is therefore bound to make the plaintiff whole for what he has got from him."

In *Whitaker v. Burrows*, 71 Hun 478, 24 N. Y. Supp. 1011 (1893), the plaintiff purchased land but had the title transferred to the defendant under an oral agreement whereby the defendant provided the balance of the purchase price and promised to convey to the plaintiff when she repaid the amount advanced. The defendant repudiated the oral agreement and conveyed the land to a third party. Plaintiff was allowed to recover the value of the land less his indebtedness to the defendant. In this connection attention should be called to the statutes enacted in some states which abolish purchase-money resulting trusts. See 3 SCOTT, TRUSTS § 440.2 (1939).

Most English courts would impose a constructive trust against the defaulting defendant in these oral reconveyance agreements. The English view is generally preferred by the legal writers: 1 SCOTT, TRUSTS §§ 41. - 44.4 (1939); 3 SCOTT, TRUSTS §§ 482-487 (1939); Stone, *Resulting Trusts and the Statute of Frauds*, 6 COL. L. REV. 326 (1906); Ames, *Constructive Trusts Based upon the Breach of an Express Oral Trust of Land*, 20 HARV. L. REV. 549 (1907); Scott, *Conveyances upon Trusts Not Properly Declared*, 37 HARV. L. REV. 653 (1924); Costigan, *Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees*, 12 MICH. L. REV. 423, 515 (1914). For a collection of authorities see Notes, 129 A.L.R. 689 (1940); 80 A.L.R. 195 (1932); 45 A.L.R. 851 (1926); 35 A.L.R. 280 (1925); 39 L.R.A. (n.s.) 906 (1912).

42. See note 27 *supra* and *Montague v. Garnett*, 3 Bush 297 (Ky. 1867).

43. This situation is illustrated by the cases which involve waiver of tort and suit in assumpsit, by the tort liability of a doctor for carelessly performing his agreement to operate, and by the tort liability of a minor for misrepresenting his age in order to induce an adult to enter into a contract with him. Also see note 13 *supra*.

44. 1 SCOTT, TRUSTS 247 (1939).

formance promised by the defendant.⁴⁵ Courts have also found legal benefits when the plaintiff parted with an undivided interest in land,⁴⁶ a right of dower,⁴⁷ or an easement of way⁴⁸ in accordance with the terms of an oral agreement that did not comply with the Statute of Frauds.

6. PERFORMANCE AS BENEFIT—PLAINTIFF RENDERED SERVICES

Many of the problems involved when the plaintiff seeks restitution for services rendered in performance of an unenforceable agreement are presented by *Fabian v. Wasatch Orchard Company*.⁴⁹ The defendant had invested a considerable sum of money in growing asparagus and was having difficulty in finding markets for his products. He orally agreed to give the plaintiff the exclusive right to sell his products in Utah and Southern Idaho for three years with a 2½ per cent commission on such sales, in return for which the plaintiff orally promised to devote his entire time during the three year period to introducing the defendant's products and creating markets for them. Accordingly, the plaintiff secured over \$30,000 worth of orders, and the defendant accepted and filled more than one-half of these before he repudiated the oral agreement. Although the defendant contended that he sustained a loss in filling these orders, the appellate court correctly affirmed the plaintiff's recovery of \$2,300 on a quantum meruit count as the reasonable value of his services.

The plaintiff's services in the *Fabian* case did not produce any tangible article which the defendant retained at the time of the trial,⁵⁰ but the plaintiff may argue that his services enhanced the monetary value of the defendant's

45. *Bethel v. Booth & Co.*, 115 Ky. 145, 72 S. W. 803 (1903) (store for \$600 and ten years employment); *Dix v. Marcy*, 116 Mass. 416 (1875) (land for mortgage to guarantee support of grantor); *O'Grady v. O'Grady*, 162 Mass. 290, 38 N. E. 196 (1894) (land for defendant's oral promise to pay off mortgage, to sell land, and to return balance to plaintiff); *Day v. New York Central Railroad Co.*, 51 N. Y. 583 (1882) (land for right to feed cattle transported by the defendant railroad); *Henning v. Miller*, 83 Hun 403, 31 N. Y. Supp. 878 (1894) (land for defendant's oral promise to will one-third of his estate to plaintiff). In the following cases the plaintiff parted with land in exchange for defendant's oral promise to convey land: *Stark's Heirs v. Cannady*, 3 Litt. 399 (Ky. 1823); *Bassett v. Bassett*, 55 Me. 127 (1867); *Basord v. Pearson*, 9 Allen 387 (Mass. 1864); *Miller v. Roberts*, 169 Mass. 134, 47 N. E. 585 (1897); *Nugent v. Teachout*, 67 Mich. 571, 35 N. W. 254 (1867); *Dickerson v. Mays*, 60 Miss. 388 (1882) (cancellation of deed); *Thomas v. Dickinson*, 14 Barb. 90 (N. Y. 1852); see *Barr v. Davis*, 82 Colo. 529, 261 Pac. 463, 464 (1927); *Marcurda v. Fuller*, 225 Mass. 341, 114 N. E. 366, 367 (1916).

46. *Vick v. Vick*, 126 N. C. 123, 35 S. E. 257 (1900).

47. *Jarboe v. Severin*, 85 Ind. 496 (1882); *Andrews v. Broughton*, 78 Mo. App. 179 (1899), 84 Mo. App. 640 (1900).

48. *Thompson v. Madsen*, 29 Utah 326, 81 Pac. 160 (1905).

49. 41 Utah 404, 125 Pac. 860 (1912), 61 U. OF PA. L. REV. 330 (1913), 26 MICH. L. REV. 942 (1928).

50. An analogous situation results when the plaintiff parted with the use of an article in performance of an oral agreement that did not comply with the Statute of Frauds. See note 77 *infra*.

estate (1) by creating good will from which the defendant would profit over a period of years, (2) by creating or increasing the market value of the particular crop of asparagus that was sold, and (3) by saving the defendant's estate from a pecuniary diminution in accordance with the defendant's request.

First, in view of the defendant's outlay in asparagus plants, the amount of orders already obtained, and the number of years for which the plaintiff was employed, it is probably fair to assume that at the time the oral agreement was formed, and probably thereafter as well, the defendant contemplated that the plaintiff's services would benefit him not only with respect to this particular crop, but also with respect to future crops. And the selling of \$30,000 worth of a product at a reduced price would undoubtedly create at least some good will for the business dealing in that product.⁵¹

The defendant would probably insist that he was not unjustly retaining any benefit, for he was forced to terminate his business long before he had any opportunity to fully realize upon whatever good will was created by the plaintiff's services. But in the case of *Frazer v. Howe*⁵² the plaintiff, who received the exclusive right to sell the defendant's line for five years under an oral agreement that did not comply with the Statute of Frauds was allowed to recover for services rendered thereunder in developing markets for the defendant's produce even though the defendant had sold his business to another.⁵³ A similar view is adopted in the analogous cases which involve restitution for partial performance under contracts that have become impossible of further performance. In such cases the plaintiff is generally allowed to recover the reasonable value of the services and materials parted with under the contract, if they were of "benefit to the owner (defendant) in the advancement of the ends to be promoted by the contract,"⁵⁴ even though they were destroyed by the same event which rendered further performance of the contract impossible. Plaintiffs have obtained restitution for partial repairs to buildings⁵⁵ or chattels⁵⁶ which were destroyed without the fault of either party before the repairs could be completed. Thus, if the plaintiff conferred a benefit upon

51. See cases cited note 38 *supra*.

52. 106 Ill. 563 (1883). It is not clear from the report whether the defendant had received anything for good will from the third person to whom the business had been sold.

53. In *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315 (1889), the plaintiff recovered for services rendered in starting to organize electric companies under an oral agreement not performable within one year, though the organization of some of these companies was not completed. Cf. *Laursen v. O'Brien*, 90 F.2d 792 (7th Cir. 1937) (plaintiff recovered for services rendered in developing invention under four year oral contract for royalties).

54. This language was used by the late Justice Cardozo in *Buccini v. Paterno Const. Co.*, 253 N. Y. 256, 170 N. E. 911 (1930), and it was later adopted in the *RESTATEMENT, CONTRACTS* § 468 (3) (1932). For a further discussion of this problem and authorities see *WOODWARD, QUASI CONTRACTS* § 115 (1913); 6 *WILLISTON, CONTRACTS* §§ 1975, 1976 (rev. ed. 1938).

55. *WOODWARD, QUASI CONTRACTS* §§ 116-118 (1913).

56. *Id.* at § 119.

the defendant, even though the latter's enjoyment of it was only temporary, a legal benefit should be found and restitution allowed.

Second, the plaintiff might contend that his services conferred a legal benefit upon the defendant with respect to the particular crop of asparagus which he sold. The defendant insisted in the *Fabian* case, however, that the services were not beneficial to him because the plaintiff sold the products "for less than the cost of manufacturing them, and (they) were therefore sold, not to the defendant's profit or gain, but to its loss. . . ."⁵⁷ In rejecting the defendant's contention and pointing out its absurdity, the court gave the following illustration:

If A should orally employ B to work on his farm for a term of three years and agree to give him ten acres of land at the end of that period, and if B, on the faith of the contract, should work . . . sowing grain, and reaping crops, and A should then repudiate the contract and refuse to longer engage B's services, . . . B could not recover the reasonable value of his services; and if it were made to appear that because of drought or falling market, or other causes not due to his negligence or willfulness, the market price of the products was less than the cost of production, then A received no benefit from B's services, and the latter could not recover from the former.⁵⁸

The court's decision for the plaintiff was approved by one writer who said:

It is not easy to see the force of the argument that the plaintiff should be paid only when the defendant makes a profit. That seems to be deducting the unmarketability of the goods from the value of the services.⁵⁹

Although the cost of production, like demand, influences the future exchange value of articles and might thereby ultimately affect the size of the defendant's estate, the exchange value of the defendant's asparagus, which was already in existence in the *Fabian* case and for which, according to the lower court, he could find no ready market, could be determined only by whatever the defendant could get for it, not by what it had cost him to produce it. Thus the exchange value of the defendant's existing crop of asparagus was at least increased, if not created, by the plaintiff's services in developing markets under the unenforceable agreement; and the defendant was thereby legally benefited.

Third, the plaintiff might contend that his services were beneficial to the defendant in that they prevented him from sustaining as great a loss as he would have suffered if they had not been rendered. In view of the facts that asparagus is perishable, that the defendant had a large quantity on hand, and that he was in an unfortunate financial condition, the defendant in the *Fabian* case was forced to sell quickly or probably lose whatever exchange value his asparagus possessed. Since the plaintiff's services, in obtaining over \$30,000 worth of orders, assisted the defendant materially in minimizing this

57. *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 408, 125 Pac. 860, 861 (1912).

58. *Ibid.*

59. 61 U. OF PA. L. REV. 330, 331 (1913).

loss, it seems clear that the pecuniary value of the defendant's estate is larger by reason of the plaintiff's services than it would have been if no such services had been rendered. Moreover, the defendant requested and promised return performance for the same type of services which were rendered by the plaintiff under the unenforceable agreement. Thus, the defendant showed that he wanted and was willing to pay for these services. Since the plaintiff's services saved the defendant from having to pay another for rendering them, it seems reasonable to conclude that such a saving should constitute a legal benefit.

This view has been adopted by a large number of cases,⁶⁰ of which *Grantham v. Grantham*⁶¹ is typical. The oral agreement in that case required the plaintiff to care for his mother in return for her verbal promise to will her personal and real property to him. The mother's will failed to provide for the plaintiff, but he was allowed to recover the reasonable value of the services he had rendered at the testatrix's request and in accordance with the terms of the unenforceable agreement. The decisions, that the plaintiff's services should constitute a legal benefit in situations like the *Grantham* case, are justified because the services were rendered in performance of the oral agreement and saved the defendant's estate from a pecuniary diminution which probably would have been suffered if the services had been secured elsewhere. Thus, the great majority of the courts have held that services rendered in performance of an unenforceable agreement constitute a legal benefit irrespective of the character of the return performance promised by the defendant.⁶²

60. The following cases allowed the plaintiff to recover for services rendered (usually in caring for the deceased) in return for the decedent's promise to will real estate to the plaintiff: *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917); *Bonner v. Sledd*, 158 Ark. 47, 249 S. W. 556 (1923); *Long v. Rumsey*, 12 Cal.2d 334, 84 P.2d 146 (1938); *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925 (1910); *Watson v. Watson*, 1 Houst. 209 (Del. 1856); *Hensley v. Hilton*, 191 Ind. 309, 131 N. E. 38 (1921); *Haralambo's Adm'r. v. Christopher*, 231 Ky. 550, 21 S. W.2d 983 (1929), 18 Ky. L. J. 396 (1930); *Segars v. Segars*, 71 Me. 530 (1880); *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709 (1901); *Dixon v. Lamson*, 242 Mass. 129, 136 N. E. 346 (1922); *In re Williams*, 106 Mich. 490, 64 N. W. 490 (1895); *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1929); *Gupton v. Gupton*, 47 Mo. 37 (1870); *Willette v. Whitney*, 82 N. H. 209, 131 Atl. 597 (1926); *McCarty v. Ennist*, 7 N. J. Misc. 558, 146 Atl. 653 (1929); *Lisk v. Sherman*, 25 Barb. 433 (N. Y. 1857); *Grantham v. Grantham*, 205 N. C. 363, 171 S. E. 331 (1933); *Richter v. Derby*, 135 Ore. 400, 295 Pac. 457 (1931); *Riddle v. George*, 181 S. C. 360, 187 S. E. 524 (1936); *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S. W. 767; *Moore v. Rice*, 110 S. W.2d 973 (Tex. Civ. App. 1937); *In re Goyk's Estate*, 216 Wis. 462, 257 N. W. 448 (1935); see *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273 (1922), 32 YALE L. J. 89 (1922).

61. 205 N. C. 363, 171 S. E. 331 (1933).

62. *Laursen v. O'Brien*, 90 F.2d 792 (7th Cir. 1937) (services in developing invention under oral four year agreement for royalties); *Franklin v. Matao Gold. Min. Co.*, 158 Fed. 941 (8th Cir. 1907) (legal services for corporate stock in violation of the goods provision of the Statute of Frauds); *Farrow v. Burns*, 18 Ala. App. 350, 92 So. 236 (1922) (services as deputy sheriff for over one year); *Patten v. Hicks*, 43 Cal. 509 (1872) (cutting logs for two years); *Mills v. Joiner*, 20 Fla. 479 (1884) (seventeen years of service for land); *Seder v. Grand Lodge*, 35 Idaho 277, 206 Pac. 1052 (1922) (soliciting

The defaulting defendant may also be willing to pay for services which he feels will restore his health, or afford him pleasure, such as the playing of music or the rendering of some other type of entertainment. If the defendant orally agrees to make such a payment and the plaintiff renders some or all of the services required by the terms of the unenforceable agreement, thereby saving the defendant from having to pay someone else for those services, it is submitted, that the defendant is legally benefited.

7. PERFORMANCE AS BENEFIT—PLAINTIFF IMPROVED LAND

Here we must distinguish the more common cases in which improvements were made, not in performance of an oral agreement, but in reliance upon it.⁶³ In a considerable number of cases, however, the improvements were made in performance of the agreement and thus at the defendant's request. *Blank v.*

of lodge members for over one year); *Quinn v. Stark County Tele. Co.*, 122 Ill. App. 133 (1905) (services in return for twenty years of telephone service); *Sehoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777 (1889) (services for land); *Hahnel v. Highland Park College*, 171 Iowa 492, 152 N. W. 571 (1915) (music teacher for one year); *Longhofer v. Herbel*, 83 Kan. 278, 111 Pac. 483 (1910) (services in consideration of marriage); *Stout's Adm'r. v. Royston*, 32 Ky. L. Rep. 1055, 107 S. W. 784 (1908) (support for land); *Chapman v. Rich*, 63 Me. 588 (1874) (support for three years of service); *Donovan v. Walsh*, 238 Mass. 356, 130 N. E. 841 (1921) (services for land); *Kutzner v. Stuart*, 215 Mich. 270, 183 N. W. 905 (1921) (five years of farm work in return for share in profits); *Oxborough v. St. Martin*, 169 Minn. 72, 210 N. W. 854 (1926), 27 Col. L. Rev. 337 (1927); 40 HARV. L. REV. 648 (1927) (attorney's services for one half of the land recovered); *Dalgarno v. Holloway*, 56 Mont. 561, 186 Pac. 332 (1919) (digging ditch for interest in land); *Riiff v. Riibe*, 68 Neb. 543, 94 N. W. 517 (1903) (services for over one year); *Howe v. Day*, 58 N. H. 516 (1879) (support for land); *Lapham v. Osborne*, 20 Nev. 168, 18 Pac. 881 (1888) (counterclaim for services for over one year); *King v. Brown*, 2 Hill 485 (N. Y. 1842) (services for land); *Price v. Askins*, 212 N. C. 583, 194 S. E. 284 (1937) (support for land); *Towsley v. Moore*, 30 Ohio St. 184 (1876) (services for over one year); *Morris Plan Co. v. Campbell*, 180 Okla. 11, 67 P.2d 52 (1937) (services for over one year); *Jackson v. Stearns*, 58 Ore. 57, 113 Pac. 30 (1911) (attorney's services for land); *Eving v. Thompson*, 66 Pa. St. 382 (1870) (nursing services for land); *Carter v. Brown*, 3 S. C. 298 (1871) (services as cotton overseer for over one year in return for 16 bales of cotton); *A. W. Kutsche & Co. v. Hot Blast Coal Co.*, 84 S. W.2d 371 (Tenn. App. 1935), 14 TENN. L. REV. 124 (1936) (services in building fence in return for old fence, not performable within one year); *Gray v. Cheatham*, 52 S. W.2d 762 (Tex. Civ. App. 1932) (support for land); *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 Pac. 860 (1912), 26 MICH. L. REV. 942 (1928); 61 U. OF PA. L. REV. 330 (1913); *Sheldon v. Preva*, 57 Vt. 263 (1884) (clearing land for timber cut, not performable within one year); *Weaver v. General Metals Merger*, 167 Wash. 451, 9 P.2d 778 (1932) (services for two years); *Nelson v. Christensen*, 169 Wis. 373, 172 N. W. 741 (1919) (services for house and lot).

For a discussion of one group of cases, however, wherein the plaintiff has been denied a quantum meruit as well as a contractual recovery for services rendered under an oral agreement which did not comply with the real estate broker's Statute of Frauds, see *Jeanblanc, Restitution Under the Statute of Frauds: What Constitutes an Unjust Retention*, 48 MICH. L. REV. 923 (1950). A representative case is *Hale v. Kreisel*, 194 Wis. 271, 215 N. W. 227 (1927), 12 MARQ. L. REV. 81, 4 WIS. L. REV. 379 (1928). For a collection of authorities see Note, 56 A.L.R. 783 (1928). Also see Notes, 6 MINN. L. REV. 167 (1922); 31 YALE L. J. 447 (1922).

63. See p. 27 *infra*.

Rogers,⁶⁴ for example, involved improvements which the plaintiff made upon the defendant's land in accordance with the terms of an oral agreement, unenforceable because of the Statute of Frauds, by which the defendant promised to lease the land to the plaintiff. In finding that these improvements constituted a legal benefit, the court said:

. . . the complaint here avers that it was part of the oral agreement that the plaintiff should do the very things for which he seeks compensation. From the declarations of the complaint there is thus a showing of an unjust enrichment of the defendant at the expense of the plaintiff, . . .⁶⁵

Under such circumstances, the majority of the courts have found that such improvements constitute a legal benefit,⁶⁶ whether they were made under an oral lease of the defendant's property for longer than one year⁶⁷ or under an oral agreement wherein the defendant promised to sell the land to the plaintiff.⁶⁸ In either event the improvements were made in response to the defendant's request, and in the absence of an agreement for severance they became the property of the defendant land owner when they were affixed to the realty. In one case, however, the plaintiff was denied restitution even against a defaulting defendant so long as he remained in possession of the realty. Possibly this decision was reached because the plaintiff was still enjoying whatever benefit could be presently derived from the improvements;⁶⁹ yet the ownership of the improvements should constitute a legal benefit to the defendant. A better explanation of such a holding is that the plaintiff acted

64. 82 Cal. App. 35, 255 Pac. 235 (1927).

65. *Id.* at 37, 255 Pac. at 238. *Interstate Hotel Co. v. Woodward & Burgess Amusement Co.*, 103 Mo. App. 198, 77 S. W. 114 (1903) involved analogous facts and reached a similar result. Also see *WOODWARD, QUASI CONTRACTS* §§ 102, 107 (1913).

66. Although the earlier cases allowed recovery only in equity, this limitation is of little significance today in the light of the many codes of procedure which minimize the distinctions between actions at law and suits in equity. *KEENER, QUASI CONTRACTS* 363-373 (1895); 2 *WILLISTON, CONTRACTS* § 537 (rev. ed. 1936); *WOODWARD, QUASI CONTRACTS* § 102 (1913); Note, 17 A.L.R. 949 (1922).

67. *Crane v. Franklin*, 17 Ariz. 476, 154 Pac. 1036 (1916); *Blank v. Rodgers*, 82 Cal. App. 35, 255 Pac. 235 (1927); *People's National Bk. v. Magruder*, 77 Fla. 235, 81 So. 440 (1919); *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950 (1905); *Williams v. Bemis*, 108 Mass. 91 (1871); *Parker v. Tainter*, 123 Mass. 185 (1877); *Interstate Hotel Co. v. Woodward & Burgess Amusement Co.*, 103 Mo. App. 198, 77 S. W. 114 (1903); *Winter v. Spradling*, 163 Mo. App. 77, 145 S. W. 834 (1912); *Rosepaugh v. Vrendenburgh*, 16 Hun 60 (N. Y. 1878); *Nastrom v. Sederlin*, 43 Wyo. 330, 3 P.2d 82 (1931).

68. *King v. Thompson*, 9 Pet. 204 (U. S. 1835); *Allen v. Young*, 88 Ala. 338, 6 So. 747 (1889); *Cozad v. Elam*, 115 Mo. App. 136, 91 S. W. 434 (1905); *Graham v. Graham*, 134 App. Div. 777, 119 N. Y. Supp. 1013 (1909); *Luron v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900); *Ebert v. Disher*, 216 N. C. 36, 3 S. E.2d 301 (1939), *rehearing denied*, 216 N. C. 546, 5 S. E.2d 716 (1939); *Love v. Burton*, 61 S. W. 91 (Tenn. Ch. App. 1900).

69. *Miller v. Tobie*, 41 N. H. 84 (1860). Also see *WOODWARD, QUASI CONTRACTS* 163 (1913).

inequitably by retaining possession, so there was an absence of an unjust retention by the defendant rather than an absence of a legal benefit.⁷⁰

Improvements illustrate the many ways in which several types of performance can be combined in a single case. The improvement cases resemble the goods cases⁷¹ in that the defendant is usually retaining something tangible at the time of the trial; they also resemble the service cases⁷² in that the improvements are usually so affixed to the land that they cannot be returned to the plaintiff.⁷³ Hence specific restitution would be impracticable and unjust to both parties; to the plaintiff because the salvaged materials would not equal the benefit he had conferred; to the defendant because the salvage operation would interfere with his use of the land. Specific restitution of improvements would also involve economic waste of labor and materials.

These peculiar characteristics of improvements sometimes raise the problem of whether the existence of a legal benefit should be determined by examining the monetary enlargement of the defendant's estate, or the pecuniary loss which the defendant would have suffered if the improvements had been obtained from someone else. In many cases either course would disclose the existence of a legal benefit, but, where it was economically unwise to make the improvements or they merely adapted the defendant's property to the peculiar use of the plaintiff, no legal benefit could be found if the enhancement test alone were employed. Since the defendant's request and his promise of return performance is present in the improvement cases the same as it is present in the cases of goods⁷⁴ and services,⁷⁵ it would seem that the performance improvements, which are really only a combination of goods and services, should constitute a legal benefit whether they save from diminution or enhance the monetary value of the defendant's estate. The defendant is held liable for what he would have had to pay someone else (in the market) to make the improvements which he requested the plaintiff to make.⁷⁶

8. PERFORMANCE AS BENEFIT—PLAINTIFF PARTED WITH USE OF LAND⁷⁷

The distinction between performance of an oral agreement and mere reliance upon it must also be emphasized here.⁷⁸ For the plaintiff who orally

70. See Jeanblanc, *Restitution Under the Statute of Frauds: What Constitutes Unjust Retention*, 48 MICH. L. REV. 923 (1950).

71. See p. 9 *supra*.

72. See p. 14 *supra*.

73. Parenthetically, many statutes have been enacted concerning recovery for this type of benefit. See MARTIN, *CASES ON CONVEYANCES* 285-288 (1939).

74. See p. 9 *supra*.

75. See p. 14 *supra*.

76. Cf. RESTATEMENT, *CONTRACTS* § 347 (1932).

77. While there are no cases squarely in point, it would seem that the use of money or of a chattel received by the promissor from the promisee under an unenforceable oral promise would also constitute a legal benefit.

78. See p. 18 *supra*.

agreed to sell his land to the defendant parts with the use of his land merely in reliance upon the oral agreement, while the plaintiff who orally agreed to lease his land to the defendant for longer than one year usually parts with the use of his land in performance of the terms of the oral agreement itself.⁷⁹

In the use of land cases, as in those involving services, and improvements, the plaintiff cannot be specifically restored to the status quo. Many of the principles discussed in connection with the cases of services⁸⁰ and improvements,⁸¹ therefore, are also applicable here. Although the cases are unanimous in allowing the plaintiff to recover from a defaulting defendant for the latter's use of land under the terms of an oral lease,⁸² they do not clearly show whether their results are based upon principles of landlord and tenant or upon principles of restitution. In this connection, Professor Woodward said:

The obligation is not strictly quasi contractual, but is incidental to the relation of landlord and tenant created by the lessee's occupancy of the land in subordination to the lessor's title and with the lessor's consent. Although the lease is said to be void or unenforceable, the terms of the lessee's obligation for use and occupation, including the amount payable and the time for payment, are governed exclusively by its provisions, . . . In substance and effect this amounts to a partial enforcement of the oral lease.⁸³

In view of the facts that the defendant accepted the use of the plaintiff's land after the formation of the oral agreement, that the defendant's estate was at least saved from a pecuniary diminution, if not enhanced, and that the defendant, by his express request and promise of return performance, consented to lessen the pecuniary value of his estate in exchange for the use and occupation of the plaintiff's land, it is submitted that such use of land should constitute a legal benefit and that the decisions mentioned above⁸⁴ could also be supported by the principles of restitution.

79. See p. 29 *infra*.

80. See p. 14 *supra*.

81. See p. 18 *supra*.

82. Walsh v. Colelough, 56 Fed. 778 (7th Cir. 1893); Smith v. Pritchett, 98 Ala. 649, 13 So. 569 (1893); Crawford v. Jones, 54 Ala. 459 (1875); Nelson v. Webb, 54 Ala. 436 (1875); Parker v. Hollis, 50 Ala. 411 (1874); Crommelin v. Thiess & Co., 31 Ala. 412 (1858); Davidson v. Ernest, 7 Ala. 817 (1845); Hays v. Goree, 4 Stew. & P. 170 (Ala. 1833); Walker v. Shackelford, 49 Ark. 503, 5 S. W. 887 (1887); Warner v. Hale, 65 Ill. 395 (1872); Smith v. Kinkaid, 1 Ill. App. 620 (1878); Wolke v. Fleming, 103 Ind. 105, 2 N. E. 325 (1885); Nash v. Berkmeir, 83 Ind. 536 (1882); Steele v. Anheuser-Busch Brewing Ass'n., 57 Minn. 18, 58 N. W. 685 (1894); Evans v. Wonona Lumber Co., 30 Minn. 515, 16 N. W. 404 (1883); Aylor v. McInturf, 184 Mo. App. 691, 171 S. W. 606 (1914); Talamo v. Spitzmiller, 120 N. Y. 37, 23 N. E. 980 (1890); Laughran v. Smith, 75 N. Y. 205 (1878); Herrmann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343 (1896); Robb v. San Antonio St. R., 82 Tex. 392, 18 S. W. 707 (1891); Brooke-Smith Realty Co. v. Graham, 258 S. W. 513 (Tex. Civ. App. 1924).

83. WOODWARD, QUASI CONTRACTS 152 (1913).

84. See cases cited note 82 *supra*. Also see discussion pp. 24, 25 *infra*.

9. PERFORMANCE AS BENEFIT—BENEFIT RENDERED TO A THIRD PARTY

Even before the enactment of the Statute of Frauds, it was established that A's delivery of goods to C at B's request would render B liable in an action of debt, an action which always proceeded upon the assumption that the defendant (B) had received something.⁸⁵ Indeed, B's desires were satisfied by A's performance and this is properly held to constitute a legal benefit to B.

In *Clement v. Rowe*⁸⁶ the defendant induced the plaintiff to convey land to a corporation of which the defendant was secretary, in return for which the corporation issued stock to the plaintiff. The defendant-secretary had orally promised to repurchase the stock if seven per cent dividends were not paid by the corporation for the next two years. The corporation paid no dividends, and after the expiration of the two years the plaintiff tendered the stock to the defendant and demanded that he repurchase it at the orally agreed price. The defendant repudiated the oral agreement which did not comply with the one year provision of the Statute of Frauds, and the plaintiff then brought this action to recover the value of the land he had conveyed. In affirming the trial court's decision to set aside a directed verdict for the defendant and grant a new trial, the court said:

In the present case the defendant, himself, did not receive the land which was the partial consideration for the invalid promise, it went to the Medicine Company. But it went to the Medicine Company at the direction of the defendant. So far as the relations between the plaintiff and the defendant are concerned, the situation was the same as though the land really became the property of the defendant, but by his direction the title was taken in the name of a third person. In such a case the law will presume that the benefit of the transaction inured to the defendant.⁸⁷

On the other hand, some courts have denied recovery when the plaintiff's performance under the oral agreement was rendered to a third party at the defendant's request.⁸⁸ The recent case of *Rotea v. Izuel*,⁸⁹ is a good illustra-

85. *The Lady Shandois v. Simson*, Cro. Eliz. 880 (Q. B. 1602). The plaintiff declared in debt for £256 for embroidery placed upon a gown for the servant of the defendant's daughter, and a judgment for the plaintiff was affirmed. Also see JACKSON, *THE HISTORY OF QUASI CONTRACT IN ENGLISH LAW* § 13 (1936).

86. 33 S. D. 499, 146 N. W. 700 (1914). And in *Moody v. Smith*, 70 N. Y. 598 (1877), the defendant orally agreed to convey land to the plaintiff in return for services which the plaintiff was to render to a third party. The court held that the defendant had received a legal benefit. Also see *Hubbard v. Hubbard*, 151 App. Div. 174, 175, 135 N. Y. Supp. 908, 910 (1912).

87. *Clement v. Rowe*, 33 S. D. 499, 507, 146 N. W. 700, 702 (1914).

88. In *Gazzam v. Simpson*, 114 Fed. 71 (2d Cir. 1902), the plaintiff and the defendant together held the majority of stock in a certain corporation. They entered into an oral agreement which was within the one-year provision of the Statute of Frauds. The defendant agreed to keep the plaintiff in control of the corporation, in return for which the plaintiff loaned money to the corporation. The court said, "It is quite impossible to

tion. The plaintiff sued an executor for services he had rendered to the deceased's sister under an oral agreement whereby the deceased promised to devise real estate to the plaintiff. The court found that the defendant had received no legal benefit, and said:

The services here were admittedly performed with respect to and for the direct benefit of Eugenia Izuel, the sister of the deceased. In other words, said services were not performed with respect to or for the direct benefit of the deceased or with respect to or for the direct benefit of any person to whom the deceased owed a legal duty of support. Defendant therefore contends that the plaintiff may not recover . . . upon an obligation implied in law as the law will not imply an obligation from the mere fact that the deceased may have requested plaintiff to perform services for a third person. In our opinion this contention must be sustained.⁹⁰

define or ascertain the pecuniary value to any stockholder or creditor accruing from a loan received by the corporation." *Id.* at 72. The court held that the defendant had received no legal benefit and affirmed the ruling of the trial judge in directing a verdict for the defendant. In *Kimmins v. Oldham*, 27 W. Va. 258 (1885), for the protection of a corporation of which both the plaintiff and the defendant were stockholders, a promissory note was signed by the plaintiff as maker and the defendant as indorser. The plaintiff and the defendant had entered into an oral agreement which was within the one-year provision of the Statute of Frauds. It provided that if the corporation should not pay the note, then any loss should be divided equally. When the note matured the plaintiff paid it in full, and sought to recover from the defendant in restitution, but the court held that such payment inured to the benefit of the corporation, not to the defendant-stockholder.

In *Pierce v. Estate of Paine*, 28 Vt. 34 (1855), the plaintiff purchased corporate stock in performance of an oral agreement with the defendant which was not performable within one year. The oral agreement provided that the defendant was to purchase the stock from the plaintiff at the end of one year, if the plaintiff so desired. The court held that the plaintiff's payments to the corporation for the stock which he had received did not constitute a legal benefit to the defendant. The writer believes, as stated in the text, that these decisions are not sound.

In *Bristol v. Sutton*, 115 Mich. 365, 73 N. W. 424 (1897) an uncle orally promised his fifteen-year-old nephew one thousand dollars if the latter, who had been emancipated, would return to his father's home and work there until he reached majority. After the uncle's death, the nephew filed a claim against the uncle's estate for the services he had rendered to his father under the oral agreement. The court found that the uncle had received no legal benefit from the nephew's services. Perhaps the decision can be explained on its peculiar facts. It will be observed that restitution was sought for services rendered by the son to his father while the son was in fact still a minor. The court may have been motivated also by the danger of collusion between the plaintiff and his father to falsify the existence of an oral agreement in order to obtain a portion of the uncle's estate.

89. 14 Cal.2d 605, 95 P.2d 927 (1939). The decision has been criticized in Note, 28 CALIF. L. REV. 528 (1940).

90. *Rotea v. Izuel*, 14 Cal.2d 605, 610, 95 P.2d 927, 930 (1939). *Cf.* *Dumphy v. Ryan*, 116 U. S. 491 (1885). In that case plaintiff sued defendant on a note. Defendant filed a counterclaim that plaintiff had repudiated an oral agreement wherein defendant bought land from a third person in return for plaintiff's promise to buy a 1/3 interest therein. In holding the counterclaim was bad the court said, "The defendant paid no money to or for the plaintiff. The money paid out by him was to enable him to perform the contract with the plaintiff. He paid it out himself and for his own advantage. The plaintiff received neither the money nor the land from the defendant." (*Italics added*). *Id.* at 497. If a defendant has not in fact requested and promised return performance for the plain-

It is believed that the court overlooked the vital fact that the defendant had done more than merely request the plaintiff to perform for the third party. He had also made a return promise whereby, in the absence of fraud, he showed his willingness to diminish the monetary value of his estate in exchange for the very performance which the plaintiff rendered. Perhaps the deceased intended to make a gift of the plaintiff's services to the sister, but at any rate the sister received services from the plaintiff which she would not have received except for the defendant's request and promise of return performance. It is submitted, therefore, that the *Rotea* case and others in accord with it are wrongly decided.

10. PERFORMANCE AS BENEFIT—SOME INTANGIBLE BENEFITS

The benefit conferred upon a third party at the defendant's request,⁹¹ like all benefit, is intangible in one sense. But the benefit to be discussed in this section is characterized by a peculiar lack of direct enjoyment by the defendant.

In *Matousek v. Quirici*⁹² the plaintiff agreed to lease his store to the defendant under an oral agreement that did not comply with the Statute of Frauds. Even though the defendant never actually occupied the store under this agreement, the plaintiff was allowed to recover the reasonable value for use and occupation. Since the evidence showed that the defendant leased the store for the express purpose of keeping competitors from occupying the property, the defendant received the same benefit that he contemplated at the time the oral agreement was formed. The presumed existence of competitors who were willing to lease the store shows that the absence of occupancy by others was a benefit to the defendant and a satisfaction of his desires. While the gain to the defendant may have been only a lessening of competition, he may be properly held to pay for it what he would have had to pay anyone else, namely, the "market" rental value of the premises.

The *Matousek* case should be compared with *Huey v. Frank*⁹³ which was decided by the same court two years earlier. In that case the plaintiff was allowed to recover from the defaulting defendant who had not occupied the rooms, the amount which the plaintiff-lessor had expended "at the special instance and request of the defendant"⁹⁴ under an oral agreement, for

tiff's conduct, as the language concerning the counterclaim in the *Dunphy* case would seem to imply, then the plaintiff's conduct is merely *reliance action* rendered in preparation for performance of the oral agreement. See discussion p. 30 *infra*.

91. *The Lady Shandois v. Simson*, Cro. Eliz. 880 (Q. B. 1602).

92. 195 Ill. App. 391 (1915); *cf.* *Barlow v. Wainwright*, 22 Vt. 88, (1849).

93. 182 Ill. App. 431 (1913).

94. *Id.* at 435, the court said: "It is well settled that while in an action at law a party cannot recover on a contract within the statute of frauds he may recover for money paid, property delivered, or services rendered in accordance with, and upon the faith of such a contract. . . . The proof shows that these several amounts (for lettering, for

window lettering, shades, and telephone services. The plaintiff's performance merely adapted his property to the use of the defendant and probably did not increase its sale or rental value. Neither did the plaintiff's performance enhance the monetary value of the defendant's estate, except for the possible benefit the defendant-lessee might have received from the advertisement on the lettered windows. This was not the type of benefit, and was probably merely an incident to the benefit the defendant contemplated when he entered into the oral agreement. It was not the benefit upon which the court based the plaintiff's recovery. The legal benefit to the defendant was found in that the plaintiff had conducted himself in accordance with the defendant's request and in expectation of the defendant's return performance as expressed in the oral agreement. In view of the presence of the defendant's request, his promise of return performance, and the pecuniary saving to the defendant's estate in his not having to do what the plaintiff did, which he could not have enjoyed if he had secured the requested performance elsewhere, it is submitted that the court in the *Huey* case was justified in finding that the defendant had received a legal benefit.

In *Kearns v. Andree*⁹⁵ the parties entered into an oral agreement for the sale of a lot upon which the plaintiff-vendor was completing a new house. Later the defendant became dissatisfied with his purchase, but "finally agreed to stand by the bargain, if certain alterations were made in the house, if it was finished in a certain way, and if certain trees standing upon the lot were cut down."⁹⁶ The plaintiff complied with the defendant's requests, which actually rendered the property less saleable, but the defendant again refused to complete the purchase. After repainting the house and repapering certain rooms in order to secure another purchaser, the plaintiff sued to recover the expenditures incurred in complying with the defendant's requests and also for those required to obtain the subsequent purchaser. The oral agreement was held unenforceable because the provisions regarding a mortgage which was to be placed on the lot were to indefinite. But the court drew an analogy to the service cases involving restitution under the Statute of Frauds⁹⁷ and, after setting aside the lower court's judgment which allowed recovery for the repainting and repapering necessary to obtain the ultimate purchaser as well as for the work done at the defendant's request, the court said:

window shades; and for telephone services), aggregating \$38.40, were paid out by plaintiff in error at the special instance and request of defendant in error. To deny to plaintiff in error a judgment for this amount would be to permit defendant in error to pervert the statute of frauds into an instrument of fraud." (Italics added).

95. 107 Conn. 181, 139 Atl. 695 (1928). Also see Notes, 44 HARV. L. REV. 623 (1931); 26 MICH. L. REV. 942 (1928); 13 MINN. L. REV. 71 (1928).

96. *Kearns v. Andrea*, 107 Conn. 181, 183, 139 Atl. 695, 696 (1928).

97. *Id.* at 187, 139 Atl. at 697.

But if the work done on the property to adapt it to the desires of the defendant was done under the terms of an oral agreement for the sale of the premises, in good faith and in the honest belief that the agreement was sufficiently definite to be enforced, the plaintiff is entitled to recover the reasonable compensation therefor.⁹⁸

The character of the plaintiff's conduct and the results therefrom (i.e., the absence of monetary enrichment to the defendant) in the *Kearns* case are similar to those in the *Huey* and *Matousek* cases. But in the *Huey* and *Matousek* cases the defendant's request was made as a part of the oral agreement and was accompanied by the defendant's promise of return performance, while in the *Kearns* case the defendant's request was made after he had repudiated a prior unenforceable agreement. Nevertheless, the parties apparently agreed to disregard their prior agreement in the *Kearns* case, and the plaintiff's performance was actually rendered in exchange for the defendant's subsequent promise to purchase the land, and not merely in reliance upon it.

Since the plaintiff in the *Kearns* case rendered performance upon his own property to prepare it for conveyance to the defendant, this case will be considered again in connection with the cases involving reliance action in preparation for performance.⁹⁹

II. ACTION IN RELIANCE¹⁰⁰ UPON ORAL AGREEMENT AS LEGAL BENEFIT

11. RELIANCE ACTION AS BENEFIT—IN GENERAL

A suit to obtain compensation for the plaintiff's action rendered in reliance upon, rather than in performance of the oral agreement that did not comply with the Statute of Frauds, frequently involves a situation wherein the plaintiff suffered a loss without conferring a corresponding benefit upon the defendant. It may be argued, on other grounds than the principles of restitution,¹⁰¹ that this type of loss by the plaintiff is one which should be shifted to the defaulting defendant. But we are concerned with the extent to which restitution can alleviate the harsh results sometimes produced by the Statute of Frauds. More specifically, our problem is to ascertain what types of reliance action, if any, should constitute a legal benefit.

98. *Id.* at 188, 139 Atl. at 698. Also see Note, 59 A.L.R. 604 (1929), for a discussion of this case.

99. See pp. 33, 37 *infra*.

100. The plaintiff's performance in the cases discussed in part I of this article may also be said to have been rendered in reliance upon the oral agreement which did not comply with the provisions of the Statute of Frauds. But the heading "Action in Reliance" is employed here to differentiate between the plaintiff's reliance action in part II, which is rendered without any request by the defendant and the plaintiff's performance in part I which was bargained for, and rendered in response to such a request and in exchange for a promise of return performance. "Performance" implies a duty to perform, whereas "reliance action" does not.

101. See note 147 *infra*.

When the defendant entered into the oral agreement, he probably contemplated that some acts would be done by the plaintiff in reliance thereon, but this does not mean that he foresaw, much less desired the same reliance action which was later rendered. In that event some mention of it would probably have been made in the oral agreement. Nevertheless, the reliance action was not rendered in response to the defendant's request and promise of return performance. From the absence of any request it is inferred that, at the time when the oral agreement was formed, the defendant did not expect to pay the plaintiff anything for the acts rendered in reliance upon the oral agreement.

It is also probable, in many instances, that the plaintiff did not expect anything from the defendant in return for his reliance action. The plaintiff may have made improvements upon the defendant's land in reliance upon the latter's oral promise to convey that land to the former. It seems reasonable to conclude that, at least when the improvements were being made, the plaintiff intended to retain them for his own benefit and did not expect anything from the defendant therefor. A further illustration is afforded when the plaintiff's reliance action consists of preparation for his own performance of the oral agreement. Although the plaintiff does ultimately expect something in return for his reliance action, he does not expect anything until it has progressed far enough to constitute performance of the oral agreement itself. On the other hand, as was discussed in Part I of this article, when the plaintiff renders performance of the oral agreement, he does so in response to the defendant's request and in expectation of the return performance promised by the defendant.

12. RELIANCE AS BENEFIT—PLAINTIFF IMPROVED LAND

Improvements may constitute a legal benefit to the defendant land owner if they enhance the pecuniary value of his estate, but if they merely save him from paying another for making them, it must be shown that the defendant wanted the improvements made. As was discussed earlier,¹⁰² improvements made by a vendee or lessee in performance of an unenforceable agreement may confer a legal benefit upon the land owner in either of the above ways. But since reliance improvements are neither requested by the defendant nor induced by his promise of return performance, it is not established that the defendant wanted the improvements or would have paid another to make them. Reliance improvements may constitute a legal benefit to the defendant, however, if they enhance the pecuniary value of his estate, even though he did not request them. When the improvements are affixed to the land so as to

102. See p. 18 *supra*.

become a part thereof,¹⁰³ the title to them passes to the land owner, and if the saleable value of his land is increased thereby,¹⁰⁴ his power to obtain things that satisfy his desires is also increased. In order to determine whether or not the improvements have become sufficiently annexed to the land so the title to them passed to the defaulting defendant, tests from the field of fixtures must be employed. If the title to the fixtures has not passed to the defendant, then the problem is one preparatory reliance.¹⁰⁵

As was pointed out elsewhere,¹⁰⁶ specific restitution of improvements upon land is usually impractical, but it would seem that the land could be reached by the plaintiff in equity as security for his claim in restitution. The Restatement of Restitution suggests that an equitable lien should arise,¹⁰⁷ and some of the cases have so held.¹⁰⁸ There are also many other cases holding that improvements made in reliance upon an unenforceable agreement to lease¹⁰⁹ or to purchase the land¹¹⁰ constitute a legal benefit to the extent that they increased the saleable value of the land.

103. But in *Goodwin v. Perkins*, 134 Cal. 564, 66 Pac. 793 (1901), the improvements were not affixed to the land so as to be regarded as a part thereof. The title to them remained in the plaintiff-lessee, and he was allowed to remove them.

104. In recognition of this principle the court in *Carter v. Carter*, 182 N. C. 186, 190, 108 S. E. 765, 766 (1921) approved the following language: "The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land." And see *Bendix v. Ross*, 205 Wis. 581, 585, 238 N. W. 381, 382 (1931), for similar language. Note, 8 Wis. L. Rev. 87 (1932).

105. See p. 30 *infra*.

106. See p. 19 *supra*.

107. RESTATEMENT, RESTITUTION § 161, comment *a* (1937), provides: ". . . Thus, where a person makes improvements upon the land of another under circumstances which entitle him to restitution, he may have an equitable lien upon the land, but he cannot charge the owner of the land as constructive trustee of the land for him and compel the owner to transfer the land to him (see § 170; compare § 206). . . ."

108. In the following cases the plaintiffs were unable to obtain specific performance of the unenforceable promise to sell the land, but were allowed a lien for the improvements made in reliance upon the oral agreement. *Jones v. Gainer*, 157 Ala. 218, 47 So. 142 (1908); *Williams v. Williams*, 210 Ala. 372, 98 So. 200 (1923); *Johnston v. Glancy*, 4 Blackf. 94 (Ind. 1835); *Brown v. East*, 5 B. Mon. 405 (Ky. 1827); *Ballamy v. Ragsdale*, 14 B. Mon. 293 (Ky. 1853); *Trecee v. Trecee*, 73 Tenn. 220 (1880).

The recovery for the improvements was also accompanied by a lien in the following cases: *Bush v. Sullivan*, 3 G. Greene 344 (Iowa 1851); *Dedman v. Nally*, 14 Ky. L. Rep. 229 (1892); see *Poole v. Johnson*, 31 Ky. L. Rep. 168, 170, 101 S. W. 955, 956 (1907).

A lien has also been granted to defendant's for improvements they made in reliance upon the unenforceable agreement when the plaintiff land owner is trying to regain possession of the land. *Union Central Life Ins. Co. v. Cordon*, 208 N. C. 723, 182 S. E. 496 (1935); *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152 (1911); see *Crain v. Crain*, 197 Ky. 813, 814, 248 S. W. 176, 177 (1923).

109. The following courts have found that reliance improvements constituted a legal benefit to the land owner: *Findley v. Wilson*, 3 Litt. 390 (Ky. 1823); *Smith v. Kober*, 108 Neb. 768, 189 N. W. 377 (1922); *Gregory v. Peabody*, 149 Wash. 227, 270 Pac. 825 (1928), *aff'd*, 153 Wash. 99, 279 Pac. 102 (1930); see *Ingram v. Corbit*, 177 N. C. 318, 322, 99 S. E. 18, 20 (1919).

110. The earlier cases allowed the plaintiff to recover only in equity. *McCracken v. Sanders*, 4 Bibb 511 (Ky. 1817); *Orear v. Botts*, 3 B. Mon. 360 (Ky. 1843); *Welsh v.*

13. RELIANCE ACTION AS BENEFIT—PLAINTIFF PARTED WITH USE OF LAND

The cases involving the use and occupation of land parted with in performance of the terms of an oral lease which did not comply with the Statute of Frauds were discussed above.¹¹¹ On the other hand, if the plaintiff orally promised to sell his land to the defendant and allowed the latter to take possession, the use and occupation is then parted with in reliance upon rather than in performance of the oral agreement.

The plaintiff did not expect anything in return for his reliance action as such, though he did expect something, in return for the performance of his promise to convey the land, which was presumably sufficient to include the value of the use and occupation enjoyed by the defendant as a result of the plaintiff's reliance upon the oral agreement. Hence, it is not to be inferred that the plaintiff intended to make a gift to the defendant of the use and occupation of the land. It would seem, even in the absence of a request by the defendant, that he was legally benefited by the use and occupation if the pecuniary value of his estate was thereby enlarged.

Welsh, 5 Ohio 425 (1832); Mathews v. Davis, 25 Tenn. 324 (1845). In *Perry v. Norton*, 182 N. C. 585, 588, 109 S. E. 641, 643 (1921) the court said, "It is doubtful whether, prior to the abolitions of the distinctions between actions at law and suits in equity, an action could have been maintained at law for compensation for improvements put upon land by the vendee. The court of equity had granted relief by enjoining the eviction of the vendee by the vendor, who repudiated his contract until he had made compensation for improvements. Whatever difficulty was encountered because of technical rules of pleading disappear when forms of action are abolished. . . ." Also see Note, 17 A.L.R. 951 (1922); 2 WILLISTON, CONTRACTS § 537 (rev. ed. 1936).

Reliance improvements were held to constitute a legal benefit to the land owner in each of the following cases: *Williams v. Williams*, 210 Ala. 372, 98 So. 200 (1923); *Wainwright v. Talcott*, 60 Conn. 43, 22 Atl. 484 (1891); *Johnston v. Glancy*, 4 Blackf. 94 (Ind. 1835); *Dunn v. Winans*, 106 Kan. 80, 186 Pac. 748 (1920); *Padgett v. Decker*, 145 Ky. 227, 140 S. W. 152 (1911); *Bishop v. Clark*, 82 Me. 532, 20 Atl. 88 (1890); *Hillebrands v. Nibelink*, 40 Mich. 646 (1879); *Schultz v. Thompson*, 156 Minn. 357, 194 N. W. 884 (1923) (*sub nom.* *Schultz v. Johnson*); *Smith v. Smith's Adm'rs.*, 28 N. J. L. 208 (1860); *Harris v. Frink*, 49 N. Y. 24 (1872); *Union Central Life Ins. Co. v. Gordon*, 208 N. C. 723, 182 S. E. 496 (1935); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893); *Smoot v. Smoot*, 80 Tenn. 274 (1883); *Burleson v. Tinnin*, 100 S. W. 350 (Tex. Civ. App. 1907); *Muckde v. Hoffman*, 119 Wash. 519, 205 Pac. 1048 (1925); *Bendix v. Ross*, 205 Wis. 581, 238 N. W. 381 (1931), 8 WIS. L. REV. 87 (1932); see *Sims v. McEwen's Adm'r.*, 27 Ala. 184, 192 (1855); *McNamee v. Withers*, 37 Md. 171, 177 (1872); *Hillis v. Rhodes*, 205 Mo. App. 439, 450, 223 S. W. 972, 974 (1920); *Faircloth v. Kinlaw*, 165 N. C. 228, 231, 81 S. E. 299, 300 (1914); *Duke v. Griffith*, 13 Utah 361, 372, 45 Pac. 276, 278 (1896); *Porter v. Shaffer*, 147 Va. 921, 933, 133 S. E. 614, 617 (1926); cf. *McCracken v. McCracken*, 88 N. C. 272 (1883) (plaintiff was not allowed to recover for improvements made when defendant denied the existence of the oral agreement to sell); *Often v. Stout*, 97 N. J. Eq. 122, 127 Atl. 677 (1925) (vendee was not allowed to recover for improvements made after vendor had repudiated the oral agreement); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893) (vendor indicated his willingness to stand by the oral agreement after he had repudiated it, and the court allowed the vendee to recover for improvements made after the repudiation). Also see Note, 17 A.L.R. 949 (1922); and 2 WILLISTON, CONTRACTS § 537 (rev. ed. 1936).

111. See p. 20 *supra*.

Although Ames pointed out that the remedy of assumpsit for use and occupation was created by statute rather than by judicial decisions, and that the courts were reluctant to extend it to situations not mentioned in the Act of Parliament,¹¹² a few courts have allowed the land owner to recover in assumpsit for use and occupation of land parted with in reliance upon the oral agreement.¹¹³ Many other decisions have also recognized that the reliance use and occupation constitutes a legal benefit and have allowed it to be set off against the vendee's claim for improvements made upon the property.¹¹⁴

14. RELIANCE ACTION AS BENEFIT—PLAINTIFF PREPARED TO PERFORM ORAL AGREEMENT—IN GENERAL

Preparation for performance is one of the most common types of action rendered in reliance upon oral agreements that do not comply with the Statute of Frauds. Preparatory reliance action may occur where the plaintiff's promise was (1) to sell goods, or (2) to render services which required him to move to a new location where the oral agreement was to be performed or (3) to make improvements upon real property. The cases involving reliance action in preparation for performance will be discussed in the order listed, an arrangement that will facilitate a comparison of these preparatory reliance cases with the performance cases involving goods, services and improvements which were discussed in Part I of this article.

The defendant in the preparatory reliance cases, like one who hires an independent contractor, has indicated by the nature of his request and promise of return performance embodied in the oral agreement that he is promising to compensate the plaintiff only for the final result, not for the various acts of preparation leading up to that result.¹¹⁵ But it frequently was essential for

112. Ames, *Assumpsit for Use and Occupation*, 2 HARV. L. REV. 377 (1889). Also see WOODWARD, QUASI CONTRACTS § 284 (1913).

113. *Smith v. Wooding*, 20 Ala. 324 (1852); *Patterson v. Stoddard*, 47 Me. 355 (1860); *Harkness v. McIntire*, 76 Me. 201 (1884); *Pierce v. Pierce*, 25 Barb. 243 (N. Y. 1857); *cf. Gould v. Thompson*, 4 Metc. 224 (Mass. 1842) (land owner recovered for use and occupation until fire destroyed buildings on the property he had orally agreed to sell to the defendant). WOODWARD, QUASI CONTRACTS 152 (1913).

114. *Williams v. Williams*, 210 Ala. 372, 98 So. 200 (1923); *Collins v. Thayer*, 74 Ill. 138 (1874) (use and occupation was set off against vendee's claim for money paid); *McCracken v. Sanders*, 4 Bibb 511 (Ky. 1817); *Fox's Heirs v. Longly*, 1 A. K. Marsh. 388 (Ky. 1818); *McC Campbell v. McC Campbell*, 5 Litt. 92 (Ky. 1824); *Grimes v. Shrieve*, 6 T. B. Mon. 546 (Ky. 1828); *Caldwell v. Davidson*, 187 Ky. 490, 219 S. W. 445 (1920); *Zanone v. Tashgian*, 231 Ky. 454, 21 S. W.2d 825 (1929); *Richards v. Allen*, 17 Me. 296 (1840); *Parkhurst v. Van Courtland*, 1 Johns. Ch. 273 (N. Y. 1814); *Albea v. Griffin*, 22 N. C. 9 (1838); *Union Central Life Ins. Co. v. Cordon*, 208 N. C. 723, 182 S. E. 496 (1935); *Bender's Adm'r v. Bender*, 37 Pa. St. 419 (1860); *Harris v. Harris*, 70 Pa. St. 170 (1871); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893); *Treece v. Treece*, 73 Tenn. 220 (1880); *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682 (1904).

115. In *McHolland v. Treadway*, 226 Mo. App. 212, 45 S. W.2d 903 (1932), for example, the plaintiff entered into an oral agreement whereby he was to assign certain notes to the defendant as partial payment for a designated tract of land owned by the latter.

the plaintiff to render reliance action in preparation for performance, for if he did not, he would later become in default under the terms of the oral agreement. In many of these instances, the plaintiff intended to retain the benefit from his reliance action only until the preparation had proceeded far enough to enable him to perform the oral agreement. In other words, the plaintiff ordinarily renders the preparatory reliance action in ultimate expectation of return performance by the defendant. From the standpoint of the ultimate expectation, therefore, it is arguable that the plaintiff's claim for compensation for rendering preparatory action in reliance is more meritorious than his claim for making improvements in reliance.¹¹⁶ But again we find that the expectation of the plaintiff is not the controlling factor; for the decisions are generally less favorable to the plaintiff in the preparatory reliance cases, than in the improvement cases, because in the former the defendant is not deemed to have received a legal benefit.

In the cases of preparatory reliance, the defendant's repudiation of the oral agreement has the effect of preventing a benefit from being conferred upon the defendant. The rules regarding the passage of title were employed in the reliance improvement cases¹¹⁷ to show the existence of a legal benefit because of the enlargement of the defendant's estate. The same argument is turned around, in the preparatory reliance cases, to establish that since no title passed to the defendant, his estate has not been enlarged and, therefore, he has not been legally benefited.

15. RELIANCE ACTION AS BENEFIT—PLAINTIFF PREPARED TO PERFORM IN GOODS CASES

The leading case of *Dowling v. McKenney*¹¹⁸ involved reliance action by the plaintiff in preparing goods for sale and delivery to the defendant under an oral agreement which did not comply with the Statute of Frauds. In that case the plaintiff orally agreed to deliver an inscribed monument, when completed, and to pay two hundred dollars, in return for which the defendant was to convey a tract of land. After the monument was finished, the plaintiff offered to deliver it to the defendant together with the balance of money due in accordance with the oral agreement. The defendant refused to accept either

The notes had been executed by the defendant's father and, at the time when the oral agreement was formed, they were held by third parties. After the plaintiff purchased the notes from the third parties, but before he assigned them to the defendant, the latter repudiated the unenforceable agreement. The plaintiff sought a lien against the defendant's land for the amount he had paid for the notes. It was held that the lower court correctly sustained a demurrer to the plaintiff's evidence because the proof showed no actual payment to the defendant for which a lien could be imposed. In other words, the plaintiff, by obtaining the notes from the third parties, was merely rendering preparatory reliance action which did not constitute a legal benefit to the defendant.

116. See p. 27 *supra*.

117. See p. 28 *supra*.

118. 124 Mass. 478 (1878).

the monument or the money or to convey the land. The plaintiff sued for the value of the monument or the labor he had expended in making it. By the consent of the parties, before verdict, the trial judge reported the case for the determination of the upper court. In holding that the case should stand for trial, the upper court said :

In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand, and the work was done upon it, we cannot say as a matter of law that it was not of benefit to the defendant. . . .¹¹⁹

If the work regarding the foundation was requested by the defendant, it would constitute partial performance of the oral agreement and the plaintiff would be entitled to restitution therefor.¹²⁰ But, even in the absence of a request by the defendant, the preparation of the foundation upon the defendant's land might constitute a legal benefit in regard to reliance improvements.¹²¹ For the title to the foundation presumably passed to the defendant as it was affixed to his land.

On the other hand, it seems evident that the title to the monument in the *Dowling* case did not pass to the defendant. Since the plaintiff still retained title to the monument, the pecuniary value of the defendant's estate could not have been increased by reason of the plaintiff's reliance action. The defendant did not request the reliance action which the plaintiff rendered, so it is not shown that the defendant wanted it or was willing to diminish the pecuniary value of his estate in order to obtain such reliance action from anyone else. Thus, no legal benefit was conferred upon the defendant, and restitution could not be allowed in regard to the monument. Other cases involving similar facts are in accord with this result.¹²²

119. *Id.* at 481.

120. See p. 18 *supra*.

121. See p. 27 *supra*.

122. In *Butler v. Shehan*, 61 Ill. App. 561 (1895), the defendant orally agreed to purchase a mare colt when four months old, if one should result from breeding the plaintiff's mare to a certain stallion. Upon the happening of this contingency, the mare colt was tendered to the defendant. In refusing to accept or pay for the colt, the defendant contended that the oral agreement could not be enforced because of the one year provision of the Statute of Frauds. The defendant also argued that there could be no recovery in restitution because the property in the colt had not passed to the defendant and, therefore, he had not been legally benefited. The upper court agreed with the defendant's contentions. In *Banker v. Henderson*, 58 N. J. L. 26, 32 Atl. 700 (1895), a similar result was reached. The oral agreement in that case required the plaintiff to furnish to the defendant a boiler, engine, saw, and wood chopper in return for the defendant's oral promise to pay four hundred fifty dollars. The saw and wood chopper were not yet built, but all of the articles were to be used together and the one price covered the entire group of articles. The plaintiff made the wood chopper and tendered all of the articles

These decisions should be distinguished from cases like *Kearns v. Andree*,¹²³ however, where the plaintiff rendered his land less salable by adapting it, at the defendant's request, to meet the latter's peculiar desire. Since the plaintiff's services in the *Kearns* case were rendered in response to the defendant's request and promise of return performance, they saved him from paying someone else for doing what the plaintiff did. Thus the plaintiff was seeking restitution for his partial performance of the unenforceable agreement in the *Kearns* case, and the court was correct in finding that the defendant had been legally benefited.¹²⁴

16. RELIANCE ACTION AS BENEFIT—PLAINTIFF PREPARED TO PERFORM IN SERVICE CASES

In *Boone v. Coe*¹²⁵ the plaintiff rendered preparatory action in reliance upon an oral agreement that did not comply with the Statute of Frauds. The following allegations appeared in the plaintiff's petition:

Defendant agreed that if plaintiffs would leave their said homes and businesses in Kentucky, and with their families, horses and wagons, move to defendant's farm in Texas, and take charge of, manage and

to the defendant who refused to accept or pay for them, insisting that the oral agreement did not comply with the goods provision of the Statute of Frauds. In reversing the lower court's judgment for the plaintiff, the appellate court said: "Had this wood chopper been delivered, or had work been done upon the defendant's ground by which some benefit accrued to defendant's property, the case would present a different aspect, for then the value of such work or materials to the defendant would be recoverable. But, in this case, as in the preceding (*Dowling* case), the title to the completed articles remaining in the plaintiff, no benefit whatever accrued to the defendant." *Id.* at 701. In *Mitchell Camera Corp. v. Fox Film Corp.*, 8 Cal.2d 192, 59 P.2d 127 (1936), 35 MICH. L. REV. 847 (1937), the oral agreement required the plaintiff to deliver to the defendant cameras of the type which the plaintiff was manufacturing in the ordinary course of its business. Before performance by the plaintiff, the defendant repudiated this unenforceable agreement which exceeded the monetary limit in the goods provision of the Statute of Frauds. The plaintiff then sued for the work and labor expended in manufacturing cameras in reliance upon the oral agreement and in preparation for the performance of it. The lower court granted the defendant's motion for a non-suit. In affirming this ruling, the upper court said, "There is absolutely no evidence of the acceptance or retention of the benefits by the defendant." *Id.* at 130. On a rehearing, however, the granting of the non-suit was reversed because the court felt that there was sufficient evidence the defendant had furnished the specifications for these cameras. If it were proved that this oral agreement involved specially made cameras, of course, the goods provision of the Statute of Frauds would not be applicable, and the plaintiff would be able to recover for the loss sustained by reason of his disappointed expectations on the contract.

123. 107 Conn. 181, 139 Atl. 695 (1928), 26 MICH. L. REV. 942. Also see Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 394-396 (1936).

124. See p. 25 *supra*.

125. 153 Ky. 233, 154 S. W. 900 (1913). This case overruled *McDaniel v. Hutcher-son*, 136 Ky. 412, 124 S. W. 384 (1910). In the *McDaniel* case the plaintiff moved from Illinois to Kentucky to live with and care for the defendant in return for the defendant's oral promise to convey certain land to the plaintiff. After the moving had taken place, but before the plaintiff had started to work for the defendant, the latter repudiated the oral agreement. The plaintiff sought to recover for the loss he sustained in relying upon the oral agreement. The lower court sustained a demurrer to the plaintiff's petition, but this ruling was reversed upon appeal.

cultivate same in wheat, corn and cotton for the twelve months next following plaintiff's arrival at said farm, the defendant would have a dwelling completed on said farm and ready for occupancy upon their arrival, which dwelling plaintiffs would occupy as a residence during the period of said tenancy. . . . Plaintiffs were to cultivate certain portions of the farm and were to receive certain portions of the crops raised,¹²⁶

The plaintiff alleged further that after he had expended \$1,387.80 in moving from Kentucky to Texas, the defendant repudiated the oral agreement. The lower court sustained the defendant's demurrer to the petition, and that ruling was affirmed on appeal.

If the plaintiff brought this suit, as the court said, "to recover certain damages alleged to have resulted from the defendant's breach of a parol contract of lease for one year to commence at a future date,"¹²⁷ and the Statute of Frauds was properly raised,¹²⁸ the decision of the court is certainly correct, even though the plaintiff could have sued for restitution. But the facts of the *Boone* case might present, and the court devotes most of its discussion to, the problem of whether or not the plaintiff should be entitled to restitution. If the plaintiff sought restitution, it may be argued from the language of the petition, quoted above, that since the "defendant agreed if the plaintiffs would leave their said homes . . .," the plaintiff's moving was done at the defendant's request and constituted partial performance rather than reliance action in preparation for performance of the oral agreement.¹²⁹ If that were true, the plaintiff would not have to maintain a suit for breach of the oral agreement that did not comply with the Statute of Frauds. Rather, he could obtain restitution for his partial performance of the oral agreement under the principles discussed in Part I of this article.¹³⁰

Although the parties in the *Boone* case perhaps contemplated the plaintiff's moving from Kentucky to Texas, it is probable that they regarded the farming to be done by the plaintiff as the primary object of the oral agreement. Apparently the court was of the opinion that the plaintiff's moving merely constituted preparation for performance, and was rendered in reliance upon the oral agreement, rather than in performance of it. In this connection the court said:

126. *Boone v. Coe*, 153 Ky. 233, 234, 154 S. W. 900, 901 (1913).

127. *Ibid.*

128. As a general rule, the Statute of Frauds must be affirmatively pleaded and cannot be raised by demurrer. CLARK, CODE PLEADING 523 (2nd ed. 1947); 2 WILLISTON, CONTRACTS 1518-1520 (rev. ed. 1936).

129. In *Foley & Whitehill v. Texas Co.*, 252 S. W. 566 (Tex. Civ. App. 1923), the plaintiff moved certain oil drilling machinery to a designated location where he was to operate it for longer than one year, and the court interpreted the moving as a separate contract to which the Statute of Frauds was not applicable.

130. See p. 14 *supra*.

. . . The plaintiffs merely sustained a loss. Defendant received no benefit. . . . To require him to pay plaintiffs for losses and expenses *incurred on the faith of the contract* without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought.¹³¹

If the plaintiff's moving merely constituted preparatory reliance action, as the italicized language above indicates, it would be practically impossible for the plaintiff to establish that a legal benefit had been conferred upon the defendant. The rules concerning the passage of title, which aided the plaintiff in showing a legal benefit in the reliance improvement cases, are no more helpful to the plaintiffs in the *Boone* case than they were in regard to the reliance action in the goods cases. In fact, it could be argued that *Boone v. Coe*¹³² presents a weaker case for restitution than was presented by the goods cases involving preparatory reliance action. In the goods cases, it will be recalled, the plaintiff intended that the benefit of his reliance action should pass to the defendant as soon as it had proceeded far enough to become performance of the oral agreement. Thus, the defendant's promise of return performance in the goods cases was expected by the plaintiff as compensation for the very reliance action he was rendering. On the other hand, the essential preparatory reliance in the *Boone* case was not rendered in expectation of anything from the defendant as compensation therefor. Although the plaintiff in the *Boone* case suffered a loss, he did not legally benefit the defendant, and notwithstanding the disappointed expectations of the plaintiff, no recovery should be allowed on principles of restitution.

17. RELIANCE ACTION AS BENEFIT—PLAINTIFF PREPARED TO PERFORM IN IMPROVEMENT CASES

The preparatory reliance action by the plaintiff in the case of *McCrowell v. Burson*¹³³ apparently was found to constitute a legal benefit. In that case the plaintiff agreed to build two storehouses for the defendant land owner in return for which the latter promised to pay sixteen hundred dollars in goods, money, and land. In reliance upon this agreement, which did not comply with the land provision of the Statute of Frauds, the plaintiff assembled men and materials and incurred considerable expense while preparing to build the storehouses. The defendant refused to permit the plaintiff to begin the actual performance of the agreement. The plaintiff then filed a declaration in assumpsit, containing the common counts for work and materials furnished at the defendant's request, and a count on the special contract. In a special verdict, the jury found that the parties had entered into this written but unsigned

131. *Boone v. Coe*, 153 Ky. 233, 239, 154 S. W. 900, 903 (1913).

132. *Ibid.*

133. 79 Va. 290 (1884).

contract, that it had been repudiated by the defendant, and that the plaintiff had suffered \$242.25 by reason of the transaction. The lower court held, however, that the law was in favor of the defendant. In reversing this judgment and remanding the case for a new trial, the appellate court said:

Can it be possible that the defendant in error can shirk his responsibility by saying he promised to pay for the work done, partly in real estate, and the promise not being in writing, he is sheltered by the statute of frauds; can disappoint and damage the other party at will and employ another to do his work? If so, then it is a most glaring instance of a right without a remedy, a wrong done by one without the possibility of redress for the party injured. Such is not the law.¹³⁴

From this language one might infer that the defendant should be estopped from relying upon the Statute of Frauds, in which case the recovery would be based upon the contract itself. But the court negated this conclusion, for it said:

Here, however, the contract assailed, as within the statute of frauds, is not sought to be enforced, but is a matter collateral to the matter in suit.¹³⁵

Thus the recovery must have been based upon the common count for work and labor.

Although the court asserted that to allow the defendant to avoid liability in the *McCrowell* case "is not the law," no case was cited in support of its statement. The court did refer to *Chitty*,¹³⁶ but that author was concerned with partial performance rather than preparatory reliance action. If the plaintiff's materials in the *McCrowell* case had been sufficiently attached to the defendant's land, so as to be regarded as a part thereof, they would then constitute partial performance of the agreement,¹³⁷ the defendant would be legally benefitted, and a recovery should have been allowed. But the facts of the *McCrowell* case reveal that the plaintiff merely prepared to perform and had not added materials or labor to the defendant's land. Indeed, the defendant's repudiation of the agreement prevented any actual performance by the plaintiff. Therefore, it would seem that the court, in allowing the plaintiff to recover in restitution, overlooked the vital distinction between partial performance, discussed in Part I of this article, and preparatory reliance action which was involved in the instant case. Despite its eloquence, the court decided the case erroneously.

134. *Id.* at 303-304.

135. *Id.* at 303.

136. *Id.* at 304, the court said: "In 1 *Chitty on Contracts*, 421, it is said: 'So, if a party fell and removed timber, or take away a growing crop, *under a void parol contract*, he becomes liable, on a new implied (in law) contract, as for goods sold, although he could not have sued on the original contract.'" (Italics added.)

137. See p. 19 *supra*.

The *McCrowell* decision should be compared with the case of *Cocheco Aqueduct Association v. Boston and Maine R. R.*¹³⁸ where a somewhat similar type of preparatory reliance action was held not to constitute a legal benefit. The oral agreement in that case provided that the defendant was to receive from the plaintiff a certain quantity of water daily for a period of ten years. After the agreement was formed, an agent of the defendant requested the plaintiff to commence work on the aqueduct which the plaintiff was planning to install for the purpose of supplying water in accordance with the terms of the oral agreement. The plaintiff had purchased a right of way for the aqueduct and laid about a half mile of pipe toward the roundhouse, where the water was to be delivered, before the defendant repudiated the oral agreement. The plaintiff then sued in assumpsit on the common count for work and labor. The lower court refused the defendant's request for a non-suit and charged the jury as follows :

If the plaintiffs performed the labor and furnished materials at the request of the defendants, or in pursuance of the contract which they were prevented from completing through the fault of the defendants, the plaintiffs could recover as damages the expense of the labor and materials less the value of the aqueduct, although the defendant had received no benefit.¹³⁹

Although this statement of the law would probably have been upheld in the *McCrowell* case, in the instant case the verdict for the plaintiff was set aside on appeal.

The plaintiff might have argued that he expended the labor and materials on the aqueduct in response to an express request by the defendant's agent which in effect extended the scope of the prior oral agreement between the parties. If this were true, the *Cocheco* case would resemble the *Kearns* case,¹⁴⁰ and the plaintiff would be seeking restitution for partial performance of the oral agreement rather than for mere preparatory reliance action. In rejecting such a view of the subsequent request by the defendant's agent in the *Cocheco* case, the court said :

It was not in effect a request to construct an aqueduct. It was a request in regard to the time when the plaintiffs should construct the aqueduct, which, before the request was made, they intended to construct. It was merely a request that the plaintiff should get ready to perform the water contract by a certain day.¹⁴¹

Although the language of the court is not too convincing, it is probably true, as in the service cases involving preparatory reliance,¹⁴² that the principal object of the agreement was to obtain water over a period of years, not the

138. 59 N. H. 312 (1879).

139. *Id.* at 312-313.

140. See pp. 25, 26 *supra*.

141. 59 N. H. 312, 314 (1879).

142. See pp. 33, 34 *supra*.

means the plaintiff would employ in performing the agreement. In any event, there is room for considerable judicial discretion in the interpretation of the agreement in order to determine what constitutes performance as distinguished from mere reliance action. Once it is determined that the plaintiff has merely rendered reliance action, the conclusion of the court, and the following language in justification thereof, is unassailable :

They (the defendants) do not own it (the aqueduct), and it has not supplied them with water. The aqueduct was built by the plaintiffs for their own use. They own it now, and they would have owned it if they had completed it. Having received no benefit from the aqueduct, the defendants are not liable, although the plaintiffs may suffer because unable to enforce the water contract. *Dowling v. McKenney*, 124 Mass. 481. Moreover, the aqueduct was not constructed in performance of the contract, which was only for the delivery of a certain quantity of water daily.¹⁴³

The preparatory reliance involved in the case of *Santoro v. Mack*¹⁴⁴ presents a weaker case for the plaintiff than was involved in either the *McCrowell* or the *Cochecho* decision. The plaintiff in the *Santoro* case orally agreed to purchase a certain tract of land from the defendant, who orally agreed to sell and convey. In reliance upon this oral agreement, the plaintiff expended considerable money in securing estimates for wiring, architectural plans, negotiations for a loan, and for the resale of the property to another at a profit. The defendant then repudiated the oral agreement, and the plaintiff sought compensation for the above mentioned items. The upper court held that the defendant's demurrer to the plaintiff's complaint was properly sustained.

In distinguishing the principal case from *Kearns v. Andree*,¹⁴⁵ which was decided by the same judges in the previous year, the court said :

In the present case it is not alleged, and does not appear, that any of the acts we are considering were performed at the request, or with the knowledge or acquiescence, of the defendant Mack. They conferred no benefit upon her, nor did they benefit the property ; nor has their performance in any way enriched the defendant. On the contrary, they were purely voluntary undertakings, such as well might have been made before obtaining any agreements from the defendant Mack. They were obviously made by the plaintiff in the belief that, if the conveyance were later obtained, they would result in a profit to him. As such, they clearly fall outside that class of expenditures for which recovery can be obtained under the principles alluded to. (i.e. restitution).¹⁴⁶

143. 59 N. H. 312, 313 (1879).

144. 108 Conn. 683, 145 Atl. 273 (1929).

145. 107 Conn. 181, 139 Atl. 695 (1928) ; also see Note, 26 MICH. L. REV. 942 (1928).

146. *Santoro v. Mack*, 108 Conn. 683, 696, 145 Atl. 273, 278 (1929). In *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869 (1896), the action was for rent due from the defendant under a sealed lease of the plaintiff's theater. The defendant offered to prove, in defense, that before the expiration of the sealed lease, the parties had orally agreed to replace it

Although the court suggested that the harsh results sometimes produced by the Statute of Frauds in the cases involving preparatory reliance action might possibly be alleviated on some other theory of liability,¹⁴⁷ it correctly recognized the limits of restitution, and that even restitution is not a panacea for all the "tough luck" cases.

18. CONCLUSIONS

Although the Statute of Frauds is usually interpreted so as to prevent actions for breach of the unenforceable agreement, it does not bar actions based upon the restitution interest. Restitution under the Statute of Frauds may be allowed if the defaulting defendant is unjustly retaining a legal benefit. What constitutes a legal benefit varies in different situations, but like the term of value in economics, it is believed to be based upon the principle of satisfaction of human wants. Since a legal benefit must be expressed in the pecuniary terms of a restitution judgment, however, it is necessary to prove objectively in terms of money that the desires of the particular defendant were satisfied. Such an objective manifestation may be established by showing that the defendant received from the plaintiff, money, or items such as goods or land, that he can exchange for money. Such items would increase his power to obtain the things that would satisfy his individual wants. If the items are not readily marketable, but the plaintiff parted with them in performance of the oral agreement, the defendant's request and promise of return

with a six year lease, and that in reliance upon the longer oral lease the defendant had executed contracts with European artists, purchased scenery and wardrobes, put in electric fans, new chairs, carpets, and contracted for other decorations, totaling nearly \$10,000. The plaintiff then repudiated the oral six year lease. The lower court excluded the defendant's testimony and directed the jury to find for the plaintiff. This ruling was affirmed upon appeal. The court spoke of the defendant's reliance action as follows: "In the case at bar there was no offer to prove that any improvements had been made on the leased premises, any services rendered or any money paid out in pursuance of the oral contract for which appellant (defendant) would have a right to recover at law. The expenditure of \$1,500 for an electric fan would not come within the rule, for it was not shown to have been put in at the request of appellee or in pursuance of the contract, or that it became attached to the building as part thereof, so as to become the property of the appellee. The same may be said of the expenditures for scenery, etc. Appellant did not offer to prove that he had decorated the building or incurred any expense therein, but only that he had become obligated to another on a contract to have the same done. It did not appear from any testimony offered, that any of the expenditures which the appellant sought to have set off against the rent were provided for by the verbal contract. Clearly, appellant could not recover moneys which he had voluntarily expended in the purchase of personal property for his own benefit, and which the contract on which he claims to have relied did not require him to purchase, even although he would not have purchased it had no such contract been made." *Id.* at 533.

147. In *Santoro v. Mack*, 108 Conn. 683, 696, 145 Atl. 273, 278 (1929), the court said, "It is conceivable that under certain circumstances of deceit, misrepresentation, or fraud which induced the making of the expenditures, a recovery might be had, but manifestly this complaint takes no such ground." Also see *Welch v. Lawson*, 32 Miss. 170 (1856), wherein the plaintiff's recovery was based upon the defendant's deceit. As to the rule applied in some states, that the plaintiff can recover on the contract because his change of position in reliance upon the oral agreement estops the defendant from pleading the Statute of Frauds, see *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909).

performance demonstrates that he wanted those items and was willing to pay for them. Further, the defendant's acts in accepting, retaining, or consuming the plaintiff's partial performance, after the formation of the unenforceable agreement, furnishes additional evidence that his desires were thereby satisfied. Since the plaintiff's performance of the oral agreement saved the defendant from paying another for such items, the courts have found that this saving from a pecuniary diminution, at the defendant's request, constitutes a legal benefit. If the plaintiff's performance of the unenforceable agreement was rendered to a third party or was of a less tangible or non-returnable type, such as services or the use of land, the courts are more apt to emphasize the defendant's request and his promise of return performance as a means of showing that he got what he wanted. Again, if the plaintiff's premises remain unoccupied or are rendered less valuable in accordance with the terms of the oral agreement, the defendant's request and return promise usually provide the sole justification for finding that his desires were satisfied and that he was thereby legally benefited.

If the plaintiff merely acted in reliance upon the unenforceable agreement, rather than in performance of it, his acts were not done in response to the defendant's request or promise of return performance. Thus, it must be shown by some other type of objective manifestation that the desires of the defendant were satisfied by the reliance action or it cannot constitute a legal benefit. In the reliance cases involving improvements and the use of land, a legal benefit was found in the resulting pecuniary enhancement of the defendant's estate. But the plaintiff's reliance action in preparation for performance of the oral agreement did not enhance the monetary value of the defendant's estate, and restitution was generally denied. It may be that the plaintiff suffered a loss by reason of his preparatory reliance action which cannot be shifted to the defaulting defendant on any other theory of liability, but it is submitted that the harshness of a particular result produced by the Statute of Frauds does not justify dispensing with the requirement of a legal benefit in suits for restitution.