Cleveland State Law Review

Volume 30 | Issue 3 Article 5

1981

Contracts during the Half-Century between Restatements

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ADDRESS

CONTRACTS DURING THE HALF-CENTURY BETWEEN RESTATEMENTS

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AS THE ROARING TWENTIES DREW TO A CLOSE a little over a half-century ago, Samuel Williston was nearing the end of his task as Reporter for the first Restatement of Contracts. He was already in his late sixties, his great treatise had been published nearly a decade before, and he was beyond dispute the preeminent American authority in his field. Over the next fifty years, the Restatement on which he was at work was to become the brightest jewel in the American Law Institute's crown of Restatements.

In May of 1979, as the sobering seventies drew to a close, I had the privilege of presenting to the membership of the Institute the final chapter of Restatement Second of Contracts. The three volumes of that Restatement have now been published. I shall not hazard a guess as to how it will fare over the next fifty years. I would like instead to use the time we have together to reflect on what has happened in the law of contracts over the course of the half century between the two contracts Restatements—roughly 1930 to 1980.

Many of you are law students, accustomed to assimilating cases at a dizzying pace, reaching a crescendo as examinations approach. As far as time and place are concerned the cases come almost at random—an Ohio case from the middle of the nineteenth century, followed by a California case with a Traynor opinion from only two decades ago, followed by a New York case from the era of Cardozo early in this century—and so on. I invite you reflect on what has happened in one field of law in which you have already invested much time and effort during a relatively short period in its history—to step back a little from your immediate concerns in order to get a fresh perspective.

I shall try to do so too, for it is much the same for reporters as it is for law students. One is always concerned with the chapter at hand—in presenting it first to the advisers, then to the Council, and finally to the membership of the Institute. One might suppose that at the end of an enterprise that occupied some fifteen years, the reporter and his advisers would have had one last year to reflect on their product as a

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whole and make some final revisions. But the Institute approves its restatements chapter by chapter, year by year, and seeks to avoid reopening matters that have once been laid to rest. In the spring of 1979 its membership was asked not only to approve the final chapter but to give final approval to the project as a whole. This left the reporter with scant time for reflection.

Since the spring of 1979, however, I have been provided with an occasion for reflection on the enterprise as a whole. The Columbia Law Review devoted its January 1981 issue to a symposium on the Second Restatement of Contracts, marking its publication.[1] Preparing my contribution to that symposium and reading the contributions of others have helped give me perspective on what has happened to contract law over the last fifty years.

What has happened in the fifty years between Restatements? For one thing, there has been an enormous explosion of statutory law affecting contracts, notably the Uniform Commercial Code and the legislation for protection of consumers. For another, there has been greater emphasis on substance over form, exemplified by the widespread abolition of the seal as a means of making enforceable promises. For a third, there has been an increasing recognition of the concept of reliance as a companion and sometimes rival of the traditional concept of expectation. I shall speak almost exclusively of the third—the increased recognition of reliance.

As a point of departure, consider the following illustration in the style of the Restatement: A makes a promise to B. B makes a return promise to A. Before B has done anything, A fails or refuses to perform. B sues A for breach of contract.

Much of the first Restatement was devoted to situations of this sort—a breach of what it described as a bilateral contract wholly executory on both sides. Was defendant A's promise an offer? Was plaintiff B's promise an acceptance? Was there consideration for defendant A's promise? If plaintiff B can enforce defendant A's promise, what damages will a court award? Is the Statute of Frauds a bar to relief? Is defendant A's promise voidable on the ground of mental infirmity or mistake? Misrepresentation or duress? Is defendant A relieved of his duty to perform because of impracticability of performance or frustration of purpose? The first Restatement devoted many sections to these questions. It concluded, of course, that if all the other questions were resolved favorably to plaintiff B, he could recover his lost expectation—the "benefit of his bargain"—including any lost profit. He could recover this without regard to the fact that he had done nothing in reliance on defendant A's promise, either by performing himself or by spending money in preparing to perform.

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[1] Symposium on the RESTATEMENT (SECOND) OF CONTRACTS, 81 COLUM. L. REV. 1 (1981).

The Restatement Second is also concerned with the wholly executory bilateral contract (though it no longer uses the word "bilateral").[2] But it has heightened concern with the role of reliance. Suppose the defendant A's promise was *not* an offer. Might plaintiff B's reliance on it make it enforceable? Suppose that defendant A's promise *was* an offer but that he tried to revoke it before plaintiff B accepted. Might plaintiff B's reliance on the offer preclude defendant A's revocation? Or suppose that defendant A's promise was an offer but that it was unenforceable because of the Statute of Frauds. Might plaintiff B's reliance on the promise remove the bar of the statute? We shall consider other questions involving reliance later, but for the moment let us concentrate on these three questions, all of which relate to the effect of reliance on whether a promise is enforceable.

As you will recall, what was said in the first Restatement about the effect of reliance on whether a promise is enforceable related only to the first of these three questions. It was said in the now famous section on "promissory estoppel" (although the Restatement itself avoids that term, in that section 90 is entitled "Promise Reasonably Inducing Definite and Substantial Action").[3] Professor Knapp, in his contribution to the Columbia symposium on the Restatement, notes that Williston's placement of that revolutionary section "in the company of such modest and familiar notions as the promise to pay a debt discharged in bankruptcy was like putting Pavarotti in a barbershop quartet."[4] In the laconic style that marked the first Restatement, Williston provided no commentary except for four illustrations. Here is the third: A promises B that if B will go to college and complete his course he will give him $5,000. B goes to college and has nearly completed his course when A notifies him of an intention to revoke the promise. A's promise is binding.[5]

Although the first Restatement has no reporter's notes to give us the inspiration of its illustration, a leading case in support of section 90 was *Ricketts* v. *Scothorn*,[6] decided by the Supreme Court of Nebraska in 1898, when Williston, in his late thirties, had been teaching at Harvard for nearly a decade. In *Ricketts*, John Ricketts promised to pay his granddaughter Katie Scothorn, a "working girl" who earned $10 a week, $2,000 so "that you have not got to work any more."[7] She quit work, but when old John died, his executor refused to honor the promise, and

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[2] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1, Reporter's Note to Comment f (1981) (definitions of unilateral and bilateral contracts have "not been carried forward because of doubt as to the utility of the distinction. . . .").

[3] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[4] Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981).

[5] RESTATEMENT OF CONTRACTS § 90, Illustration 3 (1932).

[6] 57 Neb. 51, 77 N.W. 365 (1898).

[7] *Id.* at 51, 77 N.W. at 366.

Katie sued John's estate. John had come perilously close to bargaining by making an offer that Katie could accept by quitting work, just as A had come perilously close to bargaining for B's going to college. However, the Nebraska court declined to take the approach that the New York Court of Appeals had taken in *Hamer* v. *Sidway*,[8] decided only seven years earlier in 1891. Since John Ricketts "exacted no quid pro quo . . . and looked for nothing in return,"[9] there was no consideration for his promise. Nonetheless, the trial court's judgment in Katie's favor was affirmed on the ground that, having intentionally influenced Katie "to alter her position for the worse on the faith of [his promise], it would be grossly inequitable to permit [John], or his executor, to resist payment on the ground that the promise was given without consideration."[10]

Between Restatements, section 90 received virtually unanimous judicial and academic approval. There were, however, very few square holdings by courts of last resort and the cases generally, with an exception to be noted shortly, involved reliance on gratuitous promises. A representative case with which many of you are familiar is *Feinberg* v. *Pfeiffer Co.*,[11] decided by the St. Louis Court of Appeals in 1959, enforcing a corporation's promise of a pension after the employee had relied on it by resigning her job. It came as no surprise when section 90 found its way into the Restatement Second with relatively few modifications, the most significant of which we shall discuss later. It is now supported by five pages of exegesis, including seventeen illustrations—one of them involving B who again goes to college in reliance on A's promise to give him $5,000.[12] (Presumably, at today's inflated prices, B also has a handsome scholarship.) Indeed, though the numbers of the sections of the Restatement Second have generally been changed so that they do not follow the first, this change was so contrived that the number of section 90 remains unchanged.[13]

What is of more interest to us than the fact that section 90 remains largely intact is that it has been joined by several other provisions under which reliance may also make a promise enforceable. I shall refer only to the two most significant of these extensions of the principle of the original section 90.

One of these deals with the second of the three questions raised earlier: Is defendant A precluded from revoking his offer once plaintiff

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[8] 124 N.Y. 538, 27 N.E. 256 (1891).

[9] 57 Neb. 51, 52, 77 N.W. 365, 366 (1898).

[10] *Id.*

[11] 322 S.W.2d 163 (Mo. Ct. App. 1959).

[12] RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment a, Illustration 1 (1981).

[13] Minor changes were made so that § 90 and § 45 (option contract created by part performance or tender) would retain their original numbers.

B has relied on it? This is dealt with in section 87 of the Restatement Second entitled "Option Contract."[14] It admits of the possibility that reliance on an unaccepted offer may make it irrevocable. An idea of its import is given by one of its illustrations:

> A submits a written offer for paving work to be used by B as a partial basis for B's bid as general contractor on a large building. As A knows, B is required to name his sub-contractors in his general bid. B uses A's offer and B's bid is accepted. A's offer is irrevocable until B has had a reasonable opportunity to notify A of the award and B's acceptance of A's offer.[15]

This is, of course, a thinly disguised statement of the facts in *Drennan* v. *Star Paving Co.*,[16] decided by the Supreme Court of California in 1958, shortly before work began on the Restatement Second. Thirty-five years earlier, Learned Hand had written in *James Baird Co.* v. *Gimbel Bros.*[17] that there was "no room" in the field of offer and acceptance "for the doctrine of 'promissory estoppel.' "[18] At that time all of the cases supporting section 90, as well as all of the illustrations to that section, involved gratuitous promises rather than offers looking to acceptance. In *Drennan*, however, Justice Traynor took a different view. Analogizing from section 45 of the first Restatement,[19] he found an implied subsidiary promise by the subcontractor to keep his offer open which became binding because of the contractor's reliance. Hand's view still had a few adherents, but the Restatement Second's endorsement of Traynor's position has helped to assure that it will prevail.

The other significant extension of the principle under the original section 90 comes in section 139.[20] It admits of the possibility that reliance on a promise that would otherwise be unenforceable because of the Statute of Frauds may make the promise enforceable. Its import can be seen from this illustration:

> A is a pilot with an established airline having rights to continued employment, and could take up to six months leave without prejudice to those rights. He takes such leave to become general manager of B, a small airline which hopes to expand if a certificate to operate over an important route is granted. When his six months leave (from the established airline) is about to expire, A demands definite employment (with B, the small airline)

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[14] RESTATEMENT (SECOND) OF CONTRACTS § 87 (1981).

[15] RESTATEMENT (SECOND) OF CONTRACTS § 76, Comment e, Illustration 6 (1981).

[16] 51 Cal. 2d 409, 333 P.2d 757 (1958).

[17] 64 F.2d 344 (2d Cir. 1933).

[18] *Id.* at 346.

[19] RESTATEMENT OF CONTRACTS § 45 (1932).

[20] RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

> because of that fact, and B orally agrees to employ A for two years and on the granting of the certificate to give A an increase in salary and a written contract. In reliance of this agreement A lets his right to return to his prior employer expire. The certificate is soon granted, but A is discharged in breach of the agreement. The Statute of Frauds does not prevent recovery of damages by A.

This illustration is derived from *Alaska Airlines* v. *Stephenson*,[21] decided by the Ninth Circuit in 1954. In that case an airplane pilot recovered damages from the airline for breach of its oral promise of employment. In rejecting the airline's defense of the Statute of Frauds, the Ninth Circuit quoted section 90 of the first Restatement and concluded "that there was an intention to carry promissory estoppel (or call it what you will) into the [S]tatute of [F]rauds if the additional factor of a promise to reduce the contract to writing is present."[22] This is a somewhat perplexing explanation. Courts had traditionally held that the bar of the Statute of Frauds could be removed by equitable estoppel as distinguished from promissory estoppel.[23] The essence of equitable estoppel was reliance on a misrepresentation of fact and not on a promise to perform, for example, a promisor's misrepresentation that he intended to put his promise in writing when he did not so intend. What the Ninth Circuit found significant was that the airline had promised to put the contract in writing, and such a promise to make a written contract in the future meets the test of the Restatement.

Before returning to the Restatement Second, I want to remind you of another case, *Monarco v. Lo Greco*,[24] decided by the Supreme Court of California in 1950, four years before *Alaska Airlines*. When Christie Lo Greco was eighteen years old, he lived on the family farm with his mother and stepfather. They orally promised Christie that if he stayed on the farm and participated in the family venture they would leave the bulk of their property to him, Christie did as they asked, and the family venture prospered. But when his stepfather died, twenty years later, he left the property to his grandson in breach of promise to his stepson Christie. On consulting a lawyer, Christie learned that his stepfather's promise of twenty years before came within the Statute of Frauds and that it was therefore unenforceable. Of course, if the promise could not be enforced, Christie was in theory entitled to restitution in a sum equal to the amount by which his services over twenty years had enriched his stepfather. But in practice, he was unlikely to be able to prove what this

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[21] 217 F.2d 295 (9th Cir. 1954).

[22] *Id.* at 298.

[23] *See, e.g.*, Roberts v. Fulmer, 301 N.Y. 277, 93 N.E.2d 846 (1950); *see also* Porter v. Comm'r, 60 F.2d 673 (2d Cir. 1932).

[24] 35 Cal. 2d 621, 220 P.2d 737 (1950).

amount was with sufficient certainty to satisfy a court. His lawyer, therefore, argued that the bar of the Statute of Frauds should be removed even though there had been no mispresentation "with respect to the requirements of the statute," such as a misrepresentation "that a writing . . . will be executed. . . ."[25] The Supreme Court of California agreed and held for Christie, but Justice Traynor's opinion alluded to the fact that Christie would not have succeeded had he claimed restitution. He carefully noted that because of the benefit conferred by Christie the case was one in which "unjust enrichment would result from refusal to enforce the contract."[26]

These two cases were at the frontier of the development of the law in this area when section 139 was drafted. In *Alaska Airlines* the promisee had relied on the promisor's promise to put the contract in writing. In *Monarco* the promisee had conferred a benefit on the promisor that would have resulted in unjust enrichment. Yet section 139 was broadly drafted and requires neither reliance nor unjust enrichment. Its breadth was soon to cause controversy in the grain cases.

Beginning in the summer of 1973, sharp increases in the price of grain instigated a plethora of cases in the grain belt. Farmers had made oral contracts to sell to grain elevators. When the price of grain rose, they sold their grain on the market at the higher price and reneged on their oral contracts with the elevators. When sued, they set up the Statute of Frauds as a defense. The elevators argued that they had relied on the farmers' promise by making contracts to resell the grain to others, and that the farmers were therefore precluded from setting up the statute as a defense.

The grain cases were distinguished from the *Alaska Airlines* case because the farmers had not promised to put their contracts in writing, and they were distinguished from the *Monarco* case because the grain elevators had conferred no benefit on the farmers that would result in their unjust enrichment. There was just reliance by the elevators on the farmers' promise to perform. Some of the many courts that heard the grain cases gave the traditional answer that the Statute of Frauds applied.[27] But others, relying heavily on the broad statement in section 139, held that the farmers were precluded from setting up the statute as a defense.[28] These cases show an extraordinary influence by the Restatement Second in accelerating the recognition of reliance.

It is worth mentioning in passing that these cases also illustrate the other two developments between Restatements that I singled out earlier. They show the explosion of statutory law affecting contracts,

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[25] *Id.* at 623, 220 P.2d at 740.

[26] *Id.*

[27] *E.g.*, Farmland Serv. Coop. v. Klein, 196 Neb. 538, 244 N.W.2d 86 (1976).

[28] *E.g.*, Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339 (Iowa 1979).

here the Uniform Commercial Code, since the Statute of Frauds provision involved was section 2-201 of the Code.[29] And they clearly show the emphasis of substance over form. But what is important for our purposes is their significance with respect to the effect of reliance on whether a promise is enforceable.

This concludes our consideration of our first group of sections of the Restatement Second. They are section 90 (the basic section), section 87 (on the revocability of offers) and section 139 (on the Statute of Frauds). All three evidence rules which are "plaintiffs' rules," in that they make promises enforceable that would otherwise be unenforceable.

From this first group of sections on the effect of reliance on whether a promise is enforceable, attention is now turned to a group of sections that deals with reliance as a *limit* on the enforcement of promises. Are there situations in which a promise will be enforced, but the injured party will be limited to his reliance as distinguished from his expectation interest?

Williston would have answered no. His view was that a promise was either enforceable to the full extent of the injured party's expectation, including such elements as his lost profits, or it was not enforceable at all. Of course, if the injured party's proof failed to show his lost profits, he might be awarded damages based on his out-of-pocket expenses, but this did not refute Williston's fundamental tenet that the injured party was in principle entitled to his full expectation if he could prove it. He saw no place for what Professor Young has called "half measures" in his submission to the Columbia symposium.[30] The issue came to a head in the discussion when section 90 was presented to the Institute's annual meeting in 1926. In answer to an intervention by a member of the Institute, Williston said:

> Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made. . . . I could leave this whole thing to the subject of quasi contracts so that the promisee under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the status quo.[31]

In 1936 and 1937, a decade after this discussion, Professor Lon Fuller published his remarkable two-part article entitled *The Reliance Interest in Contract Damages*.[32] In the article he argued that courts had often

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[29] U.C.C. § 2-201.

[30] Young, *Half Measures*, 81 COLUM. L. REV. 19 (1981).

[31] 4 ALI PROC., app. 103-04 (1926).

[32] Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936-37) (two parts).

measured recovery by a party's reliance interest, as distinguished from either his expectation interest or his restitution interest—the only two alternatives as Williston saw things.

The impact of this article on the Restatement Second is readily apparent from section 90 itself where a new sentence has been added to the first version: "The remedy granted for breach may be limited as justice requires."[33] In other words, it is within the court's discretion to *limit* the plaintiff to damages based on his reliance interest rather than on his expectation interest. The Restatement Second gives four examples, but for our purposes it may be best to consider a fifth and apocryphal illustration that I have made up for this purpose:

> A promise B, who is a college senior, that he will give him $5,000 when he sees him at the graduation ceremonies. B, who had not planned to go to the ceremonies, buys a cap and gown for $100 and goes to the ceremonies, but A refuses to perform his promise.

Assuming that this is a situation in which a court would enforce A's promise on the principle of section 90, might it not be just for the court to limit B's recovery to the $100 he has spent (his reliance interest) rather than the $5,000 he was promised (his expectation interest)? The Restatement Second's version of section 90 states that the court has discretion to so limit B's recovery. Similar language appears in the other two sections discussed earlier—section 87 (on the revocability of offers) and section 139 (on the Statute of Frauds).

But these are all sections in which it is reliance that makes the promise enforceable in the first place. It is not so surprising that enforcement should be limited to the reliance interest in such cases. But what of situations in which the promise is enforceable because of consideration rather than reliance? Consider, for example, our simple introductory illustration in which A and B exchange promises and B sued A. Might enforcement of A's promise sometimes be limited to B's reliance interest?

To this question the Restatement Second gives an affirmative answer in section 351(3).[34] That section admits of the possibility that a court may limit recovery for loss "by excluding recovery for loss of profits by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."[35] Even if the loss was foreseeable, unavoidable and is proved with certainty, a court may in some circumstances limit recovery to the reliance interest. To what kind of case does this rule apply? Perhaps an obvious case is that of the hardware dealer who sells a defective nail, which causes the loss of the horseshoe,

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[33] RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment c, Illustration 6 (1981).

[34] RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981).

[35] *Id.*

which causes the loss of the horse, which causes the loss of the rider, which causes the loss of the battle, which causes the loss of the war. If the buyer alerts the hardware dealer to this risk before buying the nail, is the dealer liable for the resulting loss? For another case, one of the illustrations may help:

> A, a plastic surgeon, makes a contract with B, a professional entertainer, to perform plastic surgery on her face in order to improve her appearance. The result of the surgery is, however, to disfigure her face and to require a second operation. In an action by B against A for breach of contract, the court may limit damages by allowing recovery only for loss occurred by B in reliance on the contract, including the fees paid by B and expenses for hospitalization, nursing care and medicine for both operations, together with any damages for the worsening of B's appearance if these can be proved with reasonable certainty, but not including any loss resulting from the failure to improve her appearance.[36]

The case is *Sullivan* v. *O'Connor*,[37] decided by the Massachusetts Supreme Judicial Court in 1973, in which Mrs. Alice Sullivan sued Dr. James H. O'Connor for breach of a contract to give her a "Hedy Lamarr" nose.[38] The court did not, however, have to face this issue. Although Mrs. Sullivan claimed at trial her expectation interest, "the difference in value between the nose as promised and the nose as it appeared after the operations,"[39] she abandoned her claim on appeal. However, Justice Benjamin Kaplan suggested in dictum that the proper measure would not be the expectation interest; instead, "a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to affect a cure, attain a stated result, or employ a given medical method,"[40] a measure designed "to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement."[41]

In sum, the reliance interest is used as a limit on recovery, short of the expectation interest, in this second group of sections. The group consists of sections 90, 87 and 139, under which the promise is enforceable because of reliance and of section 351(3), under which the promise is enforceable because of consideration. The sections in this group state what might be called "defendants' rules," since they limit

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[36] *Id.* Comment f, Illustration 19.

[37] 363 Mass. 579, 296 N.E.2d 183 (1973).

[38] *See* R. DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW 22-23 (1978).

[39] 363 Mass. at 580, 296 N.E.2d at 185.

[40] *Id.* at 582, 296 N.E.2d at 185.

[41] *Id.* at 583, 296 N.E.2d at 187.

recovery, in contrast to the sections in the first group, which state "plaintiffs' rights."

Now let us look at the third group of Restatement Second sections. Consider once again our simple introductory illustration in which A and B exchanged promises and B sued A. What if plaintiff B has relied on defendant A's promise and it then turns out that the promise is voidable on the ground of mental illness or mistake? What if plaintiff B has relied on defendant A's promise and it then turns out that defendant A is relieved of his duty to perform on the ground of impracticability of performance or frustration of purpose? In these situations plaintiff B cannot enforce defendant A's promise—plaintiff B cannot recover his expectation including lost profits. But is he to go uncompensated for his actual reliance on defendant A's promise?

At this point we must distinguish between reliance by plaintiff B that also confers a benefit on defendant A and reliance by plaintiff B that does not confer such a benefit. For example, if plaintiff B's reliance takes the form of payment of part of the price or part performance of some other sort, defendant A will receive a benefit from it. But if plaintiff B's reliance consists of "start up" costs such as tooling up in preparation for performance, defendant A will receive no benefit from it.

This distinction is important because plaintiff B clearly has the right to recover for such reliance which has conferred a benefit on defendant A. His right is not based on his reliance as such, but is instead a right to restitution of the benefit he has conferred on defendant A in order to avoid unjust enrichment.

Furthermore, courts have shown great skill at what Professor Perillo, in his contribution to the Columbia symposium, termed the " 'legal alchemy,' transmuting reliance damages into 'benefits conferred' simply by so labelling them."[42] Suppose, for example, that plaintiff B has relied by partly performing a promise to build a bridge that now will be useless to defendant A, who has been relieved of his duty on the ground of frustration of purpose. Though it may seem strained to say that partial construction of a useless bridge is a "benefit" to defendant A, a court might well reach this conclusion and allow plaintiff B restitution based on unjust enrichment. The reasoning runs: If defendant A bargained for this performance and received at least part of it, he has to that extent been benefited whether the part performance is now of use to him or not.[43] Indeed, in measuring the benefit in dollars, the court may well use the contract price as a yardstick.[44]

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[42] Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 39 (1981) [hereinafter cited as Perillo].

[43] *E.g.*, Carroll v. Bowersock, 100 Kan. 270, 164 P. 143 (1917).

[44] *E.g.*, Butterfield v. Byron, 153 Mass. 517, 27 N.E. 667 (1891).

But this "legal alchemy" has its limits, and there can be no restitutionary recovery if there is no benefit to defendant A—whether in the form of an actual benefit or an imputed one through part performance of a promise that he once wanted. Can plaintiff B nevertheless recover for his reliance, even though it admittedly has resulted in no benefit to defendant A?

Our last group of sections of the Restatement Second gives an affirmative answer, giving rise to what Professor Perillo referred to as a "newborn writ . . . an action for reliance."[45] One of this group of sections, section 158,[46] deals with the consequences of avoidance for mutual mistake. Another, section 272,[47] deals with the consequences of discharge on the ground of impracticability of performance or frustration of purpose. Both sections use identical language. After stating that either party may "have a claim for relief including restitution," they go on to say that if this "will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interest."[48]

This language, of which Professor Perillo and Young both make much,[49] came into the Restatement Second in some haste and almost as an afterthought. An earlier version of these sections, approved in tentative draft by the Institute, said that if restitution and other traditional relief "will not avoid injustice, the court may . . . supply a term which is reasonable in the circumstances."[50] The court's function was thus conceived to be one of filling a "gap" for which the parties had not provided.

The change to the present language was made in the last year before final editing, in connection with the work on remedies. It was not intended to have substantive significance. One reason for making the change was simply to bring these two sections into conformity with a third section, section 15,[51] which deals with avoidance for mental illness or defect. That section provided in tentative draft that a person could avoid a contract on that ground with an exception. The exception applied where the contract was made on fair terms with someone who had no knowledge of the mental illness or defect. The power of avoidance "terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance

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[45] Perillo, *supra* note 42, at 40.

[46] RESTATEMENT (SECOND) OF CONTRACTS § 158 (1981).

[47] *Id.* § 272 (1981).

[48] *Id.* §§ 158, 272.

[49] Perillo, *supra* note 42, at 40; Young, *supra* note 30, at 30.

[50] RESTATEMENT (SECOND) OF CONTRACTS § 292(2) (Tent. Draft No. 9, 1974); *id* § 300(2) (Tent. Draft No. 10, 1975) (in which the word "which" had been changed to "that").

[51] RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

would be unjust."[52] In a final sentence, the tentative draft said: "In such a case a court may grant relief on such equitable terms as the situation requires."[53] This seemed stylistically out of kilter with the "justice requires" language used in section 90 and related sections, however, and it was changed to: "In such a case a court may grant relief as justice requires."[54] It would be hard to find much substance in this change.

Once this had been done, however, it was difficult to explain why one formula had been used here, and a different formula used for mistake, impracticability and frustration, since the situations were very similar. Thus the language of sections 158 and 272 was changed to bring it closer to that of section 15. The "gap filling" language was taken out and replaced by: "[T]he court may grant relief on such terms as justice requires," and since this seemed to be unnecessarily vague, the words "including protection of the parties' reliance interests" were added.[55]

This was done in the final year of consideration. Our major concern was with the lengthy and controversial remedies chapter; there was little attention paid to a change in wording that most of us reported as essentially a matter of housekeeping.

I have detailed this for you not because of any intrinsic interest that it may have, but to suggest to you that it is not always wise to assume that such changes in the drafting process are intended to have substantive significance. Nevertheless, the language is there, an invitation to courts to use more rather than less discretion. There is little case law as of this time—no *Drennan*, *Stephenson* or *Sullivan* case. It will be interesting to see what courts make out of this last group of sections. Note that this third group of sections is, like the first, "plaintiffs' law," since the invitation to the court is to grant relief that is more generous than would be granted on a restitution theory.

This, then, is my view of contracts during the half-century between Restatements. What developments are to come over the next fifty years will depend in large part on young persons such as yourselves who will replenish the bar, the judiciary and the law faculties during that time.

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[52] *Id.* § 15(2) (1981).

[53] RESTATEMENT (SECOND) OF CONTRACTS § 180(2) (Tent. Drafts Nos. 1-7, 1973).

[54] RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981).

[55] *Id.* §§ 158(2), 272(2).