

# Michigan Law Review

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Volume 57 | Issue 2

---

1958

## Restitution - Availability as an Alternative Remedy Where Plaintiff Has Fully Performed a Contract to Provide Goods or Services

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### Recommended Citation

Jerome K. Walsh Jr., *Restitution - Availability as an Alternative Remedy Where Plaintiff Has Fully Performed a Contract to Provide Goods or Services*, 57 MICH. L. REV. 268 (1958).

Available at: <https://repository.law.umich.edu/mlr/vol57/iss2/23>

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RESTITUTION—AVAILABILITY AS AN ALTERNATIVE REMEDY WHERE PLAINTIFF HAS FULLY PERFORMED A CONTRACT TO PROVIDE GOODS OR SERVICES—It is hornbook law that restitution is sometimes available as an alternative remedy to a party who has suffered a breach of contract after having conferred a benefit on the defaulting party. It is equally clear, however, that in many cases where a benefit has been conferred, the plaintiff may not

elect to sue for the value of his performance but is left to his action for damages on the contract. The cases which are concerned with one or the other of the above rules constitute a large portion of the area of the law called Restitution, and no attempt will be made here to review all of the situations in which restitution may be available as an alternative remedy for breach of contract. On the contrary, the purpose of this comment will be to consider the availability of the remedy in a single class of cases and to discuss some of the factors which may have caused the courts to grant or deny the remedy in those cases. The rather small group of cases with which this comment will be concerned are those in which the plaintiff has fully performed, prior to a breach by the defendant, a contract to deliver goods or render services. For convenience, and also because of differing results in the courts, the cases in which the defendant's obligation was to pay money will be discussed separately from those in which his obligation was to do something else.

### I. *Availability of the Remedy*

A. *Where Defendant's Obligation Is To Pay Money.* When the plaintiff has fully performed a valid contract to deliver goods or render services for an agreed sum of money, and the defendant has breached the contract by failing to pay, the courts have uniformly denied to the plaintiff the alternative remedy of rescission and restitution for the value of his performance.<sup>1</sup> While as a matter of pleading the injured party may frame his complaint in *indebitatus assumpsit* and rely on the common counts, this is considered nothing more than a convenient method of collecting the debt raised by plaintiff's performance of the contract.<sup>2</sup> It is everywhere agreed that if the evidence discloses the existence of a special contract, the terms of the contract will control the amount of recovery.<sup>3</sup> It has often been observed that this rule represents a limitation on the use of the restitutionary remedy

<sup>1</sup> *Oliver v. Campbell*, 43 Cal. (2d) 298, 273 P. (2d) 15 (1954), and cases collected in 5 CORBIN, CONTRACTS §1110 (1951); 5 WILLISTON, CONTRACTS, 2d ed., §§1458, 1459 (1937); WOODWARD, QUASI-CONTRACTS §262 (1913). See also 2 CONTRACTS RESTATEMENT §350 (1932).

<sup>2</sup> *United States Potash Co. v. McNutt*, (10th Cir. 1934) 70 F. (2d) 126, and cases collected in 5 WILLISTON, CONTRACTS, 2d ed., §1459, p. 4076, n. 4 (1937).

<sup>3</sup> *Dermott v. Jones*, 2 Wall. (69 U.S.) 1 (1864); *Oliver L. Taetz, Inc. v. Groff*, 363 Mo. 825, 253 S.W. (2d) 824 (1953). See cases collected in 5 CORBIN, CONTRACTS §1110 (1951) and 5 WILLISTON, CONTRACTS, 2d ed., §1459 (1937).

that is logically difficult to explain in light of the treatment given to similar situations.<sup>4</sup> The case most difficult to distinguish in this regard is that of a party who has partially performed a contract to supply goods or services for money and has been prevented by the defendant's breach from completing performance.<sup>5</sup> In such a case a large majority of the courts quite readily allow the plaintiff to rescind the contract and recover the fair value of his performance.<sup>6</sup> The arguments which are advanced in support of the granting of restitution in the case of the plaintiff who has only partially performed appear equally applicable to the case of full performance. In both situations the plaintiff is free from fault and the defendant has breached the contract after accepting benefits through the plaintiff's performance. But such arguments, while often successful when the plaintiff has rendered only part performance, fall on deaf ears once it appears that the plaintiff has fully performed. When full performance is shown, the plaintiff may sue only for the loss of his bargain, and the defendant is given the benefit of the contract terms to limit the amount of the judgment against him.

In view of the relative newness of the restitutionary remedy, it is perhaps misleading to speak in terms of a limitation on the substantive rights of a plaintiff who has fully performed such a contract. It would probably be more accurate to say that a party who has rendered only part performance prior to a breach has been given a valuable alternative remedy that has not been given to one who has fully performed a similar contract. But it is nevertheless true that a party who has rendered full performance is in a much less favorable position than one who is prevented

<sup>4</sup> 5 CORBIN, CONTRACTS §1110, p. 484 (1951); 5 WILLISTON, CONTRACTS, 2d ed., §1459, p. 4078, n. 6 (1937); WOODWARD, QUASI-CONTRACTS §262, p. 415 (1913).

<sup>5</sup> The case of a plaintiff who seeks to recover money paid to the defendant for promised goods or services which are not forthcoming appears logically to call for the same result as where the plaintiff has rendered goods or services in expectation of payment. But the case of money paid seems to be *sui generis* in the law of Restitution, and it is believed that little would be gained by considering such a case in this discussion.

<sup>6</sup> *Spitalny v. Tanner Constr. Co.*, 75 Ariz. 192, 254 P. (2d) 440 (1953); *Boomer v. Muir*, (Cal. App. 1933) 24 P. (2d) 570; *Johnston v. Star Bucket Pump Co.*, 274 Mo. 414, 202 S.W. 1143 (1918); 2 CONTRACTS RESTATEMENT §347 (1932). See cases collected in 5 WILLISTON, CONTRACTS, 2d ed., §1459, p. 4077, n. 6 (1937); 5 CORBIN, CONTRACTS §1109 (1951). This proposition is subject to the qualification that if the part of the contract performed by the plaintiff was an apportioned part of the whole contract for which a definite sum had been agreed upon, the plaintiff's recovery is limited to the agreed sum. See 2 CONTRACTS RESTATEMENT §351 (1932), and cases collected in 5 CORBIN, CONTRACTS §1111 (1951).

from completing performance of the contract by defendant's breach, if the market price of the goods or services accepted by the defendant was above the contract figure. The existence of this anomaly in the law has been recognized and criticized by text-writers for over half a century,<sup>7</sup> but their suggestions that the restitutionary remedy be extended to cases in which the plaintiff has fully performed a contract calling for the payment of money have gone entirely unheeded by the courts.

B. *Where Defendant's Obligation Is Other Than To Pay Money.* The *Restatement of Contracts* notwithstanding,<sup>8</sup> it seems clear that restitution is ordinarily not available to a plaintiff who has delivered goods or rendered services in full performance of a contract which calls for some performance other than the payment of money by the defendant.<sup>9</sup> It is true, however, that the courts have not been as uniform in their refusal to grant the alternative remedy in this type situation as they have been in cases where the defendant's obligation was to pay money. Moreover, it appears that at least some progress in this area is being made in extending the use of the restitutionary remedy.

A number of cases have allowed a quantum meruit recovery of the value of services rendered where the promised consideration was either stock or a share in a business.<sup>10</sup> The value of the services rendered was also recovered where the defendant railroad

<sup>7</sup> WOODWARD, *QUASI-CONTRACTS* §262 (1913), citing KEENER, *QUASI-CONTRACTS*, pp. 301, 302 (1893); 5 CORBIN, *CONTRACTS* §1110 (1951). Williston observes that this anomaly ". . . puts it within the power of the defendant, in many instances, to determine the extent of the plaintiff's recovery for a breach by the former." 5 WILLISTON, *CONTRACTS*, 2d ed., §1459, p. 4078, n. 6 (1937). But see 7 CORN. L. Q. 166-170 (1922), where the use of restitution as an alternative remedy for breach of contract, except in the case of money paid, is disapproved.

<sup>8</sup> "The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt." 2 *CONTRACTS RESTATEMENT* §350 (1932).

<sup>9</sup> *Kopp v. Traders Gate City Nat. Bank*, 357 Mo. 659, 210 S.W. (2d) 49 (1948); *Ogden v. Ruhm*, (2d Cir. 1925) 7 F. (2d) 1007; *Clemmer v. Merriken*, 144 Md. 675, 125 A. 394 (1924); *Cook v. Dade*, 191 Mich. 561, 158 N.W. 175 (1916); *Osterling v. Cape May Hotel Co.*, 82 N.J.L. 650, 83 A. 887 (1911); *Hull v. Thoms*, 82 Conn. 647, 74 A. 925 (1910); *Pierson v. Spaulding*, 61 Mich. 90, 27 N.W. 865 (1886); *Slayton v. McDonald*, 73 Me. 50 (1881); *Mitchell v. Gile*, 12 N.H. 390 (1841). The case most often cited for the proposition that restitution is available in this situation, *Clark v. Fairchild*, 22 Wend. (N.Y.) 576 (1840), is doubtful law in New York. Compare *Ladue v. Seymour*, 24 Wend. (N.Y.) 60 (1840); *Underhill v. Pomeroy*, 2 Hill (N.Y.) 603 (1842); *Thomas v. Dickinson*, 12 N.Y. 364 (1855).

<sup>10</sup> *Bailey v. Interstate Airmotive, Inc.*, 358 Mo. 1121, 219 S.W. (2d) 333 (1949); *Coens v. Marousis*, 275 Pa. 478, 119 A. 549 (1923); *Humbert v. Chopy*, (D.C. Colo. 1914) 216 F. 549.

refused to deliver a promised pass over its lines.<sup>11</sup> Another situation in which restitution of the value of plaintiff's performance has sometimes been allowed is where the defendant has breached a promise to compensate plaintiff by his will.<sup>12</sup> But in almost all these situations there are also cases denying restitution to the plaintiff, and in many of the fact situations which might properly fall under this general heading there is no authority at all in favor of granting restitution. In sum, it appears that when the defendant's promised performance is other than the payment of money, the plaintiff who has fully performed is in a somewhat better position with regard to getting restitution than he would be if all that was owing to him was money. But this is only a relative advantage since, even when the return performance is not money, the plaintiff who has fully performed faces an uphill struggle in his attempt to get the value of his performance rather than the value of what was promised him.

## II. *Reasons Underlying the Refusal To Grant Restitution When Plaintiff Has Fully Performed*

The starting point for any discussion of the reasons why restitution is or is not available in a given case must always be with the historical origins of the remedy. Developed in part by the law judges and in part by the chancellors, the remedy of restitution was thought of as a strictly auxiliary remedy to be used in situations where the standard common law remedies sounding in tort or contract were not completely satisfactory.<sup>13</sup>

<sup>11</sup> *Brown v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 236, 31 N.W. 941 (1886).

<sup>12</sup> *Baldwin v. Lay*, (Mo. App. 1920) 226 S.W. 602; *Stone v. Todd*, 49 N.J.L. 274, 8 A. 300 (1887). See also 69 A.L.R. 14 (1930). In many of the cases where the defendant's promise was to leave property by will, it is difficult to determine if the contract was within the Statute of Frauds, and therefore, whether restitution was employed as an alternative remedy. Some courts have said that the rendition of services constitutes "part payment" which takes the contract out of both the Statute of Frauds and §4 of the Uniform Sales Act. But other courts do not agree. See 2 *PITT. L. REV.* 29 (1935).

<sup>13</sup> 5 *CORBIN, CONTRACTS* §1103 (1951). For a review of the status of the English law of quasi-contract prior to the development of the action of *indebitatus assumpsit* around the beginning of the seventeenth century, see *JACKSON, HISTORY OF QUASI-CONTRACT* 1-36 (1936). It was more than a century after *Slade's Case* was decided in 1602 before general *assumpsit* was first employed as an alternative remedy for breach of contract in *Dutch v. Warren*, 1 Str. 406, 93 Eng. Rep. 598 (1721), where the plaintiff was allowed to recover money advanced to the defendant to buy stock. Use of the remedy in contract cases did not become widespread until the time of Lord Mansfield in the latter half of the eighteenth century, but for sometime thereafter it expanded in many directions. See *FIFoot, LORD MANSFIELD* 141-157, 245-249 (1936). A strong reaction to the use of restitution in many situations, including contract cases, occurred in England about the time of the Com-

The use of restitution as an alternative remedy in breach of contract cases was mainly the work of the law judges, but they administered it with many of the same verbal palliatives used by the chancellors during the development of the equitable remedies.<sup>14</sup> They refused to apply it in many cases where the damage remedy was felt to be more appropriate, and this fact produced many of the distinctions which seem so illogical today. Although there was no expressly stated requirement of "inadequacy of the damage remedy," as in equity, the relative effectiveness of the action for damages undoubtedly was a major factor in the granting or withholding of restitution in any particular case.<sup>15</sup> This factor goes a long way toward explaining some of the logical inconsistencies mentioned above. For instance, a plaintiff who, prior to a breach, has only partially performed a contract to render goods or services is in a comparatively difficult position to establish his damages in an action on the contract. This is not so for the plaintiff who has fully performed; and having no need of an auxiliary remedy, the party who had fully performed was not given one. But however well the quasi-equitable nature of the remedy serves to explain the origin of the anomalies that exist in its present-day application, the steadfast refusal of the courts in this century to extend the use of restitution to cases in which the plaintiff has fully performed calls for an explanation having more contemporary significance. In view of the almost unanimous recommendation of the text-writers in recent years that restitution be made available to a plaintiff who has fully performed a contract to provide goods or services,<sup>16</sup> at least where the counter-performance was other than the payment of money, something more is required in the

mon Law Procedure Act of 1852. This reaction had the effect of halting the development of restitution as an alternative remedy for breach of contract in England. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 368-370 (1949); DAWSON, *UNJUST ENRICHMENT* 15-26 (1951).

<sup>14</sup> The most famous of these nostrums is Lord Mansfield's comment in *Moses v. Macferlan*, 2 Burr. 1005 at 1012, 97 Eng. Rep. 676 (1760): "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

<sup>15</sup> Occasionally, the courts expressly base the grant or denial of restitution on the adequacy of the damage remedy. See, e.g., Judge Kellogg in *Rosenwasser v. Blyn Shoes*, 246 N.Y. 340, 159 N.E. 84 (1929): "A situation is presented where an action of damages for breach of contract . . . would afford complete indemnity for the injury done. . . ."

<sup>16</sup> KEENER, *QUASI-CONTRACTS* 301, 302 (1893); WOODWARD, *QUASI-CONTRACTS* §262 (1913), adopting the arguments of Professor Keener; 5 CORBIN, *CONTRACTS* §1110 (1951); 5 WILLISTON, *CONTRACTS*, 2d ed., §1471 (1937).

way of explanation than Justice Holmes' famous maxim: "A page of history is worth a volume of logic."

Professor Corbin has suggested that the preferred position of one who has only partially performed such a contract is best explained on procedural grounds.<sup>17</sup> He points out that a party who has fully performed in this situation has available to him both the action of debt for the sum due and an action for damages on the contract, while the plaintiff who has partially performed has, absent the restitutionary remedy, only his action on the contract. By giving to the latter a restitutionary action for the value of his performance, he is put in an equal position with regard to the forms of action available to him in the event of a breach. But Professor Williston has observed that in neither case is the remedy of restitution absolutely necessary, since in either situation the injured party has an effective remedy in an action for damages on the contract.<sup>18</sup> While it may be conceded that a desire to equalize the positions of the parties with respect to the forms of action they may use might have played some part in the granting of restitution to one who had partially performed, in light of our modern pleading practices it surely does not go far to explain the extreme reluctance of our courts to extend the remedy to a plaintiff who has fully performed prior to a breach.

It is here suggested that there are several very practical reasons why the courts have ignored both logic and the text-writers by continuing the practice of granting restitution to one who has partially performed while denying it where there has been full performance. In those cases where the defendant's obligation is to pay money, the most important of these is the matter of convenience. It is readily apparent that in the case of full performance of a contract calling for payment of a fixed sum of money by the defendant, any court would be reluctant to reject this ready-made measure of damages and get into the sticky question of the fair value of the plaintiff's performance. Such valuations are usually arrived at only after varying amounts of conflicting evidence have been heard, and, even in the rare case where there is no sharp conflict in the evidence, the value arrived at lacks the aura of certainty and justness possessed by a

<sup>17</sup> 5 CORBIN, CONTRACTS §1110 (1951).

<sup>18</sup> 5 WILLISTON, CONTRACTS, 2d ed., §1459, pp. 4077, 4078 (1937).

sum which was agreed upon by the parties when they entered into their bargain. In those cases where full performance has been rendered for an agreed price, therefore, this factor of convenience appears to be an insurmountable barrier to the application of restitution as an alternative remedy. In those cases where the defendant's promised performance is not money but other goods or services, the convenience factor is not such an obstacle. On the contrary, it has been in the situations where valuation of the promised performance was more difficult than arriving at the worth of the goods or services rendered by the plaintiff that restitution has been most often employed.<sup>19</sup> But the usual situation in these cases is that the valuation difficulties are approximately equal between the rendered and the promised performances, so the convenience factor cannot be said to be a major influence in the grant or refusal of restitution when the defendant's promised performance is goods or services.

There are other factors, however, which tend to inhibit the use of the restitutionary remedy in these cases. One of these considerations is the rather widespread notion that in granting restitution a court is "making a new contract" for the parties. This objection is occasionally raised in all types of cases where restitution is employed as an alternative remedy for breach of contract,<sup>20</sup> but it apparently has added force when a plaintiff who has fully performed comes into court asking for a sum different from the value of what he was promised. As has been pointed out, there is little merit in this objection.<sup>21</sup> When a court assesses damages for breach of contract it does not purport to enforce the contract specifically. The usual view is that the court is attempting to put the injured party in the same position he would have been in had there been no breach; but there is

<sup>19</sup> E.g., a pass over the lines of a railroad, *Brown v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 236, 31 N.W. 941 (1886); stock or a share in a business, *Bailey v. Interstate Air-motive*, 358 Mo. 1121, 219 S.W. (2d) 333 (1949); *Coens v. Marousis*, 275 Pa. 478, 119 A. 549 (1923); *Humbert v. Chopy*, (D.C. Colo. 1914) 216 F. 549.

<sup>20</sup> "Beyond doubt the only injury sustained by the mere breach of a contract is the loss of the bargain. . . . I think the plaintiff in a building contract ought not to be permitted, under the guise of a *quantum meruit*, for the alleged breach of the building contract by the owner, to recover beyond the price fixed in the contract; for the reason that any greater recovery would be, in effect, damages awarded for punishment rather than compensation for loss of a bargain, and therefore opposed to the reason and spirit of the law governing damages for breach of civil engagements." Judge Bond dissenting in *Johnston v. Star Bucket Pump Co.*, 274 Mo. 414 at 479, 202 S.W. 1143 (1918).

<sup>21</sup> 5 CORBIN, CONTRACTS §1106 (1951).

nothing inherently more just in this approach than in the theory which underlies the remedy of restitution, which is to put the injured party in the position he was in before the contract was entered into. In no case has the defendant agreed to pay damages of any kind, and as he has seen fit to breach the contract there is little reason to give him the benefit of the contract terms and thereby relieve him from paying full value for what he has received. The idea that a plaintiff who has fully performed should get no more than he bargained for is still, however, an obstacle which must be overcome in any attempt to get restitution.

The final factor which, it is believed, has limited the expansion of the restitutionary remedy to cases involving full performance by the plaintiff has been the fact that lawyers rarely attempt to get restitution when their clients have suffered a breach of contract. Where the breached contract has turned out to be a bad bargain for the defendant, the damage remedy is obviously the better recourse for the plaintiff. But the lack of case authority involving attempts to get restitution where the plaintiff's performance was of *more* value than what he was promised by the breaching defendant should not discourage an attempt to invoke the restitutionary remedy in the appropriate circumstances. The use of this remedy has expanded widely in recent years and is still in the process of growth.<sup>22</sup> With the aid of the leading text-writers<sup>23</sup> and the *Restatement of Contracts*,<sup>24</sup> there is no valid reason why it cannot be extended further, especially to cases in which the plaintiff has rendered full performance in goods or services for a promise by the defendant to do something other than pay money.

*Jerome K. Walsh, Jr., S.Ed.*

<sup>22</sup> See, generally, DAWSON, UNJUST ENRICHMENT (1951).

<sup>23</sup> Note 16 *supra*.

<sup>24</sup> Note 8 *supra*.