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QUASI-CONTRACTS-CONCEPT OF BENEFIT

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QUASI-CONTRACTS—CONCEPT OF BENEFIT*—One of the basic elements of quasi-contract, and probably the most complex, is the concept of benefit. Its origin lies in the early actions to recover for unjust enrichment, and the early characteristics, for the most part, have persisted to the present time. While "enrichment" is no longer an accurate synonym for benefit, as it once was, the qualitative "unjust" still retains its vigor. Thus, "unjustified benefit" is a more accurate name for the concept. As used in quasi-contract and related fields of law, the concept is composed of several factors, no one of which can be considered as invariable. Can we with value take this concept apart, as a biologist would dissect a guinea pig, and study its pieces? In a sense we cannot, for, like the guinea pig, if it is cut up it loses the characteristics of a functioning organism. But as the biologist learns more about the complete guinea pig by studying the function and make-up of each of its parts, so by analysis we may gain a better understanding of the concept of benefit. There are two major questions: (a) What is "benefit"? and (b) What is "justice"?

Few attempts have been made to define benefit as a generalized concept applicable to all types of cases. In cases in which the question of

* This is the fourth in a series of related comments in the Law of Contracts and Restitution, to be published from time to time throughout Volume 46 of the REVIEW.

benefit is critical, the courts have narrowed discussion to the particular type of situation involved without discussing the concept in its broader aspects. Legal writers, too, have dealt with the question in a piecemeal fashion without fitting the pieces together to form the total picture. Hence, one who seeks a broad generalization must look to the results that courts have reached, and venture his own interpretation.

1. *What is "benefit"?*

We have little difficulty finding benefit, under any definition of the word, where *D* has actual cash, to which *P* has some moral or equitable claim, as in the case of money paid by mistake, or under duress, or where *D* collected fees belonging to *P*.¹ There is also little difficulty in the case of conversion and sale of goods by *D*. Since *Lamine v. Dorrell*,² courts have generally considered the proceeds to be recoverable benefit.³ Logically, where *D* converts and retains *P*'s goods, he has also received a benefit, and most courts today so hold.⁴ The real problem arises in the case where *D*'s gain is in terms of something other than cash or tangible assets. In *Phillips v. Homfray*,⁵ where *P* sought to recover for *D*'s surreptitious use of *P*'s underground passages on the ground that *D* had benefited by not paying the wayleave which would otherwise have been exacted, the court refused to allow recovery. The majority said that *D* had received no benefit, defining that term to mean a tangible increase in assets. In a vigorous dissent, one member of the court insisted that the savings made by avoidance of paying for the wayleave effected a net increase in *D*'s estate, and constituted a benefit to the same extent as would result from *D*'s appropriation of tangible goods. The "swollen assets" concept espoused by the majority set the standard for English courts,⁶ and it has had

¹ Quasi-contract had its origin in cases of this type. Here the benefit was clear and specific, and the injustice involved was so apparent as to admit of no doubt. See, for example, *Howard v. Wood*, 2 Lev. 245, 83 Eng. Rep. 540 (1683); *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (1731); and *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (1760). In this last case, Lord Mansfield gave decided impetus to the development of quasi-contract, defining the bases of the remedy in such broad terms as "natural justice," and "good conscience."

² 2 Ld. Raym. 1216, 92 Eng. Rep. 303 (1705).

³ *Marsh v. Keating*, 1 Bing. N. C. 198 (1834); *Miller v. Miller*, 24 Mass. 133 (1828); *Dougherty v. Chapman*, 29 Mo. App. 233 (1888).

⁴ *Braithwaite v. Akin*, 3 N. D. 365, 56 N.W. 133 (1893); *Felder v. Reeth*, (C.C.A. 9th, 1929) 34 F. (2d) 744; *Daniels v. Foster & Kleiser*, 95 Ore. 502, 187 P. 627 (1920). Several courts have reached opposite results, usually on the ground that quasi-contract was not the proper form of action.

⁵ L. R. 24 Ch. Div. 439 (1883).

⁶ WINFIELD, *THE LAW OF TORT* 52 (1931); Gutteridge and David, "The Doctrine of Unjustified Enrichment," 5 *CAMB. L. J.* 204 (1934).

some following in the United States.⁷ It has, however, been rather widely criticized, and many American courts refuse to follow it.⁸ They prefer, instead, to define benefit as any net gain which can be given a pecuniary value.⁹ Even this broad construction has been found to be inadequate in some cases, and has been expanded to include requested acts or services, regardless of whether *D* actually gained anything from the transaction.¹⁰ In some cases benefit has been defined to mean an advantage, even though totally incapable of being valued in terms of money, such as improved health, or even the possibility of longer life.¹¹ In one group of cases *P* has been allowed to recover the value of his ideas which were appropriated by *D*.¹² The difficulty of applying these latter conceptions of benefit is apparent, and is one reason why many courts have hesitated to go this far.

For purposes of legal action, the conclusion that *D* has received a benefit, however defined, is of little practical significance until the benefit has been measured. Several factors combine to make this problem of measurement one of the most difficult and confusing aspects of quasi-contract. For one thing, the problem is common to tort actions, contract actions, and various equitable remedies. Whether we call the subject of inquiry damages, benefit conferred, or restitution of unearned performance, the basic question is the measure of *P*'s recovery. The references made to the indefinite "yardsticks" used in other more or less related fields of law have tended to obliterate, rather than point up, any principles of measurement peculiar to quasi-contract. Another source of confusion is that in their attempts to reach a satisfactory solution to the problem, courts have, over a period of years, effected some significant alterations in the concept of benefit. In turn, these alterations create new problems of measurement.

While a detailed and complete analysis of the various measures

⁷ *Schillinger v. United States*, 155 U.S. 163, 15 S.Ct. 85 (1894); *B. F. Avery & Sons v. McClure*, 94 Miss. 172, 47 S. 901 (1908).

⁸ *McSorley v. Faulkner*, 18 N.Y.S. 460 (1892); *Shell Pet. Corp. v. Scully*, (C.C.A. 5th, 1934) 71 F. (2d) 772; *Edwards v. Lee's Admr.*, 265 Ky. 418, 96 S.W. (2d) 1028 (1936). See also WOODWARD, QUASI-CONTRACTS 445 (1913).

⁹ *Independent Elec. Lighting Corp., Inc. v. Brodsky & Co.*, 118 Misc. 561, 194 N.Y.S. 1 (1922); *How. J. Ryan & Associates v. Century Brewing Assn.*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

¹⁰ *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 P. 860 (1912); WOODWARD, QUASI-CONTRACTS 9 (1913); RESTITUTION RESTATEMENT, §§ 1 comment b, 116 (1937).

¹¹ *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907); *Edson v. Hammond*, 142 App. Div. 693, 127 N.Y.S. 359 (1911); RESTITUTION RESTATEMENT, § 116 (1937).

¹² *Liggett & Meyer Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1935); *How. J. Ryan & Associates v. Century Brewing Assn.*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

applied is outside the scope of this comment, it is necessary to scan briefly the results reached in some common situations. For this purpose, the situations may be divided into those arising out of *D*'s tort, and those arising out of an actual or supposed contract.

There is no problem, of course, where the benefit consists of a specific sum of money in *D*'s hands.¹³ Where *D* has tortiously obtained *P*'s goods and sold them, the measure of benefit is generally the amount of the proceeds of the sale.¹⁴ But suppose *D* has for some reason sold the goods at a price far below their actual or market value. Here, while the proceeds may be the only actual benefit to *D*, *P*'s loss is much greater. In many cases, this made no difference; if *P* wanted the full value, he could sue in tort.¹⁵ But a few courts have held that *D*'s benefit is measured by the reasonable value of the goods, regardless of the price for which he chose to sell them.¹⁶ Here benefit is measured as of the time *D* took possession of the goods, which seems to be a reasonable time to select, for it emphasizes practical justice instead of formal reasoning and blind adherence to precedent. Where *D* retains the goods in his possession, or consumes them, the measure applied is usually the market value at the time and place of conversion.¹⁷ If there is no market for such goods at that time and place, the value at the nearest market, adjusted for transportation costs, will govern.¹⁸ It should be noted that under the early concept of benefit, there was a distinct variance between the measure of recovery in quasi-contract and tort, based on the different theories of the actions. Lord Mansfield gave as one reason for allowing quasi-contractual recovery the fact that this was to *D*'s advantage, as well as to *P*'s, in that *P* could recover only the net amount which *D* realized from his tort, while in a tort action *P* could recover any amount which he could prove as his damages, including, in some cases, exemplary damages.¹⁹

In the cases arising out of an actual or supposed contract relationship there are even more factors to consider. If there is a valid contract and *P* is guilty of breach, he is likely to be denied recovery for his part performance whether he claims on the contract or in quasi-

¹³ See note 1, *supra*.

¹⁴ See cases cited in note 3, *supra*.

¹⁵ *Rand v. Nesmith*, 61 Me. 111 (1873); *Taylor Motor Car Co. v. Hansen*, 75 Utah 80, 282 P. 1040 (1929).

¹⁶ *Terry v. Munger*, 121 N.Y. 161, 24 N.E. 272 (1890); *Felder v. Reeth*, (C.C.A. 9th, 1929) 34 F. (2d) 744.

¹⁷ *Luse v. Jones*, 39 N.J.L. 707 (1877); *Bowen v. Detroit United Ry.*, 212 Mich. 432, 180 N.W. 495 (1920).

¹⁸ *Felder v. Reeth*, (C.C.A. 9th, 1929) 34 F. (2d) 744. Opinion is about evenly divided as to whether transportation costs should be added to, or subtracted from the market value. See 97 A.L.R. 250 (1935).

¹⁹ In *Linden v. Hooper*, 1 Cowp. 414 at 419, 98 Eng. Rep. 1160 (1776).

contract. But assuming his breach is not considered a bar, there remains the question of the measure of recovery. Here a distinction is drawn between the case in which his breach contains no element of willfulness or moral fault, and the case in which it is without moral justification.²⁰ In the former situation he is often allowed to recover the value of his performance up to the time of breach, based either upon cost to him, or market value less, of course, the damages to which *D* is entitled under the contract.²¹ In the latter situation, courts tend to restrict his recovery to the net benefit actually conferred upon *D*, without regard to the cost to *P* of conferring such benefit.²² In either case, the pro-rated contract price is usually used as an upper limit on *P*'s recovery.²³ Where *D* has breached the contract, *P* can more often disregard the contract and sue in quasi-contract for the benefit conferred. In this situation, *P*'s recovery may be measured by market value of his performance or the cost to him of such performance, whichever is higher.²⁴ Here again, a few courts set the pro-rated contract price as an upper limit, although such cases are in the minority.²⁵

Where the contract becomes impossible of performance, *P*'s quasi-contract claim is more likely to succeed than in either of the cases considered in the preceding paragraph, and the measure of recovery will probably be the value of the performance which he has made up to the time of impossibility.²⁶ It is apparent that in many of these cases, the actual net benefit to *D* has little bearing on the measure of *P*'s recovery. In fact, recovery has sometimes been permitted where *D*, far from receiving a net benefit, has suffered a heavy loss.²⁷

Where the contract is unenforceable because of the statute of

²⁰ *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 A. 264 (1887); *Viles v. Traction and Power Co.*, 79 Vt. 311, 65 A. 104 (1906); 5 WILLISTON, CONTRACTS, rev. ed., 4126 (1938).

²¹ *Blood v. Wilson*, 141 Mass. 25, 6 N.E. 362 (1886); KEENER, QUASI-CONTRACTS 231 (1893).

²² *Britton v. Turner*, 6 N.H. 481 (1834); *Gillis v. Cobe*, 177 Mass. 584, 59 N.E. 455 (1901); *Heitz v. Sayers*, 32 Dela. 207, 121 A. 225 (1923).

²³ *Britton v. Turner*, 6 N.H. 481 (1834); *Gillis v. Cobe*, 177 Mass. 584, 59 N.E. 455 (1901); WOODWARD, QUASI-CONTRACTS 285 (1913).

²⁴ *Bailey v. Marden*, 193 Mass. 277, 79 N.E. 257 (1906); *Valente v. Weinberg*, 80 Conn. 134, 67 A. 369 (1907); *Johnston v. Star Bucket Pump Co.*, 274 Mo. 414, 202 S.W. 1143 (1918); 5 WILLISTON, CONTRACTS, rev. ed., 4136 (1938); 2 SEDGWICK, DAMAGES, 8th ed., 318 (1891).

²⁵ *Rice v. Partello*, 88 Ill. App. 52 (1899); *U.S. Potash Co. v. McNutt*, (C.C.A. 10th, 1934) 70 F. (2d) 126; WOODWARD, QUASI-CONTRACTS 431 (1913).

²⁶ *Whelan v. Ansonia Clock Co.*, 97 N.Y. 293 (1884); *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891); 6 WILLISTON, CONTRACTS, rev. ed., 5536 et seq. *Contra*, *Brumby v. Smith*, 3 Ala. 123 (1841). On the general subject of recovery of benefits conferred under contracts rendered impossible of performance, see the preceding comment in this series, 46 MICH. L. REV. 401 (1948).

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

frauds, or for indefiniteness, *P* can often recover the full value of performance he has made,²⁸ which in some cases has been held to include expenses of preparing to perform.²⁹ Other courts restrict his recovery to the net economic benefit conferred upon *D*.³⁰ Where the contract has been rescinded for mistake, each party may recover the cost of performance rendered.³¹ Where *D* rescinded because of *P*'s fraud, *P*'s recovery, if any, is limited to the net economic benefit conferred.³² If *P* rescinded for *D*'s fraud, the recovery is more likely to be based upon cost to *P* or market value, whichever is higher.³³ Thus, in all these cases, it is clear that the element of fault is as much a factor in determining recoverable benefit as is actual gain or advantage to *D*. This factor will be discussed in more detail below.

2. What is "justice"?

For purposes of this discussion, "justice" has two significant aspects. First, in a narrow sense, it must be used to qualify benefit. Thus, generally speaking, benefit must be unjustified in order to be recoverable.³⁴ Secondly, the furtherance of "justice" in a much broader sense must be considered as the very basis and reason for development of the remedies of quasi-contract.

A brief review of the results reached and reasoning used in some common fact situations will indicate the attitude of the legal profession toward this problem. In the cases arising out of *D*'s tort, we start with the proposition that his action was wrongful, hence benefit obtained thereby is not justified.³⁵ There is more difficulty with the cases

²⁸ *King v. Welcome*, 71 Mass. 41 (1855); *Ford v. Stroud*, 150 N.C. 362, 64 S.E. 1 (1909).

²⁹ *Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1927); *People's National Bank v. Magruder*, 77 Fla. 235, 81 S. 440 (1919). Contra: *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913). This emphasizes the reliance interest, which is, strictly speaking, correlative to benefit, rather than a part of it. For an analysis of this factor, see Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 *YALE L. J.* 52, 373 (1936-37).

³⁰ *Mathews v. Davis*, 25 Tenn. 324 (1845); *Chamberlain v. Preston*, 170 Md. 1, 182 A. 579 (1935).

³¹ *Kutsche v. Ford*, 222 Mich. 442, 192 N.W. 714 (1923); *In re Agnew's Will*, 132 Misc. 466, 230 N.Y.S. 519 (1928).

³² *Kruger v. Block*, 114 Neb. 839, 211 N.W. 173 (1926); *Kimmel v. Peach*, 240 Mich. 697, 216 N.W. 374 (1927).

³³ *Crown Cycle Co. v. Brown*, 39 Ore. 285, 64 P. 451 (1901); *McRae v. Lonsby*, (C.C.A. 6th, 1904) 130 F. 17. Contra: *Huganir v. Cotter*, 102 Wis. 323, 78 N.W. 423 (1899), in which recovery was limited to net economic benefit conferred.

³⁴ *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (1760); *Hartford Acc. & Indem. Co. v. Benevento*, 133 N.J.L. 315, 44 A. (2d) 97 (1945).

³⁵ Of course, the tort must be proved before the question of benefit arises. But in *Independent Elec. Lighting Corp., Inc. v. Brodsky & Co.*, 194 N.Y.S. 1 (1922),

arising out of contractual relationships. One view is that if *P* is in default under a valid contract he cannot recover for partial performance rendered, the reason being, apparently, that his breach justifies *D*'s retention of any benefits received under the contract.³⁶ But in a case in which the benefit conferred by *P*'s part performance is much greater than the damages resulting from his breach of the contract, some courts, reluctant to enforce a forfeiture, will permit recovery.³⁷ If, however, *P*'s breach is willful, his recovery may be greatly reduced or denied altogether.³⁸ The same principle applies where *D* has rescinded the contract because of *P*'s fraud.³⁹ On the other hand, if *D* has breached the contract or has been guilty of fraud, *P*'s recovery is not only more certain, but may be for a larger amount than would otherwise be the case.⁴⁰ In short, the element of fault has a definite bearing on the question of whether, and to what extent, *D*'s benefit is unjustified. While, in many jurisdictions, it cannot be said that if *P* is at fault, he cannot recover, certainly his chance of recovery is better when he is not at fault.

In connection with this discussion of justification of benefit, a few rather specialized groups of cases should be considered. Where a contract is unenforceable under the statute of frauds, but *D* is willing to carry out his portion of the agreement, some courts deny recovery of the performance rendered by *P*, comparing the situation to one in which *P* has willfully defaulted on a valid contract.⁴¹ Where *P* sues to recover for use and occupancy of his land, as an alternative to an action for trespass, the courts have quite uniformly refused recovery for reasons which are purely historical in nature and which appear to have little relevance today.⁴² Certainly it seems that one who uses and

P was allowed to recover in quasi-contract for the value of electric current consumed by *D*, although a prior suit for conversion had been dismissed on the ground that "conversion" of electricity could not be proved.

³⁶ *Reab v. Moor*, 19 Johns. (N.Y.) 337 (1822); KEENER, QUASI-CONTRACTS 218 (1893). See also 24 COL. L. REV. 885 (1924).

³⁷ *Britton v. Turner*, 6 N.H. 481 (1834); *Hickory Inv. Co. v. Wright Lumber Co.*, 152 Miss. 825, 119 S. 308 (1928); 5 WILLISTON, CONTRACTS, rev. ed., 4123 (1938).

³⁸ *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N.W. 797 (1908); *Maxwell & Delehomme v. Moore*, 163 Ala. 490, 50 S. 882 (1909); WOODWARD, QUASI-CONTRACTS 227 (1913).

³⁹ *Higbee v. Trumbauer*, 112 Iowa 74, 83 N.W. 812 (1900); 5 WILLISTON, CONTRACTS, rev. ed., 4273 (1938). See also McCORMICK, DAMAGES, § 121 (1935).

⁴⁰ This is implicit in all the cases which discuss fault. See cases cited in note 32, supra.

⁴¹ *Collier v. Coates*, 17 Barb. (N.Y.) 471 (1854); *Summers v. Hively*, 78 W. Va. 53, 88 S.E. 608 (1916); *Keystone Hdwe. Co. v. Tague*, 246 N.Y. 79, 158 N.E. 27 (1927).

⁴² *Stringfellow v. Curry*, 76 Ala. 394 (1884); *Central Mills Co. v. Hart*, 124

occupies land is benefited to the extent of the rental value of the land, and that quasi-contract remedies should be extended to permit the owner to recover therefor. In the cases of "volunteered" benefit, recovery has traditionally been refused.⁴³ The rule has been relaxed to some extent, and recovery permitted, where *P*'s intervention was "dutiful," or where he had an "interest" in the transaction.⁴⁴ It should be noted that although *P*'s performance was such as to confer benefit, if *D* refused to accept it, he would not be held liable to pay *P* its value.⁴⁵

It is generally assumed that *D*'s gain must be at *P*'s expense in order to constitute a recoverable benefit. Keener says, ". . . it is not sufficient for the plaintiff to prove that the defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity."⁴⁶ But there are instances where this is not strictly true.⁴⁷ Of course, some act of the plaintiff or the infringement of his rights must lie behind the benefit to *D*, but it does not necessarily follow that *P* suffered loss. There are cases, for instance, in which the only "loss" or "detriment" to *P* by reason of *D*'s act was loss of the right to complete an unfavorable contract at a heavy loss. Yet, as *D* benefited thereby, *P* was allowed to recover the amount of such benefit.⁴⁸ Hence, if we say that there must be a minus quantity, it must be with the proviso that "minus" is used in a technical sense and does not necessarily mean an actual pecuniary loss, although in a great majority of the cases *P* has suffered actual loss. On the other hand, of course,

Mass. 123 (1878); KEENER, QUASI-CONTRACTS 192 (1893). This restriction does not extend to tangibles removed from the land during such use and occupancy.

⁴³ *Wragg v. Wragg*, 208 Iowa 939, 226 N.W. 99 (1929); *Weberling v. Bursell*, 180 Minn. 283, 230 N.W. 654 (1930); RESTITUTION RESTATEMENT, § 2 (1937).

⁴⁴ KEENER, QUASI-CONTRACTS 354 (1893); WOODWARD, QUASI-CONTRACTS 308-335 (1913). For an excellent discussion of this subject, see Hope, "Officiousness," 15 CORN. L. Q. 25, 205 (1929-30).

⁴⁵ Use does not always imply acceptance. Continued occupancy of a building upon which unsatisfactory or incomplete repairs have been made will not ordinarily constitute acceptance of a benefit, but use of machinery or other chattels which do not meet specifications does ordinarily constitute acceptance. In the first case, *D* has no real opportunity to reject the benefit, while in the latter case, rejection is easily made. Cases are collected in 107 A.L.R. 1411 (1937).

⁴⁶ KEENER, QUASI-CONTRACTS 163 (1893). See also WOODWARD, QUASI-CONTRACTS 442 (1913).

⁴⁷ *Weems v. Melton*, 47 Okla. 706, 150 P. 720 (1915); *Shell Pet. Corp. v. Scully*, (C.C.A. 5th, 1934) 71 F. (2d) 772; *Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc.*, (D.C. N.Y. 1920) 268 F. 575.

⁴⁸ See cases cited in note 47, supra. In the *Federal Sugar Co.* case, based on interference with contract, the record disclosed that, because of the rising price of sugar, *P* would have sustained a heavy loss if it had completed its contract.

mere loss to *P* will not justify recovery in quasi-contract unless there is some basis for finding that *D* has received a benefit.

From the foregoing discussion, it would seem that whenever we find that *D* was unjustly benefited at *P*'s expense, a remedy in quasi-contract will lie. However, such is not always the case. Other elements enter into the picture. For one thing, in the Anglo-American system of law there has been a traditional abhorrence of overlapping remedies. Quasi-contract from its very inception has overlapped other fields of law; from sheer necessity, it developed to supplement the more cumbersome common law actions and to supply a remedy for cases which would not fit neatly into one of the common law's established pigeon-holes. Hence, it was used sparingly at first, and every extension of its scope was made with reluctance.⁴⁹ To a large extent, this accounts for the persistence of the rule that a quasi-contractual remedy will not lie to recover for use and occupancy of land; the courts say that trespass is the proper and only remedy.⁵⁰ Another source of difficulty springs from the fictions attending the birth and infancy of quasi-contracts. Lawyers who were wholly familiar with implication of promise in cases of many types (indeed so familiar with these implications that they took them for granted and did not realize their fictitious character) might suddenly rebel against implying a promise in an unfamiliar situation. "There is no contract express or implied between the parties, and therefore an action *ex contractu* will not lie."⁵¹ This statement typified the thinking of many lawyers and was widely adopted by the courts.⁵² The doctrine has been rejected to a large extent, but since several jurisdictions are still committed to it it cannot be overlooked or ignored.⁵³ While these restrictive doctrines are only indirectly concerned with a concept of benefit, they have had some bearing on the subject. A court denying recovery on these grounds is inclined to bolster its opinion by taking a narrow view of what constitutes a recoverable benefit. This attitude, and the precedents thus established, could not but retard the process of developing a broad concept of benefit.

Opposed to these restrictive tendencies was the pronounced preference of litigants for extension of quasi-contractual remedies. In addi-

⁴⁹ This reluctance is evident in cases that present a ground for recovery not previously approved by the court. See *Kirk v. Todd*, 21 Ch. Div. 484 (1882); *Jones v. Hoar*, 5 Pick. (Mass.) 285 (1827).

⁵⁰ The rule is due in part to the reluctance of courts to entertain a transitory action in which they might be called upon to try title to land. See cases cited in note 42, *supra*.

⁵¹ *Jones v. Hoar*, 5 Pick. (Mass.) 285 at 290 (1827).

⁵² See, for example, *Sandeen v. Kansas City, St. Joseph & Council Bluffs Ry. Co.*, 79 Mo. 278 (1883).

⁵³ Cases are collected in 97 A.L.R. 250 (1935).

tion to the greater simplicity of procedure, other advantages made quasi-contract desirable. In many instances, its use permitted a counterclaim or set-off to be utilized;⁵⁴ it did not abate at *D*'s death;⁵⁵ often a longer statute of limitations applied;⁵⁶ and it could be used in some instances to avoid the immunity of governments to tort actions.⁵⁷ Again, these factors are relevant to the concept of benefit only insofar as they created pressure on the courts to apply a broader definition of benefit, so as to extend the scope of quasi-contractual remedies. The latter pressure, on the whole, was stronger than the ultra-conservative traditions of the legal system. As we have seen the concept of benefit has been steadily expanded, and with it the scope of quasi-contract.

3.

It is impossible to reconcile the varied conceptions of benefit which have been expressed by courts and writers in the last few decades. In the origins of quasi-contract, benefit consisted only of a specified sum of money, which by "right" should be returned to *P*. We have seen how the concept was expanded to include chattels and land, then valuable services, or the appropriation of some privilege; and how it may now include the appropriation of an idea, or even an intangible, indefinite advantage. It may now include any requested act or forbearance, regardless of whether the result to *D* is gain or loss, and we find a growing number of cases in which benefit to *D* is defined in terms of detriment to *P*. The thread of consistency is that there must be some sort of advantage or gain, however fleeting or tenuous it might be. Courts have uniformly held that *D*'s wrongful act, in itself, is not sufficient to support an action in quasi-contract; he must have received something as a result of this act before the action will lie.⁵⁸

It is interesting to note that the American law of quasi-contract has gone far beyond the English law out of which it grew. In Eng-

⁵⁴ *Fanson v. Linsley*, 20 Kan. 235 (1878); *Kubat v. Zika*, 186 Minn. 122, 242 N.W. 477 (1932).

⁵⁵ *Phillips v. Homfray*, L. R. 24 Ch. Div. 439 (1883); *Treas. and Receiver Gen. v. Sheehan*, 288 Mass. 468, 193 N.E. 46 (1934).

⁵⁶ *Garrity v. State Board of Administration*, 99 Kan. 695, 162 P. 1167 (1917); *Andersen v. Thude*, 42 Ariz. 271, 25 P. (2d) 272 (1933).

⁵⁷ *Nelson County v. Coleman*, 126 Va. 275, 101 S.E. 413 (1919); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135 (1922). See *Anderson*, "Tort and Implied Contract Liability of the Federal Government," 30 MINN. L. REV. 133 (1946). There are various other advantages which may be gained by use of quasi-contractual remedies, depending upon the basis and circumstances of the case.

⁵⁸ *Patterson v. Prior*, 18 Ind. 440 (1862); *Minor v. Baldrige*, 123 Cal. 187, 55 P. 783 (1898); *WOODWARD, QUASI-CONTRACTS* 439 (1913).

land, the tendency has been to restrict, rather than broaden the application of the concept announced in *Moses v. Macferlan*.⁵⁹ Only in recent years has there been indication of a relaxation in the strict approach to cases which we consider quasi-contractual.⁶⁰ In French law, adherence to the *code civil* restrained the expansion of remedies of quasi-contractual nature, although by the use of fictions, and by giving a strained interpretation to certain articles of the code, some added breadth of application was achieved.⁶¹ In 1892, decisions of the high French court opened the door to recovery in practically all cases of "unjust enrichment."⁶² Since that time, the French law concerning unjust enrichment has expanded rapidly, with an extremely broad conception of what constitutes enrichment or benefit. The result has been a more frequent application of the remedy than is found in American law, with more opportunity for confusion than is found in our law of quasi-contract.⁶³

The difficulty in forming a simplified concept of benefit comes largely from the attempts of the courts to make quasi-contract truly an instrument for rendering "natural justice." The addition of one fact to a given situation may transform what is justice in the one case to gross injustice in the other. Ideally, perhaps, benefit in each case should be determined on its particular facts, and the remedy molded accordingly. But the defects in this method of judicial administration more than outweigh the advantages which would result. Any field of law requires a more definite framework and guide to action than is to be found in terms such as "natural justice." For the result in each case to depend entirely upon its own facts would leave too much to the whims or emotions of a jury, and would place too much importance on the attitude of the particular judge trying the case. It could also prevent effective control by the appellate courts over the conduct of these cases in the lower courts. These defects, in time, might well destroy rather than enhance the value of quasi-contractual remedies.

On the other hand, an absolute or inflexible pattern of law for quasi-contract is equally undesirable. In attempting to simplify our concepts of benefit, we should not forget that these remedies were

⁵⁹ See Gutteridge and David, "The Doctrine of Unjustified Enrichment," 5 *CAMB. L. J.* 204 (1934).

⁶⁰ This is noticeable in cases involving impossibility of performance. See *Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, 167 *L.T.(N.S.)* 101 (1942); 144 *A.L.R.* 1298 at 1317 (1942), and statutory provisions of 6 & 7 *Geo. VI*, c. 40 (1943).

⁶¹ Gutteridge and David, "The Doctrine of Unjustified Enrichment," 5 *CAMB. L. J.* 204 (1934).

⁶² *Id.* at 208.

⁶³ *Id.* at 223. See also Lorenzen, "The *Negotiorum Gestio* in Roman and Modern Civil Law," 13 *CORN. L. Q.* 190 (1928).

developed to supply the flexibility which the existing common law did not have, and their value to a constantly changing society can be maintained only if they are sufficiently adaptable to provide reasonable answers to the new problems that arise.

At the one extreme, we have the foggy conception of "natural justice"; at the other, a pattern with the certainty of an algebraic formula, neither of which is desirable. Somewhere in between must lie a practical, workable concept of benefit. It cannot be "discovered" in the present law of quasi-contract; it is not there, except in a kaleidoscopic pattern that shifts with every slight change of circumstance. It can be delineated, if at all, only through the thoughtful attention and discussion of the legal profession as a whole.

Certain threads of consistency may be found in the cases. There must be (a) some sort of advantage, (b) obtained at *P*'s expense, (c) that *D* is not justified in retaining. If these hazy principles were clarified and used as a guide in quasi-contract cases, a flexible, yet stable concept of benefit could emerge. Since unjustified benefit is one of the main bases of quasi-contract, an understandable, consistent concept of benefit, emphasized in proportion to its importance in these remedies, would go far toward eliminating the confusion which now exists in the law of quasi-contracts.

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