Chapter 14: Contracts

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§14.1. Restitution: Unjust enrichment. Previous Annual Survey volumes have indicated the developing interest in restitution and the difficulties existing in the selection of proper remedies. The Supreme Judicial Court, in the case of Douillette v. Parmenter, undertook further to clarify several aspects of restitutional law. The plaintiff had been invited by the defendant to live on her farm with the promise that she would deed the plaintiff some land on which to build a house. The defendant pointed out the land on which the plaintiff could build and at least acquiesced in the building until the house was nearly completed. The defendant then told the plaintiff he would have to leave because he could have no more water. The plaintiff sued in contract for services rendered and materials furnished, but the Supreme Judicial Court held he could not recover in the action, there being no express or implied contract for services and materials. The Court found that the plaintiff's move to the farm and not his furnishing of services and materials was the consideration for the promise to deed.

The Court indicated, however, that the plaintiff could recover in a suit in equity for unjust enrichment because the defendant's conduct could be found to have been tantamount to fraud. The Court stated that, although this principle has not been recognized previously in the Commonwealth, there is ample authority from other jurisdictions for the principle. The record does not indicate that there was

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actual fraud at the time the plaintiff came out to the land and commenced building his home, although there is some evidence that the defendant may have decided not to deed the property to the plaintiff a short time before he was ordered off the land and while he was still working on the house.\textsuperscript{5} Even if there was no fraud on the defendant's part, there is authority recognizing the plaintiff's right to recover because of his mistaken belief that his services would inure to his benefit with the defendant's concurrent knowledge of his mistaken belief.\textsuperscript{6} The Court in the present case, however, primarily cites as authority cases in which services have been rendered in reliance upon a contract voidable under the Statute of Frauds.\textsuperscript{7} This is the most acceptable of the three possible bases for restitutional recovery in the present case. The basis of fraud is inexact since there was no actual fraud except possibly just before the plaintiff was ordered to leave. Even if American courts accepted the theory of "constructive fraud" as the English courts have,\textsuperscript{8} the facts of this case do not fit it within any established area of "constructive fraud."\textsuperscript{9} The basis of mistake on the part of the plaintiff with knowledge of the mistake on the part of the defendant, although possibly supportable from the record, would similar to the fraud basis have to be supported by a finding that the defendant really never intended to deed the property to the plaintiff. On the other hand, the record clearly shows that the original contract to deed was unenforceable under the Statute of Frauds and yet the defendant obtained a benefit from the plaintiff because of the original understanding between the parties. As the authorities cited by the Court, as well as other authority, establish, restitution is a proper remedy in this Statute of Frauds situation.\textsuperscript{10}

In cases of unjust enrichment induced by fraud, the damages awarded have been the market value of services rendered and materials furnished, irrespective of benefit to the defendant.\textsuperscript{11} Even if we accept as a proper theory of recovery not the fraud of the defendant but the mistaken belief of the plaintiff of which the defendant knew, the measure of recovery is still the reasonable value of services and materials furnished rather than the benefit conferred on the defendant.\textsuperscript{12} The Court in the present case held, however, that the proper measure of damages was the benefit conferred upon the defendant less

\textsuperscript{5} 2 Restatement of Contracts §471; Restatement of Restitution §8.
\textsuperscript{6} Restatement of Restitution §40 (c) and Comment d.
\textsuperscript{7} Johnson v. Armfield, 130 N.C. 575, 41 S.E. 705 (1902); Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, 286 (N.Y. Ch. 1814), rev’d on other grounds, 14 Johns. 15 (N.Y. 1816); 2 Williston, Contracts §237 (rev. ed. 1936); Woodward, Quasi Contracts §107 (1913).
\textsuperscript{8} Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 28 Eng. Rep. 82 (Ch. 1750).
\textsuperscript{9} 3 Pomeroy, Equity Jurisprudence §§922-923 (5th ed., Symons, 1941).
\textsuperscript{10} See note 7 supra; 2 Restatement of Contracts §355; Restatement of Restitution §108; Keener, Quasi-Contracts 278 (1893).
the value of any benefits which accrued to the plaintiff. The latter requirement is clearly correct since there would be a duty, in any restitutional situation, for the plaintiff to account for benefits he has received, which in the present case would at least include the rental value of the house during his occupancy of it. The Court cites, as authority for its theory of damages, cases in which contracts are void because of a condition not being fulfilled and authorities in which contracts are void under the Statute of Frauds. Since the present case is most properly a case for restitution for benefits conferred under a contract void under the Statute of Frauds, the measure of damages prescribed by the Court is the proper one. In most cases, of course, the benefit and services rendered theories of measure of damages would produce substantially equivalent damages. There is a danger, however, that the Court, because of its language identifying the defendant’s actions in the present case as tantamount to fraud, may have tended to bind itself to an inadequate measure of damages in a future case in which restitution is sought on the basis of actual fraud and little or no benefit was conferred upon the defendant despite substantial rendition of services by the plaintiff.

The choice of remedy in a case involving restitution is always a difficult one in jurisdictions that have maintained technical pleading distinctions. The law of restitution developed in both equity and law courts and it is difficult to determine which court system developed a particular theory of recovery. The Court in the present case required the plaintiff to seek amendment of his petition to change it from contract to equity, holding that the form of restitutional recovery he could obtain was only available in equity. This was the prevalent view when most jurisdictions retained the niceties of common law pleading, although the rejection of recovery in contract on a general assumpsit theory was criticized even at that time. Since money recovery only is being sought in the present case, a recovery in contract might have been supported. Litigants, however, are less interested in any possible theoretical arguments on selection of remedies than in knowing what remedy to use, and henceforth Massachusetts litigants will have this information available in situations similar to the present case.

13 Restatement of Restitution §159 (1).
15 Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, 287 (N.Y. Ch. 1814), rev’d on other grounds, 14 Johns. 15 (N.Y. 1816); 2 Williston, Contracts §§537 n.1 (rev. ed. 1936); Woodward, Quasi Contracts §107 (1913).
16 The Court has, however, refused to follow the benefit theory in all cases. For a recent case see M. Ahern Co. v. John Bowen Co., 334 Mass. 36, 133 N.E.2d 484 (1956), discussed in 1956 Ann. Surv. Mass. Law §4.1.
17 Restatement of Restitution, Introductory Note; Woodward, Quasi Contracts §§2, 6 (1913).
18 Keener, Quasi-Contracts 369 (1893).
§14.2. Existing impossibility of performance; Breach of contract: Restitution. The performance of a contract may be impossible either owing to factors that existed at the time the contract was made or because of events occurring between the time of contracting and the time of performance. In *Boston Plate & Window Glass Co. v. John Bowen Co.*,¹ the Court had to determine if, in an action for breach of contract, the plaintiff could recover when performance was impossible at the time the contract was made. Bowen’s bid on a state hospital had been incorrectly accepted; its bid was not actually low, as appeared, because it had not used the required statutory procedures.² Before Bowen’s bid was found to have been improperly accepted, Bowen had subcontracted two jobs with the Glass Company. The Glass Company had not performed under the subcontracts before it was found that the Bowen bid had been incorrectly accepted, but it had done certain work and incurred expenses preparatory to performance. The Court refused to allow damages to the plaintiff for breach of contract.

When a contract is, from the outset, impossible of performance and yet one or both parties have acted on it to their detriment, the question of who should bear the loss involves a difficult policy decision for the courts.³ If contracting parties realized at the time of contracting that one of their performances was impossible because of events then existing, we can assume they either would not have contracted or would indicate who was to bear the loss in case the factors preventing performance did not disappear before time for performance. The Court’s decision in the present case that the loss falls on the promisee rather than the promisor agrees with the Restatement of Contracts ⁴ and the decisions of most courts that have decided the problem.⁵ A complicating factor in the present case, however, was that the impossibility was caused by the negligence of the defendant in using improper bidding procedure. The Court did not consider this fact pertinent, holding that it would only be considered if the original contract between the defendant and the Commonwealth would have been valid except for Bowen’s conduct. Since Bowen was not the actual low bidder, no contract between Bowen and the Commonwealth ever existed; the subcontracts were thus impossible of performance from the outset, since they specifically depended upon the general contract. While the logic of this argument is impressive, defendant still created the impossibility by his conduct. Courts have not uniformly held the promisor free in cases of existing impossibility; certainly if the promisor knows of the impossibility at the time of contracting, the

² This was decided in Gifford v. Commissioner of Public Health, 328 Mass. 608, 105 N.E.2d 476 (1952).
³ 6 Corbin, Contracts §1321 (1951).
⁴ §456.
⁵ See 6 Williston, Contracts §§1937, 1951 (rev. ed. 1938); 6 Corbin, Contracts §§1326, 1339 (1951).
transaction may be voidable for fraud. The present case might have been analogized to the fraud situation by the Court, on a theory that the defendant should have known of the impossibility at the time it contracted with the plaintiff. Decisions in this area are, however, policy decisions; the courts attempt to reach the just result, considering business practice, the moral standards of the community and other such factors. The defendant in the present case was faced with a complicated statute regulating bidding procedure. There is no evidence that it deliberately evaded the statutory requirements in order to appear low bidder, and certainly the agents of the Commonwealth, in accepting the bid, were also negligent. It thus may be entirely fair that in this precise case of negligence the promisor not be liable for breach of contract; it is, however, easy to foresee possible cases in which negligence of a promisor might be sufficiently unjustifiable so as to warrant holding him liable even in the absence of a showing of his actual knowledge of the impossibility.

In the present case the Court also holds out hope to the plaintiff that it might recover in an action other than for breach of contract; without deciding, the Court states that plaintiff might recover restitutio­nally under the common counts. In the case of M. Ahern Co. v. John Bowen Co., which arose out of the same factual situation as the present case but involved a different subcontractor, the plaintiff recovered restitutio­nally for the value of his part performance. The plaintiff in the present case has not performed but has only incurred certain expenses in preparation for performance. In a rather com­plicated construction subcontract situation such as was here involved, however, not only the performance of services but also proper preparation for performance properly could be considered part of the bargain, and thus restitutio­nally recovery reasonably could be awarded.

§14.3. Conditions precedent: Architect’s approval. Courts often have had difficulty in determining if a condition precedent in an agree­ment must be met before a contract comes into existence or if the contract exists from the time of the original agreement, merely pending the occurrence of the condition. A construction subcontract in pur­chase order form in Louis M. Herman Co. v. Gallagher Electrical Co. required the architect’s approval and the Court had to determine if a contract existed on the basis of the original purchase order or if the contract did not ever come into existence because the architect did not appro­ve the order. The plaintiff had bid on the electrical subcontract,

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the specifications for which required the installation of equipment "similar to" Stromberg-Carlson units. Plaintiff's bid substituted RCA equipment for the Stromberg-Carlson types listed in the specifications. The purchase order dictated by defendant's agent to plaintiff stated: "1 RCA Sound System As per Plans and Specifications. Subject to Approval of Architect and Engineer. Prices as Per Louis M. Herman Quotation of 22 Jan. 1954." The defendant knew that the plaintiff had done extensive work under this subcontract before it raised the question of whether there was a contract.

The Court construed the purchase order as a contract subject to a condition precedent, rather than as a contract that would not come into existence until the condition precedent was fulfilled. This result was obtained by interpreting the architect's approval to refer to the substitution of one sound system for the other, rather than to refer to approval of the entire contract. This interpretation follows from the Massachusetts authorities in similar cases. The Court, however, was still faced with the fact that the architect had never approved the substitution of one sound equipment for another. The Court reviewed evidence that the engineer of the project had recommended approval to the architect, that the architect had been hampered by a member of the building advisory committee — who had no authority to interfere — and that the architect stated he otherwise would have approved the substitution of the one sound equipment for the other. The Court then rather cryptically stated that the parties were entitled to the architect's honest, non-arbitrary and non-fraudulent judgment, and that he had failed to decide the question which he had a duty to decide.

When a contract requires the approval of an expert, the condition may be excused on certain grounds such as impossibility, fraud or gross mistake. The cases, however, do not excuse the condition merely on the basis that the expert should decide within a reasonable time whether he will approve. This is one interpretation that might be given to the Court's statement in the Herman case that the architect did not carry out his duty to decide. The facts of the case, however, and the authorities cited by the Court suggest this was not the Court's intent. The architect's failure did not occur because of any negligent delay but because of outside pressure that made him intentionally delay decision. The cases cited by the Court cover situations in which the architect's decision was fraudulent or owing to mistake and lack of independence in decision. While these cases do not directly apply to the present case, they evidence prior recognition by the Court that a condition of expert approval may be excused on sufficient grounds.

3 1 Restatement of Contracts §303.
The Restatement of Contracts, digesting the American cases,\(^5\) states that a condition requiring approval by an expert may be excused if the expert fails to exercise an honest judgment in a situation that involves extreme penalty and if the condition is not an essential part of the exchange for the promisor's performance.\(^6\) The Massachusetts Court has held that an expert's approval is not so essential that other means cannot be used to determine rights of parties under a contract.\(^7\)

It is a reasonable assumption from the record in the *Herman* case that the plaintiff would be heavily penalized if he could not recover contractually for his extensive expenditures and work during the six-month period during which he was performing under the contract. The architect in the present case did not fraudulently refuse to act, in the strict sense of fraud, but he did not exercise an honest judgment because of pressures on him. Thus the Court properly excused the performance of the condition of the contract requiring the architect's approval.\(^8\)

\(^{14.4.}\) **Contracts of indemnity: Death actions.** The Supreme Judicial Court has held that the usual rule permitting contribution among joint tortfeasors not in pari delicto \(^1\) does not apply to suits brought under the death statute.\(^2\) In *Western Union Telegraph Co. v. Fitchburg Gas and Electric Light Co.*,\(^3\) the Court decided that the rule for death actions could be modified by a contract for reimbursement. In this case a common ownership arrangement of the plaintiff and the defendant included an agreement that, in its essentials, provided that each party would hold the other harmless for all loss or damages occasioned by the other's negligence in relation to its electric currents and maintenance of equipment on the commonly owned property. Concerning the death action here involved, the plaintiff and the defendant agreed that each should be free to settle the claim against it for a sum not to exceed $3850, and that any reimbursement under the common ownership agreement should include the settlement and expenses. The plaintiff settled for $3250. The defendant answered the plaintiff's present suit for reimbursement by claiming the plaintiff had suffered no loss or damages under the agreement, since there was no judicial determination of the plaintiff's liability for the death. The Court rejected this "proof of loss" argument because the defendant had stipulated that the plaintiff's settlement was a "reason-

\[^5\] See cases collected in 3 Corbin, Contracts §§651, 652 (1951), and 3 Williston, Contracts §§794, 797 (rev. ed. 1936).

\[^6\] 1 Restatement of Contracts §§302, 303(e).


\[^8\] The Court held that the question of estoppel to deny the contract, since the defendant had knowingly and without objection permitted the plaintiff to perform extensively under the agreement for over six months, was a question of fact that should be decided in the lower court.


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able and prudent" one. The defendant also contended the plaintiff had suffered no loss under the agreement since, if the death action had been tried, the plaintiff would either have won and thus suffered no loss or would have lost and thus would not be entitled to reimbursement from any joint tortfeasor in a death action. The Court found that the common ownership agreement included reimbursement in death actions and thus the general rule for death actions did not apply. It also again held that "loss" was established by the stipulation of the defendant that the settlement was reasonable and prudent.

The Court has held that judicial determination of liability is not required to permit recovery by a party against the one who was the means of subjecting the party to a claim if the claim was one against which the first party could make no legal defense; the second party, however, is not concluded by the amount of the settlement made by the first party in paying the original claim and can have a jury determine the amount of his liability.4 It is fairly certain that the plaintiff in the Western Union case was liable in the death action and that the amount of the settlement was no more than a jury would find proper in the action. The defendant should not, however, have stipulated the fact that the settlement was reasonable and prudent since there was always a possibility, even under the agreement between the parties, that a jury might have found that the plaintiff was not liable and thus suffered no loss in the death action or that the amount of the plaintiff's settlement was excessive. While stipulation is of great value in insuring prompt settlement of cases, the defendant in the present case stipulated away the major part of its defense against the plaintiff's claim.

§14.5. Documents of identification: Exculpatory provisions. While primarily a commercial law case,1 Polonsky v. Union Federal Savings and Loan Assn.2 deals with the perennial contract question of whether documents that include exculpatory provisions, but which also have an identification purpose, contractually bind those who accept the documents. The Court held that acceptance of a pass book evidencing a savings deposit bound the depositor to the exculpatory provisions printed on the cover of the book. Although a novel case in Massachusetts, most courts that have considered the problem have reached the same result.3 The case does, however, raise the question of where the dividing line between binding and not binding the recipients of these documents may properly be drawn. The present


§14.5. 1 See the discussion at §§5.2 supra and 18.5 infra.
3 See the cases cited by the Court in the Polonsky case, 334 Mass. at 700, 138 N.E.2d at 117. See also Annotation, 5 A.L.R. 1205 (1919).
case follows Massachusetts law by defining the dividing line as between those documents that purport to set forth a contract and those that do not, i.e., those that are primarily means of identification. The Court further holds, however, that in determining this line under the prescribed test an important factor is whether it is a matter of common knowledge that the document in question contains provisions defining the rights of parties. If a "common knowledge" test is generally adopted, certain documents like baggage checks and hat checks will eventually if not presently be included in this class, since it is likely that most people know they purport to contain exculpatory provisions. Danger lies in using "common knowledge" since proof of such knowledge is very difficult and the use of judicial notice in such circumstances is at best questionable. The primary goal in deciding this type of case would seem to be certainty, so that the parties involved have available to them the knowledge of whether they are bound; certainty is much more to be desired than a completely logical test that might later change the result of previously litigated cases, with resulting confusion. As a practical matter the Massachusetts decisions have established the desirable certainty but the Court should be certain the principles applied to decide these cases do not undermine that certainty for the future.

4 See Kergald v. Armstrong Transfer Express Co., 330 Mass. 254, 113 N.E.2d 53 (1953), and cases cited.