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## **RESTITUTION UNDER THE STATUTE OF FRAUDS: MEASUREMENT OF THE LEGAL BENEFIT UNJUSTLY RETAINED\***

LINDSEY R. JEANBLANC\*\*

### I. INTRODUCTION

In the cases of restitution under oral agreements within the Statute of Frauds that are to be discussed in this article, a legal benefit was found which was unjustly retained by the defendant, and the plaintiff was entitled to restitution. But the plaintiff sought restitution in value, rather than restitution in specie.<sup>1</sup> This article is concerned with the measurement of the exact amount of recovery that should be allowed.

Many of the factors which influenced the operation of the concepts of benefit<sup>2</sup> and unjustness,<sup>3</sup> and caused them to expand and contract, also enter into the calculation of the amount of legal benefit conferred upon and unjustly retained by the defendant. Although it is practically impossible to evaluate accurately the effect of any particular factor upon the measurement of the recovery, it seems evident that such factors as the type of

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1. The specific return of that with which the plaintiff has parted under the oral agreement would seem to constitute the most perfect adjustment of the rights of the parties, for the risk of making an inaccurate measurement in monetary terms would be eliminated. In this connection one might note the following statement by Professor Williston, "The fundamental duty of the defendant is restitution, and . . . the law gives money value generally, not because that is the plaintiff's primary right but merely as the equivalent of what he is entitled to." 2 WILLISTON, CONTRACTS § 535, p. 1551 (Rev. ed. 1936). The leading case which is contra to this view is *Hawley v. Moody*, 24 Vt. 603 (1852), but it is criticized by KEENER, QUASI CONTRACTS pp. 286-287 (1893). Also see Corbin, *Quasi Contractual Obligations*, 21 YALE L. J. 533 (1912).

2. See my article entitled, *Restitutions Under the Statute of Frauds: What Constitutes a Legal Benefit*, to be published subsequently.

3. See my article entitled, *Restitution Under the Statute of Frauds: What Constitutes An Unjust Retention*, to be published in 48 MICH. L. REV. (1950).

benefit conferred, the type of return performance promised by the defendant, the evidential weight accorded to the oral agreement, and the relative unjustness of the parties exert an influence on the selection, scope and operation of the measurement tests used by the courts. The tests of measurement most frequently employed are: (1) oral agreement, (2) market value, and (3) cost to the plaintiff.

In many instances the same result would be obtained irrespective of the particular test of measurement applied, for the market value of the plaintiff's performance rendered under the oral agreement is frequently equal, not only to the value of the performance promised in return by the defendant, but also to the amount of loss the plaintiff has sustained. On the other hand, situations often arise in which the results produced would vary considerably depending upon which test of measurement was employed. The various tests of measurement will be discussed in the order listed above.

## 2. ORAL AGREEMENT AS A TEST OF MEASUREMENT

In another article<sup>4</sup> the writer has pointed out that the principle which underlies a legal benefit is the satisfaction of human wants. It is reasonable to expect that the same principle should affect the measurement of the amount of the benefit for which a recovery is allowed. The satisfaction of human desires constitutes a legal benefit and finds expression in restitution judgments, however, only to the extent that such satisfaction can be proved and measured objectively in money terms. Consequently, the oral agreement, which is frequently relied on as objective evidence that the defendant received a legal benefit, is also frequently employed to ascertain the amount of the plaintiff's recovery.

The oral agreement test of measurement permits attention to be centered upon the type and value of the performance promised by the plaintiff, or upon the assumed equivalent performance promised by the defendant. If the plaintiff paid money to the defendant (or to another person at the defendant's request) in whole or partial performance of the oral agreement,<sup>5</sup> its value as a medium of exchange is equivalent both to the

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4. See my article, *supra* note 2.

5. In most of the cases which illustrate this situation the defendant's return promise was to convey land: *Dudley v. Hayward*, 11 Fed. 543 (1882); *Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 33 (Ala. 1829); *Flinn v. Barber*, 64 Ala. 193 (1879); *Chandler v. Wilder*, 215 Ala. 209, 110 So. 306 (1926); *Littell v. Jones*, 56 Ark. 139, 19 S.W. 497 (1892); *Reynolds v. Harris*, 9 Cal. 338 (1858); *Jones v. Ceres Inv. Co.*, 60 Colo. 562, 154 Pac. 745 (1916), Ann. Cas. 1918C 432; *Dreier v. Sherwood*, 77 Colo. 539, 238 Pac. 38 (1925); *Gilson v. Boston Realty Co.*, 82 Conn.

defendant's benefit and to the plaintiff's loss. In such a situation, the amount of benefit conferred upon the defendant is not only ascertained; it is already expressed in the same language employed by the courts in the rendition of

383, 73 Atl. 765 (1909); *Mayer v. First Nat. Co. of Sarasota*, 99 Fla. 173, 125 So. 909 (1930); *Dodgen v. Camp*, 47 Ga. 328 (1872); *Jay v. Sweatt*, 8 Ga. App. 481, 70 S.E. 16 (1911); *Amonson v. Idaho Development Co.*, 25 Idaho 615, 139 Pac. 352 (1914); *Crabtree v. Welles*, 19 Ill. 55 (1857); *Collins v. Thayer*, 74 Ill. 138 (1874); *Falls v. Visser*, 250 Ill. App. 481 (1928); *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45 (Ind. 1835); *Barickman, Adm'r. v. Kuykendall, Adm'r.*, 6 Blackf. 21 (Ind. 1841); *Frey v. Stangl*, 148 Ia. 522, 125 N.W. 868 (1910), L.R.A. 1916D 462; *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640 (1911); *Sellers v. Bell*, 10 Kan. App. 581, 63 Pac. 457 (1901); *Fox's Heirs v. Longly*, 1 A. K. Marsh. 388 (Ky. 1818); *Hunt v. Sandlers*, 1 A. K. Marsh. 552 (Ky. 1819); *Brown v. East*, 5 T. B. Mon. 405 (Ky. 1827); *Craig v. Prather*, 2 B. Mon. 9 (Ky. 1841); *Mannen v. Bradberry*, 81 Ky. 153 (1883); *Curnette v. Curnette*, 21 Ky. L. Rep. 1422, 55 S.W. 422 (1900); *Lyttle v. Davidson*, 23 Ky. L. Rep. 2262, 67 S.W. 34 (1902); *Lucas v. McGuire*, 29 Ky. L. Rep. 1068, 96 S.W. 867 (1906); *Wright v. Yates*, 140 Ky. 283, 130 S.W. 1111 (1910); *Reid v. Reid*, 141 Ky. 402, 133 S.W. 219 (1911); *Padgett v. Decker*, 145 Ky. 227, 140 S.W. 152 (1911); *Grace v. Gholson*, 159 Ky. 359, 167 S.W. 420 (1914); *Kentucky Counties Oil Co. v. Cupler*, 204 Ky. 799, 265 S.W. 334 (1924); *Zanone v. Tashgian*, 231 Ky. 454, 21 S.W. 2d 825 (1929); *Jellison v. Jordan*, 68 Me. 373 (1878); *Purves v. Martin*, 122 Me. 73, 118 Atl. 892 (1922); *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14 (1869); *Powell v. Young*, 45 Md. 494 (1876); *Schroeder v. Loeber*, 75 Md. 195, 23 Atl. 579 (1892), rehearing denied, 24 Atl. 226 (1892); *Cross v. Iler*, 103 Md. 592, 64 Atl. 33 (1906); *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275 (1910); *Thompson v. Gould*, 20 Pick. 134 (Mass. 1838); *Cook v. Doggett*, 2 Allen 439 (Mass. 1861); *De Moss v. Robinson*, 46 Mich. 62, 8 N.W. 712, 41 Am. Rep. 144 (1881); *Robinson v. Batzer*, 195 Mich. 235, 161 N.W. 879 (1917); *Croy v. Hawkins' Estate*, 228 Mich. 107, 199 N.W. 679 (1924); *King v. Bird*, 245 Mich. 93, 222 N.W. 183 (1928); *Johnson v. Krassin*, 25 Minn. 117 (1878); *Pressnell v. Lundin*, 44 Minn. 551, 47 N.W. 161 (1890); *Herrick v. Newell*, 49 Minn. 198, 51 N.W. 819 (1892); *Payne v. Hackney*, 84 Minn. 195, 87 N.W. 608 (1901); *Larson v. O'Hara*, 98 Minn. 71, 107 N.W. 821, 116 Am. St. Rep. 342, 8 Ann. Cas. 849 (1906); *Schultz v. Thompson*, 156 Minn. 357, 194 N.W. 884 (1923) (*sub. nom.* *Schultz v. Johnson*); *Milam v. Paxton*, 160 Miss. 562, 134 So. 171 (1931); *Blew v. McClelland*, 29 Mo. 304 (1860); *Devore v. Devore*, 138 Mo. 181, 39 S.W. 68 (1897); *Interstate Hotel Co. v. Woodward & Burgess Amusement Co.*, 103 Mo. App. 198, 77 S.W. 114 (1903); *Chamberlain v. Ft. Smith Lumber Co.*, 179 S.W. 740 (Mo. App. 1915); *Mary C. Marshall Realty Co. v. Zerman*, 296 S.W. 1057 (Mo. App. 1927); *McHolland v. Treadway*, 226 Mo. App. 212, 45 S.W. 2d 903 (1932), 11 Tex. L. Rev. 140 (1932); *Malone v. Romano*, 95 N. J. Eq. 291, 127 Atl. 91 (1923); *Gillet v. Maynard*, 5 Johns. 85, 4 Am. Dec. 329 (N.Y. 1809); *Marquat v. Marquat*, 7 How. Pr. 417 (N. Y. 1853), *rev'd on other grounds*, 12 N. Y. 336 (1855); *Capps v. Holt*, 58 N. C. 153 (1859); *Wilkie v. Womble*, 90 N. C. 254 (1884); *Pass v. Brooks*, 125 N. C. 129, 34 S.E. 228 (1899), on rehearing a different point was modified, 127 N. C. 119, 37 S.E. 151 (1900); *Ford v. Stroud*, 150 N. C. 362, 64 S.E. 1 (1909), 9 Col. L. Rev. 561 (1909); *Carter v. Carter*, 182 N. C. 186, 108 S.E. 765, 17 A.L.R. 945 (1921); *Grant v. Brown*, 212 N. C. 39, 192 S.E. 870 (1937); *Buck v. Waddle & McGarraugh*, 1 Ohio 358 (1824); *Welsh v. Welsh*, 5 Ohio 425 (1832); *Schechinger v. Gault*, 35 Okla. 416, 130 Pac. 305 (1913), Ann. Cas. 1914D 468; *Helgeson v. Northwestern Trust Co.*, 103 Ore. 1, 203 Pac. 586 (1922); *Smith v. Dunn*, 165 Ore. 418, 107 P. 2d 985 (1940); *Hertzog v. Hertzog's Adm'r.*, 34 Pa. St. 418 (1859); *Milligan v. Dick*, 107 Pa. St. 259 (1884); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893); *Durham v. Wick*, 210 Pa. 128, 59 Atl. 824,

judgments. If the performance rendered by the plaintiff, at the defendant's request, is something other than money,<sup>6</sup> the defendant is probably benefited as much as if he had obtained that performance from someone else.

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105 Am. St. Rep. 789, 2 Ann. Cas. 929 (1904); *Moll v. Dickson*, 129 Pa. Super Ct. 383, 195 Atl. 456 (1937); *Arnold v. Garst*, 16 R. I. 4, 11 Atl. 167 (1887); *Miller v. Healey*, 39 R. I. 339, 97 Atl. 796 (1916); *Pipkin v. James*, 1 Humph. (20 Tenn.) 325, 34 Am. Dec. 652 (1839); *Herring v. Pollard*, 4 Humph. (23 Tenn.) 362, 40 Am. Dec. 653 (1843); *Crippen v. Bearden & Odell*, 5 Humph. (24 Tenn.) 129 (1844); *Rhea v. Allison*, 40 Tenn. 176 (1859); *Hilton v. Duncan*, 41 Tenn. 313 (1860); *Winters v. Elliott*, 69 Tenn. 676 (1878); *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S.W. 677 (1898); *Chrisenberry v. Wylie*, 54 S.W. 49 (Tenn. Ch. App. 1899); *Love v. Burton*, 61 S.W. 91 (Tenn. Ch. App. 1900); *Moore v. Powell*, 6 Tex. Civ. App. 43, 25 S.W. 472 (1894); *Brown v. Randolph*, 26 Tex. Civ. App. 66, 62 S.W. 981 (1901); *Burleson v. Tinnin*, 100 S.W. 350 (Tex. Civ. App. 1907); *McDonald v. Whaley*, 244 S.W. 596 (Tex. Com. App. 1922), modified other points, 228 S.W. 313 (Tex. Civ. App. 1921); *Brooke Smith Realty Co. v. Graham*, 258 S.W. 513 (Tex. Civ. App. 1924); *Strickland v. Strickland*, 276 S.W. 795 (Tex. Civ. App. 1925); *Welch v. Darling*, 59 Vt. 136, 7 Atl. 547 (1886); *Tollensen v. Gunderson*, 1 Wis. 113 (1853); *Brandeis v. Neustadt*, 13 Wis. 142 (1860); *Thomas v. Sowards*, 25 Wis. 631 (1870); *Miller v. Metz*, 103 Wis. 220, 79 N.W. 213 (1899); *Richer v. Carlson*, 136 Wis. 353, 117 N.W. 815 (1908); *Carlock v. Johnson*, 165 Wis. 49, 160 N.W. 1053 (1917); *Helmholz v. Greene*, 173 Wis. 306, 181 N.W. 221 (1921); *Durkin v. Machesky*, 177 Wis. 595, 188 N.W. 97 (1922); *Lewis v. Wisconsin Banking Commission*, 225 Wis. 606, 275 N.W. 429 (1937).

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

There are also a few cases in which the defendant's return promise was to repay money: *Swift v. Swift*, 46 Cal. 267 (1873) (plaintiff was allowed to recover money which the defendant had borrowed from him under an oral agreement obligating the defendant to repay the money after the expiration of one year); *Weber v. Weber*, 25 Ky. L. Rep. 908, 76 S.W. 507 (1903) (same); cf. *Salisbury v. Credit Service*, 39 Del. 377, 199 Atl. 674 (1937) (plaintiff recovered money paid for bonds under an oral agreement whereby the defendant was bound to repurchase them at the expiration of one year). It should be noticed that these courts allowed recovery in restitution even though the result happened to be the same as though the oral agreement had been enforced. In this connection see discussion *infra* p. 5.

6. In the following cases the plaintiff parted with goods in performance of the oral agreement: *Booker v. Wolf*, 195 Ill. 365, 63 N.E. 265 (1902) (stock of groceries for land); *Singletary v. Ginn*, 153 Miss. 700, 121 So. 820 (1929) (goods for land); *Albea v. Griffin*, 2 Dev. & B. Eq. (22 N. C.) 9 (1838) (same); *Jelleff v. Hummel*, 56 N. D. 512, 218 N.W. 227 (1928) (stock of shoes for land); *Chrisenberry v. Wylie*, 54 S.W. 49 (Tenn. Ch. App. 1899) (stock of goods for land).

In the following cases the plaintiff parted with land under the oral agreement: *Bethel v. Booth & Co.*, 115 Ky. 145, 72 S.W. 803, 24 Ky. L. Rep. 2024 (1903) (store

Thus, it is sometimes stated, especially when the defendant is in default, that the measure of recovery in restitution should be the monetary equivalent of that with which the plaintiff parted.<sup>7</sup> But to reduce the plaintiff's performance to money terms requires the use of some other test of measurement such as market value,<sup>8</sup> or reference to the defendant's promise.

The value of that which the defendant promised in the oral agreement has been employed, in some instances,<sup>9</sup> as a pecuniary measure of the benefit he derived from the plaintiff's performance. But the defendant's promise also manifests what the plaintiff expected to obtain under the agreement, and is used in measuring the amount of the plaintiff's lost profits in suits for breach of contract. Thus, its use in cases of restitution under the Statute of Frauds may be objectionable as constituting an indirect enforcement of the oral agreement itself. In the case of *McElroy v. Ludlum*,<sup>10</sup> for instance, the court said:

"The policy of the statute is to prevent frauds which may be accomplished by setting up contracts of the interdicted class, by parol testimony. That policy is infringed upon equally, whether the contract be used for the purpose of influencing the amount of the recovery, or be made the foundation of the action."<sup>11</sup>

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for \$600 and ten years employment); *Dix v. Marcy*, 116 Mass. 416 (1875) (land for mortgage to guarantee support of grantor); *O'Grady v. O'Grady*, 162 Mass. 290, 38 N.E. 196 (1894) (land for defendant's oral promise to pay off mortgage, to sell land, and to return balance to plaintiff); *Day v. N. Y. Central Railroad Co.*, 51 N. Y. 583 (1873) (land for the right to feed cattle transported by defendant railroad); *Henning v. Miller*, 83 Hun 403, 31 N. Y. Supp. 878 (1894) (land for defendant's oral promise to will one-third of his estate to the plaintiff).

In the following cases the plaintiff parted with land under an oral agreement in which the defendant had promised to convey land in exchange therefor: *Stark's Heirs v. Cannady*, 3 Litt. (13 Ky.) 399 (1823); *Bassett v. Bassett*, 55 Me. 127 (1867); *Basford v. Pearson*, 9 Allen (91 Mass.) 387, 85 Am. Dec. 764 (1864); *Miller v. Roberts*, 169 Mass. 134, 47 N.E. 585 (1897); *Nugent v. Teachout*, 67 Mich. 571, 35 N.W. 254 (1887); *Dickerson v. Mays*, 60 Miss. 388 (1882) (cancellation of deed); *Thomas v. Dickinson*, 14 Barb. 90 (N. Y. 1852).

For a collection of the cases in which the plaintiff rendered services under the oral agreement see cases cited *infra* note 25.

7. For example, Professor Williston said, ". . . the plaintiff's measure of restitution is based, not on the extent of his lost advantage from the non-performance of the contract, but on the reasonable value of what he has done." 2 WILLISTON, CONTRACTS p. 1553 (Rev. ed. 1936).

8. See discussion *infra* pp. 18-27.

9. See cases *infra* notes 14 and 15.

10. 32 N. J. Eq. 828 (1880). The plaintiff in the *McElroy* case rendered services as a superintendent under an oral agreement which provided that his compensation was to be one-eighth of the profits of the business, but not less than \$3,000 per year. The court denied the plaintiff's quantum meruit claim, but the decision would seem to be wrong.

11. *Id.* at 837.

But Professor Woodward argued, in this connection, as follows:

"Reasonably interpreted, the statute applies only to the enforcement of oral *contracts*. It does not relate to oral admissions against interest. If, then, the same transaction happens to amount to both an oral contract and an oral admission, the unenforceability or invalidity of the contract should not affect the competency of the admission as evidence of a non-contractual obligation."<sup>12</sup>

And in the case of *Murphy v. De Haan*,<sup>13</sup> the court went even further by admitting the terms of the oral agreement apparently as conclusive evidence of the recovery that should be allowed. The court said:

"While there are decisions which seem to hold that a contract within the statute of frauds cannot be referred to for any purpose, we think that when it is for labor to be performed, and plaintiff has partially or wholly executed the same on his part, the terms of the contract govern as to the rate of compensation."<sup>14</sup>

The majority of the decisions involving the measurement problem have agreed with Professor Woodward, and have taken positions in between the two extremes represented by the *McElroy* and *Murphy* cases. It has been said, for example, that the terms of the oral agreement ought to be received in evidence as an admission regarding the amount of benefit the defendant derived from the plaintiff's performance,<sup>15</sup> but that it should not be conclusive.<sup>16</sup>

12. WOODWARD, *QUASI CONTRATS* p. 166 (1913).

13. 116 Iowa 61, 89 N.W. 100 (1902).

14. *Id.* at 64, 89 N.W. at 101. And in *Spinney v. Hill*, 81 Minn. 316, 322, 84 N.W. 116, 117 (1900) after citing considerable authority, the court said, "The doctrine adopted by these decisions is undoubtedly that, while no action can be maintained on an oral agreement for services not to be performed within one year, such agreement controls the rights and remedies of the parties with respect to what has been done, and fixes the values of services rendered under it. . . ." Other cases to the same effect are: *A. W. Kutsche & Co. v. Hot Blast Coal Co.*, 84 S.W. 2d 371 (Tenn. Ct. of App. 1935); 14 TENN. L. REV. 124 (1936); *Weaver v. General Metals Merger*, 167 Wash. 451, 9 P. 2d 778 (1932); see *Darknell v. Cocur D'Alene & St. Joe Transp. Co.*, 18 Idaho 61, 69, 108 Pac. 536, 538 (1910).

15. In the case of *Oxborough v. St. Martin*, 169 Minn. 72, 75, 210 N.W. 854, 855 (1926), for example, the court said, "When there has been an understanding . . . as to the value of the services by consenting to give a certain amount therefor, that fact ought also to be received in evidence as an admission against the client [defendant] as to what value he placed on the [legal] services." For a further discussion of this case see *infra* note 34; Notes, 27 COL. L. REV. 337 (1927); 40 HARV. L. REV. 648 (1927); 49 A.L.R. 1121 (1927). Other cases to the same effect as the *Oxborough* case above are: *General Paint Corp. v. Kramer*, 68 F. 2d 40 (C.C.A. 10th, 1933), *cert. denied*, 292 U. S. 623, 54 Sup. Ct. 628, 78 L. Ed. 1478 (1934) (patent rights assigned in return for oral promise of lifetime employment); *Farrow v. Burns*, 18 Ala. App. 350, 92 So. 236 (1921), *rehearing denied*, and the case is *aff'd* on this point in 207 Ala. 197, 92 So. 426

There may be a further objection to the use of the defendant's promise in the oral agreement. For it involves the assumption,<sup>17</sup> that the plaintiff's partial performance under the unenforceable agreement is proportionately as beneficial to the defendant, but no more so, than the rate of compensation agreed upon by the parties for complete performance. This assumption seems justifiable for the purpose of establishing that a legal benefit was conferred,<sup>18</sup> but it has been questioned in some instances, when the problem is one of measurement.

If the defendant's return promise is to pay money,<sup>19</sup> the majority of the decisions have employed it in measuring the amount of legal benefit the defendant derived from the plaintiff's partial performance of the oral agreement. In a few cases, however, the defendant's promise in the oral agreement, even though payable in money, could not afford an accurate measure of the amount of legal benefit conferred upon and unjustly retained by him. In the case of *Dreidlein v. Manger*,<sup>20</sup> for example, the plaintiff entered into an oral agreement with the defendant whereby he was to manage the defendant's ranch for three years in return for one-half of the

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(1922) (services rendered as deputy sheriff under an oral agreement not performable within one year); *Moore v. Capewell Horse-Nail Co.*, 76 Mich. 606, 43 N.W. 644 (1889) (services rendered as salesman under an oral agreement not performable within one year); see *Faircloth v. Kinlaw*, 165 N. C. 228, 232, 81 S.E. 299, 300 (1914); *Grantham v. Grantham*, 205 N. C. 363, 368, 171 S.E. 331, 334 (1933); *Capers v. Stewart*, 3 Willson Civ. Cas. § 291, 3 Tex. App. Civ. Cas. 355 (1887). Also see WOODWARD, QUASI CONTRACTS §§ 103-104 (1913).

16. *Offeman v. Robertson-Cole Studios*, 80 Cal. App. 1, 250 Pac. 830, 835 (1926) (services rendered as manager of the defendant's studios under a three year oral agreement); and in *McGilchrist v. F. W. Woolworth Co.*, 138 Ore. 679, 687, 7 P. 2d 982, 985 (1932) the court said, ". . . the contract may be received in evidence relative to the question of the value of the services, but that it is not conclusive and the jury may consider it for what it may deem it to be worth." For a further discussion of the *McGilchrist* case see *infra* pp. 8-10.

17. This assumption rests upon another one, namely that the monetary value of the complete performance promised by the defendant is equivalent to the pecuniary value of the complete performance promised by the plaintiff. Even though this assumption proves to be false, the use of the defendant's promise may still be justified because it represents that which the plaintiff was willing to accept for his performance (thus being an admission by the plaintiff that its value was no higher), as well as the value which the defendant once placed upon it. In this connection, however, the relative unjustness of the parties must be considered. See discussion *infra* pp. 12-14. Another assumption involved in the use of the defendant's promise in the measurement of the amount of recovery is that the monetary value of the benefit the defendant derived from the plaintiff's performance is the same at the time when the valuation is made in the restitution litigation that it would have been at the time when the oral agreement was formed. In this connection see discussion *infra* pp. 21-23.

18. See my article, *supra* note 2, § 2.

19. See cases *supra* note 15.

20. 69 Mont. 155, 220 Pac. 1107 (1923).



net profits. At the end of the first year the defendant repudiated the oral agreement which was "invalid" under the Montana Statute of Frauds. In a suit for the value of the services he had rendered, the plaintiff was allowed to prove the amount of the net profits made during the first year. From a verdict and judgment in the plaintiff's favor, the defendant appealed. The upper court held that the plaintiff was entitled to recover for the services performed, but remanded the case because, as the defendant contended, it was error to admit in evidence the terms of the oral agreement. The court said:

"The contract being declared void, the receipt of evidence respecting its terms is prohibited; it can have no place in measuring the compensation to which the plaintiff may be entitled on the quantum meruit for services rendered."<sup>21</sup>

It is conceivable that the word "invalid" employed in the Montana Statute motivated the court in its decision, but the result can be justified on other grounds. The share of net profits promised by the defendant, although presumably payable in money, probably would not constitute a very accurate pecuniary measure of the benefit the defendant derived from the plaintiff's services. For there are many factors, such as weather conditions, physical facilities, and market prices of cattle, that might affect the net profits as much as the type and value of the services rendered by the plaintiff. Moreover, the full value of the services rendered during the first year might not be completely realized in the net profits for that year. Or the net profits for the first year might reflect, in part, the value of services rendered by someone prior to that year. Thus the court was correct in refusing to rely on the defendant's promise to pay money in measuring the amount of legal benefit he was unjustly retaining.

The *Manger* decision should be compared with the somewhat analogous case of *McGilchrist v. F. W. Woolworth Co.*<sup>22</sup> The parties in the latter case had orally agreed that the plaintiff was to render services during a three year apprenticeship at an agreed weekly salary, and at the end of the apprenticeship the plaintiff was to be appointed manager in one of the defendant's stores with a minimum salary of two thousand five hundred dollars per year. After the plaintiff had rendered the required services as an apprentice and received the weekly salary as agreed, the defendant re-

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21. *Id.* at 165, 220 Pac. at 1110.

22. 138 Ore. 679, 7 P. 2d 982 (1932); Note 16 MINN. L. REV. 875 (1932).

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puddiated the oral agreement and refused to appoint the plaintiff to a store managership. In a prior suit to recover damages for the breach of this agreement, the Statute of Frauds was interposed, and a verdict was directed for the defendant-employer. Then the plaintiff brought this action to recover for the value of the services he had rendered during the apprenticeship minus the amount of weekly payments he had already received. At the trial the plaintiff introduced evidence tending to show that the reasonable value of his services as rendered was fifty dollars per week. The defendant's motions for a nonsuit, and for a directed verdict were overruled, and the jury returned a verdict for the plaintiff. The case was affirmed on appeal. The court said:

"We think the weight of authority and the better reasoned cases are to the effect that the contract may be received in evidence relative to the question of the value of the services, but that it is not conclusive and the jury may consider it for what it may deem it to be worth."<sup>23</sup>

Hence, the oral agreement, which was unenforceable because of the Statute of Frauds, was accorded at least some evidential weight as a test of measurement in this case, while it received none in the *Manger* decision discussed above. It will also be observed that the sum of money promised by the defendant in the *McGilchrist* case was definite and not subject to unpredictable contingencies as in the *Manger* decision. Moreover, the defendant in the *McGilchrist* case promised and later paid the weekly salary agreed upon by the parties for the same type and quantity of services which were later rendered by the plaintiff as an apprentice. On the facts in the record, it could be argued that the plaintiff had completed the apprenticeship, and fully performed his part of the oral agreement, so the assumption that the rate of compensation in the agreement was equivalent to the value of the partial performance by the plaintiff was not necessarily involved. Nevertheless, the court felt that the defendant's promise to pay money in the *McGilchrist* case was an inadequate test for measuring the benefit conferred, because it said:

"We think a fair construction of the evidence received and that which was offered, but rejected by the court, tended to show that the plaintiff performed services for defendant at a wage less than the reasonable value thereof in consideration of the agreement of

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23. *Id.* at 687, 7 P. 2d at 985.

the latter to employ him as a manager at end of his apprenticeship.<sup>24</sup>

But, in determining the amount of the recovery, no reference was made to the pecuniary value of the defendant's promise to appoint the plaintiff to a store managership. Although the annual salary for that position was already expressed in money terms of two thousand five hundred dollars per year, the emphasis was shifted instead to the monetary equivalent of the performance promised and later rendered by the plaintiff as an apprentice. It might be contended that the court thereby manifested its unwillingness to employ the defendant's oral promise to pay money in the measurement of the value of the *complete* performance rendered by the plaintiff. Actually, however, the two thousand five hundred dollar figure referred primarily to the annual value of the services to be rendered by the plaintiff as manager, and had little relationship, if any, to the amount of benefit the defendant derived from the plaintiff's services rendered as an apprentice. Thus, it seems to the writer, that the court was correct in relying on evidence outside of the oral agreement and in employing the market value test of measurement.

If the defendant's return promise in the oral agreement is to do something other than to pay money,<sup>25</sup> it must be used in connection with some other test of measurement, such as market value. And as the difficulty of placing a monetary value on the performance promised by the defendant increases, the use of his promise in the oral agreement as a test of measurement becomes less reliable.

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24. *Id.* at 685, 7 P. 2d at 984.

25. In the following cases the plaintiff was allowed to recover for services (usually in caring for the decedent) rendered in return for the decedent's oral promise to devise land to the plaintiff: *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (C.C.A. 6th, 1917); *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Bonner v. Sledd*, 158 Ark. 47, 249 S.W. 556 (1923); *Zellner v. Wassman*, 184 Cal. 80, 193 Pac. 84 (1920); *Long v. Rumsey*, 12 Cal. 2d 334, 84 P. 2d 146 (1938); *Mayborne v. Citizens' Trust & Savings Bk.*, 46 Cal. App. 178, 188 Pac. 1034 (1920); *Rutherford v. Peppa*, 53 Cal. App. 309, 199 Pac. 1111 (1921); *Warder v. Hutchison*, 69 Cal. App. 291, 231 Pac. 563 (1924); *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379 (1893); *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925 (1910); *Watson v. Watson*, 1 Houst. 209 (Del. 1856); *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666, 55 Am. Rep. 222 (1885); *Schoonover v. Vachon*, 121 Ind. 3, 22 N.E. 777 (1889); *Miller v. Eldridge*, 126 Ind. 461, 27 N.E. 132 (1891); *Hensley v. Hilton*, 191 Ind. 309, 131 N.E. 38 (1921); *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N.E. 511 (1891); *Nelson v. Masterson*, 2 Ind. App. 524, 28 N.E. 731 (1891); *Smith v. Lotton*, 5 Ind. App. 177, 31 N.E. 816 (1892); *Gullet v. Gullet*, 28 Ind. App. 670, 63 N.E. 782 (1902); *Flowers v. Poorman*, 43 Ind. App. 528, 87 N.E. 1107 (1909); *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209, 123 Am. St. Rep. 215 (1905); *Walker v. Dill's Adm'r.*, 186 Ky. 638, 218 S.W. 247 (1920); *Haralambo's Ex'r. v. Chris-*

In the case of *Williams v. Bemis*,<sup>26</sup> for example, the parties had entered into an oral two year lease under which the plaintiff was to furnish one-half the seed and all of the labor in growing potatoes upon the defendant's land in return for two-thirds of each crop. After the plaintiff had raised the first crop and received two-thirds thereof as his share, the defendant repudiated the oral lease and refused to allow the plaintiff to plant the land for the second year. The plaintiff was allowed to recover fifty-three dollars as the difference between the benefit the defendant derived from the plaintiff's performance under the oral lease and the two-thirds share of the first crop which he had already received.

Although the value of the crop grown during the first year of the oral lease had already been reduced to money terms, it would be extremely speculative to place a monetary value on the crops to be grown during the second year. In addition to the difficulty of ascertaining the pecuniary value of the complete performance promised by the defendant, there is also the problem of determining that proportion of the defendant's promise, and its monetary value, which would correspond to the extent of partial performance rendered by the plaintiff. The testimony in the *Williams* case revealed that the

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topher, 231 Ky. 550, 21 S.W. 2d 983 (1929), Note 18 Ky. L. J. 396 (1930); Segars v. Segars, 71 Me. 530 (1880); Hamilton v. Thirston, 93 Md. 213, 48 Atl. 709 (1901); Donovan v. Walsh, 238 Mass. 356, 130 N.E. 841 (1921) (defendant orally promised to convey or to devise land); Dixon v. Lamson, 242 Mass. 129, 136 N.E. 346 (1922); In re *Williams*, 106 Mich. 490, 64 N.W. 490 (1895); Ellis v. Berry, 145 Miss. 652, 110 So. 211 (1926); Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930); Gupton v. Gupton, 47 Mo. 37 (1870); Ham v. Goodrich, 37 N.H. 185 (1858) (defendant orally promised to convey or to devise land); Willette v. Whitney, 82 N.H. 209, 131 Atl. 597 (1926); McCarty v. Ennist, 7 N. J. Misc. 558, 146 Atl. 653 (1929); Lisk v. Sherman, 25 Barb. 433 (N. Y. 1857); Lasher v. McDermott, 173 App. Div. 79, 158 N.Y.S. 708 (3d Dep't 1916), motion to dismiss appeal was granted, 219 N. Y. 554, 114 N.E. 1070 (1916); Grantham v. Grantham, 205 N. C. 363, 171 S.E. 331 (1933); Albee v. Albee, 3 Ore. 322 (1871); Richter v. Derby, 135 Ore. 400, 295 Pac. 457 (1931); Riddle v. George, 181 S. C. 360, 187 S.E. 524 (1936); Goodloe v. Goodloe, 116 Tenn. 252, 92 S.W. 767, 6 L.R.A. (n.s.) 703 (1906); Gray v. Cheatham, 52 S.W. 2d 762 (Tex. Civ. App. 1932) (defendant orally promised to convey or to devise land); Moore v. Rice, 110 S.W. 2d 973 (Tex. Civ. App. 1937); Ellis v. Cary, 74 Wis. 176, 42 N.W. 252, 4 L.R.A. 55, 17 Am. St. Rep. 125 (1889); In re Kessler's Estate, 87 Wis. 660, 59 N.W. 129, 41 Am. St. Rep. 74 (1894); In re Sheldon's Estate, 120 Wis. 26, 97 N.W. 524 (1903); Taylor v. Thieman, 132 Wis. 38, 111 N.W. 229, 122 Am. St. Rep. 943 (1907); Laughnan v. Estate of Laughnan, 165 Wis. 348, 162 N.W. 169 (1917); Nelson v. Christensen, 169 Wis. 373, 172 N.W. 741 (1919); Leiser v. Pagel, 172 Wis. 530, 179 N.W. 796 (1920); Predmore v. Brill's Estate, 183 Wis. 282, 197 N.W. 802 (1924); In re Goyk's Estate, 216 Wis. 462, 257 N.W. 448 (1934).

For a collection of the cases wherein the plaintiff parted with goods, or land, in return for defendant's promise to convey land see *supra* note 6.

26. 108 Mass. 91, 11 Am. Rep. 318 (1871).

plaintiff had declined to lease the defendant's land for one year because, as subsequently materialized, the value of the plaintiff's seed and labor for the first year would exceed the value of his share of the crop for that year. In this connection the court said:

"Both parties understood that there was to be no profit or advantage to the plaintiff except from the operations of both years taken together. A large part of the labor and expense, incurred in the first year, had no reference whatever to the operations and results of that year, taken by itself, but were a preparation of the land for increased productiveness in the second year. The plaintiff must be considered as having, in that way, paid in advance, in part at least, for the privilege of using the land the second year in the manner agreed upon."<sup>27</sup>

Thus, it would seem, the court was justified in refusing to employ, as a test of measurement, the defendant's promise of two-thirds of the crops grown during the first year under the oral lease, and in shifting its attention to the easier task of ascertaining by means of the market value test, the pecuniary value to the defendant of the partial performance rendered by the plaintiff.

On the other hand, if a monetary value can be placed upon the performance promised by the defendant with less difficulty and greater reliability than it can be placed upon the performance rendered by the plaintiff, the courts are more willing to employ the defendant's promise. This situation is well illustrated by the case of *Waters v. Cline*.<sup>28</sup> The plaintiff in that case was a niece of Mr. and Mrs. Cline. The Clines had no children of their own and were very fond of the plaintiff. After much persuasion they induced the plaintiff's parents to allow her to come and live with them. It was orally agreed that if the plaintiff lived with them as their own daughter until she was twenty-one years old, they would clothe her, give her a musical education, a designated farm with buildings and stock upon it, as well as five thousand dollars with which to run it. The plaintiff lived with the Clines and nursed and cared for them until she was married at the age of twenty-four. The Clines also carried out their part of the oral agreement, except that Mr. Cline failed to devise the improved farm and bequeath the five thousand dollars as agreed. He died intestate and his property was to pass to collateral kindred. The plaintiff filed a petition setting out the above

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27. *Id.* at 93.

28. 121 Ky. 611, 85 S.W. 209, 123 Am. St. Rep. 215 (1905).

facts and sought judgment against Mr. Cline's estate for eight thousand dollars as the value of the farm, four thousand dollars as the value of the improvements, and five thousand dollars as the amount she was to receive with which to run the farm. At the close of the evidence, the court instructed the jury to find for the defendant. The upper court held that the case should have been submitted to the jury, and remanded it for a new trial. The court said:

"Where the party who has performed the contract cannot be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, this court has adopted the rule that in such cases . . . it will adjudge compensation for what has been received by the defendant under the contract, measured by the consideration which by the contract he agreed to as the value of what he received."<sup>29</sup>

In applying the above rule to the facts of this case, the court said:

"By the arrangement the girl gave up her home, her father, and her mother. The father and mother gave up their child. Cline secured for himself and his sick wife a daughter in the home. Money can secure the services of strangers, but the love and tender ministrations of a daughter are not to be bought in this way. They had long known and loved the girl. Her presence in their home, with her music, joyousness, and dutiful attention, transformed it. Who can measure this in dollars and cents? It is presumed that Cline knew what it was worth to him. He had long been trying to get the girl's parents to give her to him, and, when he finally secured what he wanted, we know of no adequate standard to value the consideration which he enjoyed under the contract, except that he himself fixed."<sup>30</sup>

This excerpt demonstrates that the court relied on the oral agreement test of measurement because it felt that the defendant's promise, even though not in money terms, afforded the most accurate means for ascertaining the pecuniary value of the benefit the defendant derived and unjustly retained from the performance rendered by the plaintiff.

But the applicability, if any, of the defendant's return promise in the oral agreement as a test of measurement is not usually revealed with the degree of clarity found in the *Waters* and *Williams* cases respectively. And

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29. *Id.* at 617, 85 S.W. at 209.

30. *Id.* at 618, 85 S.W. at 210.

in the absence of such a clear revelation, one way or the other, many of the courts have regarded the defendant's promise to do something other than to pay money as an unreliable measure of the legal benefit conferred upon and unjustly retained by the defendant.<sup>31</sup> Instead, the amount of the recovery has generally been determined, in such situations, especially when the defendant has repudiated the oral agreement, by an application of the market value test directly to the performance rendered by the plaintiff.<sup>32</sup>

Although the *Waters* decision has been followed in Kentucky,<sup>33</sup> and in a few other jurisdictions,<sup>34</sup> it will be observed, as was suggested earlier,<sup>35</sup>

31. *Fuller v. Reed*, 38 Cal. 99 (1869) (defendant orally promised to pay a commission and to convey a designated tract of land to the plaintiff in return for the latter's services in effecting the sale of some other land owned by the defendant); *Hillebrands v. Nibbelink*, 40 Mich. 646 (1879) (oral settlement whereby a farm was promised in return for services rendered, and the court said at page 651, "There was no testimony whatever from which it can be inferred that the parties estimated either the value of the farm or the value of the indebtedness [regarding the services rendered], or compared them."); *Erben v. Lorillard*, 19 N. Y. 299 (1859) (defendant orally promised to lease property to the plaintiff as payment for services to be rendered by the latter); *Rosepaugh v. Vredenburgh*, 16 Hun 60 (N. Y. 1878) (defendant orally promised to allow the plaintiff to take stone from a certain quarry in return for a certain royalty and services that the plaintiff was to render in connection with the quarry. After the plaintiff had rendered the services and unearthed considerable stone, the defendant repudiated the oral agreement. The court emphasized that the measure of recovery should be the value of the services rendered, rather than the value of the promised stone which the plaintiff had uncovered); *Hertzog v. Hertzog's Adm'r.*, 34 Pa. St. 418 (1859) (defendant promised land for services to be rendered by the plaintiff).

32. For a collection of such cases see *infra* notes 57, 58 and 59.

33. *Walker v. Dill's Adm'r.*, 186 Ky. 638, 218 S.W. 247 (1920) (plaintiff cared for deceased and the value of the land to be conveyed in return therefor under the oral agreement was used as the measure of the benefit the defendant derived from the plaintiff's services); see *Haralambo's Ex'r. v. Christopher*, 231 Ky. 550, 553, 21 S.W. 2d 983, 985 (1929), Note 18 Ky. L. J. 396 (1930) (the court repeated the rule that where there is no other standard for measurement, the value of the land promised by the defendant in the oral agreement determines the amount of the recovery for the plaintiff's services); *Hinton v. Hinton's Ex'r.*, 239 Ky. 664, 668, 40 S.W. 2d 296, 298 (1931) (to the effect that if "the benefit received from services rendered cannot be measured by ordinary pecuniary standards, then the measure of the recovery is the value of the property promised" by the defendant in the oral agreement).

34. In the case of *Oxborough v. St. Martin*, 169 Minn. 72, 75, 210 N.W. 854, 855 (1926), for instance, the oral agreement provided that certain attorneys, through whom the interveners now claim, should render services in an effort to establish the defendant's title to a designated tract of land, in return for which they were to receive either an undivided one-half interest in the land recovered or nothing, depending upon the outcome of the attorneys' effort in the defendant's behalf. The defendant's title was established, but the interveners were unable to have themselves adjudged owners of the one-half interest in the land because of the Statute of Frauds. They then sought in this action of *quantum meruit* to recover for the value of the legal services rendered, and they were allowed to introduce the terms of the oral agreement in evidence as to the value thereof. An order denying the defendant's motion for a new trial was affirmed on appeal. The court

that such decisions, which measure the plaintiff's recovery by the value of the defendant's promised performance, may be objectionable in that they fail to consider the possibility that one or the other of the parties has made an exceptionally advantageous bargain.

If the plaintiff's performance is less valuable than that promised by the defendant, for example, a recovery determined by the latter's promise would allow the plaintiff to retain the advantage of his bargain even though the oral agreement was unenforceable because of the Statute of Frauds. Such a result, at first blush, would seem to be contrary to the principles of restitution. In this connection, however, the relative unjustness of the parties must be considered. And, as in the *Waters* case,<sup>36</sup> the unjustness of the defendant's retention may be such as to preclude him from saying that the plaintiff's performance was less valuable than his own promised performance.

If the bargain is advantageous to the defendant (*i.e.* his promised performance is less valuable than that of the plaintiff), he would probably contend that the rate of compensation he promised should at least constitute an upper limit on the amount of the plaintiff's recovery.<sup>37</sup> Such a

said, "There certainly was a voluntary and full performance in the instant case by the attorneys, from which defendants reaped in full the expected advantage. In an action to recover on *quantum meruit* for an attorney's services, it is always proper and material to consider the value and importance to the client of that to which the services relate. And, when there has been an understanding, not only as to the value and importance of the subject-matter, but also as to the value of the services by consenting to give a certain amount therefor, that fact ought also to be received in evidence as an admission against the client as to what value he placed on the services."

Other cases illustrating this point are: *Bonner v. Sledd*, 158 Ark. 47, 249 S.W. 556 (1923) (value of land orally promised by the defendant was the measure used for evaluating the plaintiff's services); *Bassett v. Bassett*, 55 Me. 127 (1867) (an oral agreement for the exchange of lands, and the plaintiff was allowed to recover the value of the land promised by the defendant); *Redmon v. Roberts*, 198 N. C. 161, 150 S.E. 881 (1929) (the measure of the plaintiff's recovery was the value of the land the defendant had orally agreed to convey).

35. See *supra* note 17.

36. See discussion *supra* pp. 12-13.

37. This proposition is illustrated by practically every case allowing a defaulting plaintiff to recover, see *infra* note 38. It has also been suggested that the oral agreement might be admitted for the purpose of showing that no recovery should be allowed to the plaintiff for his partial performance. In the case of *Ox-borough v. St. Martin*, 169 Minn. 72, 74, 210 N.W. 854, 855 (1926) discussed *supra* note 34, for example, the court said, "Suppose the appeal from Judge Fish's order had been determined adversely to defendants, and Laybourn & Cary [the attorneys] had sued upon a quantum meruit, should the agreement then have been ruled out that the employment was undertaken with the understanding that no fees were to be received unless [attorney's] services resulted in a reversal of the order? If so, the statute would be used not as a shield but as a means of fraud." For dicta to the same effect see *Montague v. Garnett*, 66 Ky. 297, 299 (1867).



result would tend to preserve the advantage of the bargain for the defendant, while if the plaintiff is allowed to recover in excess of the contract rate promised by the defendant, the latter would be deprived of the benefit of his bargain. Again, the relative unjustness of the parties' conduct must be considered.

For example, if the plaintiff has repudiated the oral agreement, there are practically no cases that have allowed a recovery in excess of the orally stipulated rate.<sup>38</sup> In this connection, the *Restatement of the Law of Contracts* provides:

"In no case will the benefit received by the defendant be reckoned at more than a proportionate part of the agreed price for full performance. A plaintiff in default will not be allowed to profit by his own wrong; so that if his performance is only one-third complete, he can in no case get judgment for more than one-third of the agreed compensation."<sup>39</sup>

On the other hand, if the defendant is in default, the rate of compensation in the oral agreement should not be imposed as an upper limit on the amount of the recovery.<sup>40</sup> This view is illustrated by the case of *Schanzenbach v. Brough*<sup>41</sup> in which the plaintiff had orally agreed to render services to the defendant for a period of five years in return for which he was to be paid at the rate of five dollars per day. After the plaintiff had partially performed the oral agreement, it was repudiated by the defendant. In allowing the

38. See my article *supra* note 3. Only one case was found in which a defaulting plaintiff was allowed to recover in excess of the rate of compensation stipulated in the oral agreement. It was the case of *Mendelsohn v. Banov*, 57 S. C. 147, 35 S.E. 499 (1900). The plaintiff was to receive \$100 per month for his services rendered under an oral agreement within the one-year provision of the Statute of Frauds, but \$20 per month was to be retained by the defendant and was not to be paid to the plaintiff if he should quit before the end of the term. The plaintiff quit at the end of eight months and was allowed to recover the amount so retained by the defendant. It may be possible, however, to justify this result on the theory of preventing a forfeiture.

39. RESTATEMENT, CONTRACTS § 357, comment g (1932). We must look to this section entitled, "Restitution in favor of a plaintiff who is himself in default" because section 355 of this work, which covers restitution under oral agreements within the Statute of Frauds, provides as follows: (4) "There is no right of restitution against a defendant who is not in default and who is ready and willing to perform the contract or to execute a memorandum sufficient to make it enforceable, *except to the extent that such a right would exist if the requirements of the Statute were satisfied and the contract an enforceable one.*" (Italics supplied). Accord: 2 WILLISTON, CONTRACTS § 538 (Rev. ed. 1936).

40. In this connection, Professor Williston suggests that the party who repudiated the oral agreement within the Statute of Frauds should be treated as if he were a contract-breaker. 2 WILLISTON, CONTRACTS § 536 (Rev. ed. 1936).

41. 58 Ill. App. 526 (1895).

plaintiff to recover the reasonable value of the services he had rendered, the court said:

"The appellee put in testimony that services of the character that he rendered were worth from \$7 to \$10 per day, and if he was employed for a long term and discharged without cause, he is not limited to the price fixed by his contract, void under the statute of frauds and broken by the appellant, but may recover what his services were really worth."<sup>42</sup>

Professor Woodward also supports this proposition, for he said:

"Where the value of the plaintiff's performance exceeds the contract price, he may realize, it is true, returns larger than he contemplated when entering into the contract. If it is the defendant who has refused to perform the contract, no injustice results. The defendant suffers no loss, and moreover, if the plaintiff's recovery were limited to the contract rate the defendant might actually profit by the contract which he refused to perform."<sup>43</sup>

Although there are a few cases to the contrary,<sup>44</sup> there are numerous decisions in accord with the *Brough* decision.<sup>45</sup> Thus, it is submitted, the defendant's unjustness in repudiating the oral agreement, plus his retention of the benefit derived from the plaintiff's performance without paying anything therefor, is a sufficient justification for disregarding the rate of compensation stipulated in the oral agreement as an upper limit on the amount of the recovery.<sup>46</sup>

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42. *Id.* at 527.

43. WOODWARD, QUASI CONTRACTS pp. 165-166 (1913).

44. See *supra* note 14.

45. In the case of *The William Butcher Steel Works v. Atkinson*, 68 Ill. 421 (1873), for example, the parties had entered into an oral three year agreement whereby the plaintiff was to render services as an exclusive agent for the sale of the defendant's products in a designated area in return for which he was to receive a commission of five per cent. After the plaintiff had worked for about ten months under this agreement, and while business was prospering and increasing daily, the defendant discharged the plaintiff without cause. In affirming the lower court's judgment for the plaintiff, the court at page 423 said, "The question for determination in this case, then, is, can appellee recover the true value of his services, or does the contract price conclude him as to the amount of recovery? The contract proven in this case was clearly within the Statute of Frauds, and when the appellant pleaded and relied upon the statute, no recovery could be had on the contract. . . . By the act of appellant the contract became and was void, yet it insists that this void contract shall control appellee; that the contract price is the only measure of the value of his services; that the contract shall be void for the protection of appellant, and in force and valid for the destruction of appellee's cause of action. This position is neither equitable nor is it well founded in law." To the same effect are the following cases: *Stout's Adm'r. v. Royston*, 32 Ky. L. Rep. 1055 (1908); *Emery v. Smith*, 46 N. H. 151 (1865). Also see cases cited *supra* note 31.

46. WOODWARD, QUASI CONTRACTS § 104 (1913). Also see RESTATEMENT, CONTRACTS, § 347, comment c (1932); RESTATEMENT, RESTITUTION § 107, comment b (1937).

Finally, as discussed in another article,<sup>47</sup> if the plaintiff has merely acted in reliance upon rather than in performance of the oral agreement, the stipulations contained therein have no applicability to the measurement of the amount of legal benefit conferred upon and unjustly retained by the defendant, and some other test of measurement, such as market value, must be employed.

### 3. MARKET VALUE AS A TEST OF MEASUREMENT

If neither party has promised money in return for the other's performance of the oral agreement,<sup>48</sup> or if the terms of the agreement are inadmissible as evidence of the amount of the legal benefit unjustly retained,<sup>49</sup> the market value test of measurement is usually employed. It may provide the sole test of measurement if the monetary value is placed directly upon the performance rendered by the plaintiff, or it may operate in connection with the oral agreement test by determining the pecuniary value of the performance promised by the defendant.<sup>50</sup>

But what constitutes market value? How and when is it to be ascertained? To an economist there is a definite relationship between the ability of goods, land, or services to satisfy human wants and the demand that is shown for them in the market place. This factor, as discussed elsewhere,<sup>51</sup> was relied upon frequently to establish the existence of a legal benefit. Market value has also been employed, like the oral agreement test of measurement, to demonstrate in terms of money the extent of satisfaction that the defendant derived from the plaintiff's performance, which, if unjustly retained, is the amount of recovery that should be allowed in restitution. But economists usually regard market value as the amount actually obtained under prevailing conditions.<sup>52</sup> In problems of judicial valuation, however, some sort of a hypothetical market is generally employed as the test of measurement. In this connection, for example, it was said:

"The 'market value' means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value; not a value obtained from the necessities of another; nor, on

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47. See my article, *supra* note 2, part II.

48. For a collection of such cases, see *supra* notes 6 and 25.

49. See discussion *supra* p. 5.

50. See discussion *supra* pp. 10-13.

51. See my article, *supra* note 2, § 2.

52. 1 BONBRIGHT, VALUATION OF PROPERTY p. 56 (1937).

the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy."<sup>53</sup>

If the performance to be evaluated is land, the test of "ready-buyer, ready-seller," or some variation thereof, is frequently employed.<sup>54</sup> This type of hypothetical market value is also relied upon in valuation for other purposes.<sup>55</sup> In some instances, however, it may be peculiarly difficult to evaluate particular property even with the use of the hypothetical market and, in that event, an appraisal method of valuation based upon the expectant net income of the property may be adopted. But many complications arise from employing the appraisal valuation, and it should be relied upon only as a last resort. In this regard, Professor Bonbright said:

"The actual recent sale prices of adjacent or substantially similar properties, despite the inferential difficulties to which they give rise because of the fact that most properties are, in some respects, unique, are ordinarily a far safer guide than are the profits which biased experts for the litigants say that they believe that the business would yield."<sup>56</sup>

Although there are numerous cases in which the market value test of measurement has been employed, there are very few decisions that discuss adequately the detailed methods by which the test has been applied. Even if the performance to be evaluated is relatively marketable, such as goods, many courts simply say that the amount to be recovered is the "reasonable

53. *Kansas City Wyandotte & Northwestern Ry. Co. v. Fisher*, 49 Kan. 17, 18, 30 Pac. 111 (1892).

54. *Jarboe v. Severin*, 85 Ind. 496 (1882); *Long v. Woodman*, 65 Me. 56 (1875); *Dix v. Marcy*, 116 Mass. 416 (1875); *O'Grady v. O'Grady*, 162 Mass. 290, 38 N.E. 196 (1894); *Macurda v. Fuller*, 225 Mass. 341, 114 N.E. 366 (1916); *Wood v. Shultis*, 4 Hun 309 (N. Y. 1875); *Henning v. Miller*, 83 Hun 403, 31 N. Y. S. 878 (N. Y. 1894); *Hubbard v. Hubbard*, 151 App. Div. 174, 135 N. Y. S. 908 (4th Dep't. 1912), leave to appeal granted, 151 App. Div. 902, 136 N. Y. S. 1138 (4th Dep't. 1912); *Vick v. Vick*, 126 N. C. 123, 35 S.E. 257 (1900); *Jelleff v. Hummel*, 56 N. D. 512, 218 N.W. 227 (1928); *Clement v. Rowe*, 33 S. D. 499, 146 N.W. 700 (1914).

55. See *People v. Gillespie*, 358 Ill. 40, 46, 192 N.E. 664, 667 (1934) in which the court said, ". . . property must be assessed at its fair cash value—not the price that the property would bring at a forced sale but at a voluntary sale, where the owner is ready, able, and willing to sell but not compelled to, and the buyer is ready, able, and willing to buy but not forced to . . ." For similar language see *Atlantic States Coal Corp. v. Lechter County*, 246 Ky. 549, 551, 55 S.W. 2d 408, 410 (1932); *Tremont & Suffolk Mills v. City of Lowell*, 271 Mass. 1, 18, 170 N.E. 819, 825 (1930).

56. 1 BONBRIGHT, VALUATION OF PROPERTY p. 430 (1937).

value"<sup>57</sup> of them. And if services are to be evaluated, the courts merely state that the amount of recovery is the "reasonable value"<sup>58</sup> or the "value of the services"<sup>59</sup> rendered in performance of the oral agreement. It seems evident that these expressions are employed merely as a variation of the market value test of measurement. In illustration of this point, for example, one court said:

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57. *Blank v. Rodgers*, 82 Cal. App. 35, 255 Pac. 235 (1927) (materials); *Taylor Co. v. Fansteel Products Co.*, 234 App. Div. 548, 255 N. Y. S. 270 (1st Dep't. 1932) (ore); *Jelleff v. Hummel*, 56 N. D. 512, 218 N.W. 227 (1928) (goods).

58. *Laursen v. O'Brien*, 90 F. 2d 792 (C.C.A. 7th, 1937) (plaintiff rendered services in promoting the defendant's invention); *Comes v. Lamson*, 16 Conn. 245 (1844); *Clark v. Terry*, 25 Conn. 395 (1856); *Watson v. Watson*, 1 *Houst.* 209 (Del. 1856) (son worked for his father in return for the latter's promise to convey one-half of his estate); *Hall v. Luckman*, 133 Iowa 518, 110 N.W. 916 (1907) (oral agreement to work as stenographer for the defendant at so much per folio); *Hambell v. Hamilton*, 33 Ky. 501 (1835) (plaintiff rendered services in teaching the defendant the carpenter trade under an oral three year apprenticeship); *Davenport v. Gentry's Adm'r.*, 48 Ky. 427 (1849) (negroes rendered services under an oral agreement not performable within one year in return for legal services to obtain their freedom); *Speers v. Sewell*, 67 Ky. 239 (1868) (plaintiff rendered services during decedent's lifetime under an oral agreement whereby the homestead was to be conveyed to him); *Cadman v. Markle*, 76 Mich. 448, 43 N.W. 315 (1889) (plaintiff rendered services in organizing electric companies); *Burner v. Northwestern Bible etc. School*, 161 Minn. 480, 201 N.W. 939 (1925) (plaintiff prepared architect's drawings for a building, the construction of which was halted by the war); *Howe v. Day*, 58 N. H. 516 (1879) (plaintiff cared for the defendant in return for the latter's promise to convey land); *Werre v. Northwest Thresher Co.*, 27 S. D. 486, 131 N.W. 721 (1911) (plaintiff rendered services as the defendant's sales agent); *Bebb v. Jordon*, 111 Wash. 73, 189 Pac. 553 (1920) (architect's services); *Koch v. Williams*, 82 Wis. 186, 52 N.W. 257 (1892) (plaintiff rendered services in preparing plans and in superintending the construction of a building in return for defendant's oral promise to convey land); *Wojahn v. Nat. Union Bank*, 144 Wis. 646, 129 N.W. 1068 (1911) (plaintiff rendered services as supervisor of a mercantile establishment under an oral agreement not performable within one year); see *Denning, Quantum Meruit and the Statute of Frauds*, 41 L. Q. Rev. 79 (1925).

59. *Winton v. Amos*, 255 U. S. 373, 41 Sup. Ct. 342 (1921); *Sims v. McEwen's Adm'r.*, 27 Ala. 184 (1855); *Patten v. Hicks*, 43 Cal. 509 (1872); *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15 (1893); *McGartland v. Steward & Clark*, 2 *Houst.* 277 (Del. 1860); *Frazier v. Howe*, 106 Ill. 563 (1883); *Miller v. Eldridge*, 126 Ind. 461, 27 N.E. 132 (1891); *Flowers v. Poorman*, 43 Ind. App. 528, 87 N.E. 1107 (1909); *Aiken v. Nogle*, 47 Kan. 96, 27 Pac. 825 (1891); *Stout's Adm'r. v. Royston*, 32 Ky. L. Rep. 1055, 107 S.W. 784 (1908); *Kleeman & Co. v. Collins*, 9 Bush. 460 (Ky. 1872); *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709 (1901); *King v. Welcome*, 71 Mass. 41 (1855); *Freeman v. Foss*, 145 Mass. 361, 14 N.E. 141 (1887); *Donovan v. Walsh*, 238 Mass. 356, 130 N.E. 841 (1921); *Dixon v. Lamson*, 242 Mass. 129, 136 N.E. 346 (1922); *Sutton v. Rowley*, 44 Mich. 112, 6 N.W. 216 (1880); *In re Williams' Estate*, 106 Mich. 490, 64 N.W. 490 (1895); *Snyder v. Neal*, 129 Mich. 692, 89 N.W. 588 (1902); *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1929); *Lapham v. Osborne*, 20 Nev. 168, 18 Pac. 881 (1888); *Crawford v. Parsons*, 18 N. H. 293 (1846); *Gay v. Mooney*, 67 N. J. L. 27, 50 Atl. 596 (1901); *King v. Brown*, 2 Hill 485 (N. Y. 1842); *Van Schoyck v. Backus*,

"The reasonable value of the services rendered would be what was the reasonable price paid for such service or like service in the community where such services or like services were rendered."<sup>60</sup>

Thus, the market value test of measurement, though employing a relatively uniform phraseology, would seem to be sufficiently flexible to permit results which at least most laymen would regard as eminently fair. But in some cases, such as *Waters v. Cline*,<sup>61</sup> which involve oral agreements for the care and support of the promisor over a period of years in return for the devise of property on the latter's death, the market value test of measurement may be incapable, in and of itself, of providing a desirable result.<sup>62</sup> In these instances, as was pointed out above,<sup>63</sup> the market value test often operates in connection with the oral agreement test of measurement.

One of the problems which arises in regard to the use of the market value test of measurement is the determination of the time when the valuation should be made. A few courts have ascertained the amount of legal benefit unjustly retained by the defendant as of the time when the oral agreement was formed.<sup>64</sup> Such a view has the advantage, at least to the extent that the admissions in the oral agreement are relied upon in making the valuation, of dispensing with the necessity for assuming that the value of the plaintiff's promised performance is proportionately as valuable to the defendant as the actual performance which was later rendered.<sup>65</sup> Such decis-

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9 Hun 68 (N. Y. 1876); *Burns v. McCormick*, 233 N. Y. 230, 135 N.E. 273 (1922); *Price v. Press Pub. Co.*, 117 App. Div. 854, 103 N. Y. S. 296 (2d Dep't. 1907); *Deal v. Wilson*, 178 N. C. 600, 101 S.E. 205 (1919); *Price v. Askins*, 212 N. C. 583, 194 S.E. 284 (1937); *Towsley v. Moore*, 30 Ohio St. 184, 27 Am. Rep. 434 (1876); *Jackson v. Stearns*, 58 Ore. 57, 113 Pac. 30 (1911); *Ray v. Young*, 13 Tex. 550 (1855); *Stevens' Ex'rs. v. Lee*, 70 Tex. 279, 8 S.W. 40 (1888); *Salb v. Campbell*, 65 Wis. 405, 27 N.W. 45 (1886); *Nelson v. Christensen*, 169 Wis. 373, 172 N.W. 741 (1919); see *Hamilton v. Glassell*, 57 F. 2d 1032 (C. C. A. 5th, 1932); *Cozad v. Elam*, 115 Mo. App. 136, 91 S.W. 434 (1905); *Breniman v. Breniman*, 281 Pa. 304, 126 Atl. 751 (1924).

60. *Gray v. Cheatham*, 52 S.W. 2d 762, 764 (Tex. Civ. App. 1932). Also see *Buckingham v. Ludlum*, 37 N. J. Eq. 137, 143 (1883); *Albee v. Albee*, 3 Ore. 322, 325 (1871).

61. 121 Ky. 611, 85 S.W. 209, 123 Am. St. Rep. 215 (1905).

62. *Id.* at 618, 85 S.W. at 210.

63. See discussion *supra* pp. 10-13.

64. *Bethel v. Booth & Co.*, 115 Ky. 145, 72 S.W. 803 (1903) (plaintiff sold a store with \$1,200 assets and good will, for \$600 and an oral agreement of employment for ten years. Defendant discharged the plaintiff without cause, and a recovery was allowed for the difference between the amount paid and the actual value of the assets and good will on the day the oral agreement was formed); *Andrews v. Broughton*, 78 Mo. App. 179 (1899), also 84 Mo. App. 640 (1900) (value of an assignment of a dower right held recoverable as of the date of the oral agreement to assign).

65. See *supra* note 17.

ions are also consistent with the idea that the function of restitution is to return the parties to the situation they occupied when the transaction started. Other courts have made the valuation as of the date of the repudiation of the oral agreement.<sup>66</sup> This view has been followed in some of the cases involving restitution for the use and occupation of land.<sup>67</sup> Since the

66. *Perry v. Norton*, 182 N. C. 585, 109 S.E. 641 (1921) (defendant orally promised to convey a designated house to the plaintiff as an inducement for the latter to remain in the defendant's employment. Upon the defendant selling the house to another, the plaintiff was allowed to recover for his services and improvements with interest from the date of the breach of the oral agreement). In *Hertzog v. Hertzog's Adm'r.*, 34 Pa. St. 418, 437 (1859), however, the court said, "But to compensate her [the plaintiff], without reference to the value of her services, and according to the value of the property promised [by the defendant]—not as its value was when the promise was made, but when it was broken—is, . . . opposed to law, reason and justice."

67. See, for example, *Zanone v. Tashgian*, 231 Ky. 454, 21 S.W. 2d 825, 827 (1929). In the following cases restitution was allowed for use and occupation of land parted with merely in reliance upon the oral agreement within the Statute of Frauds: *Smith v. Wooding*, 20 Ala. 324 (1852); *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490 (1860); *Harkness v. McIntire*, 76 Me. 201 (1884); *Pierce v. Pierce*, 25 Barb. 243 (N. Y. 1857); *Cf. Gould v. Thompson*, 4 Metc. 224 (Mass. 1842) (land owner recovered for use and occupation until fire destroyed buildings on the property he had orally agreed to sell to the defendant). Also *cf. WOODWARD, QUASI CONTRACTS* p. 152 (1913). Many other cases have allowed the use and occupation of land parted with in reliance upon the oral agreement within the Statute of Frauds to be set off against the plaintiff's claim for money paid or improvements made upon the land he had orally agreed to purchase: *Williams v. Williams*, 210 Ala. 372, 98 So. 200 (1923); *Collins v. Thayer*, 74 Ill. 138 (1874) (use and occupation was set off against vendee's claim for money paid); *McCracken v. Sanders*, 4 Bibb (7 Ky.) 511 (1817); *Fox's Heirs v. Longly*, 1 A. K. Marsh. (8 Ky.) 388 (1818); *McC Campbell v. McC Campbell*, 5 Litt. (15 Ky.) 92, 15 Am. Dec. 48 (1824); *Grimes v. Shrieve*, 6 T. B. Mon. (22 Ky.) 546 (1828); *Coldwell v. Davidson*, 187 Ky. 490, 219 S.W. 445 (1920); *Richards v. Allen*, 17 Me. 296 (1840); *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273 (N. Y. 1814); *Albea v. Griffin*, 22 N. C. 9 (1838); *Union Central Life Ins. Co. v. Cordon*, 208 N. C. 723, 182 S.E. 496 (1935); *Bender's Administrators v. Bender*, 37 Pa. St. 419 (1860); *Harris v. Harris*, 70 Pa. St. 170 (1871); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893); *Treece v. Treece*, 73 Tenn. 220 (1880); *Schneider v. Reed*, 123 Wis. 488, 101 N.W. 682 (1904). In the following cases restitution was allowed for use and occupation of land parted with in performance of the oral agreement which did not comply with the requirements of the Statute of Frauds: *Walsh v. Colclough*, 56 Fed. 778 (C. C. A. 7th, 1893); *Hays v. Goree*, 4 Stew. & P. 170 (Ala. 1833); *Davidson v. Ernest*, 7 Ala. 817 (1845); *Crommelin v. Thiess & Co.*, 31 Ala. 412, 70 Am. Dec. 499 (1858); *Parker's Adm'r. v. Hollis*, 50 Ala. 411 (1874); *Nelson v. Webb*, 54 Ala. 436 (1875); *Crawford v. Jones*, 54 Ala. 459 (1875); *Smith v. Pritchett*, 98 Ala. 649, 13 So. 569 (1893); *Walker v. Shackelford*, 49 Ark. 503, 5 S.W. 887, 4 Am. St. Rep. 61 (1887); *Warner v. Hale*, 65 Ill. 395 (1872); *Smith v. Kinkaid*, 1 Ill. App. 620 (1878); *Nash v. Berkmeir*, 83 Ind. 536 (1882); *Wolke v. Fleming*, 103 Ind. 105, 2 N.E. 325, 53 Am. Rep. 495 (1885); *Evans v. Winona Lumber Co.*, 30 Minn. 515, 16 N.W. 404 (1883); *Steele v. Anheuser-Busch Brewing Ass'n.*, 57 Minn. 18, 58 N.W. 685 (1894); *Aylor v. McInturf*, 184 Mo. App. 691, 171 S.W. 606 (1914); *Laughran v. Smith*, 75 N. Y. 205 (1878); *Talamo v. Sptizmiller*, 120 N. Y. 37, 23 N.E. 980, 8 L.R.A. 221, 17 Am. St. Rep. 607 (1890); *Herrman v. Curiel*, 3 App. Div. 511, 38 N. Y. Supp. 343 (1st Dep't. 1896); *Robb v. San Antonio St. R.*, 82 Tex. 392, 18 S.W. 707 (1891); *Brooke Smith Realty Co. v. Graham*, 258 S.W. 513 (Tex. Civ. App. 1924).

cause of action for restitution does not ordinarily accrue in the Statute of Frauds cases until the oral agreement is repudiated,<sup>68</sup> the retention of the benefit received usually not being unjust until that time, it would seem that the latter view is preferable. In a jurisdiction which holds that the cause of action for restitution accrues when the performance is rendered,<sup>69</sup> however, the use of that time for making the valuation may be justified. It should also be observed that the time when the valuation is made influences the calculation of the amount of interest that should be recoverable.<sup>70</sup>

The cases involving restitution for improvements made upon land give rise to the additional problem of whether the amount of the recovery should be determined by the market value of the improvements obtained, or by the enhanced value of the land resulting therefrom. If the improvements were made in performance of an oral agreement which required the defendant to lease<sup>71</sup> or to sell<sup>72</sup> his land to the plaintiff, the courts have generally al-

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68. *Collins v. Thayer*, 74 Ill. 138 (1874); *Steven's Ex'rs. v. Lee*, 70 Tex. 279, 8 S.W. 40 (1888); see *Perry v. Norton*, 182 N. C. 585, 589, 109 S.E. 641, 643 (1921); WOODWARD, *QUASI CONTRACTS* § 108 (1913). If the plaintiff's services are rendered under an oral agreement wherein the defendant promised to will realty to the plaintiff, it is generally held that this cause of action, in the absence of an earlier repudiation, does not accrue until the death of the promissor. *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (C. C. A. 6th, 1917); *Ellis v. Berry*, 145 Miss. 652, 110 So. 211 (1926); see *Hull v. Thoms*, 82 Conn. 647, 650, 74 Atl. 925, 926 (1910).

69. In *Estate of Leu*, 172 Wis. 530, 179 N.W. 796 (1920) the court held that the cause of action accrued and the statute of limitations began to run when the services were rendered, rather than when the defendant repudiated the contract by dying without providing for the plaintiff in his will. This result is based upon the theory that the oral agreement within the Statute of Frauds is void. For a good discussion of this decision and other earlier Wisconsin cases, some of which are consistent with *supra* note 68, see Page, *The Effect of Failure to Comply with the Wisconsin Statute of Frauds*, 4 Wis. L. Rev. 323, 333-338 (1928).

See RESTATEMENT, *CONTRACTS* § 347 (1932) ("measured as of time it was rendered"); cf. RESTATEMENT, *RESTITUTION* § § 151 and 154 (1937) showing that no one rule as to time of valuation can provide satisfactory results in all the cases involving restitution.

70. WOODWARD, *QUASI CONTRACTS* pp. 172-173 (1913); RESTATEMENT, *RESTITUTION* § 156 (1937).

71. *Crane v. Franklin*, 17 Ariz. 476, 154 Pac. 1036 (1916); *Blank v. Rodgers*, 82 Cal. App. 35, 255 Pac. 235 (1927); *People's National Bk. of Orlando v. Magruder*, 77 Fla. 235, 81 So. 440 (1919); *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950 (1905); *Williams v. Bemis*, 108 Mass. 91, 11 Am. Rep. 318 (1871); *Parker v. Tainter*, 123 Mass. 185 (1877); *Interstate Hotel Co. v. Woodward & Burgess Amusement Co.*, 103 Mo. App. 198, 77 S.W. 114 (1903); *Winter v. Spradling*, 163 Mo. App. 77, 145 S.W. 834 (1912); *Rosepaugh v. Vredenburg*, 16 Hun 60 (N. Y. 1878); *Nastrom v. Sederlin*, 43 Wyo. 330, 3 P. 2d 82 (1931).

72. *King v. Thompson*, 9 Pet. 204 (U. S. 1835); *Allen v. Young*, 88 Ala. 338, 6 So. 747 (1889); *Cozad v. Elam*, 115 Mo. App. 136, 91 S.W. 434 (1905); *Graham v. Graham*, 134 App. Div. 777, 119 N. Y. Supp. 1013 (3d Dep't. 1909); *Luton v. Badham*, 127 N. C. 96, 37 S.E. 143, 80 Am. St. Rep. 783, 53 L.R.A. 337 (1900); *Ebert v. Disher*, 216 N. C. 36, 3 S.E. 2d 301 (1939), rehearing denied, 216 N. C. 546, 5 S.E. 2d 716 (1939); *Love v. Burton*, 61 S.W. 91 (Tenn. Ch. App. 1900).



lowed a recovery for the market value of the improvements. But, if the improvements were made merely in reliance upon, rather than in performance of the oral agreement, the recovery is usually limited to the extent that they enhanced the value of the land.<sup>73</sup>

73. In the case of *Carter v. Carter*, 182 N. C. 186, 190, 108 S.E. 765, 766, 17 A.L.R. 945, 948 (1921) the court approved the following language: "The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land." For similar language see *Bendix v. Ross*, 205 Wis. 581, 585, 238 N.W. 381, 382 (1931); Note 8 Wis. L. Rev. 87 (1932). The following cases are also consistent with this view: *Jones v. Gainer*, 157 Ala. 218, 47 So. 142, 131 Am. St. Rep. 52 (1908); *Williams v. Williams*, 210 Ala. 372, 98 So. 200 (1923); *Wainwright v. Talcott*, 60 Conn. 43, 22 Atl. 484 (1891); *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45 (Ind. 1835); *Lister v. Batson*, 6 Kan. 420 (1870); *Dunn v. Winans*, 106 Kan. 80, 186 Pac. 748 (1920); *Fox's Heirs v. Longly*, 1 A. K. Marsh. (8 Ky.) 388 (1818); *Stark's Heirs v. Cannady*, 3 Litt. (13 Ky.) 399, 14 Am. Dec. 76 (1823); *McCampbell v. McCampbell*, 5 Litt. (15 Ky.) 92, 15 Am. Dec. 48 (1824); *Grimes v. Shrieve*, 6 T. B. Mon. (22 Ky.) 546 (1828); *Bellamy v. Rasdale*, 14 B. Mon. (53 Ky.) 364 (1853); *Padett v. Decker*, 145 Ky. 227, 140 S.W. 152 (1911); *Bishop v. Clark*, 82 Me. 532, 20 Atl. 88 (1890); *Hillebrands v. Nibbelink*, 40 Mich. 646 (1879); *Schultz v. Thompson*, 156 Minn. 357, 194 N.W. 884 (1923) (*sub. nom.* *Schultz v. Johnson*); *Smith v. Smith's Adm'rs.*, 28 N.J.L. 208, 78 Am. Dec. 49 (1860); *Parkhurst v. Van Cortlandt* 1 Johns. Ch. 273 (N. Y. 1814); *Harris v. Frink*, 49 N. Y. 24 (1872); *Baker v. Carson*, 21 N. C. 381 (1836); *Albea v. Griffin*, 22 N. C. 9 (1838); *Love v. Neilson*, 45 N. C. 339 (1854); *Thomas v. Kyles*, 45 N. C. 302 (1854); *Winton v. Fort*, 58 N. C. 251 (1859); *Pitt v. Moore*, 99 N. C. 85, 5 S.E. 389, 6 Am. St. Rep. 489 (1888); *Tucker v. Markland*, 101 N. C. 422, 8 S.E. 169 (1888); *Vann v. Newsom*, 110 N. C. 422, 14 S.E. 519 (1892); *Pass v. Brooks*, 125 N. C. 129, 34 S.E. 228 (1899); *Ford v. Stroud*, 150 N. C. 362, 64 S.E. 1 (1909), 9 Col. L. Rev. 561 (1909); *Carter v. Carter*, 182 N. C. 186, 108 S.E. 765, 17 A.L.R. 945 (1921); *Perry v. Norton*, 182 N. C. 585, 109 S.E. 641 (1921); *Union Central Life Ins. Co. v. Cordon*, 208 N. C. 723, 182 S.E. 496 (1935); *Bender's Administrators v. Bender*, 37 Pa. St. 419 (1860); *Harris v. Harris*, 70 Pa. St. 170 (1871); *Holthouse v. Rynd*, 155 Pa. St. 43, 25 Atl. 760 (1893); *Herring v. Pollard's Ex'rs.*, 28 Tenn. 362, 40 Am. Dec. 653 (1843); *Rhea v. Allison*, 40 Tenn. 176 (1859); *Treece v. Treece*, 73 Tenn. 221 (1880); *Smoot v. Smoot*, 80 Tenn. 274 (1883); *Anderson v. Langford*, 4 Tenn. App. 206 (1927); *Witt v. Siler*, 12 Tenn. App. 116 (1928); *Thouvenin v. Lea*, 26 Tex. 612 (1863); *Burleson v. Tinnin*, 100 S.W. 350 (Tex. Civ. App. 1907); *Ernst v. Schmidt*, 66 Wash. 452, 119 Pac. 828, Ann. Cas. 1913C 389 (1912); *Muckle v. Hoffman*, 119 Wash. 519, 205 Pac. 1048 (1922); *Clark v. Davidson*, 53 Wis. 317, 10 N.W. 384 (1881); *Schneider v. Reed*, 123 Wis. 488, 101 N.W. 682 (1904); *Bendix v. Ross*, 205 Wis. 581, 238 N.W. 381 (1931), Note 8 Wis. L. Rev. 87 (1932); see *Sims v. McEwen's Adm'r.*, 27 Ala. 184, 192 (1855); *McNamee v. Withers*, 37 Md. 171, 177 (1872); *Hillis v. Rhodes*, 205 Mo. App. 439, 450, 223 S.W. 972, 974 (1920); *Barnes v. Brown*, 71 N. C. 507 (1874); *Faircloth v. Kinlaw*, 165 N. C. 228, 231, 81 S.E. 299, 300 (1914); *Duke v. Griffith*, 13 Utah. 361, 372, 45 Pac. 276, 278 (1896); *Porter v. Shaffer*, 147 Va. 921, 133 S.E. 614, 617 (1926).

It should be mentioned, however, that in many of these cases the increased value of the defendant's land is frequently equal to the value of the improvements, so the courts are not forced to recognize the principle of measurement expressed in the text.

It will be recalled, that the principle underlying benefit is the satisfaction of human wants, and the recovery in restitution necessarily depends upon the objective manifestation that the desires of the individual defendant have been satisfied.<sup>74</sup> In view of the inapplicability of the provisions of the oral agreement to reliance improvements, it is evident that neither party expected the defendant would diminish the pecuniary value of his estate therefor. Thus, the plaintiff is able to show that his reliance improvements have satisfied the desires of the defendant only to the extent that they have increased the monetary value of his land.<sup>75</sup> On the other hand, the applicability of the defendant's request and return promise to improvements made in performance of the oral agreement, demonstrates objectively that the defendant's desires were satisfied by such improvements to the extent that they saved his estate from pecuniary diminution, even though they did not enhance the monetary value of his land.<sup>76</sup> And, as was pointed out above,<sup>77</sup> if the defendant has increased his unjustness by repudiating the oral agreement, the rate of compensation stipulated therein is not ordinarily imposed as an upper limit on the amount of the recovery. Thus, the above results in the improvement cases would seem to be correct, and they have been approved by an eminent author.<sup>78</sup>

It also should be mentioned at this point that the relative unjustness of the parties exerts an influence upon the operation of the market value test in much the same manner that it influenced the oral agreement test of measurement.<sup>79</sup> For, if the defendant is in default under the oral agreement, the emphasis is placed on the extent of pecuniary saving to the defendant as a result of the performance rendered by the plaintiff. And the plaintiff is allowed to recover the market value of that with which he has parted, irrespective of whether or not the monetary value of the defendant's estate was thereby increased. This proposition is illustrated by the many decisions wherein the plaintiff has been allowed to recover from a decedent's estate for services rendered in caring for the decedent under an oral agreement whereby the decedent had promised to will real estate to the plaintiff.<sup>80</sup> It is further illustrated by the cases which allow the plaintiff to recover from a

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74. See discussion in my article, *supra* note 2, § 2.

75. See discussion in my article, *supra* note 2, § 12.

76. See discussion in my article, *supra* note 2, § 7.

77. See discussion *supra* pp. 13-17.

78. WOODWARD, QUASI CONTRACTS §107 (1913).

79. See discussion *supra* pp. 13-17.

80. See cases collected *supra* note 25.

defaulting defendant even though the benefit from the plaintiff's performance was received by a third party,<sup>81</sup> or was of an intangible type.<sup>82</sup> But, on the other hand, if it is the plaintiff who has repudiated the oral agreement, and if he is allowed any recovery at all, the emphasis is shifted to the monetary enlargement of the defendant's estate, and the recovery is limited to the rate of compensation provided in the oral agreement.<sup>83</sup>

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81. In the case of *Clement v. Rowe*, 33 S. D. 499, 146 N.W. 700 (1914), for example, the defendant induced the plaintiff to convey land to a corporation of which the defendant was secretary, in return for which the corporation issued stock to the plaintiff. The defendant-secretary had orally promised to repurchase the stock if seven per cent dividends were not paid by the corporation for the next two years. The corporation paid no dividends, and after the expiration of the two years the plaintiff tendered the stock to the defendant and demanded that he repurchase it at the orally agreed price. The defendant repudiated the oral agreement which did not comply with the one year provision of the Statute of Frauds, and the plaintiff then brought this action to recover the value of the land he had conveyed. In affirming the trial court's decision to set aside a directed verdict for the defendant and grant a new trial, the court at page 507 said, "In the present case the defendant, himself did not receive the land which was the partial consideration for the invalid promise; it went to the medicine company. But it went to the medicine company at the direction of the defendant. So far as the relations between plaintiff and defendant are concerned, the situation was the same as though the land really became the property of the defendant; but by his direction the title was taken in the name of a third person." And in *Moody v. Smith*, 70 N. Y. 598 (1877) the defendant orally agreed to convey land to the plaintiff in return for services which the plaintiff was to render to a third party. The court held that the defendant had received a legal benefit from the plaintiff's services rendered to the third party. Also see *Hubbard v. Hubbard*, 151 App. Div. 174, 175, 135 N. Y. Supp. 908, 910 (4th Dep't. 1912). For a discussion of cases of this type see my article, *supra* note 2, § 9.

82. The benefit conferred upon a third party at the defendant's request, discussed *supra* note 81, like all benefit, is intangible in one sense. But the benefit to be considered in this footnote is characterized by a peculiar lack of direct enjoyment by the defendant. In the case of *Matousek v. Quirici*, 195 Ill. App. 391 (1915), for example, the plaintiff agreed to lease his store to the defendant under an oral agreement that did not comply with the Statute of Frauds. Even though the defendant never actually occupied the store under this agreement, the plaintiff was allowed to recover the reasonable value for use and occupation. Other cases illustrating this situation are: *Huey v. Frank*, 182 Ill. App. 431 (1913), and *Kearns v. Andree*, 107 Conn. 181, 139 Atl. 695, 59 A.L.R. 599 (1928). See Notes 26 MICH. L. REV. 942 (1928); 44 HARV. L. REV. 623 (1931); 13 MINN. L. REV. 71 (1928). For a discussion of the cases cited in this footnote see my article, *supra* note 2, § 10.

83. See *supra* note 38. In this connection Professor Williston said, "Wherever the defaulting plaintiff is allowed to recover, the basis of quasi contractual recovery is adhered to—that the defendant has received something for which in equity and good conscience he ought to pay a fair value; but if the parties have made their own arrangement as to what should be given by the plaintiff, and what should be paid for it, and the defendant though not obliged to perform his agreement is willing to do so, there is no occasion for the court to invoke the principles of quasi contract to any greater extent than if the contract had been enforceable. . . . If his performance were a gift he would nowhere be allowed to recover pay for it, and to allow a plaintiff who has orally agreed to sell his performance for half its value to recover the full value when he himself is the cause of the breach of the

The market value test is also influenced, as was pointed out above, by the marketability of the performance<sup>84</sup> or reliance action<sup>85</sup> to be evaluated, and by the time when the valuation is to be made.<sup>86</sup> Further, since the market value test is frequently employed either in connection with the plaintiff's or the defendant's promise in the oral agreement, it is also influenced, by the extent of evidential weight accorded to the oral agreement.<sup>87</sup> Although the oral agreement and the market value tests, either alone or in connection with each other, usually afford a satisfactory method of ascertaining the amount of recovery that should be allowed in restitution, in a few instances, the cost to the plaintiff test of measurement has been employed.

#### 4. COST TO THE PLAINTIFF AS A TEST OF MEASUREMENT

Of the various tests of measurement, the cost to the plaintiff is probably the least likely to approach the monetary value of the benefit the particular defendant derived from the plaintiff's performance. The cost to the plaintiff test is also objectionable because it comes nearer to the measure of recovery that would be allowed in actions for breach of contract,<sup>88</sup> than to the measure of the defendant's benefit. Consequently it should be employed only when it is clear that the other tests would furnish an inadequate measure of the benefit conferred upon and unjustly retained by the defendant. There are a few instances, however, wherein it apparently has been applied. In the case of *Chapman v. Rich*,<sup>89</sup> for example, the plaintiff orally agreed to provide board, clothes, and schooling for the defendant's ten year old daughter until she reached majority, in return for which the daughter was to live with and render services to the plaintiff. At the end of three years, however, the oral agreement was repudiated "by the act, or with the consent" of the defendant. Then the plaintiff brought this action in assumpsit

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oral agreement is as objectionable as to allow him to recover the full value when he agreed to perform for nothing. Therefore, in this situation of the defaulting plaintiff the law limits restitution to 'the price fixed by the contract for such part performance, or, if no price is fixed, (to) a ratable proportion of the total contract price.'" 2 WILLISTON, CONTRACTS pp. 1561, 1564-1565 (Rev. ed. 1936).

84. See discussion *supra* pp. 18-21.

85. See discussion *supra* pp. 23-24.

86. See discussion *supra* pp. 21-23.

87. See discussion *supra* pp. 2-18.

88. RESTATEMENT, CONTRACTS § § 329, 333 (1932).

89. 63 Me. 588 (1874). Other cases of this type are: *Huey v. Frank*, 182 Ill. App. 431 (1913) (discussed in my article, *supra* note 2, § 10; *Pulbrook v. Lawes*, 1 Q. B. 284 (1876) (lessee under unenforceable agreement allowed to recover his expenses of making fanciful decorations).

for the care he had rendered to the defendant's daughter under the oral agreement. The court held that it was improper to non-suit the plaintiff, and that he was entitled to recover "the value of what he had *expended*" in pursuance of the oral agreement, less the value of whatever services the child had performed.<sup>90</sup> It seems reasonable to infer that "the value of what he had expended" is more likely to equal the cost to the plaintiff in supplying his performance, than it is to equal either the market value of the performance as rendered to the defendant, or the value of the benefit the latter derived from the performance. If this is true, the court adopted the cost to the plaintiff test of measurement.

Although the facts of the *Chapman* case reveal that the defendant is unjustly retaining a legal benefit, it may be difficult to determine the pecuniary amount thereof, either by the oral agreement test, or by the market value test of measurement. The oral agreement test is of little assistance, in and of itself, because neither party promised money in return for the other's performance. Indeed, the performance that each party promised in the *Chapman* case would seem to be as indefinite in character as that which was rendered by the plaintiff in the case of *Waters v. Cline*.<sup>91</sup> Yet, it will be recalled,<sup>92</sup> that the plaintiff's performance in the *Waters* case was regarded as too indefinite to be measured by the market value test. And, although the performance promised by the defendant in return was relatively definite in the *Waters* decision and was reduced to money terms by the market value test, the court in the *Chapman* case apparently felt that the performance promised by either party was too indefinite for the application of the market value test of measurement. Hence, neither the oral agreement test, nor the market value test, either alone or in connection with each other, was thought to furnish an adequate measure of the amount of recovery that should be allowed in the *Chapman* case. But the expenditures of the plaintiff in rendering his performance under the oral agreement in the *Chapman* decision apparently was more readily ascertainable, and the court approved this test of measurement.<sup>93</sup> One may disagree with the court's view as to the inapplicability of the market value test to the facts of the *Chapman* case,

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90. *Id.* at 589. The plaintiff, a sub-tenant, was allowed to recover the cost of the building in the case of *Parker v. Tainter*, 123 Mass. 185 (1877), apparently without regard to the amount of benefit the defendant sub-lessor derived therefrom. But the case is properly criticized in KEENER, *QUASI CONTRACTS* pp. 280-281 (1893).

91. 121 Ky. 611, 85 S.W. 209, 123 Am. St. Rep. 215 (1905). Also see *supra* notes 33 and 34.

92. See discussion *supra* pp. 12-15.

93. 63 Me. 588, 589 (1874).

but it is conceivable that peculiar factual situations may arise wherein the more standardized tests of oral agreement and market value provide an inadequate measure of the benefit conferred. In such instances, an examination of the expenditures of the plaintiff in supplying his performance under the oral agreement may be justified.

## 5. CONCLUSIONS

Restitution is based upon the unjust retention of a legal benefit, and a legal benefit is found when it can be demonstrated objectively that the desires of the particular defendant have been satisfied by reason of the plaintiff's performance. The monetary equivalent of the legal benefit unjustly retained by the defendant constitutes the amount of recovery allowed in the cases of restitution under oral agreements which do not comply with the requirements of the Statute of Frauds. The tests of measurement usually employed in determining the amount of the recovery are the oral agreement, the market value, and the cost to the plaintiff.

If the plaintiff parted with money in whole or partial performance of the oral agreement the amount of legal benefit conferred upon the defendant is clearly expressed. And if the defendant's promise in the oral agreement was to pay money, the agreement provides, in the absence of peculiar circumstances, a reliable test for ascertaining the amount of legal benefit the defendant derived from the plaintiff's full performance. But if neither the plaintiff nor the defendant promised to pay money, the oral agreement cannot provide the sole test of measurement. It must be employed in connection with the market value test either applied to the plaintiff's performance rendered under the oral agreement, or to the assumed equivalent performance promised by the defendant. Either approach involves an assumption. If the market value test is applied to the defendant's promise, the assumption is that the defendant derived legal benefit from the plaintiff's performance at the same pecuniary rate that he had promised to pay for complete performance. On the other hand, if the market value test is applied to the plaintiff's performance, the assumption is that the monetary amount of legal benefit conferred upon the defendant by the plaintiff's performance is equal to the market value of that performance. The market value test of measurement produces results which are perhaps less closely connected with the satisfaction of the desires of the particular defendant, than is true when the oral agreement test is employed. For, in the latter case, the defendant's admissions are available to show what would satisfy his individual

desires. But the use of the market value test is generally justified because it comes into operation only after the oral agreement, in and of itself, has failed to provide an adequate test of measurement. If the plaintiff merely acted in reliance upon, rather than in performance of the oral agreement, the stipulations contained therein are inapplicable as a test of measurement, but the market value test demonstrates that the defendant was benefited to the extent that the pecuniary value of his estate was enlarged, for to that extent his power to satisfy his desires was increased. The cost to the plaintiff test of measurement is rarely used because it produces results which resemble those allowed for breach of contract, and which are the least likely to accurately approximate the monetary amount of benefit conferred upon the particular defendant.

It should be observed that the selection and operation of the various tests of measurement are influenced to a considerable extent by the type of benefit conferred,<sup>94</sup> and by the type of return performance promised by the defendant. For these factors affect the ease and reliability of determining the monetary equivalent of the legal benefit which the defendant is unjustly retaining. Another factor which affects the operation of the measurement tests is the relative unjustness of the conduct of the parties. It may be extremely difficult, if not impossible, to trace the extent of influence exerted by each type of unjust conduct upon the amount of the recovery. But there are certain types of unjustness<sup>95</sup> in the Statute of Frauds cases involving restitution, such as the repudiation of the oral agreement, which clearly influence the operation of the various tests of measurement. Thus, it would seem, the determination of the amount of the recovery involves more than a mere measurement of value, for the tests of measurement should be applied so as to allow recovery only for the amount of legal benefit which is unjustly retained.

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94. See my article *supra* note 2.

95. See my article *supra* note 3.