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Contract Damages in Montana Part II: Reliance and Restitution

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I. INTRODUCTION

Determination of contract damages is ultimately a question of policy—a statement of the objectives our society is attempting to achieve through its legal system. Before the subject of damages can be reduced to a system of rules, it is important to understand the principles, the reasons for the rules. 1 In a seminal 1937 article, L. L. Fuller and William R. Perdue, Jr. identified three interests...
served by judicial remedies for breach of contract: expectancy, reliance, and restitution. Their influence may be seen in section 344 of the Restatement (Second) of Contracts, which expressly recognized the three interests:

§344. Purposes of Remedies
Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

(a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
(b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
(c) his “restitution interest,” which is his interest in having restored to him any benefit that he has conferred on the other party.

The three interests are illustrated by the following example. A agrees to build a house for B for $50,000, of which $5000 represents A’s profit. If B breaches before any performance by A, A’s only remedy is the expectation interest, $5000. If B breaches after A has expended $30,000, A’s reliance interest is $30,000 and A’s expectation interest is $35,000. If A has conferred on B a benefit worth $36,000, A’s restitution interest is $36,000.

Within the area of contract damages, these interests frequently overlap. For example, computation of the expectation and restitution interests may include expenses incurred or benefits conferred in reliance on the agreement. And reliance may provide an

3. See E. Farnsworth, CONTRACTS 814-15 (1982). Application of these concepts outside of the commercial area is particularly difficult. Those who began law school with Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929), the case of the “hairy hand,” will sympathize with the modern student who begins with Sullivan v. O’Connor, 363 Mass. 579, 296 N.E.2d 183 (1973). In Sullivan, plaintiff was promised a “Hedy Lamarr” nose by defendant doctor and received a nose more bulbous than her pre-operative nose. In applying these concepts, the court had to decide whether plaintiff was entitled to:

   (a) the expectation interest: the value of the difference between what she was promised (a Hedy Lamarr nose) and what she got (the post-operative nose); or
   (b) the reliance interest: the value which would restore her from where she stood after performance (the post-operative nose) to where she stood prior to performance (the pre-operative nose); or
   (c) the restitution interest: the value which she conferred on defendant (the cost of the operation).
4. See infra text accompanying notes 34-38 & 159-67. Corbin does not recognize reli-
alternative basis for the enforcement of a promise where consideration is lacking. More significantly, the interests in contract actions overlap with the interests served by the other two branches of the law of obligations, tort and restitution. Reliance, in serving the injured party's interest in being restored to the status quo, performs the same function in tort actions. And restitution, in serving the injured party's interest in recovering benefits unjustly retained, performs the same function in actions based on unjust enrichment.

A previous article examined Montana statutes and case law in the area of expectancy damages with a view toward determining the flexibility with which courts apply the available remedies and whether the remedies serve the desired ends. This article makes a similar examination in the areas of reliance and restitution, but the inquiry is not limited to damages for breach of contract. Remedies serving the expectation interest are available only in a contract claim. But remedies serving the restitution and reliance interests may be available in the absence of an enforceable agreement.

This article explores those interests not only in claims arising from breach of contract, but also in claims involving non-contractual voluntary obligations. For example, reliance may be available

5. A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 990 (1964) [hereinafter cited as A. CORBIN, CONTRACTS].


7. Id. at 254.

8. Id.


when plaintiff seeks damages (1) for breach of contract\textsuperscript{11} or (2) for having been induced to change position by a promise of defendant.\textsuperscript{12} And restitution may be available when plaintiff seeks damages (1) for breach of contract\textsuperscript{13} or for benefits conferred, (2) where there has been no contract,\textsuperscript{14} (3) where there was a contract but defendant’s performance has been discharged,\textsuperscript{15} (4) where plaintiff is in breach,\textsuperscript{16} or (5) where the contract is voided for illegality.\textsuperscript{17}

Courts are fond of repeating the shibboleth that for every wrong there is a remedy.\textsuperscript{18} There are many remedies available to protect the interests of an injured party, including money damages and specific performance.\textsuperscript{19} Ironically, the very flexibility of the remedies and the duplication of the remedies among the various branches of the law often promote rigidity. For example, statutes in Montana do not expressly recognize restitution.\textsuperscript{20} Within contract, the expectation interest is recognized, but not reliance or restitution.\textsuperscript{21} Restitution as a branch of law and the reliance and restitution interests are found in common law,\textsuperscript{22} but in dredging up the common law, courts often scoop up the detritus of the forms of action\textsuperscript{23} and the separation of law and equity.\textsuperscript{24} In pleading, courts may be concerned with overlapping interests and require an “election of remedies.”\textsuperscript{25}

\textbf{11. See infra Part II.}
\textbf{12. See infra Part III.}
\textbf{13. See infra Part VI.}
\textbf{14. See infra Part IV.}
\textbf{15. See infra Part V.}
\textbf{16. See infra Part VII.}
\textbf{17. See infra Part VIII.}
\textbf{18. Montana Code Ann. § 1-3-214 (1983). See also Restatement (Second) of Contracts § 345 comment a (1981); 5 A. Corbin, Contracts § 990.}
\textbf{19. See Restatement (Second) of Contracts § 345 (1981). Other remedies may include reformation, declaratory judgment, and enforcement of an arbitration award. The remedy of specific performance is beyond the scope of this article.}
\textbf{22. Restitution is not defined in the statutes or cases. Moreover, there are no West key numbers for “Reliance” or “Restitution,” leading the researcher to search for the concepts across a multitude of topics where they might be applied.}
\textbf{23. See, e.g., Puetz v. Carlson, 139 Mont. 373, 364 P.2d 742 (1961). Corbin comments dryly, “It looks as if the lawyers in the case must have reverted back to the days of common law pleading and forms of action.” 5 A. Corbin, Contracts § 1102 n.1. One is reminded of the famous statement: “The forms of action we have buried, but they still rule us from their graves.” F. Maitland, The Forms of Action at Common Law 2 (1962).}
\textbf{24. See, e.g., Madison Fork Ranch v. L & B Lodge Pole Timber Products, ___ Mont. ___, 615 P.2d 900, 906 (1980) (distinction between rescission at law and rescission in equity). This practice is especially unproductive with respect to restitution, for the remedy was available at both law and equity. 5 A. Corbin, Contracts § 990.}
\textbf{25. See infra text accompanying notes 157-67.}
In deciding a particular case, a court often becomes entangled in statutory mandates, the common law tradition, and the embodiment of claims in pleadings, and loses sight of principle, the reason for the rules. The basic principle of damages, to compensate for injury done, can usually be found when the entanglements are cleared away.\(^{26}\)

II. RELIANCE DAMAGES FOR BREACH OF CONTRACT

While the paramount interest in contract damages is the expectation interest, the other interests should be given wider recognition.\(^{27}\) Fuller and Perdue concluded from their 1936-37 examination of the three interests that the reliance interest should be rescued from neglect.\(^{28}\) They pointed out that the original Restatement of Contracts virtually ignored the reliance interest.\(^{29}\) Even the now-famous section 90, which recognized the possibility of recovery on a promise in the absence of a bargained-for consideration, treated the promisee's reasonable reliance as creating an agreement for the breach of which expectancy damages would be available.\(^{30}\) Their position won the day with legal scholars, for the Restatement (Second) of Contracts organized the chapter on remedies on the basis of the three interests\(^ {31}\) and added a new sentence to section 90: “The remedy granted for breach may be limited as

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\(^{26}\) See Wright, supra note 1.

\(^{27}\) Farnsworth, supra note 1, at 1147-49.

\(^{28}\) Fuller & Perdue, supra note 1, at 56-67, 418-20.

\(^{29}\) Id. at 89-96. See MONTANA ANNOTATIONS TO THE RESTATEMENT OF THE LAW OF CONTRACTS § 333 (1940) [hereinafter cited as ANNOTATIONS]; RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

\(^{30}\) See infra note 49.

\(^{31}\) RESTATEMENT (SECOND) OF CONTRACTS ch. 16 (1981).
justice requires." The appropriate remedy may be restitution or reliance damages. 

Courts, however, have been slower to identify the reliance interest, perhaps because plaintiffs rarely seek reliance damages independent of the expectancy. For example, if A agrees to build a house for B for $50,000 of which $5000 represents A's profit and B breaches when half finished, A is entitled to damages of $27,500, (the cost of performance plus the entire profit). This can be computed either as expectancy damages of $5000 plus reliance damages of $22,500, or as expectancy damages of $27,500 (the amount required to put A in as good a position as A would have been in had the contract been performed).

It is important for a court to distinguish between the reliance expenses in performing the agreement and reliance expenses in collateral transactions, lest it include reliance damages in the expectancy or exclude reliance expenses that are separate from the expectancy. For example, in Smith v. Fergus County, plaintiff alleged defendant breached an agreement to lease him farmland. Plaintiff claimed as damages the expense of regaining possession, the expense of preparing farm machinery to work the land, and lost profits. In dicta, the court correctly stated that the expense of regaining possession was recoverable in addition to the expectancy, for this was a foreseeable consequence of the breach.

But the court would have denied the expense of preparation, for this expense would have been incurred in order to earn the profit. The court failed to think through the consequences of this proposition. It correctly stated that plaintiff was entitled to recover net profit, which is the profits less all the expenses that would have been incurred. But if a court equates hypothetical expenses with actual expenses, plaintiff will not recover the expectancy when net profit is awarded. This would be like awarding the contractor in the previous example only the net profit of $5000 irrespective of how much the contractor had expended in performance.

32. Id. § 90. 33. Id. § 90 comment d. See infra note 49. 34. Fuller & Perdue, supra note 1, at 78 categorized expenditures in preparing for and performing the agreement as "essential" reliance and expenditures in preparing for collateral transactions as "incidental" reliance. 35. 98 Mont. 377, 39 P.2d 193 (1934). 36. Unless otherwise indicated, "the court" means the Supreme Court of Montana. 37. Smith, 98 Mont. at 385, 39 P.2d at 195. 38. Id. 39. A correct application of the court's principle may be found in Wyatt v. School Dist. No. 104, 148 Mont. 83, 417 P.2d 221 (1966). In awarding a teacher the salary lost when the school board terminated her contract, the court denied her moving expense, which she
The court in *Smith* recognized the possibility of a remedy based on the reliance interest alone when it stated that "[t]he expense incurred would have been a proper item of damages, had the plaintiff not sought to recover the net profits anticipated from prospective farming operations . . . ."40 Damages for reliance alone are likely to be sought where plaintiff is unable to prove lost profits and where the benefit was not conferred on defendant, thus ruling out expectancy and restitution damages.41 When this occurs, a court will not allow plaintiff’s reliance damages to exceed what plaintiff would have recovered for full performance. Thus defendant may generally prove that the agreement would have been a losing one to limit the expectancy and therefore the reliance damages as well.42

In *Wiseman v. Holt*,43 the court approved the recovery of reliance expenses which exceeded the expectancy in order to prevent the non-breaching party from losing money on the bargain. The case involved breach of an agreement to purchase real property, for which the statutory damages are the excess of the contract price over the value of the property.44 Under a literal reading of the statute, if purchaser breached an agreement to buy property at its market price, seller would be unable to recover expenses incurred in reliance on the sale. The California Supreme Court had rejected the literal reading of an identical statute.45 The court approved of this interpretation in *Wiseman*, holding that reliance damages were permissible to compensate the non-breaching party under general principles of damages.46

would have incurred even if defendant had performed. See Burnham, *supra* note 9, at 21. *Wyatt* may be distinguished from *Smith* in that the lost salary is a gross loss while the lost profit on the crop is a net loss.

41. The classic example is Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932), in which a fight promoter unable to prove profits with certainty sought expenses incurred. Reliance damages may also be awarded where the agreement is unenforceable. See infra text accompanying notes 115-27.
42. Fuller & Perdue, *supra* note 1, at 79 stated that “[w]e will not in a suit for reimbursement of losses incurred in reliance on a contract knowingly put the plaintiff in a better position than he would have occupied had the contract been fully performed,” but the “simple formula” does not do justice to their exposition on the subject at 75-80.
44. MONT. CODE ANN. § 27-1-315 (1983) provides:
The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him.
For the breach of an obligation arising from contract, the measure of damages,
Wiseman is an excellent illustration of the statutory neglect of reliance damages and the court's salutory recognition of broad principle. Regrettably, Wiseman was overruled in Whitney v. Bails.47 In Whitney, the court held that what is now section 27-1-315 of the Montana Code Annotated is the exclusive measure of damages for breach of an agreement to purchase real property.48 The court adopted the ruling in the course of overruling the broad exception to the statute under the facts of Wiseman. It is possible that a narrow exception, such as that recognized by the California court, might survive.

III. RELIANCE IN THE ABSENCE OF A CONTRACT

The Restatement of Contracts recognized that promises may be enforceable even in the absence of bargained-for consideration if the promisee reasonably relied on the promise and suffered a detriment. This principle is expressed in section 90 of the Restatement (Second) of Contracts:

**§ 90. Promise Reasonably Inducing Action or Forbearance**

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Under this section, a promise may be enforced to the extent only of the reliance interest rather than the expectation interest.49 The principle of reliance has had a tremendous impact on the law of

except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract.

47. 172 Mont. 121, 560 P.2d 1344 (1977).
48. Id. at 125, 560 P.2d at 1347. See Burnham, supra note 9, at 31-33.
49. See supra text accompanying notes 29-33. Under the RESTATEMENT rule, the reliance was apparently viewed as consideration. The remedy was therefore all or nothing: the expectancy if reasonable reliance was found, nothing if it was not. The RESTATEMENT (SECOND) rule is more flexible, but § 90 comment d persists in stating that the reliance creates a contract. This does not seem to follow. If there were a contract, expectancy damages would be available and performance by the promisee could be enforced. For example, A promises B $5000 toward law school expenses and in reasonable reliance on the promise, B spends $1500 on tuition. B has undertaken no enforceable obligation. And if A repudiates, B may enforce A's promise, if at all, only to the extent of $1500. Since these aspects of contractual obligations are absent, it would seem more accurate to state that § 90 provides for the enforcement of promises in the absence of a contract.
contracts since its appearance in the Restatement, yet that impact has been scarcely felt in Montana.\textsuperscript{50}

In \textit{Fiers v. Jacobson},\textsuperscript{61} defendant sold to a third party land which plaintiff had an option to purchase. When plaintiff attempted to exercise the option, defendant claimed that plaintiff was estopped by his oral statements that he would not exercise the option. The court cited Restatement section 90 among many examples of the doctrine of estoppel.\textsuperscript{62} The section is generally applied to estop a promisor from denying that the promise created a legal obligation when the promise is reasonably acted upon. In \textit{Fiers}, a legal obligation had already been created; the issue was whether the statements \textit{modified} the existing obligation.\textsuperscript{63} The court held that the statements "were not so definite and certain as to reasonably be expected to induce action on the part of the promisee."\textsuperscript{64} The conclusion presumes that the statements constituted a promise, but if they were not definite and certain they probably would not rise to the level of a promise.\textsuperscript{65} Therefore the question of reasonable reliance need not have been reached.

The requirement that the statements constitute a promise before the reliance principle is applicable was correctly analyzed in \textit{Keil v. Glacier Park, Inc.}\textsuperscript{66} In \textit{Keil}, plaintiff claimed breach of a written contract for the rental of a water pump. Defendant alleged that prior to the written agreement, plaintiff had bound himself either by an oral agreement or by a promise enforceable under Restatement section 90. The court held that the oral discussions were preliminary negotiations lacking the specific terms necessary to constitute a promise.\textsuperscript{67} Since this element of promissory estoppel was lacking, the court properly concluded that Restatement section 90 was not applicable.\textsuperscript{68}

Other Montana cases have utilized the concept without citing...
the Restatement. In Bronken's Good Time Co. v. J.W. Brown & Associates, the court affirmed a conclusion that defendant was liable for damages for termination of an exclusive distributorship agreement even though the agreement was terminable at will. Applying the "modern majority rule" that "such agreements are terminable at will only after a lapse of a reasonable time and on reasonable notice," the court upheld a finding that plaintiff was entitled to a binding agreement for a reasonable term, here two years. Plaintiff had made a substantial investment in the business in reliance on the agreement. Nevertheless, it seems arbitrary for a trial court to assign a particular term to the agreement and award expectancy damages for profits lost during that term. In many such situations there may be no profits. A more appropriate remedy might be reliance damages to the extent of plaintiff's investment.

Restatement (Second) section 90 represents an alternative to the formalistic bargain theory of consideration. As a policy matter, courts have increasingly recognized that reliance on an unbar-gained-for or illusory promise may call for a remedy. The possibilities for imaginative use of the doctrine are enormous. For example, employees have invoked the doctrine in unsuccessful efforts to prevent an employer from closing plants after the employer represented that it would not shut down the plants if employees worked to keep them profitable. And the city of Yonkers, New York sued United Technologies Corporation after the corporation closed a plant that was constructed with the help of sixteen million dollars in public funds.

IV. RESTITUTION IN THE ABSENCE OF A CONTRACT

As recognized in Restatement (Second) of Contracts section 344, restitution is a remedial interest of a contract promisee. In this context, where it is a source of remedial rights, principles of

59. [Mont. 661 P.2d 861 (1983)]
60. [Id. at 661 P.2d at 863]
61. [Id. See also Annot., 19 A.L.R.3d 196 (1968)]
62. [See, e.g., Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388, 391 (8th Cir. 1968)]
63. [See the many annotations in Restatement (Second) of Contracts, Appendix § 90 (1982)]
64. [Local 1330, United Steelworkers of America v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980)]
contract law are paramount. But restitution is also a branch of law dealing with obligations imposed in the absence of contract. In this context, where it is a source of primary rights, principles of unjust enrichment are paramount. In between these contexts are situations where there has been a contract, but the contractual duties have been held to be unenforceable, excused, or avoided. In this context, while restitution is apparently a source of primary rights, principles of contract law are nevertheless significant. This article examines restitution in all of these contexts, going from its application where there are no antecedent contractual rights, to where the antecedent rights are no longer applicable, to where the antecedent rights are served by the restitution interest. 66

At common law, general assumpsit developed as the action to be used where, in the absence of a contract (for which there was the action of special assumpsit), plaintiff claimed that there was a debt which defendant ought to pay. The “common counts” in this action included, among others, goods sold and delivered, money had and received, and work and labor performed. 67 In Moses v. Macferlan, 68 Lord Mansfield stated:

[T]his kind of equitable action, to recover money back, which ought not in justice to be kept, is very beneficial, and therefore much encouraged . . . .

In one word, the gist of this kind of action is, that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Today, the claim is known broadly as restitution, 69 more narrowly as quasi-contract or contract implied in law, 70 even more narrowly as quantum meruit or quantum valebant, 71 and somewhat

67. RESTATEMENT OF RESTITUTION 4-10 (1937).
68. 2 Burr. 1007, 1012 (1760).
69. Restitution may include claims for equitable relief such as specific restitution, equitable lien, and constructive trust, as well as money damages. See RESTATEMENT (SECOND) OF CONTRACTS § 345 (1981).
70. The fictions of “quasi-contract” or “implied contract” should be discarded. A money claim predicated on the restitution interest in the absence of contract is simply a claim for restitution.
71. Quantum meruit (“as much as he deserves”) and quantum valebant (“as much as they are worth”) were specific counts under the common law action of general assumpsit, used where money was due but where the exact amount was not ascertainable, as was required in the action for debt. While originally a procedural term, quantum meruit is gener-
anachronistically as assumpsit. This article will use the principle broadly, as stated in section 1 of the Restatement of Restitution:

§ 1 Unjust Enrichment. A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

While the adverb "unjustly" indicates that restitution is not available to remedy every enrichment, that element should not be equated with enrichment obtained by unlawful means. Identification of the appropriate application of the remedy requires case-by-case analysis. In fact, this is how the doctrine developed, with courts granting relief according to a general theory only later discovered by commentators.

This process of exploring the parameters of a slippery doctrine on a case-by-case basis has gone on in Montana. In Brown v. Thornton, plaintiff supplied building materials to the intervenors, whose house was mortgaged to defendants. The intervenors defaulted and the house was conveyed to defendants. Plaintiff allowed his mechanic's lien to lapse and failed to appear in the intervenor's bankruptcy proceedings, in which the debt was discharged. Plaintiff then sued defendants in restitution for the benefits conferred. The court stated that the equitable doctrine of unjust enrichment required that plaintiff "show some element of misconduct or fault of some sort on the part of the defendant, or that he was in some way taken advantage of." While this dictum embodies an overly restrictive view of the availability of restitution, the court correctly stated that "[t]he mere fact that defendants were benefited by plaintiff’s materials is not of itself sufficient to require defendants to make restitution therefor."

As the court recognized, the requirements for a claim for unjust enrichment lie within the bounds of mere benefit on the one hand and benefit obtained by misconduct on the other. While

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73. See Dawson, Restitution or Damages?, 20 Ohio St. L.J. 175 (1959).
74. The doctrine may arise in contexts other than the determination of substantive rights. In Iowa Mfg. Co. v. Joy Mfg. Co., __ Mont. ___, 669 P.2d 1057 (1983), one of the issues was the statute of limitations for an indemnity action, which the dissent characterized as an action based on restitution.
75. 150 Mont. 150, 432 P.2d 386 (1967).
76. Id. at 156, 432 P.2d at 390.
77. Id.
78. See Wade, Restitution for Benefits Conferred Without Request, 19 Vand. L. Rev. 1183 (1966). Wade summarizes the restrictions on restitution in this manner:
plaintiff in Brown did not exemplify the "officious intermeddler" who confers benefits on unwilling recipients.\textsuperscript{79} defendants' receipt of the benefit was not "unjust" where defendants had no opportunity to decline the benefit and there was no public policy supporting plaintiff's conferring of it.\textsuperscript{80} As between defendants and intervenors, plaintiff's claim against the intervenors was far stronger and was lost only because of his improvidence.

Failure of the parties conferring the benefit to secure their interests before claiming restitution was a major factor in Business Finance Co. v. Red Barn Inc.\textsuperscript{81} Plaintiff leased equipment to defendant which then traded its business to one Palmer. There was no express agreement between defendant and Palmer regarding use of the equipment, but when plaintiff sued defendant, defendant claimed Palmer was obligated in restitution. The court held that equitable relief would not be granted where defendant "failed to exercise reasonable prudence and diligence under the circumstances."\textsuperscript{82} The court did not elaborate, but apparently referred to the fact that where defendant and Palmer had entered into a complex business transaction, defendant should have paid more attention to the leased property. It was clear that defendant was aware that Palmer had the property, for it received—and ignored—frequent notices from plaintiff.

Frequently a claim for benefits conferred has been brought by a subcontractor against the owner of property when a prime contractor has defaulted. In those circumstances the owner has requested the services and is on notice of their receipt. Even then courts rarely grant relief, usually expressing the reasons in the form that the enrichment is not unjust. For example, the subcontractor could have secured payment through a mechanic's lien, the value of services in restitution could exceed the contract price, and the subcontractor accepted the risk of extending credit.\textsuperscript{83}

\textsuperscript{79} \textit{Restatement of Restitution} § 2 (1937).
\textsuperscript{80} As, for example, in the case of services to protect life and safety. \textit{See} \textit{Restatement of Restitution} § 116 (1937); Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907).
\textsuperscript{81} 163 Mont. 263, 517 P.2d 383 (1973).
\textsuperscript{82} \textit{Id.} at 267, 517 P.2d at 386.
In Kosmerl v. Barbour, 84 the court upheld a denial of plaintiff subcontractor's claim against defendant owner. The trial court found that the general contractor was solely responsible for paying this subcontractor even though defendant had paid other subcontractors. It was significant that the owner had fully paid the contract; this shifted the responsibility for payment to the general contractor. 85

V. Restitution When Contractual Obligations Are Unwound

When a contract is unwound because of application of the Statute of Frauds, impossibility of performance, mutual mistake, indefiniteness, or other situations in which the obligations are voidable or unenforceable, one party may have conferred a benefit on the other. 86 In this context, courts may apply principles of restitution to determine the extent to which retention of the benefits is "unjust." 87 Application of the doctrine may involve consideration of such contract principles as identification of the breaching party, allocation of risk, and fundamental fairness. 88

A court may declare rescission of a contract and restitution of benefits in the event of mistake. 89 In Quinn v. Briggs, 90 the court reversed a judgment awarding restitution of payments made under a contract for the purchase of a ranch. The trial court held that plaintiff was mistaken as to the tax consequences of the transaction, but the court reversed, holding that there was no mutual mistake where plaintiff had a duty to procure adequate advice and was not misled by defendant. 91 Rescission may be awarded only where the mistake is mutual. 92

A mutual mistake was found and careful consideration given

84. 180 Mont. 208, 589 P.2d 1017 (1979).
85. Id. at 213, 589 P.2d at 1020.
86. See Annotations, supra note 29, § 348; Restatement (Second) of Contracts § 370 (1981). Perillo employs the useful phrase "the unwinding of contracts" to cover all situations where contractual duties have been found to be unenforceable, excused, or avoided, attributing the phrase to J. Dawson, Unjust Enrichment 12 (1951). Perillo, supra note 66, at 1209 n.13.
87. See Annotations, supra note 29, § 488; Restatement (Second) of Contracts § 376 (1981).
91. Id. at 478, 565 P.2d at 302.
to restitution in *Berry v. Romain*. Plaintiff and defendant agreed on terms for the sale of an office building. Plaintiff sought rescission when he discovered that due to a title defect, defendant would not be able to provide a promised parking lot. Finding a mutual mistake as to a material part of the agreement, the court affirmed the restitution of payments made less an offset for certain of defendant’s expenses. No offset was allowed for fair rental value since the premises could not have been rented during the time prior to rescission.

In *Baldwin v. Stuber*, plaintiff and defendant executed an agreement for the sale of plaintiff’s barber salon. Ignoring the agreement, defendant entered into a lease with plaintiff’s lessor for plaintiff’s premises and plaintiff removed his furniture and fixtures. The trial court held that plaintiff was not entitled to recover for breach of contract because there was no meeting of the minds. On appeal, the court accepted that conclusion, but held that defendant must compensate plaintiff for the goodwill he received by occupying the same premises.

The court in *Baldwin* was troubled by the fact that its judgment allowed a recovery in restitution under a complaint alleging an express contract. But the court found exceptions to this rule in that a contract never came into existence, and the record showed unusual and equitable reasons for the recovery. While the result is correct, the principle is simpler. Plaintiff had conferred a benefit upon defendant under circumstances which made it unjust for defendant to retain the benefit. The court recognized this restitution interest by implication when it stated that “[i]t appears . . . that plaintiff has in fact lost a valuable asset without being compensated.” The only impediment to recovery was plaintiff’s pleadings. Under modern rules of pleadings, the impediment should have been removed. Defendant could not have

94. Although the court did not discuss the issue, these were apparently deducted as reliance expenses. See 2 G. PALMER, _THE LAW OF RESTITUTION_ § 128 (1978) [hereinafter cited as G. PALMER, _RESTITUTION_].
95. _Berry_, _Mont._ at _,_ 632 P.2d at 1132.
97. _Id._ at 505-06, 597 P.2d at 1138.
98. _Id._ at 507, 597 P.2d at 1139.
99. See _infra_ text accompanying notes 189-92.
100. _Baldwin_, 182 Mont. at 507, 597 P.2d at 1139.
101. None of the factors that might exclude restitutionary relief was present. See _supra_ text accompanying notes 73-77.
102. _Baldwin_, 182 Mont. at 507, 597 P.2d at 1139.
103. Perillo approaches the problem from another angle: “Are there reasons other
been surprised by this claim, which was encompassed by the contract claim and by the request for "other and further relief" in the complaint.104

When a contract is discharged because of supervening impossibility of performance,105 the restitution interest can be difficult to compute because the supervening act usually prevents full performance.106 In Smith Engineering Co. v. Rice,107 plaintiff contracted to build for defendant a refinery which was to produce from crude oil sixty percent gasoline containing no more than one-tenth of one percent sulphur. The refinery did not perform as promised. When plaintiff sought payment due, defendant claimed breach of contract. The federal district court held that plaintiff was in breach for failing to meet the agreed upon standards even though the standards were impossible for anyone to meet.108

The Ninth Circuit reversed, reasoning that by statute the impossibility voided the contract.109 The Montana Supreme Court had previously held that where a contract is void for illegality under the same statute, the beneficiary of the services rendered is required to make restitution to the other party.110 In Smith Engineering, although the contract price was $482,545, the court allowed a recovery in quantum meruit of $535,146.111 This appears to be the only case applying Montana law where the recovery in restitution exceeded the contract price.112 While such a recovery is al-

104. MONT. R. Civ. P. 8(f), 15(b), 54(c). See also Adams v. Chilcott, 182 Mont. 511, 517, 597 P.2d 1140, 1144 (1979) (citing Foy v. Anderson, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978)): "In addition to the specific relief prayed for in his complaint, respondent sought 'such other relief as to the Court may seem proper.' We note that courts have 'the power to grant complete relief under [their] equity power.'"

105. See Annotations, supra note 29, § 468; Restatement (Second) of Contracts § 377 (1981).

106. 2 G. Palmer, Restitution § 7.1.

107. 102 F.2d 492 (9th Cir. 1939), cert. denied, 307 U.S. 637 (1939).

108. Id. at 496-97. See Annot., 84 A.L.R.2d 12 (1962).

109. MONT. CODE ANN. § 28-2-603 (1983) provides: Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

110. Smith Engineering, 102 F.2d at 499 (citing Hill Co. v. Shaw & Borden Co., 225 F. 475 (9th Cir. 1915); Hicks v. Stillwater Co., 84 Mont. 38, 274 P. 296 (1929); Morse v. Bd. of Comm., 19 Mont. 450, 48 P. 745 (1897); State v. Dickerman, 16 Mont. 279, 40 P. 698 (1895)).

111. Id.

112. It is difficult to ascertain from the opinion the relationship between the contract price and plaintiff's damage claim. The trial decision was not reported and the issue of impossibility was first raised by the circuit court. Furthermore, plaintiff performed work
allowed in the majority of jurisdictions, it is usually not granted where plaintiff has completed performance. Moreover, the result compelled a defendant to pay more than the contract price for less than the contract performance. While the finding of impossibility avoids an attribution of fault, it would seem equitable to measure the recovery by the value of the benefit conferred, which must logically be less than the contract price.

When an agreement is found to be unenforceable, restitution is generally available for benefit conferred. In Kidder v. Harding, where plaintiff ranch hand worked for five months under an unenforceable agreement, he recovered the value of his services, expenses paid to defendant, certain reliance expenses, and the value of his property used by defendant. Deductions were made for the use of defendant's equipment and for goods received from defendant.

In Fink v. Doggett, during negotiations for the purchase of a ranch, plaintiff turned $2500 over to a real estate broker who turned it over to defendant. Plaintiff claimed that the $2500 was paid as a deposit with the understanding that no agreement would exist without a writing. Defendant claimed the money was a down payment forfeited by plaintiff's refusal to perform. In addition, defendant alleged he suffered a loss when plaintiff went into possession of the property and damaged the crops. The jury found that defendant was entitled to retain the $2500. The court held that the trial court had erroneously refused one of plaintiff's proposed jury instructions. Under the proposed instruction, if the jury found an agreement had been formed but was unenforceable because oral, plaintiff was entitled to recovery of the deposit less the crop loss.

While the Statute of Frauds provides that oral agreements beyond that called for in the contract in an effort to achieve the contract specifications; this work may have been the basis for the additional recovery. Id. at 492.

113. 2 G. PALMER, RESTITUTION § 7.5.
114. RESTATEMENT (SECOND) OF CONTRACTS § 377 (1981). Comment b states that "to the extent that the contract price can be roughly apportioned to the work done, recovery will not be allowed in excess of the appropriate amount of the price."
115. 2 G. PALMER, RESTITUTION § 6.1.
118. Id. at 326, 214 P.2d at 745.
119. Id. at 328, 214 P.2d at 745 (citing Helmes v. K. & M. Realty Co., 41 Ohio App. 322, 180 N.E. 210 (1931)).
120. Fink, 123 Mont. at 328, 214 P.2d at 745. The court cited what are now MONT. CODE ANN. §§ 27-1-311 and 27-1-317 (1983) as a basis for recovery of the losses.
121. MONT. CODE ANN. § 28-2-903(d) (1983).
for the sale of real property are “invalid,” it is not clear what effect this provision has on recovery in restitution on an agreement within the statute.\textsuperscript{122} In a minority of states, where an agreement within the statute is “void,” a party who refuses to perform, like plaintiff in \textit{Fink}, may recover in restitution.\textsuperscript{123} In the majority of jurisdictions, where an agreement within the statute is “unenforceable,” a party who would not recover if the agreement were enforceable may not recover where it is not.\textsuperscript{124} This fault principle prevents the Statute of Frauds from being used as a sword instead of a shield.

While \textit{Fink} suggests that Montana follows the minority rule, \textit{Lewis v. Peterson}\textsuperscript{125} urges the majority rule on the theory that the law should compel parties to live up to their agreements—even their unenforceable ones. In \textit{Lewis}, purchaser paid seller a $1000 down payment on an oral agreement to purchase real property and seller paid a broker $225. Purchaser then failed to carry out the transaction and sought restitution of the $1000. The court held that purchaser was “guilty of a breach of his contract” but granted relief from forfeiture because of his mental incapacity.\textsuperscript{126} Seller was allowed a credit for the $225; while the court did not explain the award, it must have been reliance damages.\textsuperscript{127} The court got off the track in \textit{Lewis} by finding that purchaser had breached a contract. To reach the same result, it should have treated the unenforceable contract as if it were an enforceable contract.

Concurring, Justice Angstrom criticized the majority for basing the result on what would have occurred with respect to an enforceable agreement. He claimed that seller was relying upon a defense—the oral sale of real property—which seller could not prove.

\textsuperscript{122} Annotations, supra note 29, § 355; Restatement (Second) of Contracts § 375 (1981).
\textsuperscript{123} 2 G. Palmer, Restitution § 6.2. The minority rule is also known as the “Wisconsin” rule after the leading case of Brandeis v. Neustadtl, 13 Wis. 142 (1860).
\textsuperscript{124} Id. See also Restatement (Second) of Contracts § 375 (1981).
\textsuperscript{125} 127 Mont. 474, 267 P.2d 127 (1954).
\textsuperscript{127} While the Wisconsin rule allows a seller to recover reliance expenses, a seller who refuses to perform should not recover them. The rule attempts to overlook fault, but it would be unfair to allow a defaulting seller to shift the expense of preparation for performance to buyer. See 2 G. Palmer, Restitution § 6.2, at 13-14.
Putting that defense aside, he would have allowed recovery because there was no consideration for the $1000 paid.\(^{128}\) The illogic of this approach is that not all payments made without consideration are recoverable, e.g., gifts.

The dilemma here is that one way or another courts must consider the "unprovable" agreement. If the court simply recognizes that defendant has been enriched by plaintiff, how can plaintiff prove that the benefit was not conferred officiously or as a gift? And how can defendant explain the expenses in reliance on the agreement, since this expenditure did not enrich plaintiff? Only through evidence of the oral agreement.\(^{129}\)

Proof of the agreement shows that plaintiff paid the money in the expectation of receiving some consideration. But if the only reason plaintiff did not receive the consideration was plaintiff's own refusal to perform, can the enrichment be said to be unjust? Most courts have resolved the problem by denying restitution to a defaulting purchaser under the unenforceable agreement just as under an enforceable agreement.\(^ {130}\)

This result was reached by implication in the recent case of Robertus v. Candee.\(^{131}\) Plaintiffs orally leased 1250 acres from defendant for three or four years under a crop share arrangement whereby plaintiffs would break the land and farm it at their own expense and pay defendant a one-quarter share of the crop. A few months later, a dispute arose. After plaintiffs had broken 1000 acres, disked 680, and planted 320, defendant terminated the agreement and harvested and sold the wheat, netting $26,180. The trial court held the lease unenforceable and awarded plaintiff $55,000 in restitution for the increase in the value of the land, three-quarters of the wheat crop, and the value of work, seed, and fertilizer.\(^ {132}\)

On appeal, defendant claimed that restitution was not applicable. The court held that it was, stating that "where one party repudiates a contract or breaches it by non-performance, the injured party may seek restitution of the unjust enrichment whether the Statute of Frauds applies or not."\(^{133}\) As it did in Lewis, the court seemed to state the paradox of breach of an invalid agreement.

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129. Perillo uses the problem of the Statute of Frauds to illustrate his thesis that the action for restitution is an action based on contract. *Perillo*, supra note 66, at 1215-16.

130. Restitution is not always denied a defaulting purchaser. See *infra* text accompanying notes 229-44.


132. *Id.* at ---, 670 P.2d at 541-42.

133. *Id.* at ---, 670 P.2d at 542.
This would make sense under the rule of Restatement (Second) of Contracts section 375, which treats defaults under contracts within the Statute of Frauds the same as those outside the statute, but that was not the court's position. The court declined to address the issue of the effect of the Statute of Frauds, finding that the breach gave plaintiff a right of rescission and restitution. While the result in this case would be the same under either theory, Robertus should have been treated as a case where contractual obligations were unwound when unenforceable under the Statute of Frauds rather than as a case of breach of contract.

VI. RESTITUTION DAMAGES FOR BREACH OF CONTRACT

A. Rescission

When a party has breached an enforceable agreement, the remedies available to the other party as plaintiff depend on whether or not the breach is material. If the breach is not material, plaintiff may elect remedies serving the reliance and expectation interests. Restitution is not available for non-material breach because plaintiff is not excused from performance and must confer the bargained-for benefit on defendant, less damages. If the breach is material, as an alternative to the other remedies plaintiff may seek restitution, i.e., compensation for the benefit conferred upon defendant. For example, A purchases from B for $10,000 a mobile home which turns out to be defective. If the defects are not material, A must still pay the purchase price but may deduct the cost of repair. If the defects are material, as an alternative to recovering the cost of repair, A may elect to recover the purchase price.

The remedy of restitution in the event of material breach is known as rescission. For a court to decree a rescission in the

134. Id. The court then treated restitution as a source of primary rights for purposes of computing damages. See infra note 203.

135. See Annotations, supra note 29, §§ 347, 350, 351, 353; Restatement (Second) of Contracts § 373 (1981); 5 A. CORBIN, CONTRACTS § 1104.


137. Under Mont. Code Ann. §§ 28-2-1701 to -1716 (1983), the judicial remedy of rescission is available in a number of other circumstances, including mutual consent of the parties and avoidance of the contract by one of the parties. Corbin would limit the concept of rescission to the mutual discharge of obligations by the parties. 5 A. CORBIN, CONTRACTS §
event of breach, it must determine that defendant’s breach is significant enough to justify protection of plaintiff’s restitution interest. Rescission in these circumstances can only be granted where the breach is material, plaintiff is excused from performance, and plaintiff desires compensation for the benefit conferred rather than damages. In granting the remedy, the court may require plaintiff to return any benefit received or may make any other equitable adjustment.

When a plaintiff requests rescission, the issue is often whether the breach is material, although the court may not frame it that way. In Leiman-Scott, Inc. v. Holmes, plaintiff sold defendants exclusive distribution rights to a product for $10,000 payable at $2000 per year. Defendants paid for two years and then defaulted. When plaintiff sued for the balance due, defendants raised breach of a noncompetition clause as a defense. The trial court, finding that breach of the noncompetition clause cost defendants $1500 in sales, dismissed the complaint.

On appeal, the court stated that “[the buyer] may rescind the contract and sue for a recovery of the money paid; but he cannot insist that the contract has been rescinded and yet recover on the contract.” That unwieldy statement simply means that restitution is available where there is a material breach of contract but not where there is an immaterial breach. In Leiman-Scott, because


139. For factors used in determining whether duties are discharged, see Restatement (Second) of Contracts § 242 (1981).

140. Return of the benefit conferred may be in the form of either money damages or in specie (specific restitution). See 5 A. Corbin, Contracts § 1107. The circumstances in which specific relief is available are, like specific performance itself, beyond the scope of this article.


On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation or restoration to the other which justice may require.

143. 142 Mont. 58, 381 P.2d 489 (1963).

144. Id. at 60, 381 P.2d at 490.

145. Id. at 61, 381 P.2d at 490 (quoting Advance-Rumely Thresher Co. v. Terpening, 58 Mont. 507, 511, 193 P. 752, 754 (1920)). Under the Uniform Commercial Code, the statement is untrue. A buyer may in some circumstances rescind and recover expectancy damages. See supra note 136.
plaintiff's breach was not material, defendants were not excused from performance and could not seek restitution.146

The issues involved in a claim for rescission were properly analyzed by the court in Compton v. Alcorn.147 Plaintiffs sought rescission of an agreement to purchase a mobile home. The court affirmed findings that plaintiffs had fully performed, that the defects were "so substantial and fundamental as to defeat the object of the parties in making the agreement," and that a rescission was warranted.148 In dissent, Justice Daly argued that both parties were in breach and that defendant's breach was not material.149

When a rescission is adjudged, the court may require the rescinding party to restore the consideration acquired from the other party.150 Under this equitable adjustment, the rescinding party may be required to pay for use of the property during the time of possession, for example, the rental value of land151 or depreciation of an automobile.152 But property can also appreciate, making restoration to the parties' previous positions more difficult. In Scott v. Hjelm,153 the court granted rescission of an oral agreement in which plaintiff gave defendant a $1000 down payment on the purchase of a mare and took possession of the mare. While in plaintiff's possession, the mare foaled and was gravid at the time of trial. The court affirmed the judgment awarding plaintiff return of the down payment plus $250 for the care of the mare and awarding defendant return of the mare with the unborn foal.154 Defendant claimed she was not returned to the status quo if plaintiff kept the foal, but the court stated that the trial court did not abuse its discretion since defendant got back what she originally had—a mare and an unborn foal.155 Dissenting, Justice Sheehy argued that defendant was not restored to the status quo, for the mare had lost breeding time while in plaintiff's possession.156

146. Leiman-Scott, 142 Mont. at 62, 381 P.2d at 491.
149. Id. at 237, 557 P.2d at 296-97.
150. See supra note 142.
152. In T&W Chevrolet v. Darvial, --Mont. --, 641 P.2d 1368 (1982), defendant was granted rescission but was not compelled to pay for use of the automobile. Cf. the Montana "Lemon Law," MONT. CODE ANN. §§ 61-4-501 to -507 (1983), which provides for "a reasonable allowance for the consumer's use" upon rescission in § 61-4-503(2).
154. Id. at ____, 613 P.2d at 1387-88.
155. Id. at ____, 613 P.2d at 1388.
156. Id. (Sheehy, J., dissenting).
Often the court has erroneously addressed the issue of "election of remedies" when a party seeks rescission. In Harrington v. Holiday Rambler Corp., the court stated that "a party may not pursue both an action for rescission and damages for deceit or misrepresentation." The court may have meant that a party may not recover both, but it makes sense to plead both. A plaintiff who can prove the breach is material will then be eligible for restitution, but a plaintiff who cannot prove the breach is material may still be eligible for damages.

When restitution is available, incidental reliance damages may also be recoverable. In Harrington, the court cited Fraser v. Clark as authority for the proposition that a party is not entitled to pursue both remedies. But the holding in Fraser is just the opposite. In Fraser, plaintiffs, sellers of a ranch, sued for breach of a purchase agreement. Defendants sought rescission on the grounds of fraud, restitution for improvements to the property and payments made, and expenses incurred because of plaintiffs' use of a pasture. The trial court, finding a material breach entitling defendants to rescind, awarded damages for the improvements and the expenses, less reasonable rental value for defendants' occupancy. On appeal, plaintiffs admitted that if rescission were proper, restitution for the improvements was proper, but argued that rescission and damages were incompatible remedies.

The court held that these remedies were not incompatible: "the damages for feeding cattle prior to discovery of the fraud are other than the mere loss of the bargain and are damages which were naturally and proximately the result of plaintiffs' fraud." In other words, recovery of those expenses did not give defendants the expectancy but restored them to the status quo. Nor did the award give them a double recovery. The expenses were incurred as an incidental expense of their attempt to perform.

157. 176 Mont. 37, 46, 575 P.2d 578, 583 (1978) (citing Fraser v. Clark, 137 Mont. 362, 376, 352 P.2d 681, 688 (1960)).
159. Harrington, 176 Mont. at 46, 575 P.2d at 583.
161. Id. at 373-74, 352 P.2d at 687.
162. Id.
163. Id. at 378, 352 P.2d at 689.
164. For example, if a party is injured by defective goods, return of the goods for a refund (i.e., rescission) does not bar a claim for damages for breach of the warranty. See 5A A. Corbin, Contracts § 1223.
While the court suggested that plaintiffs should have moved to compel defendants to make an election of remedies prior to appeal,\textsuperscript{165} the damage award would have been proper even in the face of the motion. The issue arises because of the conceptual distinction between restitution and reliance. Remedies serving the restitution interest compel defendant to restore benefits conferred on defendant while those serving the reliance interest compel defendant to pay for plaintiff's expenses, some of which may have benefited defendant and some third parties.\textsuperscript{166} Some commentators prefer to think of reliance in terms of restoring plaintiff to the status quo, which encompasses both interests.\textsuperscript{167} Most importantly, the concern should not be with pigeonholing the remedies but with compensating plaintiff for loss.

Circumstances may arise, however, in which the benefit conferred may exceed the bargained-for consideration. In that event, damages measured by the restitution interest may exceed the expectation measure. For example, A, a computer consultant who regularly bills at $50 per hour, agrees to write a program for B for a flat fee of $1000. If A fully performs the contract, A's recovery is $1000 irrespective of the extent of A's endeavors.\textsuperscript{168} But suppose B terminates the contract without cause after A has spent 25 hours and completed 75\% of the work?\textsuperscript{169} There are three possible measures of A's recovery on B's breach:

(a) $1250, the reasonable value of A's services (25 hours at $50/hour);
(b) $1000, the measure in (a), but with the contract price as a ceiling; or
(c) $750, the pro-rata portion of the contract price completed.

Under measure (a), A can recover more for part performance than for full performance; the theory here is that the contract, hav-

\textsuperscript{165} Fraser, 137 Mont. at 375-76, 352 P.2d at 687-88.
\textsuperscript{166} See supra Part I.
\textsuperscript{167} See Burrows, supra note 1, at 219-21. See also supra note 4.
\textsuperscript{168} RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981).
\textsuperscript{169} The example involves personal services rather than construction. The situation is unlikely to arise in a construction case because (a) the contractor will probably breach rather than perform when the cost of performance exceeds the contract price, and (b) the owner will probably accept the more valuable performance rather than breach. Nevertheless, the situation has arisen. See Palmer, The Contract Price As A Limit on Restitution for Defendant's Breach, 20 OHIO ST. L.J. 264, 270 n.26 (1959).

The example might not be applicable to services performed by an attorney. Several courts have held that an attorney's right to recover in restitution is limited lest the claim for fees restrict the client's right to discharge counsel without cause. See, e.g., Fracassee v. Brent, 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972); Annot., 54 A.L.R.2d 604 (1957) (non-contingent fee contracts); Annot., 92 A.L.R.3d 690 (1979) (contingent fee contracts).
ING BEEN MATERIALLY BREACHED, IS IRRELEVANT. SINCE A HAS ELECTED TO SUE NOT ON THE EXPECTATION INTEREST BUT ON THE RESTITUTION INTEREST, THE ONLY ISSUE IS THE VALUE OF A’S SERVICES.170 THIS MEASURE IS THE RULE IN THE MAJORITY OF JURISDICTIONS.171 IN MONTANA, PLAINTIFFS HAVE OFTEN SOUGHT RECOVERY UNDER THE RESTITUTION RATHER THAN THE EXPECTATION INTEREST, BUT THERE IS NO CLEAR INSTANCE WHERE THE RECOVERY IN RESTITUTION EXCEEDED THE CONTRACT PRICE.172 IT IS THEREFORE UNSETTLED WHICH RULE MONTANA WILL FOLLOW.

B. PLEADING RESTITUTION OR EXPRESS CONTRACT

While plaintiff’s choice between the restitution and expectation interests is a question of substantive law, the Montana court has too often treated it as a question of procedure, trying to find a pigeonhole into which to fit the case.173 Like most pleading problems, this one has its roots in common law. In an action in special assumpsit, plaintiff pleaded the contract. But in general assumpsit, plaintiff pleaded one of the common counts, such as quantum meruit. In such a case there might actually have been a contract, and reference was frequently made to it in the proof, but it could not be mentioned in pleading.174 In Montana, where plaintiff may have a claim either on an express contract or in restitution, the court has derived various rules from common law pleading:175

1. When a complaint alleges restitution, an express contract may not be proved. This rule is subject to two exceptions:

170. MONT. CODE ANN. § 28-2-813 (1983) PROVIDES:
WHEN A CONTRACT DOES NOT DETERMINE THE AMOUNT OF THE CONSIDERATION OR THE METHOD BY WHICH IT IS TO BE ASCERTAINED OR WHEN IT LEAVES THE AMOUNT THEREOF TO THE DISCRETION OF AN INTERESTED PARTY, THE CONSIDERATION MUST BE SO MUCH MONEY AS THE OBJECT OF THE CONTRACT IS REASONABLY WORTH.


172. SEE SMITH ENGINEERING Co. v. RICE, 102 P.2D 492 (9TH CIR. 1938), DISCUSSED SUPRA IN TEXT ACCOMPANYING NOTES 105-14.

173. CORBIN DECRIES THIS HARKING BACK TO ANCIENT PRACTICES:

5 A. CORBIN, CONTRACTS § 1102, AT 551.

174. PERILLO, SUPRA NOTE 66, AT 1215-16. THE SITUATION FITS PERILLO’S THESIS THAT RESTITUTION IS A CONTRACTUAL REMEDY.

175. PUETZ v. CARLSON, 139 MONT. 373, 378-80, 364 P.2D 742, 745-46 (1961).
(a) when a contract is fully performed, a complaint may allege restitution and the express contract is proof of the value of the services rendered;
(b) when defendant prevents full performance of an express contract, the express contract may be proved even though the complaint alleges restitution.

2. When a complaint alleges an express contract, restitution may not be proved.

Rule 1 was applied in Keneally v. Orgain.176 Plaintiff, a discharged commission salesman, claimed defendant, his former employer, owed him commissions earned prior to his discharge on the basis of restitution. But under plaintiff’s express contract, commissions were credited only if the goods were installed and invoiced during the term of employment. The court held that it was fatal for plaintiff to have brought a claim in restitution when he had an express contract.177 The decision can be explained as a matter of substantive law rather than procedure, for restitution is not available as a remedy where the contract has not been discharged.178

Rule 1(a) is illustrated by Falls Sand and Gravel Co. v. Western Concrete, Inc.,179 and Matos v. Rohrer.180 In Falls, plaintiff supplier of sand alleged that defendant’s promise of a price adjustment for increased costs in drying the sand modified their original agreement. The court implicitly barred proof of the alleged modification181 and treated the claim as one for restitution. In Matos, plaintiff builder sought to recover in restitution $17,000 over the ceiling price of a house he constructed for defendants. The court found that a contract to build a house on a “cost-plus” basis with a ceiling of $86,000 created an express contract to build the house for $86,000.182 In both cases, once the finder of fact found an express contract, the court followed the substantive rule that on full performance, the contract price is the limit of plaintiff’s recovery.183

177. Id. at ___, 606 P.2d at 129.
178. See supra text accompanying notes 135-36.
181. While the court cited the agreement as “parol,” it would be barred not as parol evidence but as a subsequent oral modification of a written agreement under what is now MONT. CODE ANN. § 28-2-1406 (1983). Falls, 270 F. Supp. at 505.
182. Matos, ___ Mont. at ___, 661 P.2d at 448.
183. See supra text accompanying note 168. See also Gyrion v. Sanders, 168 Mont. 214, 541 P.2d 348 (1975) (agreement that repairs would not exceed insurance recovery of $20,000); St. James Hosp. v. Dept. of Social and Rehabilitational Services, 182 Mont. 80, 595 P.2d 379 (1979) (agreement that reimbursement for Medicaid services would not exceed

https://scholarship.law.umt.edu/mlr/vol45/iss1/2
In *Puett v. Carlson* 184 plaintiff contractor sued defendant owner in restitution and proved an express contract at trial. Defendant claimed the variance surprised the defense, for prevention of performance under an express contract is not an issue in restitution. The court held that the complaint sufficiently advised defendant "that there may have been an express contract." 185 Because there was a finding that defendant had breached, Rule 1(b) applied. Although the court did not make clear how damages were computed, since plaintiff alleged performance of services worth $4408 and defendant alleged an express contract price of $6309, the court did not have to reach the issue of whether the contract price is a ceiling on recovery in restitution.

In *DeFord v. Wansink*, 186 plaintiff alleged damages for both breach of contract and restitution arising from an agreement to raise cattle for defendant. The trial court found a material breach and determined plaintiff's recovery in restitution "without regard to the part of the written contract performed." 187 This language did not mean that the recovery was allowed irrespective of whether the entire agreement was performed. Rather, it meant that the contract was not divisible and performance of the first half, when the calves were younger, was more valuable than performance of the second half. 188 This is a thoughtful and non-mechanical application of the principle of restitution.

The danger of a court's attempting to shape the facts to fit a rule rather than carefully analyzing them is illustrated by *Survco v. Kenyon Noble Ready-Mix*, 189 in which the trial court applied Rule 2 where it was not applicable. Plaintiff performed a series of photographic services for defendant, sending defendant two bills which were paid and a third which was not. The trial court, stating that "it is fatal to plaintiff's cause to allege and prove an express contract and to attempt to recover judgment based upon a theory of quantum meruit because the terms of the contract limit such recovery to the agreed price for the services rendered," apparently limited plaintiff's recovery to the express contract, represented by the first two bills. 190 On appeal, the court suggested that plaintiff was suing in quantum meruit and using the express contract as

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184. 139 Mont. 373, 364 P.2d 742 (1961).
185. Id. at 381, 364 P.2d at 746.
187. Id. at 493, 452 P.2d at 76.
188. Id.
190. Id. at ——, 664 P.2d at 945.
proof of the reasonable value of the services. 191

Both explanations appear strained. A sounder explanation is that no express contract was created because the parties had not agreed on a material element, namely price. Plaintiff’s claim was therefore properly in restitution for the value of goods and services provided at defendant’s request. The court recognized this in its conclusion, which is a laudable statement of the restitution interest: “[Defendant] has accepted the benefits of the contract by obtaining prints of all the aerial photograph projects. We find [he] must be required to pay for that which he has received and that the District Court’s limitation of Survco’s recovery was in error.” 192

Examination of the rules applied in this line of cases indicates that they can be reduced to three well-known propositions, two substantive and one procedural:

(1) a party may not recover more than the contract price for full performance;193
(2) where there has been material breach, the non-breaching party may recover in restitution;194
(3) a party may not prove a claim at trial that takes the other party by surprise.195

A court may place the plaintiff on the horns of a dilemma if its procedural requirements are not flexible. On the one hand, a court may find claims for breach of contract and restitution incompatible and compel an election. On the other hand, if the contract is found unenforceable at trial, plaintiff’s only claim for relief is in restitution.196 A pleader would be well-advised to plead both claims; while a court may not grant relief on both claims, it should not compel an election until necessary to prevent confusion.197

VII. RESTITUTION FOR A BREACHING PARTY

A. The Competing Interests

When calculating the expectation interest, the court is extremely careful to insure that parties recover no more than their losses.198 This principle is codified in Montana Code Annotated

191. Id. at —, 664 P.2d at 946.
192. Id.
193. See supra text accompanying notes 179-83.
194. See supra text accompanying notes 184-88.
196. See supra text accompanying notes 86-88.
197. See Restatement (Second) of Contracts § 378 (1981).
198. See Burnham, supra note 9, at 11-13.
section 27-1-303:

No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides unless a greater recovery is specified by statute. 199

Yet the court is not as careful to limit recovery when a non-breaching party has received part performance from the breaching party. A non-breaching party who keeps the benefits of performance and also recovers the expectancy will in fact profit from the breach.

The issue—an ancient one in contract law 200—is whether a breaching party is entitled to restitution for benefits conferred on the non-breaching party before a material breach. 201 In addressing this issue, it is assumed that before restitution for the breaching party is considered, the non-breaching party’s interests will be protected. For example, A agrees to build a house for B for $50,000 of which $5000 represents A’s profit. After A has completed half the work at an out-of-pocket cost of $28,000, A abandons the contract. There are two considerations prior to determining A’s recovery. First, A’s recovery is subordinate to B’s expectancy damages. Thus, if the cost of completion is $30,000, A’s recovery can be no more than $20,000 in order to give B the expectancy: a house at a cost of $50,000. Second, A’s recovery is limited to the pro-rata portion of the total contract price that A’s performance represents. Thus, if the cost of completion is $20,000, A’s recovery can be no more than $25,000 (half of the $50,000 contract price). 202 As between the two parties, the benefit of the favorable cost of completion should go to the non-breaching party rather than the breaching party.

Furthermore, in order to minimize the benefit, the measure of damages in restitution for a breaching party may differ from the measure for a non-breaching party. For example, A agrees to build a wall for B for $5000. A spends $5000 to build ninety percent of the wall and B breaches. When A is the non-breaching party, A’s

199. Curiously, the only citation of MONT. CODE ANN. § 27-1-303 (1983) is in Roundup Cattle Feeders v. Horpestad, 184 Mont. 480, 603 P.2d 1044 (1979), which did not follow it. The non-breaching party in Horpestad received not only the benefit of the bargain but the benefit of the breaching party’s part performance. See infra text accompanying notes 212-219.

200. See 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1473 (1970); 5 A. CORBIN, CONTRACTS § 1123.


202. If there were no completion, A’s recovery should not include profits, for A is recovering on the basis of restitution and not expectancy. See Nordstrom & Woodland, Recovery By Building Contractor in Default, 20 Ohio St. L.J. 193, 214 (1959).
recovery is measured by the value of the services performed. On the other hand, if A spends $5000 but builds the wall so defectively that there is no substantial performance, A's recovery in restitution may be measured by the value of the benefit to B, which may be considerably less than A's expense. If these considerations are taken into account before awarding restitution, expectancy damages fully compensate the non-breaching party and the breaching party does not benefit from the breach.

Montana has on occasion denied restitution to the breaching party. In *Riddell v. Peck-Williamson Heating and Ventilating Co.*, plaintiff contracted to perform construction work for defendant for approximately $11,500. Under the facts as found, plaintiff stopped work without cause and claimed $9300 in restitution. The court found that the claim was for partial performance of an indivisible contract. Courts have divided over whether to award restitution to the breaching party in such a situation. In the leading case of *Britton v. Turner*, the New Hampshire Supreme Court allowed recovery to an employee who had performed nine and a half months of a twelve-month contract before breaching, reasoning that it would be unfair to allow one to keep without payment a benefit that could not be returned. The court in *Riddell* disapproved *Britton*, stating that morality may compel payment for a benefit received but the law did not. The court was concerned that under such a rule parties would violate their agreements and courts would enforce agreements that were never made. Defendant

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203. See supra note 170. In Robertus v. Candee, Mont., 670 P.2d 540 (1983), the court regarded breach of an agreement unenforceable under the Statute of Frauds as a breach of contract. See supra text accompanying notes 131-34. For purposes of damages, the court cited Restatement (Second) of Contracts § 371 (1981) for the proposition that the measure was either the cost of labor and materials or the value of enhancement, but not both, as the trial court had incorrectly ruled. The court went on to limit the award to that part of the enrichment that was unjust. Here the court confused restitution in the absence of contract with restitution for the breach of contract. Consistent with its holding that restitution was a proper remedy for this breach of contract, the court meant simply that plaintiffs should recover only the value of the benefit they conferred.


206. 27 Mont. 44, 69 P. 241 (1902).

207. Id. at 58, 69 P. at 243.

208. 6 N.H. 481 (1834).

209. This situation would not arise today in an employment context, as modern wage statutes require more frequent pay periods, but it could arise with an independent contractor. See Mont. Code Ann. § 39-3-204 (1983).

210. *Riddell*, 27 Mont. at 60, 69 P. at 244.
was allowed to retain the $9300 worth of work without payment.\textsuperscript{211}

The same result was reached in a more modern case. In \textit{Roundup Cattle Feeders v. Horpestad},\textsuperscript{212} when cattle prices fell, plaintiff defaulted on a cattle-feeding joint venture and sought restitution for the feed it had furnished defendant. On his counterclaim, defendant was awarded expectancy damages—the cost of moving and feeding the cattle. The court held that plaintiff was not entitled to restitution because the contract was not severable and plaintiff’s breach was willful.\textsuperscript{213} The concepts of severability and willfulness are often employed to make fine distinctions that ultimately determine whether or not recovery will be allowed. These factors were termed “emotional” by Judge Clark of the Second Circuit in a concurring opinion in \textit{Harris v. The Cecil N. Bean},\textsuperscript{214} a case cited in \textit{Horpestad}: “I endorse Professor Corbin’s view that we ought to reject these emotional grounds of decision and do what he demonstrates the courts tend to do in reality, namely, look to whether real benefit has been conferred or not.”\textsuperscript{215}

In \textit{Horpestad}, the court stated that plaintiff was not entitled to equitable relief on the grounds that a wrongdoer may not take advantage of his own wrong, citing \textit{Mitchell v. Pestal} as authority. In \textit{Mitchell}, plaintiff sought to quiet title to land which it conveyed before it acquired title. The court held that title inured to the grantee.\textsuperscript{217} In equity, the court would not allow the grantor to retain a consideration where the grantee received nothing. In \textit{Mitchell}, the party which committed the wrong also retained a benefit, while in \textit{Horpestad} the party which committed the wrong (assuming, as the court does, that breach of contract is a wrong)

\textsuperscript{211} Id.
\textsuperscript{212} 184 Mont. 480, 603 P.2d 1044 (1979).
\textsuperscript{213} Id. at 486, 603 P.2d at 1048.
\textsuperscript{214} 197 F.2d 919 (2d Cir. 1952).
\textsuperscript{215} 197 F.2d at 922 (Clark, J., concurring). Corbin is worth quoting at length: Such terms as “wilful,” “deliberate,” “intentional,” “fraudulent,” are epithets characterizing the quality of the conduct of one guilty of a breach of contract and expressing the mental attitude of the court. There is a high degree of discretion and flexibility in the remedies that are available for the purposes of justice; within this degree, both verdict and judgment are inevitably affected by the court’s opinion of conduct. Nevertheless, this very discretion and flexibility should operate so that punishments are not “cruel and unusual,” so that “the penalty may fit the crime.” Not even a “wilful” wrongdoer is an outlaw; and the enrichment of even an injured man may become unjust. In refusing compensation or restitution to a wrongdoer, his conduct may properly be described epithetically; but the fact that it may be so described does not automatically decide the case and make it unnecessary to weigh and give effect to other factors therein.
\textsuperscript{216} 123 Mont. 142, 208 P.2d 807 (1949).
\textsuperscript{217} Id. at 150-51, 208 P.2d at 811.

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suffered a detriment. The case is analogous only if compensating a party for services provided is equated with obtaining an advantage for that party.

The court also supported its decision in *Horpestad* by citing Montana cases disapproving of willful breach. If recovery were allowed in these circumstances, the court stated, the law would "encourage parties to be delinquent in the performance of their solemn engagements; whereas its policy is to compel observance of them." While this view may reflect a Western disposition to regard one's word as one's bond, traditional contract theory holds that in the interest of economic efficiency, persons should be able to breach their contracts as long as they pay damages. The traditional theory makes sense only on the assumption that the vast majority of contracts will be honored and that breach is an aberration. If the premise were reversed, society could not function, so the court is right that there is value in deterrence lest breach become more frequent.

But the court's view could promote the nonperformance it intends to deter. If A, a contractor, came to B early on in performance and said, "I'm not sure I'm going to be able to finish my performance," B's entreaties to perform would fall on deaf ears if A knew that the further performance would become a gift to B. In short, A would have an incentive to quit performance at the earliest possible sign of trouble rather than attempt full performance.

**B. Application to Contract for Deed**

The doctrine of restitution for a party in breach could assist in resolving the thorny problems that arise from forfeiture under a contract for deed. Under the standard contract for deed, on breach by purchaser, seller takes possession and keeps all payments made as liquidated damages. Seller thereby also recaptures the equity acquired by purchaser through principal payments and appreciation. This could result in a harsh forfeiture which a court may wish to prevent. For example, P contracts to purchase a house from S for $60,000, payable $10,000 down and $50,000 on contract at ten percent over twenty-five years. After five years, when P has made payments totaling over $37,000, P defaults. S repossesses,

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218. *Horpestad*, 184 Mont. at 486, 603 P.2d at 1048 (quoting Waite v. C. E. Shoemaker & Co., 50 Mont. 264, 278, 146 P. 736, 739 (1915)). In *Waite*, the expectancy damages exceeded the restitution requested by plaintiff, so the principle would not be applied.


keeps all payments made, and sells the house for its present value, $90,000. Even after deductions are made for the rental value, any inflation factor, and all of S’s expenses, S has still profited considerably from the breach. Under these circumstances, a court could reject the liquidated damages provision as a penalty and honor purchaser’s demand for restitution of monies paid in excess of seller’s damages.\footnote{221}

This principle has been recognized in Montana. In \textit{Cook-Reynolds Co. v. Chipman},\footnote{222} defendant defaulted on a contract for deed but sought to return the property in exchange for the return of payments made less deductions for the use of the property and damages. The trial court awarded judgment to plaintiff. On appeal, the court reversed, holding that

\begin{quote}
as a matter of fact the actual damages sustained by the vendor in this case are less in amount than the moneys paid by the purchaser, and if . . . the vendor can retain the excess, then most assuredly the purchaser will have incurred a loss in the nature of a forfeiture authorized by the terms of the contract, by reason of his failure to comply with the same.\footnote{223}
\end{quote}

The court invoked the anti-forfeiture statute\footnote{224} to relieve plaintiff of his forfeiture, finding that his failure to make payments was not negligent, willful, or fraudulent.\footnote{225} In fact, defendant had attempted to continue performance even in the face of default, allegedly at plaintiff’s urging, and those payments only increased his loss on default.

The principle of restitution stated so firmly in \textit{Cook-Reynolds} was gradually eroded until it was fully swept away by \textit{Estabrook v. Sonstelie},\footnote{226} which made clear that a forfeiture should be relieved not by payment of all damages, as in \textit{Cook-Reynolds}, but by payment in full under the contract. Where there is an acceleration

\begin{footnotes}
\footnotetext{221}{While it has not yet directly confronted a harsh forfeiture, the court seems to favor the seller’s demand for specific performance to other remedies on default. \textit{See SAS Partnership v. Schafer}, \footnote{222}Mont. \footnote{223}, 653 P.2d 834 (1982). If the seller seeks this remedy and does not resell the property, the buyer may not be entitled to restitution. \textit{Restatement (Second) of Contracts} § 374 illustration 1 (1981).}
\footnotetext{222}{47 Mont. 289, 133 P. 694 (1913).}
\footnotetext{223}{\textit{Id.} at 300, 133 P. at 698.}
\footnotetext{224}{\textit{Mont. Code Ann.} § 28-1-104 (1983) provides:
Whenever by the terms of an obligation a party thereto incurs a forfeiture or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.}
\footnotetext{225}{\textit{Cook-Reynolds}, 47 Mont. at 302-03, 133 P. at 698-99.}
\footnotetext{226}{86 Mont. 435, 284 P. 147 (1930).}
\end{footnotes}
clause, this would mean payment of the full contract price. The court noted that this was the interpretation given the same statute in California.

Yet California later changed its view. In Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, plaintiff purchased property for $18,000, paying $2000 down with the balance to be paid later. On plaintiff's default, defendant sold the property for $20,000. Justice Traynor, writing for the majority, recognized that since defendant had not suffered a loss from the breach, allowing it to keep the down payment as damages would be to enforce a penalty. Under earlier California cases, courts had invoked the equivalent of the Montana anti-forfeiture statute to allow plaintiffs to recover payments made. But in those cases, the breach had been found not to be willful, so the anti-forfeiture statute permitted relief for the purchaser. Justice Traynor had to find an independent basis for recovery for a willfully breaching party. He recognized the illogic of a penalty that becomes more severe as the performing party comes closer to full performance:

> If a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty.

Imposition of a penalty is inconsistent with the prohibition on punitive damages in contract actions and with the requirement that liquidated damages bear a reasonable relationship to actual damages. Therefore, Justice Traynor reasoned, the damages in Freedman were neither compensatory nor enforceable as liquidated damages. They therefore must be punitive. The court then awarded restitution of the $2000 in order to avoid the imposition

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228. Estabrook, Mont. 440, 284 P. at 149.
231. Freedman, 37 Cal. 2d at 20, 230 P.2d at 632.
of punitive damages.\textsuperscript{234}

The doctrine of restitution for a breaching purchaser has been firmly established in California. In \textit{Bensinger v. Davidson},\textsuperscript{235} purchaser under a contract for deed defaulted after making a down payment of $10,000 and monthly payments of $17,200. For purposes of deciding whether purchaser had a claim to which a federal tax lien would attach, the court held that purchaser had a claim under California law for unjust enrichment.\textsuperscript{236} After deducting the fair rental value and expenses occasioned by the sale and default from the $17,200 paid, the court found unjust enrichment in the amount of $1639.\textsuperscript{237} This principle was recognized in Montana in \textit{Greenup v. United States},\textsuperscript{238} in which Judge Jameson held that the government in enforcing a tax lien "should be given an opportunity to allege and prove the amount of any unjust enrichment."\textsuperscript{239}

While courts make passing reference to the significance of willful breach, in fact the distinction between willful and non-willful breach is rarely the basis for decision.\textsuperscript{240} The determination is so subjective as to justify Corbin's characterization of "emotional."\textsuperscript{241} And it is unfair. The moral quality of the breaching party's behavior does not alter the benefit the non-breaching party has received.\textsuperscript{242} Under broad principles of restitution, that party should pay for the benefit conferred.\textsuperscript{243} In an article advocating restitution for breach of a contract for deed, Corbin established principles by which courts can decide objectively whether restitution is appropriate:

The cases denying restitution can ... be justified on one or more of the following grounds:

\begin{enumerate}
\item \textit{Freedman}, 37 Cal. 2d at 21, 230 P.2d at 633.
\item 147 F. Supp. 240 (S.D. Cal. 1956).
\item The court stated that "we think the California cases rest on the principle of 'unjust enrichment' and the policy of the law against forfeitures." \textit{Id.} at 247. The California statutes construed in those cases all have Montana counterparts.
\item \textit{Id.} at 249.
\item \textit{Id.} at 333.
\item One of the most famous statements is that of Justice Cardozo in \textit{Jacob & Youngs, Inc. v. Kent}, 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921), \textit{rearg. denied}, 230 N.Y. 656, 130 N.E. 933 (1921): "The willful transgressor must accept the penalty of his transgression." Yet when defendant moved for reargument on the grounds that in this instance plaintiff had not performed as agreed, the court stated that the express condition had not been materially breached.
\item \textit{See supra} note 215.
\item A fine discussion of this issue may be found in Nordstrom & Woodland, \textit{supra} note 202, at 211-14.
\item \textit{See supra} text accompanying note 73.
\end{enumerate}
The defendant has not rescinded and remains ready and willing to perform, and still has a right to specific performance by the vendee; (2) the plaintiff has not shown that the injury caused by his breach is less than the instalments received by the defendant; (3) there is an express provision that the money may be retained by the vendor and the facts are such as to make this a genuine provision for liquidated damages, and not one for a penalty or forfeiture. If the facts are such that none of these justifications exists, restitution should be allowed.244

VIII. Restitution Under Illegal Contracts

The fundamental principle of restitution is that absent special circumstances a party ought to be compensated for benefits conferred.246 This principle has been extended to give restitution to a breaching party.248 But does the principle extend to restitution for performance under an illegal contract?

The general rule is that there is no recovery.247 In McPartlin v. Fransen,248 the trial court, having found illegal an agreement to transfer a radio station license without consent of the Federal Communications Commission, ordered an allocation of payments between the parties. On appeal, the court reversed, stating that "the law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them."249

The rule stated in McPartlin must be applied flexibly, for leaving the parties where they are could render injustice, especially if one of the parties is not a wrongdoer.250 In Builders Supply Co. v. City of Helena,251 plaintiff entered into a contract with the mayor of Helena to supply the city with $20,920 worth of water pipe. By billing for lots of less than $500, the parties evaded the bid laws which applied only to contracts in excess of $500.252 The city paid all but $6271 before the deal was scrutinized. Plaintiff

245. See supra text accompanying notes 67-73.
246. See supra text accompanying notes 200-05.
249. Id. at ___, 648 P.2d at 731 (quoting authorities cited in McManus v. Fulton, 85 Mont. 170, 182-83, 278 P. 126, 131 (1929)).
250. 2 G. Palmer, Restitution § 814.
252. The laws concerning municipal contracts are now found in Mont. Code Ann. §§ 7-5-4301 to -4309 (1983). Plaintiff's argument in Builders Supply that the multiple purchases were not a violation of the statute would now be foreclosed by Mont. Code Ann. § 7-5-4305 (1983), which was adopted in 1947.
acknowledged that the agreement was illegal and therefore void, but sought the $6271 in restitution. The court cited the general rule in cases of illegal contracts that the courts will not assist the parties but will leave them where they are. The court nevertheless reasoned that specific restitution—return of the actual property—would be appropriate where possible, but buried pipe need not be dug up and the reasonable value need not be paid.

Restoration of the property is a more generous remedy than many courts have allowed in similar circumstances, for it contradicts the rule that the courthouse door is closed to transgressors. Although the court did not so distinguish it, Builders Supply could fall under the exception to the general rule that arises when refusal to enforce an illegal agreement could frustrate the policy that refusal is designed to serve. For example, if the city had paid more than the price for which the city could have purchased the pipe, it would not serve the public if the courthouse door was closed to the city's attempt to recover the overcharge.

In dicta, the court recognized that restoration of the unused property and acceptance of the balance at the contract price would defeat the purpose of the bid statute, which is to insure that goods are purchased at the lowest price. The court stated that if the property was available for return, the city would have to restore only an amount which, added to the payments made, would equal the price for which the city could have purchased the pipe. This is an application of the principle that when restitution is demanded by a breaching party, the measure of the recovery is the benefit to the non-breaching party.

Restitution was also allowed under an illegal contract in Larry C. Iverson, Inc. v. Bouma. Plaintiff corporation sold a farm on a contract for deed to defendants when the officers of the corporation did not have authority to authorize the sale. The sale was

254. Id.
255. McManus, 85 Mont. at 182-83, 278 P. at 131.
257. In Grady v. City of Livingston, 115 Mont. 47, 141 P.2d 346 (1943), a closely-divided court denied a taxpayers' suit in similar circumstances.
259. See supra text accompanying note 204. Here, the city had made payments of $14,649 for pipe which it could have obtained for $15,453. If the pipe had been available for return to plaintiff, the city would have had to return only $804 worth ($15,453 - $14,649). Id. at 385, 154 P.2d at 277.
261. The officers violated MONT. REV. CODES ANN. §§ 15-908 and 15-909 (1947), which were repealed when Montana adopted the Montana Business Corporation Act, MONT. CODE

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voided by the trial court, which restored the farm to the newly reconstituted corporation and made various adjustments between the parties. Defendants were allowed two-thirds of each crop harvested and the value of improvements to the property, but were denied income from mineral rights. On appeal, the corporation urged that defendants should not be allowed to keep their gains under an illegal contract, but the court upheld the award of the crop share "if for no other reason than it was fair and equitable."²⁶² The court also reduced the award for improvements from their value to their cost. As a general rule a party is not entitled to restitution for improvements in these circumstances, for the enrichment is not unjust where the party makes the improvements with knowledge of its questionable title, but the court awarded the cost in equity and because plaintiff in its pleadings sought limitation of recovery to cost.²⁶³ The gas and oil income was denied, for defendants lacked authority to enter contracts exploiting land they wrongfully possessed.²⁶⁴

In McPartlin, the performance of the agreement was illegal. In that instance a court may readily find that it will not intercede where the public is not affected. But in Larry C. Iverson, Inc., the performance itself was not illegal but occurred under a contract illegally obtained. Courts have had difficulty deciding whether to allow restitution in this situation. For example, if an agent of seller bribes a purchaser to order goods, is purchaser excused from paying for the goods?²⁶⁵ Perhaps where there is an independent sanction against illegally obtaining the agreement, such as criminal penalties for bribery, restitution should be allowed. But if there is no sanction against obtaining the contract illegally, as in a shareholders' derivative suit, refusal to allow the wrongdoers to obtain the fruits of the illegal act may be appropriate.

IX. Conclusion

The theory of contract damages is designed to achieve maximum economic efficiency. In this theoretical model, a party is under no compulsion to perform. The only consequence of breach is that damages become payable. A party therefore contemplates breach with the goal of minimizing economic loss, asking whether

²⁶² Larry C. Iverson, Inc., Mont. at —, 639 P.2d at 61.
²⁶³ Id.
²⁶⁴ Id. at —, 639 P.2d at 61-62.
breach will cost more than performance, and acting in accordance with the answer. 266

For example, A agrees to build a house for B for $50,000. A begins performance and when half the house is built, A has spent $25,000, which B has paid. A predicts that complete performance will cost $50,000; A will be paid $50,000 by B, but will realize no profit. To predict the cost of breach, A estimates the losses payable. B will be entitled to the expectancy: what B would have had if the contract had been performed. If C can complete for $28,000, B must pay C $28,000 and A $22,000 to obtain the expectancy: a house for $50,000. Since B has paid A $25,000, B may recover $3000 from A to achieve this result. 267

Having predicted the losses payable on breach, A will then determine the gains realizable. These might include alternative profitable projects and more efficient use of capital. If the gains exceed the damages payable to B, breach will benefit A and will not harm B. For example, if A can earn a profit of $5000 on another project, A can pay B the $3000 occasioned by the breach and still net $2000. Efficient distribution of economic effort will have been facilitated. 268

A's decision-making will be facilitated by the rules governing the extent of damages recoverable. A must decide whether, in addition to liability for B's loss of the "benefit of the bargain," there will be additional liability for consequential damages. The rule of foreseeability, in stating that B may recover only the losses which A could have foreseen at the time of contracting, allows A to factor in those losses when contemplating breach. 268 The rule of certainty limits B's proof to insure that B does not benefit from the breach. 270 The rule of avoidable consequences prevents B from recovering losses that could have been prevented. 271 Alternatively, the parties might have liquidated the damages for breach. These damages will also be limited, for the clause will not be enforced if

266. The classic statement of this viewpoint is found in Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897): "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."

267. The example assumes restitution for a breaching party. The issue is usually mooted by progress payments.

268. RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, at 100 (1981) states the theory with less than a ringing endorsement: "This traditional response is not without its shortcomings. . . . However, the main thrust of the preceding economic analysis lends some support to traditional contract doctrine in this area."

269. See Burnham, supra note 9, at 4-11.

270. Id. at 11-18.

271. Id. at 18-20.
it is too far removed from the actual damages.\textsuperscript{272} Finally, the award of transaction costs—the expenses incurred by the non-breaching party in resolving the dispute, such as attorneys’ fees, expenses, and loss of use of money—will be restricted to amounts below actual cost.\textsuperscript{273}

The thesis of a previous article was that the transaction costs are so significant that the scheme does not function according to the theoretical model.\textsuperscript{274} Because of the limitations on proof, on the extent of damages, on recoverable costs, and on collection, the award of damages will in fact not compensate the non-breaching party. Knowing this, the breaching party may manipulate the situation. For example, A may offer B $1000 to satisfy the $3000 claim. If B’s estimated transaction costs exceed $2000, as a rational economic person B will accept the offer. B has not received the expectancy and A has benefited from the breach. Various reforms were suggested to redress this imbalance.\textsuperscript{275}

Courts have not been unmindful of this problem, but the solutions have generally addressed not the transaction costs, which are often dictated by statute,\textsuperscript{276} but other assumptions of the economic model.\textsuperscript{277} In addition to zero transaction costs, the economic model assumes that compelling performance of obligations is not a goal of contract law, that the motive for or “willfulness” of breach is not significant, and that punitive damages are not appropriate for breach of contract.\textsuperscript{278}

There is, however, a tension between the constraints of the traditional model and the reality of the fact situations seen every day in the courtroom where compensation for loss does not occur. Faced with the inadequacy of the remedial system, it is no wonder that judges occasionally attempt to compel the performance of obligations, emphasize the willfulness of breach, or find punitive damages appropriate. It is the reversal of such traditional contract constructs that has led at least one writer to predict “The Death of Contract,”\textsuperscript{279} with compensation for the breach of voluntary obliga-

\textsuperscript{272} Id. at 41-43.
\textsuperscript{273} Id. at 44-47.
\textsuperscript{274} Id. passim.
\textsuperscript{275} Id. at 50-51.
\textsuperscript{276} Id. at 44-49.
\textsuperscript{277} There are exceptions. In Foy v. Anderson, 176 Mont. 507, 580 P.2d 114 (1978), the court affirmed an award of attorneys’ fees in the absence of statutory authority or agreement of the parties in order to minimize the transaction costs of the defendant.
\textsuperscript{278} Restatement (Second) of Contracts ch. 16, at 100 (1981). The economic model also presumes money damages is an adequate substitute for specific performance.
tions merging with the tort system. The undesirability of this practice is not that contract should be kept free of "foreign" influences, but that no doctrine should be applied on an ad hoc basis.

Before resorting to such measures, attorneys and courts should recognize the wealth of possibilities available in the principles of reliance and restitution. The conservatizing measures of the expectation interest should give way to the reliance and restitution interests when remedies serving those interests would fully compensate a party. Restitution has long been a stepchild of the law, slipping through the cracks of the curriculum, unrecognized in the statutes, neglected in the digests. Yet the doctrine has developed sufficient flexibility along with sufficient particularity to guide its application in most situations. Greater recognition of these doctrines, along with modern liberal pleading, may assist attorneys and courts in achieving a more satisfactory system of damages in contract actions.

280. See supra note 10.