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## THE NECESSITY OF CONFERRING A BENEFIT FOR RECOVERY IN QUASI-CONTRACT

In *Coleman Engineering Co. v. North American Aviation, Inc.*,<sup>1</sup> the plaintiff sued for breach of a contract for the construction of missile trailers. The plaintiff, Coleman, had submitted a bid for the job based on its interpretation of specifications set by the defendant, North American. The defendant's engineers filed the bid without reading it. Coleman was then notified that it was the successful bidder, five "go-ahead" telegrams were sent, and work was begun. Subsequently a controversy arose over the height of the payload center of gravity. Because of the discrepancy between the specifications and Coleman's interpretation of them, much of the work already completed had to be changed, raising the cost substantially over the original bid price. Meetings were scheduled to negotiate a price adjustment, but meanwhile, at the request of one of the defendant's engineers, Coleman continued working. When the parties eventually failed to agree upon a satisfactory price adjustment, North American awarded the contract to another firm.

The majority of the court affirmed the trial court's decision that the defendant had breached a valid contract. Chief Justice Traynor, with Justice Mosk concurring, dissented,<sup>2</sup> taking the position that some material terms were too vague and that others had been left to future negotiation. According to the dissent, the parties had failed to form a valid contract upon which damages could be based.<sup>3</sup> But the chief justice would have granted recovery to the plaintiff on the basis of restitution in quasi-contract.<sup>4</sup> Recovery on that basis would have been contrary to the general rule in California<sup>5</sup> and other jurisdictions.<sup>6</sup> It is repeatedly stated that the basis of recovery in restitution is the unjust enrichment of the defendant at the plaintiff's expense.<sup>7</sup> Some benefit must be conferred upon the defendant or he simply has not been unjustly enriched. In *Coleman* the plaintiff had expended some \$250,000 on the construction of the trailers, but these expenditures had neither enriched nor benefited the defendant in the usual sense because the trailers were never delivered.

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<sup>1</sup> 65 Cal. 2d 396, 420 P.2d 713, 55 Cal. Rptr. 1 (1966).

<sup>2</sup> *Id.* at 410, 420 P.2d at 723, 55 Cal. Rptr. at 11.

<sup>3</sup> *Id.* at 418, 420 P.2d at 728, 55 Cal. Rptr. at 16.

<sup>4</sup> *See id.* at 420, 420 P.2d at 729, 55 Cal. Rptr. at 17.

<sup>5</sup> *See, e.g.,* Challenge Cream & Butter Ass'n v. Royal Dutch Dairies, 212 Cal. App. 2d 901, 908, 28 Cal. Rptr. 448, 452 (1960); Major-Blakeney Corp. v. Jenkins, 121 Cal. App. 2d 325, 340, 263 P.2d 655, 664 (1953).

<sup>6</sup> *See, e.g.,* Bogan v. Finn, 298 S.W.2d 311, 314 (Ky. 1957); Henrikson v. Henrikson, 143 Wis. 314, 324, 127 N.W. 962, 966 (1910); RESTATEMENT OF CONTRACTS § 348 (1932); Annot., 59 A.L.R. 604 (1929).

<sup>7</sup> *City of Vernon v. Southern Cal. Edison Co.*, 191 Cal. App. 2d 378, 393, 12 Cal. Rptr. 701, 711 (1961); *Bellanca Corp. v. Bellanca*, 53 Del. 378, 383, 169 A.2d 620, 623 (1961); *Estate of Phillips*, 10 Misc. 2d 714, 716, 173 N.Y.S.2d 632, 635 (Sur. Ct. 1958); *Bill v. Gattavara*, 34 Wash. 2d 645, 648, 209 P.2d 457, 459 (1949).

Chief Justice Traynor argued that in some cases involving personal service contracts the plaintiffs have been awarded the reasonable value of their services, on a *quantum meruit*, without regard to whether those services benefited the defendants.<sup>8</sup> Personal service contracts do not represent a universal exception to the general rule that a benefit must have been conferred upon the defendant,<sup>9</sup> but courts have been less reluctant to grant recovery in those cases than they have been when the services were incidental to the construction of a finished product.<sup>10</sup> Traynor sees no reason for a distinction between the two types of cases and, as in *Coleman*:

[W]hen two parties mistakenly believe that a contract exists between them, but the agreement is too uncertain and indefinite to be enforced, the one rendering performance . . . at the request of the other should receive reasonable compensation therefor without regard to benefit conferred upon the other.<sup>11</sup>

He maintains that such a rule would place the loss where it belongs, *i.e.* on the party whose request induced performance.<sup>12</sup>

The dissent in *Coleman* may indicate a forthcoming change in the law in California.<sup>13</sup> It certainly indicates a recognition that restricting recovery in quasi-contract to only those instances involving unjust enrichment is often too harsh.

The purpose of this note is to examine the reasons why unjust enrichment is the sole basis for recovery in quasi-contract, to explore the possibilities of broadening that basis, and to determine if a valid reason exists for a distinction between personal service contracts and contracts for the manufacture of a finished product.

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<sup>8</sup> 65 Cal. 2d at 419, 420 P.2d at 728-29, 55 Cal. Rptr. at 16-17; see *Minsky's Follies, Inc. v. Sennes*, 206 F.2d 1 (5th Cir. 1953); *Williams v. Dougan*, 175 Cal. App. 2d 414, 346 P.2d 241 (1959); *Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1928); *People's Nat'l Bank v. Magruder*, 77 Fla. 235, 81 So. 440 (1919); *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909); *Abrams v. Financial Serv. Co.*, 13 Utah 2d 343, 374 P.2d 309 (1962); *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 P. 860 (1912).

<sup>9</sup> *Rotea v. Izuel*, 14 Cal. 2d 605, 95 P.2d 927 (1939), *criticized in* 28 CALIF. L. REV. 528 (1940); *Bristol v. Sutton*, 115 Mich. 365, 73 N.W. 424 (1897); *cf.* *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913); *Taulbee v. McCarty*, 144 Ky. 199, 137 S.W. 1045 (1911); *Henrikson v. Henrikson*, 143 Wis. 314, 127 N.W. 962 (1910).

<sup>10</sup> *Dowling v. McKenney*, 124 Mass. 478 (1878); *Anderson Forge & Mach. Co. v. Sterling Motor Co.*, 201 Mich. 429, 167 N.W. 988 (1918); *Manning Mfg. Co. v. Miller Bros.*, 87 Vt. 455, 89 A. 479 (1914).

<sup>11</sup> 65 Cal. 2d 396, 420, 420 P.2d 713, 729, 55 Cal. Rptr. 1, 17 (1966).

<sup>12</sup> *Id.*

<sup>13</sup> See *Palmer v. Gregg*, 65 Cal. 2d 657, 422 P.2d 985, 56 Cal. Rptr. 97 (1967). It is significant that the court made special mention of *Coleman*, distinguishing it from the principal case. In *Palmer* the plaintiff sued for services performed for the decedent. The lower court had awarded the plaintiff the cost of a gardener whom she had hired to care for her own home while she was away caring for the decedent. The supreme court disallowed that award, stating: "The rule espoused in the dissenting opinion of Chief Justice Traynor . . . is inapplicable because, in contrast to the present case, the expenditures in *Coleman* were made at the request of the obligor North American." *Id.* at 661 n.1, 422 P.2d at 987 n.1, 56 Cal. Rptr. at 99 n.1.

### Historical Background<sup>14</sup>

It has been suggested that the requirement of a benefit for restitutionary recovery is due to purely historical reasons<sup>15</sup> and is the result of an accident of early development rather than sound judicial reasoning.

The early English common law was extraordinarily conservative with its "persistence of archaic reverence for form and of scholastic methods of interpretation."<sup>16</sup> The development of equity was necessary to fill in the gaps left by the rigid limitations within which the law courts were operating. An injured plaintiff, unable to fit his claim within the bounds of a specific writ, could bring the case before a chancellor who was not handcuffed by "form and . . . scholastic methods of interpretation."<sup>17</sup>

Although it has been said that "[t]he law of restitution should not lightly be presumed to be past the age of child-bearing,"<sup>18</sup> it was one of the earliest remedies granted in Chancery.<sup>19</sup> The first cases did not establish the principle that restitution was based upon the defendant's unjust enrichment.<sup>20</sup> As will be explained later,<sup>21</sup> exactly when that principle became established is not clear. More important than the principle upon which these cases were based, was the fact that the courts were looking to the plaintiff's claim and not to the form of the pleading.<sup>22</sup> An injured plaintiff was being restored to his original position, not because the defendant had been unjustly enriched but because the equities of the situation demanded it.

Quasi-contract, however, developed in the law courts from the action of *assumpsit*.<sup>23</sup> As more and more plaintiffs were taking their cases before the chancellors in order to avoid the difficulties of the forms of pleading, and because of the necessity of proving a *quid pro quo* to establish debt, the law courts began to realize that new remedies at law were needed. Ames suggests that the jealousy of the growing jurisdiction of the chancellors was a potent influence in the growth and expansion of *assumpsit*.<sup>24</sup> Law needed this new form of action based on equitable principles to compete with equity.

*Assumpsit* was originally an action in tort but by a "natural transition" came to be regarded as an action *ex contractu*.<sup>25</sup> The

<sup>14</sup> See generally P. WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 121-46 (1931) [hereinafter cited as WINFIELD]; Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888) [hereinafter cited as Ames].

<sup>15</sup> 28 CALIF. L. REV. 528, 530 (1940) citing Ames 53.

<sup>16</sup> Ames 53.

<sup>17</sup> *Id.*

<sup>18</sup> R. GOFF & G. JONES, *THE LAW OF RESTITUTION* 14 (1966).

<sup>19</sup> See RESTATEMENT OF RESTITUTION Introductory Note to pt. 1, at 5 (1937); Ames 14.

<sup>20</sup> See Ames 14.

<sup>21</sup> See text accompanying notes 33-35 *infra*.

<sup>22</sup> See cases cited in Ames 14 nn. 1 & 3.

<sup>23</sup> See W. KEENER, *QUASI-CONTRACTS* 14 (1893).

<sup>24</sup> Ames 14, citing Y.B. 21 Edw. IV 23, pl. 6, said: "Fairfax, J., . . . advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery."

<sup>25</sup> Ames 15.

"natural transition" was probably due to several factors, one of which was the fact that liability in tort did not survive the wrongdoer.<sup>26</sup> At first the action could only be brought on an express promise, but in 1603, in *Slade's Case*,<sup>27</sup> an *indebitatus assumpsit* was allowed as a remedy on a contract genuinely implied from the facts.<sup>28</sup>

It was not without a struggle that *indebitatus assumpsit* was stretched to include contracts implied by law.<sup>29</sup> Quasi-contract, using equitable principles, did not become established as a popular remedy until Lord Mansfield's decision in *Moses v. Macferlen*<sup>30</sup> in 1760: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract . . ." <sup>31</sup> He goes on to say, "[t]his kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money *ex aequo et bono*, the defendant ought to refund . . ." <sup>32</sup>

The exact limits of quasi-contract, through its early development, have been difficult to establish.<sup>33</sup> The two phrases, "natural justice" and "*ex aequo et bono*" (in justice and fairness), according to Winfield, were a source of confusion in one direction and difficult to apply in another.<sup>34</sup> They are not clear guidelines, but it appears that Mansfield meant that they were only to apply when the defendant held money belonging to the plaintiff. Most cases decided after *Moses v. Macferlen* fit into that category.<sup>35</sup> The defendant held something of value, either money or chattels, that in equity and good conscience belonged to the plaintiff.<sup>36</sup> The obvious conclusion was that quasi-contract was based on the fundamental principle that one man ought not to be unjustly enriched at another man's expense. Two English writers have summarized the establishment of the criterion:

Historical accident is an unsatisfactory basis for classification and, to arrive at a satisfactory description of quasi-contract, jurists have been forced to search for a predominant principle which will enable them to reject a minority and unify the majority of the claims enforced by these forms of action. This principle is widely accepted

<sup>26</sup> *Id.*

<sup>27</sup> 76 Eng. Rep. 1074 (K.B.).

<sup>28</sup> WINFIELD 124.

<sup>29</sup> *Id.* at 125.

<sup>30</sup> 97 Eng. Rep. 676 (K.B.).

<sup>31</sup> *Id.* at 678.

<sup>32</sup> *Id.* at 680.

<sup>33</sup> WINFIELD 116: "[T]he limits of quasi-contract are not so much untraced as untraceable." See also W. KEENER, QUASI-CONTRACT 7 (1893).

<sup>34</sup> WINFIELD 128.

<sup>35</sup> See text accompanying note 37 *infra*.

<sup>36</sup> One writer has noted that the English judges, because of the doctrine of *stare decisis*, necessitating defined rules of law, failed to recognize natural law completely, ". . . and so a judge was assumed to have no mandate, in the absence of *consensus* or *delictum*, to create law. Especially must he avoid any resort to fundamental moral principles, since these, even if they were valid, were deemed to be beyond the scope of jurisprudence. It followed that in quasi contract one had to be able to imply a real promise to repay money or restore a benefit before the law would offer redress." O'Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2, 5 (1956).

to be *Unjust Enrichment*.<sup>37</sup>

### Personal Service Contracts

The dissent in *Coleman* relied heavily on a small group of cases that have disregarded the requirement of a benefit. In order to do justice, the courts in those cases found it necessary to avoid a strict application of the doctrine that the defendant must have been enriched. In *Williams v. Dougan*<sup>38</sup> the plaintiff brought an action to recover the reasonable value of services he had performed in caring for animals placed in his custody by the defendant. The defendant contended that since the animals had been left homeless by the death of their owner and did not belong to the defendant, the plaintiff's services had conferred no benefit upon her. The court held that the defendant's request was sufficient to imply a promise to pay for the reasonable value of the services. As to the absence of a benefit the court said, "[a]lthough the question of the direct benefit flowing to the promisor is one of evidence to be considered in determining whether the law implies an agreement, it is not controlling."<sup>39</sup> Treating the presence of a benefit as of evidentiary significance only is a more rational approach to finding the proper solution for a particular case. Rather than restricting recovery to those cases in which the requirement is met, the courts should be more flexible by considering the presence or absence of a benefit as only one of several determining factors. In *Williams* the defendant, being under no duty to care for the animals, was not benefited by having someone else care for them, but she did request the plaintiff's services and must have known that he expected compensation for his troubles. Had the defendant not wished to be held financially responsible she could have turned the animals over to the proper public agency. In light of all these factors the decision seems fair and proper.

The Utah Supreme Court in *Abrams v. Financial Service Co.*<sup>40</sup> held that the prospective vendor of a house and lot could recover for certain alterations made on the house at the defendant's request. The contract of sale was unenforceable because the parties had failed to obtain a Federal Housing Administration appraisal. Financial Service Co. recovered the value of its services in spite of the fact that the improvements were made on its own property and in no way enriched the defendant. *Kearns v. Andree*,<sup>41</sup> decided in Connecticut, reached the same conclusion on similar facts, stating:

The basis of that [implied promise] is that the services have been requested and have been performed by the plaintiff in the known expectation that he would receive compensation, and neither the extent nor the presence of benefit to the defendant from their performance is of controlling significance.<sup>42</sup>

As in *Williams*, the court in *Kearns* recognized that no benefit existed

<sup>37</sup> R. GOFF & G. JONES, *supra* note 18, at 4.

<sup>38</sup> 175 Cal. App. 2d 414, 346 P.2d 241 (1959).

<sup>39</sup> *Id.* at 418, 346 P.2d at 244.

<sup>40</sup> 13 Utah 2d 343, 374 P.2d 309 (1962).

<sup>41</sup> 107 Conn. 181, 139 A. 695 (1928).

<sup>42</sup> *Id.* at 187, 139 A. at 697.

but disregarded that fact and placed more importance on the request. Professor Corbin approves of the *Kearns* decision.<sup>43</sup> He notes that the basis of recovery was neither damages for breach nor unjust enrichment, but just as those rules were made in older cases, when a new and different problem arose the court was justified in extending former remedies to fit the new situation.

An earlier Utah case, *Fabian v. Wasatch Orchard Co.*,<sup>44</sup> took a different approach. The defendant had orally granted to the plaintiff the exclusive right to sell the former's produce for a period of 3 years. The plaintiff made some sales but the defendant actually lost money. It could not be said that the defendant was enriched, but rather than disregarding the absence of a benefit the court employed the fiction that the request and the plaintiff's compliance constituted that benefit.<sup>45</sup> The result is proper but the use of "legal" or "implied" benefit has been criticized.<sup>46</sup> The decision is given support by the *Restatement of Restitution* provision as to what constitutes a benefit: "A person confers a benefit upon another if he . . . performs services beneficial to or at the request of the other."<sup>47</sup>

Regardless of the method used, the above decisions illustrate the flexibility of the judicial system in finding a suitable remedy that avoids harsh or inequitable results.<sup>48</sup>

Unfortunately there are cases involving personal service contracts which have adhered to the strict requirement of a benefit and, by not allowing recovery on a *quantum meruit*, have placed the entire burden upon the plaintiff. In *Rotea v. Izuel*<sup>49</sup> the defendant had asked the plaintiff to perform certain services for the defendant's sister, an invalid. The defendant had orally promised to pay for these services out of his estate. Finding the contract unenforceable because it did not satisfy the Statute of Frauds,<sup>50</sup> the court also denied recovery in quasi-contract because it considered that the benefit to the defendant was only an incidental one.<sup>51</sup> The satisfaction the defendant obtained in having his request complied with was insufficient to raise an obligation to pay for the services. The net result of the decision was that the defendant had received the very act he desired and had been relieved of the moral obligation to care for his sister without incurring any expense. The plaintiff, who had performed valuable services, was left without a remedy.

*Bristol v. Sutton*,<sup>52</sup> decided in Michigan, involved an emancipated boy of 15 who had returned home to help his father with the farm on the faith of an uncle's oral promise to provide for the boy by will. Since the direct benefit of the boy's services went to the father, recovery against the uncle's estate was denied.<sup>53</sup> Here again the

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<sup>43</sup> 3 A. CORBIN, CONTRACTS § 599, at 599 n.22 (1960).

<sup>44</sup> 41 Utah 404, 125 P. 860 (1912).

<sup>45</sup> *Id.* at 410, 125 P. at 862.

<sup>46</sup> 26 MICH. L. REV. 942, 943 (1928).

<sup>47</sup> RESTATEMENT OF RESTITUTION § 1, comment b (1937).

<sup>48</sup> 3 A. CORBIN, *supra* note 41.

<sup>49</sup> 14 Cal. 2d 605, 95 P.2d 927 (1939).

<sup>50</sup> *Id.* at 607, 95 P.2d at 929.

<sup>51</sup> *Id.* at 612, 95 P.2d at 931.

<sup>52</sup> 115 Mich. 365, 73 N.W. 424 (1897).

<sup>53</sup> *Id.* at 368, 73 N.W. at 426.

defendant had received the performance he had bargained for and yet was not required to pay.

In both the *Rotea* and the *Bristol* cases the services were performed for a third person but upon the defendant's specific request. *Bristol* was decided 30 years before the *Restatement of Restitution*, but *Rotea* came down thereafter and failed to take cognizance of the provision making the request sufficient to satisfy the benefit requirement.<sup>54</sup> Had the courts in the above two decisions been willing to accept the proposition that the request constituted the benefit, or had they considered the presence or absence of a benefit as only evidence to be weighed with other factors, the harsh results could have been avoided. What is needed is either a more liberal approach to the requirement of a benefit or a new rule with a broader basis for recovery. The latter is the better solution, since it would provide for a more uniform application and would dispense with the necessity of resorting to fictions.<sup>55</sup>

### Unjust Enrichment or Unconscionable Loss

It is submitted that there should be a dual basis for recovery in quasi-contract: the prevention of either an unjust enrichment of the defendant or an unconscionable loss to the plaintiff.<sup>56</sup> Attention should be focused on the equities of the case, or the grounds for relief, rather than on the form the benefit assumes.<sup>57</sup> With this approach the presence of a benefit,<sup>58</sup> the request by the defendant, the expectation of payment on the part of the plaintiff, and the knowledge of that expectation on the part of the defendant all become matters of evidence<sup>59</sup> to be considered by the court in determining whether the gain or loss was an unjust one and on whose shoulders

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<sup>54</sup> See text accompanying note 47 *supra*.

<sup>55</sup> "One may disagree that the straining of logic to feign a contract is a 'more specific and therefore less vague inquiry than to ask is it fair that the defendant should make a payment to the plaintiff,' . . . and may well consider that the disadvantages attendant on the law being influenced by rival philosophies of justice are slight, compared to the disadvantages of a common law inhibited by antiquated fictions in its capacity to expand." O'Connell, *supra* note 36, at 9.

<sup>56</sup> This is the rule in situations where the plaintiff's property has been wrongfully converted. He may recover in restitution even against an innocent converter who has received no net benefit, the theory being that an unjust loss to the plaintiff is avoided. RESTATEMENT OF RESTITUTION § 128, comment f (1937).

<sup>57</sup> J. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 23 (1951).

<sup>58</sup> Roman law, the origin of the principle of unjust enrichment, did not require a benefit in some situations. The French Civil Code recognizes the doctrine of unjust enrichment in only four specific situations under quasi-contractual remedies. See Newman, *The Cleft: The Similarity of Fundamental Doctrines of Law Which Underlies Their Conceptual Formulation in Different Legal Systems*, 18 HASTINGS L.J. 481, 525 (1967). Even where unjust enrichment is the basis, the French judges have more discretion in that the enrichment need not be directly at the plaintiff's expense. F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 159 (1953).

<sup>59</sup> Cf. *Williams v. Dougan*, 175 Cal. App. 2d 414, 418, 346 P.2d 241, 244 (1959).

the burden should rest. This rule facilitates placing the loss on the party who was at fault.<sup>60</sup>

The Kentucky decision in *Boone v. Coe*<sup>61</sup> well-illustrates the necessity of a change in the requirements for recovery in quasi-contract. In that case the defendant had orally promised to lease certain land to the plaintiff if the latter would move his family from Kentucky to Texas, enter upon the land and cultivate crops for one year. The plaintiff incurred great expense in moving his family and belongings but when he got to Texas the defendant repudiated the agreement. In an action to recover the moving expenses, a demurrer to the plaintiff's petition was sustained because those expenditures had not benefited the defendant. Again, it was the Statute of Frauds that precluded an action upon the contract.<sup>62</sup> While it is well-settled that the Statute is no defense to suits on contracts implied in law,<sup>63</sup> the necessity of a benefit and the court's inability to find one prevented the plaintiff from recovering in quasi-contract.<sup>64</sup> If the court had instead been willing to imply a contract in law to prevent unconscionable injury to the plaintiff, the Statute of Frauds would have been inapplicable. While it might be argued that a more liberal rule for recovery in quasi-contract would defeat the purpose of the Statute, the purpose of the Statute is to prevent fraud rather than to foster it.<sup>65</sup>

The fact that the expenditures made by the plaintiff in *Boone* were in preparation for performance makes the case analogous to those involving contracts for the manufacture of a product, as in *Coleman*. In both types of cases the expenditures or services are merely incidental to full performance. Because with personal service contracts the service is the complete act requested, it has been easier for the courts to find a "legal" or "implied" benefit,<sup>66</sup> or to disregard the requirement altogether.<sup>67</sup> It might be that the natural tendency is to be more sympathetic toward the individual laborer, therefore the courts consider the moral obligation to pay stronger where personal services are involved. But these seem to be inadequate reasons for making a distinction between the two types of cases, as to grounds for recovery. The moral obligation is just as strong in any case where the plaintiff might suffer an unconscionable injury at the hands of the defendant. In both *Boone* and *Coleman* the expenses incurred and the services performed, although not the

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<sup>60</sup> See *Coleman Eng'ring Co. v. North Am. Aviation, Inc.*, 65 Cal. 2d 396, 420, 420 P.2d 713, 729, 55 Cal. Rptr. 1, 17 (1966) (dissenting opinion), discussed in text accompanying note 10 *supra*.

<sup>61</sup> 153 Ky. 233, 154 S.W. 900 (1913).

<sup>62</sup> *Id.* at 239, 154 S.W. at 903.

<sup>63</sup> *Beard v. Melvin*, 60 Cal. App. 373, 426, 140 P.2d 720, 723 (1943); see *Dondero v. Aparicio*, 63 Cal. App. 373, 378, 218 P. 608, 609 (1923); 23 CAL. JUR. 2d, *Statute of Frauds* §§ 30, 53, 76 (1955); Annot., 101 A.L.R. 923, 931 (1936); cf. *Anderson v. Stansburg*, 38 Cal. 2d 707, 715-16, 242 P.2d 305, 310 (1952); *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 604, 53 Cal. Rptr. 25, 33 (1966).

<sup>64</sup> 153 Ky. at 239, 154 S.W. at 903.

<sup>65</sup> See *Huey v. Frank*, 182 Ill. App. 431, 435-36 (1913).

<sup>66</sup> See 26 MICH. L. REV. 942, 943 (1928).

<sup>67</sup> See, e.g., *Huey v. Frank*, 182 Ill. App. 431 (1913).

essence of the agreements, were consequences of the defendant's request and the plaintiff's reliance on a supposed contract. It is therefore equitable to compel the defendant to restore the plaintiff to his original position.

### Conclusion

The well-settled rule that a benefit must have been conferred upon the defendant by the plaintiff in order to recover in quasi-contract has produced undesirable results. To avoid such results some courts have either disregarded the requirement of a benefit or have used a fictional benefit to grant relief. This relaxation of the rule has been confined to cases on personal service contracts.

There is no reason, other than historical accident, for unjust enrichment being the only grounds for recovery in quasi-contract. Nor is there a reasonable basis for distinguishing personal service contracts from contracts for the manufacture of a product in formulating a rule of recovery.

It is suggested that by broadening the basis of quasi-contractual recovery to include the prevention of unconscionable injury of the plaintiff, equitable results might be reached in a more forthright manner. The elements of benefit, request, expectation of payment, and knowledge of the plaintiff's expectation of payment would all be factors to be considered by the court in determining the defendant's liability.

Professor Corbin has remarked: "Judges like all other men, find it difficult to escape from the mental habits and procedural ruts of the past."<sup>68</sup> But not all judges fit into that category. Chief Justice Traynor has taken the course prescribed by Lord Atkins: "When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."<sup>69</sup>

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<sup>68</sup> 5 A. CORBIN, *supra* note 41, § 1102, at 459 n.2.

<sup>69</sup> *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1, 29.

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