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IMPROVEMENTS IN THE LAW OF RESTITUTION

*Edwin W. Patterson**

The law of restitution is one of those quiet backwater areas of the law whose problems, however earnestly debated among legal scholars, have never caused legislators and politicians to tremble in fear of defeat at the next election. This body of legal doctrines has to do principally with the troubles of careless and ignorant people who make mistakes, of gullible people who are defrauded, and of shiftless people who change their minds, or suffer "hard luck," and default in the performance of their contracts. In short, it has to do with the "affairs of insignificant persons" which, as Professor Eugen Ehrlich acridly remarked, have often not been properly attended to by the legal profession because they are regarded as unremunerative and trivial.¹ These are the claims that end in unreported decisions; the sparsity of official reports on many problems of this area is in striking contrast with the teeming case law of other "private-law" areas. Partly because of this reason, and the consequent lack of familiarity of the bench and the bar with the traditional principles and the sometimes unjust rules of restitution, changes *in* case law and *by* case law are less easily brought about than, for instance, in the comparable fields of torts and contracts.

Here, then, is a body of legal doctrine to which is applicable the principal argument of Judge Benjamin N. Cardozo's plea for "A Ministry of Justice,"² which was chiefly influential in bringing about, after a lapse of nearly twenty years, the establishment in New York of the Law Revision Commission.

"On the one side," said Cardozo, "the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move in proud and silent isolation. Some agency must be found to mediate between them."³

* See Contributors' Section, Masthead, p. 764 for biographical data.

¹ Ehrlich, "Sociology of Law," (trans. by Nathan Isaacs) 36 Harv. L. Rev. 130, 141 (1922).

² Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113 (1921), reprinted in Hall, *Readings in Jurisprudence* 1132 (1938).

³ *Id.* at 113-114, Hall at 1132.

He likewise pointed out that judge-made change in law would likely come about as strained and distorted applications or evasions of established rules, and these would create more legal uncertainty than clear-cut abolition by a statute. Eventually, he thought, codification would come about, yet it seemed a long way off. "What we need is some relief that will not wait upon the lagging years."⁴ Yet this relief need not, should not, be a detailed statute that will create new judicial fetters.

"Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. . . . We are to set the judges free."⁵

These precepts have guided the Law Revision Commission in their work. The statutory provisions recommended by them to correct parts of the law of restitution are, for the most part, brief, and stated so as to negate a prevalent case-law rule or principle. On procedural devices, however, some more explicit directions have been necessary. Statutes are guides to counselors, as well as to judges.

The need for legislation in this field is dramatically illustrated by a narrative told by Judge Harold R. Medina in his John Randolph Tucker lectures at Washington and Lee University in 1954. Speaking on the theme, *The Spiritual Quality of Justice*, he said:

Let me tell you when the lightning first struck me. The first case I ever tried was a little case in the Municipal Court in Brooklyn, for the recovery of \$500 which I alleged had been procured from my client by fraud. The facts were very simple. My client, a young man of about 27, had seen an advertisement in one of the New York papers to the effect that anyone having \$500 to invest would get some very interesting information at such and such a place. Having just \$500 in a savings bank he answered the advertisement and was shown some acetylene gas articles such as lamps, irons, and so on, and was told that he could have the exclusive agency of the State of New Jersey in the selling of these articles on behalf of the sole manufacturer. The \$500 was supposed to be put up as security for his integrity. He made the contract, put up the \$500, and was given a little box containing samples of the articles he was to sell. When he went to New Jersey and tried to sell these articles he found that they were on sale in various stores at retail at prices lower than he was paying, which, of course, made it impossible for him to make any profit, or indeed to make any sales at all except at a loss. The person or corporation which had his money was not the sole manufacturer. On the basis of these false representations, I sued to recover the \$500. We had a jury of six and everything went swimmingly in my presentation of the plaintiff's case. I even had a school teacher from Pennsylvania who had been defrauded in the same way, by

⁴ *Id.* at 117, Hall at 1135.

⁵ *Id.* at 117, Hall at 1136.

the same defendant, and she made quite an impression on the jury. I noticed that my adversary did not seem to be putting up much of a fight. In any event, I rested at the close of the plaintiff's case; and my adversary then said merely "I move to dismiss the complaint." There was no statement of any reasons, there was no discussion; and the judge said "Motion granted."

I was bewildered and dismayed. Before I could even collect my thoughts and my papers on the counsel table, the trial of the next case started.

I had no premonition of the tragedy that was to come, but, as the result of that ruling, my client went out and shot himself. I was so frightened that I did not even tell my wife about it, or anyone else for a space of some fifteen years. I am not sure that I did not destroy the papers, for I have never been able to find them.

A little reflection and further study showed me the problem in all its simplicity. My suit must of necessity have been based upon an affirmance or disaffirmance of the contract. If based upon a disaffirmance, there should have been a tender of the box containing perhaps \$25 worth of samples. I had made no tender. On the basis of affirmance, it was incumbent upon me to prove my damages by offering testimony of the value of the contents of the box. I had not done that either. I was inclined to take all the blame for the tragedy upon myself.⁶

If Section 112-g of the New York Civil Practice Act,⁷ as enacted in 1946, had been in force when Judge Medina's client paid the \$500, the result might well have been different, and the client might be alive today. For under that statute a tender, *in advance of judgment*, of the benefits received by the defrauded party is not necessary to the maintenance of a rescission action; the court may make restoration of such benefits a condition of the judgment. A dismissal of the complaint on the ground of failure to tender before action brought would have been "plainly erroneous."⁸

In this brief survey of the Commission's work I cannot do justice to all of the Commission's reports and recommendations on topics in or related to the field of restitution. Some of these have been *primarily* designed to change or to clarify or modify rules of restitution,⁹ while

⁶ Medina, *The Spiritual Quality of Justice* 12-14 (1954) (pamphlet).

⁷ N.Y. Civ. Prac. Act § 112-g.

⁸ *Ploof v. Somers*, 282 App. Div. 798, 123 N.Y.S.2d 5 (3d Dep't 1953) (personal injury release alleged to have been obtained by misrepresentation); *De Leon v. Caplan*, 204 Misc. 535, 126 N.Y.S.2d 482 (Sup. Ct., App. T., 2d Dep't 1953) (buyer sued seller for breach of warranty and fraud). See other cases cited *infra*, notes 12-17.

⁹ The following reports of the Commission, classified by topic and then by year of the Legislative Document, deal primarily with restitution:

(1) Restoration of benefits by defrauded party. Act, Recommendation and Study relating to the Tender of Benefits by a Party Rescinding; Leg. Doc. No. 65(B), Report of Law Rev. Com. 31-78 (1946); resulted in enactment of Laws, 1946, c. 483 (N.Y. Civ. Prac. Act § 112-g). Act, Recommendation and Study relating to Restoration of Benefits by a Party Seeking to Have a Transaction Declared Void, Leg. Doc. No. 65(K), Report of Law Rev. Com. 339-354 (1952); resulted in enactment of Laws, 1952, c. 487 (revised N.Y. Civ. Prac. Act § 112-g).

others, broader in scope, have incidentally touched upon problems of restitution.¹⁰ The ones chosen for further comment in this article are: 1. Restoration of Benefits by Defrauded Party. 2. Relief against Mistake of Law. 3. Election of Remedies for Fraud. 4. Election of Remedy for Reformation. 5. Recovery of Benefits Conferred by Party in Default under Contract.

RESTORATION BY DEFRAUDED PARTY

The requirement that a defrauded party must, in advance of bringing an action at law for restitution of benefits by the defrauder, tender resto-

(2) Relief for Mistake of Law. Act, Recommendation and Study Relating to Restitution of Money Paid Under Mistake of Law, Leg. Doc. No. 65(B), Report of Law Rev. Com. 27-67 (1942); resulted in enactment of Laws, 1942, c. 558 (N.Y. Civ. Prac. Act § 112-f).

(3) Election of Remedies. Acts, Recommendation and Study relating to Election of Remedies, Leg. Doc. No. 65(F), Report of Law Rev. Com. 205-299 (1939); resulted in enactment of N.Y. Civ. Prac. Act §§ 112-a, 112-b, 112-c and 112-d, Laws, 1939, c. 147. Act, Recommendation and Study Relating to Recovery of Damages in Addition to Rescission, Leg. Doc. No. 65(L), Report of Law Rev. Com. 283-344 (1941); resulted in enactment of Laws, 1941, c. 315 (N.Y. Civ. Prac. Act § 112-e), Act, Recommendation and Study relating to Recovery of Damages in Addition to Rescission of a Sale of Goods, Leg. Doc. No. 65(F), Report of Law Rev. Com. 271-288 (1948); resulted in enactment of Laws, 1948, c. 276, amending N.Y. Pers. Prop. Law (Sales Act) § 150(1) (d).

(4) Recovery of Benefits Conferred by Party in Default. Acts, Recommendation and Study relating to Recovery for Benefits Conferred by Party in Default under Contract, Leg. Doc. No. 65(F), Report of Law Rev. Com. 179-243 (1942). Act, Recommendation and Study relating to the Right of a Buyer of Goods to Restitution for Benefits Conferred Under a Contract of Sale on Which He Has Defaulted, Leg. Doc. No. 65(C), Report of Law Rev. Com. 83-101 (1952); resulted in enactment of Laws, 1952, c. 823, § 2, adding new § 145-a to N.Y. Pers. Prop. Law (Sales Act).

(5) Contribution between Tort-feasors. Act and Recommendation relating to Contribution among Tort-feasors and Release of Tort-feasors, Leg. Doc. No. 65(G), Report of Law Rev. Com. 67-82 (1937). Leg. Doc. No. 65(G), Report of Law Rev. Com. 65-88 (1938), same title. Leg. Doc. No. 65(A), Report of Law Rev. Com. 27-58 (1939), same title. Act and Recommendation relating to Contribution Among Tort-feasors, Leg. Doc. No. 65(A), Report of Law Rev. Com. 17-41 (1941).

¹⁰ The projects which involved some consideration of restitution were, principally, the following:

(1) Act, Recommendation and Study relating to Infancy as a Defense to a Contract, Leg. Doc. No. 65(I), Report of Law Rev. Com. 95-161 (1938). Act and Recommendation relating to Infancy as a Defense to a Contract, Leg. Doc. No. 65(B), Report of Law Rev. Com. 59-66 (1939). Leg. Doc. No. 65(B), Report of Law Rev. Com. 43-48 (1941), same title; resulted in enactment of N.Y. Debtor and Creditor Law, § 260.

(2) Act, Recommendation and Study relating to Restitution for Property Transferred in Contemplation of Marriage, Leg. Doc. No. 65(J), Report of Law Rev. Com. 225-247 (1947).

(3) Act, Recommendation and Study relating to the Vendee's Lien on Land to Secure Restitution or Damages, Leg. Doc. No. 65(K), Report of Law Rev. Com. 249-170 (1947); resulted in enactment of Laws, 1947, c. 97 (N.Y. Civ. Prac. Art § 112h).

(4) Act, Recommendation and Study relating to Determination of Claims Where Foreclosure of a Mortgage of Real Property Was Void or Voidable, Leg. Doc. No. 65(K), Report of Law Rev. Com. 501-548 (1951); resulted in enactment of Laws, 1951, c. 610 § 1 (N.Y. Real Prop. Law § 500-a), and Laws 1951, c. 610 § 1 (N.Y. Real Prop. Law §§ 506-a, 506-b).

ration¹¹ of benefits which the defrauded party had received under the transaction, was chiefly justified on the ground that the plaintiff in an action at law must have a *complete* cause of action when he commences the action; nothing that occurs afterward can be allowed to perfect an imperfect cause of action. As early as 1846 it was held that the plaintiff's tender of restoration at the trial was too late.¹² Where the defrauded party brought an action of trover to recover money as restitution for the value of chattels of which he was defrauded, his failure to tender restoration before suing left a fatal flaw in his title to the chattels.¹³ While one misguided court permitted the defrauded party, who had received money from the defrauder, to recover a money judgment for restitution minus the amount due on restoration,¹⁴ this generosity was sternly repudiated a few years later by a court which said:

This case did equity between the parties, but it rests upon no principle.¹⁵

The rule was strictly adhered to in actions at law. Even a plaintiff suing to recover damages for a tort claim, who had received money under a release of that claim which was voidable because of fraud, was required to anticipate the pleading of the release and to tender in advance of action the restoration of the sum received.¹⁶ Even a letter offering to restore, to which the defendant made no reply, was insufficient for the maintenance of an action for restitution of money paid for mortgage certificates alleged to be secured only by a mortgage on vacant land.¹⁷ The restoration requirement continued to be a bear-trap for the unwary.

Meanwhile it had also become well settled that in an "action" in equity the purpose was to *obtain* rescission, hence the action need not be "based upon a completed rescission" and hence an offer in the pleading (complaint) to make restoration was sufficient.¹⁸ The equity action was said to be one "for rescission." The distinction was thus primarily historical,

¹¹ The terminology of the Restatement, Restitution (1937) is followed in this article: "Restitution" is the result (specific restitution of the thing transferred, or money substitute) which the injured party seeks by his suit (id. § 1), while "restoration" is used to mean the return by the injured party (claimant of restitution) of benefits, or the equivalent in money, which that party received, from the wrongdoer, ordinarily the defendant (id. §§ 65, 66).

¹² Baker v. Robbins, 2 Denio 136 (1846).

¹³ Matteawan Co. v. Bentley, 13 Barb. 641 (1852).

¹⁴ Ladd v. Moore, 3 Sanf. S. C. Rep. 589 (1850).

¹⁵ Stevens v. Hyde, 32 Barb. 171, 182 (1869).

¹⁶ Gould v. Cayuga County National Bank, 86 N.Y. 75 (1881); Gilbert v. Rothschild, 280 N.Y. 66, 73, 19 N.E.2d 785, 788 (1939).

¹⁷ E. T. C. Corp. v. Title Guarantee & Trust Co., 271 N.Y. 124, 2 N.E.2d 284 (1936).

¹⁸ Allerton v. Allerton, 50 N.Y. 670 (1872). Here the plaintiff was seeking a money judgment but the need for a partnership accounting was the thin thread of "equity" which distinguished the case from an action "based on rescission." Even Judge Cardozo sought to

i.e., it depended on the traditional scope of equity jurisdiction. It was therefore the kind of distinction that Judge Cardozo referred to in his noted article.¹⁹ Although the New York procedural code had purported, as far back as 1849, to abolish the distinction between actions at law and suits in equity, the distinction still ruled from its grave.

The present writer in 1946 suggested this distinction as a suitable project for study by the Commission, and was asked to prepare such a study.²⁰ While it dealt principally with *fraud in the inducement*, it also showed that New York cases, adopting the theory that *fraud in the execution* (whereby a party is deceived into believing that the instrument he is signing is a substantially different one), regard the transaction as utterly "void," hence there is no need for rescission or avoidance, hence no need for restoration of benefits received by the defrauded party.²¹ It was urged by the present writer that this situation showed an injustice in the opposite direction (that is, an injustice to the defrauder) and should be covered by the statute. Because of some uncertainty as to the interpretation of the New York cases, fraud in the execution was omitted from the statute as enacted in 1946.²² However, this omission itself gave rise to some doubts a few years later when this type of fraud was alleged in an unreported Supreme Court case, and a supplemental study was made by the present writer, resulting in a re-draft of C.P.A. § 112-g, which was enacted in 1952:

§ 112-g. Restoration of benefits by party seeking to have transaction declared void. A party who has received benefits by reason of a transaction *that is void or voidable* because of fraud, misrepresentation, mistake, duress, infancy or incompetency, and who, in an action or proceeding or by way of defense or counterclaim, seeks rescission, restitution, *a declaration or judgment that such transaction is void*, or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was *void or voidable*, shall not be denied relief because of a failure to tender before judgment restoration of such benefits; but the court may make a tender of restoration a condition of its judgment, *and may otherwise in its judgment so adjust the equities between the parties that unjust enrichment is avoided*. [The italicized words were added in 1952].

Several interpretations of this statute seem worthy of comment. The term "transaction" is broader than "contract" as ordinarily used, since

explain, if not to justify, this distinction. See *Marr v. Tumulty*, 256 N.Y. 15, 22, 175 N.E. 356, 358 (1931). Incidentally, the phrase, "based upon a completed rescission," was a verbal fiction, since a "completed rescission" would mean a completed exchange of benefits (given and received) and would need no action whatever to "complete" it.

¹⁹ See note 2 *supra*.

²⁰ Leg. Doc. No. 65(B), Report of Law Rev. Com. 31-78 (1946).

²¹ Leg. Doc. No. 65(B) at 39 et seq., Report of Law Rev. Com. 69 et seq. (1946).

²² See note 9(1) *supra*.

the former includes conveyances, sales and gifts.²³ The phrase, "seeking to have a transaction declared void," in the title of the act, includes both the case of a transaction initially voidable and now to be avoided by the party having the power of avoidance and the case of the transaction initially "void," as in the case of fraud in the execution and in some cases of mental incompetency. The statute is so designed as to treat both "void" and "voidable" transactions alike for this purpose (restoration). The statute is to be read against the principles of common law and equity that determine under what circumstances, and with what legal consequences, a transaction is to be deemed void or voidable, on the grounds specified. These specified grounds do not include two important ones: material breach, and illegality. Where one party seeks restitution for benefits conferred on the other pursuant to a contract which the latter has materially breached (or wholly repudiated), the case law does not ordinarily require an advance tender, or, indeed, any tender, of the benefits received by the injured party. They are ordinarily deducted from the amount of the judgment he is entitled to.²⁴ Because the need for change was scarcely apparent (despite the Restatement rule based on the stricter holdings²⁵) and because this type of claim is not based solely on unjust enrichment,²⁶ breach of contract was omitted. Yet the general principle of the statute should be applied to restitution for breach of contract. Likewise, the statute omits illegality, which is sometimes a ground for declaring a transaction void or voidable, because the restoration problem has not become important in those cases.

The statute authorizes the court, in an action or proceeding to obtain restitution, to give a conditional judgment. While conditional judgments were not unknown at common law, the New York courts seem to have assumed that only a "court of equity" could give such a judgment.²⁷ Here, as well as in the general statement that the court may so adjust the equities as to avoid unjust enrichment, the statute gives affirmative guidance to the courts.

²³ Compare the narrower informal definition of "transaction" in Restatement, Contracts § 470, comment c (1932): "Includes the formation, performance or discharge of a contract, the assignment of a right under a contract. . . ."

²⁴ Leg. Doc. No. 65(B), 16-17, Report of Law Rev. Com. 46-47 (1946).

²⁵ See Restatement, Contracts § 349 (1932), stating a requirement of restoration. If the injured party has received chattels other than money, an offer of restoration is sometimes required. *Morris v. Prefabrication Engineering Co.*, 160 F.2d 779 (4th Cir. 1947); but here, it seems, deduction of the value of the chattels would suffice.

²⁶ The plaintiff in such an action is allowed to recover his expenditures in part performance of the contract, without being limited to the extent of the defendant's unjust enrichment. See Restatement, Contracts §§ 346, 347, comment c (1932); Clark, J., in *U.S. to use of Susi Contracting Co. v. Zara, Contracting Co.*, 146 F.2d 606, 611 (2d Cir. 1944).

²⁷ Leg. Doc. No. 65(B) at 30, Report of Law Rev. Com. 60 (1946).

Our survey of the New York cases that have cited the restitution statutes²⁸ seems to indicate that §112-g has been more often invoked than any of the other restitution statutes, with the mistake of law provision (§112-f) a close second. A summary of a few of these cases will serve to show the usefulness of the statute. Where a person injured in an automobile collision was induced to sign a release of an insurer, for a payment, by the insurer's false representation that the instrument did not discharge anyone else, the trial court gave judgment against plaintiff on the ground that he had failed to tender the amount that he received for the release. The Appellate Division reversed, citing the statute and also holding that there was sufficient proof of the misrepresentation.²⁹ Another recent case shows the advantage of bringing the restoration-requirement for fraud into line with that for breach of warranty in the sale of a chattel. A buyer of shoes sued the seller for breach of warranty and fraud, apparently seeking restitution. The trial court dismissed on the ground that the plaintiff had not tendered the shoes before beginning the action. The Appellate Term promptly reversed, pointing to §112-g.³⁰ Under the Uniform Sales Act as adopted in New York, a buyer rescinding the sale for breach of warranty is required to "return or *offer to return*" the goods,³¹ and this has been construed *not* to require a tender before action.³² Without the statute the appellate court would have been in duty bound to dismiss the action in so far as it was based on fraud, but not in so far as it was based on a breach of warranty. The greater the wrong, the less effective the remedy!

An action by an infant to rescind his contract for the purchase of a horse, plus expenditures in keeping the horse (a kind of set-off commonly allowed the innocent party in an "equity" rescission) was deemed to be an action "at law" because a money judgment could give complete relief; yet because of §112-g a tender of the horse was not a condition precedent to the bringing of the action.³³ Without the statute the court would, it seems, have had to determine in which of two slots, "legal" or "equitable" (nominally abolished in 1849), the action fitted. The 1946 statute (§112-

²⁸ The editorial staff of the CORNELL LAW QUARTERLY kindly undertook to gather the case material, and I have added my own reading of cases that seemed especially interesting.

²⁹ *Ploof v. Somers*, supra note 8. The statute was applied to a similar situation in: *Ciletti v. Union Pacific Ray.*, 196 F.2d 50 (2d Cir. 1952); *Shontell v. Glens Falls Ins. Co.*, 282 App. Div. 965, 125 N.Y.S.2d 911 (2d Dep't 1953); *Morris v. Hoffman*, 272 App. Div. 911, 70 N.Y.S.2d 595 (2d Dep't 1947), aff'd mem., 297 N.Y. 738, 77 N.E.2d 26 (1947) (here the Appellate Division said the result would be the same without the statute, but did they overlook *Gilbert v. Rothschild*, supra note 16?).

³⁰ *De Leon v. Caplan*, 204 Misc. 535, 126 N.Y.S.2d 482 (Sup. Ct., App. T. 2d Dep't 1953).

³¹ N.Y. Pers. Prop. Law § 150.

³² Leg. Doc. No. 65(B) at 16, Report of Law Rev. Com. 46 (1946).

³³ *Holman v. Hudson*, 67 N.Y.S.2d 615 (Sup. Ct. N.Y. County 1946) (not officially reported).

g in first version) served to implement a procedural reform begun nearly a century earlier. While one decision seems to intimate that the statute will be applied to a rescission action brought on any ground,³⁴ two later decisions have declined to apply it to a ground not named in the statute.³⁵ These latter decisions will do no harm if the court is aware of the palimpsest of case law against which any such statute is to be read and under which, if my Study for the Commission was correct, the requirement of *tender in advance* was not applied outside of actions based on the grounds which the statute specified. Without an understanding of this background, a court might erroneously conclude that tender before the bringing of an action to rescind on any ground *other than those designated* in the statute, is impliedly required.³⁶

The statute applies to a defense³⁷ as well as to an action or counterclaim. It also applies to a proceeding in the Surrogate's Court, and in two cases, at least, that court has exercised its power to grant a conditional decree.³⁸ It seems that the statute merely affects procedure, and therefore may properly be applied to any action brought in New York even though the substantive law applicable would be that of another jurisdiction.³⁹ In less than a decade since its first enactment this Commission statute has done substantial service in improving the administration of justice in New York.

³⁴ See *Hillman v. Hillman*, 69 N.Y.S.2d 134 (Sup. Ct. N.Y. County 1947), (not officially reported) aff'd, 273 App. Div. 960, 79 N.Y.S.2d 325 (1st Dep't 1948).

³⁵ *Jaffe v. Jaffe*, 283 App. Div. 738, 127 N.Y.S.2d 576 (2d Dep't 1954) (wife sues to rescind separation agreement on grounds not stated); see *La Barbera v. Ciotta*, 277 App. Div. 798, 97 N.Y.S.2d 505 (2d Dep't 1950), aff'd mem., 302 N.Y. 571, 96 N.E.2d 888 (1951).

³⁶ In a counterclaim by buyer of goods against seller for rescission, where no tender was made, the federal Court of Appeals said that no tender was required for rescission on the ground of mistake, under § 112-g, and that, since the buyer also sought (or should have sought) reformation, no tender was necessary for reformation anyhow. Thus the negative fallacy was not even considered. See *U.S. Plywood Corp. v. Hudson Lumber Co.*, 210 F.2d 462 (2d Cir. 1954).

³⁷ *Bryant Park Building, Inc. v. Netley Service Corp.*, 79 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1948) (not officially reported), rev'd and aff'd on other grounds, 274 App. Div. 766, 80 N.Y.S.2d 727 (1st Dep't 1948), 274 App. Div. 728, 80 N.Y.S.2d 728 (1st Dep't 1948), 274 App. Div. 902, 84 N.Y.S.2d 704 (1st Dep't 1948).

³⁸ *In re Zacoum's Estate*, 115 N.Y.S.2d 42 (Surr. Ct. Kings County 1952) (not officially reported) ("void" agreement by decedent); *In re Lieberman's Will*, 206 Misc. 263, 132 N.Y.S.2d 558 (Surr. Ct., King's County 1954). See *Gordon v. Pushcoff*, 67 N.Y.S.2d 873 (Sup. Ct. N.Y. County 1946) (not officially reported), aff'd, 272 App. Div. 872, 72 N.Y.S.2d 402 (1st Dep't 1947). The statute was applied by the Surrogate Court to a motion by a surviving husband to set aside on the ground of fraud his assignment of his share in his deceased wife's estate. *In re Schnabel's Will*, 77 N.Y.S.2d 593 (Surr. Ct. Queens County 1947) (not officially reported).

³⁹ See *Rothstein v. Rothstein*, 66 N.Y.S.2d 884 (Sup. Ct. N.Y. County 1946) (not officially reported); rev'd on other grounds, 272 App. Div. 26, 68 N.Y.S.2d 305 (1st Dep't 1947), aff'd, 297 N.Y. 705, 77 N.E.2d 13 (1947) (discretionary jurisdiction of fraud action between non-residents).

MISTAKE OF LAW

The statute abolishing the distinction between mistakes of law and mistakes of fact was a change in the substantive law. Yet because in courts of equity and with respect to certain types of mistake of law the distinction was not recognized, or at least had no definite legal consequences, this statute also may be regarded as consolidating law and equity in the way that was probably intended by David Dudley Field a century ago, and that was later more effectively achieved under the English Judicature Acts. That is, "equitable" principles were extended to actions formerly denominated "legal." While the Restatement of Restitution was supported by case law in a majority of states, in stating as a general rule that one who is induced solely by a mistake of law to confer a benefit in response to an honest claim for such benefit is not entitled to restitution,⁴⁰ yet the exceptions and the other types of situations in which relief for mistake of law was given nearly engulfed this "general rule." Indeed, the rule might well have been stated as narrowly as this: Money paid in supposed satisfaction of an honest claim, even though mistakenly believed by the payor to be legally obligatory, is not recoverable.⁴¹ At all events, the Commission statute was so worded as to free the courts of the monstrous mistake of law made by Lord Ellenborough, and to direct them to apply to claims for relief on the ground of mistake of law the same criteria and principles that they would apply to a mistake of fact in a situation otherwise the same:

§ 112-f. Relief against mistake of law. When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact.⁴²

The judicial decisions that have cited this statute have displayed a liberal attitude in favor of giving effect to its purpose. Thus the payment of money under a mistakenly supposed legal duty of the payor to pay, may because of the statute give rise to an action for restitution against the payee, although the payor's mistake was only one of law. The plaintiff bank paid money to the payee of a check after the drawer had stopped payment, and was subsequently held liable to the drawer for such payment. The bank then sued to recover from the payee of the check the amount so paid. The facts do not clearly disclose whether the bank em-

⁴⁰ Restatement, Restitution § 45 (1937).

⁴¹ This was substantially the rule applied by Lord Ellenborough in the leading English case of *Bilbie v. Lumley*, 2 East 469 (1802). See Introductory Note, Restatement, Restitution 179 (1937).

⁴² N.Y. Civ. Prac. Act § 112-f.

ployee in paying was in ignorance of the fact of the stop-payment order, or mistakenly believed that the bank was under a duty to pay anyhow. The court held that under §112-f the plaintiff can recover even if the mistake was one of law, since it was a mutual mistake of law.⁴³ Here the payment was not made in compromise of a doubtful claim, and compromise would not be available as a defense.

However, the decision last cited is one of several which raise doubts as to whether the New York courts will, in applying §112-f, be sufficiently informed by counsel as to the limitations upon, and defenses to, actions grounded on mistake. Because of "the policy of maintaining confidence in the security of negotiable paper"⁴⁴ and perhaps for other reasons,⁴⁵ the drawee of a check has frequently, perhaps usually, been denied recovery of money paid to the payee of a check under these circumstances, unless the payee "had reason to know" of the drawee's mistake.⁴⁶ On the other hand, it seems to the present writer that the payee should be held liable to make restitution in such a case, even though he has no reason to know of the drawee's mistake, unless he has changed his position⁴⁷ before demand for repayment was made upon him.

A somewhat similar case involved a mistake of law as to the amount of a tax lien on real property; both vendor and vendee believed the amount to be much larger than it was, and the vendor, having allowed this larger amount as a deduction from the price, now seeks to recover from the vendee the difference between the amount allowed and the amount which, as subsequently discovered, the vendee was legally required to pay and did pay. The court decided that the vendee had been unjustly enriched.⁴⁸ The decision enforced a just claim which would probably not have been enforceable prior to the statute.

Another example of liberality in construing the statute is found in a case allowing corporate stockholders, who had failed to comply with a provision of the Stock Corporation Law permitting an appraisal in case

⁴³ Chase National Bank of City of New York v. Battat, 105 N.Y.S.2d 13 (Sup. Ct. N.Y. County 1951) (not officially reported). Another case in which the mistake of law was, apparently, as to the legal duty of the payor and in which recovery would probably have been denied without the statute, is cited *infra* note 51.

⁴⁴ Woodward, Quasi Contracts § 182 (1913).

⁴⁵ Woodward, *op. cit.* *supra* note 44 § 19, also points out that some courts deny restitution where the payor's mistake was as to his duty to a third person (drawer) rather than his duty to the payee.

⁴⁶ Restatement, Restitution § 33, and comment a (1937).

⁴⁷ *Id.* § 69, "Change of circumstances."

⁴⁸ One Fifty-Seven Prince Street Corporation v. Michelini, 62 N.Y.S.2d 148 (Sup. Ct. N.Y. County 1946) (not officially reported). See also dictum in *Skating Vanities v. State of New York*, 203 Misc. 779, 119 N.Y.S.2d 184 (Ct. Cl., 1953) which said an overpayment of a premium to the State Insurance Fund, based on mistake of law, would be recoverable.

of a proposed merger, to have such an appraisal on the ground that the plaintiffs' failure to comply with the provision was due to a mistake of law and fact.⁴⁹ The court also found that the corporation had "waived" compliance with the appraisal provision. An equitable result seems to have been attained in this case. However, it seems that in many cases a delayed compliance with a statutory requirement would be so prejudicial to the other party or so contrary to public policy that the balancing of equities would lead to a denial of such relief. A probable example is a fixed time limitation for the commencement of an action.

Fortunately, one Court has held the statute broad enough to include a mistake of law induced by a misrepresentation of the other party.⁵⁰ A misrepresentation of law by the other party to the transaction is only a special case of mistake, and *a fortiori* relief should be given in such a case. On the other hand, the statute is not *limited* to a mistake of law induced by the other party, as a dissenting judge in another case⁵¹ apparently suggested.

One decision illustrates limitations upon the scope of relief. The mistake must be as to what the law *is* and not merely as to what an administrative official will (correctly or incorrectly) decide. A seller of automobiles to the State reduced the price to the extent of the Federal excise tax, yet the seller for some reason, presumably mistaken as to the law, paid part of the excise taxes to the United States. The seller's claim for a refund was denied by the Bureau of Internal Revenue, whereupon it sued the State to recover the amount paid on the theory that it had made the State a price reduction under mistake of law. Recovery was denied, on the ground that there was no mistake of law as to seller's legal liability to pay the excise taxes; no tax was due. The only "mistake" of the seller was in not carrying to a higher tribunal its claim for a refund.⁵² Two other cases indicate that a bargain not induced by misrepresentation will not be set aside merely on the ground of one party's mistake of law.⁵³ It seems that the same result would have been reached

⁴⁹ Application of Wood, 103 N.Y.S.2d 110 (Sup. Ct. N.Y. County 1951) (not officially reported).

⁵⁰ Matter of Dushane v. Kazmierczak, 192 Misc. 23, 79 N.Y.S.2d 293 (Sup. Ct. Erie County 1948) (teacher justifiably relied on Board of Education's implied representation as to its legal powers).

⁵¹ See opinion of Hofstadter, J., dissenting, in Century Oxford Mfg. Corp. v. Eppens Smith Co., 86 N.Y.S.2d 405, 406 (Sup. Ct., App. T. 1st Dep't 1949) (not officially reported), aff'd, 275 App. Div. 834, 89 N.Y.S.2d 898 (1st Dep't 1949). Here a tenant was allowed to recover an overpayment of rent in excess of that permitted by the emergency rent law.

⁵² Bates Chevrolet Corp. v. State of New York, 192 Misc. 151, 76 N.Y.S.2d 718 (Ct. Cl., 1948).

⁵³ Town of Pelham v. City of Mount Vernon, 304 N.Y. 15, 105 N.E.2d 604 (1952), reversing 278 App. Div. 79, 103 N.Y.S.2d 494 (2d Dep't 1951) (agreement between towns

prior to the enactment of the statute. The policy of protecting an innocent party's reliance on a bargain has long outweighed the policy of giving the other party a power of avoidance because of his unilateral, impalpable mistake.⁵⁴

On the whole, then, one can say that the judicial adaptation of this beneficent statute to its context of case law has proceeded thus far with beneficial results.

ELECTION OF REMEDIES FOR FRAUD

The Commission through its staff and consultants undertook several studies under the general heading of Election of Remedies, and several statutes were enacted as a result of the Commission's recommendations.⁵⁵ In this article I have time to mention only two: The statute authorizing recovery of both damages and rescission for fraud, and the statute as to reformation for mistake.

The best example that I can recall to show the need for the fraud statute is a case decided in Wisconsin during an earlier boom period. The plaintiff, a resident of Faribault, Minnesota, was induced by fraudulent misrepresentations of defendants to contract to buy forty acres of land and a house near Shell Lake, Wisconsin, for the price of \$1,500, of which the plaintiff paid \$100 down. The plaintiff then moved, at a cost of \$140, from his Minnesota residence, to the Wisconsin land, paid taxes on the land, and then discovered the fraud. He refused to pay the balance of the price, returned to his former residence in Minnesota, and sued to recover from the defendants the down payment, the taxes and the moving expenses. The trial court allowed all three items, but the Supreme Court of Wisconsin sternly rejected the claim for moving expenses, not on the ground that they were not proximate damages resulting from the defendant's wrong, but on the ground that the plaintiff had elected to disaffirm the contract and therefore could not recover damages for deceit.⁵⁶

What substantial reason can be given for such a decision? Did not the defendants' wrong proximately cause the plaintiff all of the losses that he sustained?⁵⁷ Did not the plaintiff allege and prove all of the facts neces-

as to maintenance of a bridge); *Steinhardt v. Steinhardt*, 192 Misc. 815, 78 N.Y.S.2d 481 (Sup. Ct. N.Y. County 1947) (but facts arose before § 112-f became effective). See also *Tanner v. Imperial Recreation Parlors, Inc.*, 265 App. Div. 371, 39 N.Y.S.2d 99 (4th Dep't 1943) (query dictum that § 112-f would have changed the result here).

⁵⁴ See Patterson, "Equitable Relief for Unilateral Mistake," 28 Colum. L. Rev. 859, 884, 894 (1928).

⁵⁵ See *supra* notes 9, 10.

⁵⁶ *Carpenter v. Mason*, 181 Wis. 114, 193 N.W. 973 (1923).

⁵⁷ The opinion by Rosenberry, J., suggests at one point that if plaintiff is entitled to recover his expenses of moving from Faribault to Shell Lake, then he would necessarily be

sary to entitle him to all of the items of recovery claimed? Was there any *duplication* of items of recovery? Certainly not. Was the defendant misled prejudicially by the plaintiff's suing to get his money "back," and also his money paid out for moving? No prejudicial reliance appears. Then is not the doctrine of election of remedies here merely a requirement of formal consistency? To satisfy this requirement *fully* it would seem that, in order to recover his moving expenses, the plaintiff would have to "affirm" the voidable contract, pay to the defendants the balance due on the contract price (thus sending "good money" after "bad") and then sue the wrongdoers to obtain judgment for his total expenditures. This would be "true" affirmance, angelic consistency. (It might also be construed as a complete condonation of the fraud!) But the nineteenth century courts that enjoyed the logic-chopping of the election doctrine were usually not so strict as to require the defrauded party to perform his *executory promises* to the fraud-doer in order to be able to recover damages for the deceit.⁵⁸

The New York case of *Weigel v. Cook*⁵⁹ is another illustration of the need for statutory reform. P's purchased land from D's in reliance upon material misrepresentations by D's that the land had natural mineral springs with a specified daily flow. P's took possession and purchased and installed machinery for the bottling and distribution of the mineral spring water, before discovering that the water was not mineral spring water and that the flow was much less than that represented.⁶⁰ P's sued "in equity" for rescission and were awarded a judgment not only for the amount of cash paid by P's on the purchase price and for the cancellation of securities given for the balance of the price, but also for the damages sustained by P's in the installation and operation of the new machinery and for labor paid. The Court of Appeals modified the judgment by striking out the item of damages, on the ground that the plaintiffs had to elect between an action based on rescission, an action *for* rescission (such as this one) and an action for damages.

In this and in other cases no reason was given for the rule stated. In

entitled to recover his expenses of moving back to Faribault. This seems a plain non sequitur. At all events the measure of damages recoverable in an action of deceit is a problem independent of election of remedies.

⁵⁸ *Moran v. Tucker*, 40 R.I. 485, 101 Atl. 327 (1917); and see *Patterson*, Cases on Restitution 254 note (1950). But two New York opinions seemed to reject even this departure from strict consistency. *Armstrong v. Herman*, 229 App. Div. 162, 241 N.Y. Supp. 282 (1st Dep't 1930); *Roome v. Jennings*, 2 Misc. 257, 21 N.Y. Supp. 938 (N.Y. C. P. 1893). Fortunately the statute has "repealed" or modified these precedents.

⁵⁹ 237 N.Y. 136, 142 N.E. 444 (1923).

⁶⁰ The foregoing summary of the case is taken from the Commission's Study, Leg. Doc. No. 65(L) at 16, Report of Law Rev. Com. 298 (1941).

the same opinion which flatly stated the election rule Crane, J., likewise said, "We take it that the doctrine of election is one of substance and not of mere words."⁶¹

The rule as to election of remedies, probably of modern origin, was widely accepted and applied by nineteenth century appellate judges who preferred to decide, or to justify their decisions of, legal controversies on the basis of mistakes in procedure made by the lawyers rather than by stating value-principles applicable to the conduct of the parties. This statement is, while only conjectural, supported by more evidence than I can present here. On the merits I can conceive of only two substantial reasons for the rule here discussed: First, the possible duplication of items of recovery if the defrauded party is allowed to recover both restitution and damages. For instance, in the mineral spring case, the vendee *might* recover the part payment on the purchase price as restitution (unjust enrichment of defendant) and again as damages (loss due to vendee's reliance on the misrepresentation). Perhaps it would take a singularly confused and simple minded judge to make such a mistake; yet it seems worth guarding against, as is done in the last line of the Commission statute.⁶² Second, in combining rescission and damages the trial court may overlook the different substantive-law requirements of the two remedies; in many states an action of deceit (damages) requires proof of a *fraudulent* misrepresentation, whereas rescission and restitution may be successfully maintained on the basis of an innocent material misrepresentation. The New York statute endeavors to prevent such a mistake by emphasizing that the aggrieved party can recover "damages to which he is entitled because of such fraud or misrepresentation."

These introductory remarks will, it is hoped, serve to explain the language of the statute, abolishing election of remedies for fraud, which was recommended and enacted in 1941:

§ 112-e. A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based on rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery.

While the subsequent cases in which the statute has been a decisive factor are not numerous, they show a liberal attitude toward the purpose

⁶¹ 237 N.Y. 136, 140, 142 N.E. 444, 445 (1923).

⁶² N.Y. Civ. Prac. Act § 112-e, reprinted below.

of the statute, and one could only guess how many defendant-lawyers would have limbered up the old election bear-trap if the statute had not been there to stop them. In one case involving a lease of realty a situation similar to *Weigel v. Cook*⁶³ appeared, and the lessee who sought to move out of water-flooded premises (thus rescinding) and also to recover damages resulting from fraud was held not precluded from doing so.⁶⁴ Another suit sought money damages for fraud from individual defendants and as a second cause of action rescission of a contract with the corporation defendant.⁶⁵ Here double recovery can be prevented by specifying in the judgment that it shall be deemed satisfied when the plaintiff has received a specified total amount from *all* defendants. Two other cases rejected the election doctrine with entire approval of the purpose of the Commission in recommending enactment of the statute,⁶⁶ and the Court of Appeals in one case mentioned the statute with approval.⁶⁷ While it is somewhat surprising to find damages claimed by a party seeking annulment of a marriage on the ground of fraud,⁶⁸ the statute seems broad enough to apply to such an action.

On the other hand, the statute does not affect prior law as to estoppel, res judicata, or splitting a cause of action. It does not bar laches as a defense⁶⁹ nor dispense with the necessity of stating enough facts to make out a plausible claim on *some* theory.⁷⁰ The scope of the statute seems to have been well understood.

ELECTION OF REMEDY FOR REFORMATION

The brief statute on reformation, recommended and enacted in 1939, served to clarify some apparent conflicts in New York case law:

§ 112-d. Action on contract no bar to action to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed.⁷¹

⁶³ See note 59 supra.

⁶⁴ *Looney v. Smith*, 198 Misc. 99, 96 N.Y.S.2d 607 (Sup. Ct. Queens County 1950).

⁶⁵ *Delgaudio v. Casey*, 68 N.Y.S.2d 629 (Sup. Ct. King's County 1947) (not officially reported).

⁶⁶ See *Seafire, Inc. v. Ackerson*, 193 Misc. 965, 76 N.Y.S.2d 805, 814 (Sup. Ct. Suffolk County 1947), aff'd, 275 App. Div. 717, 37 N.Y.S.2d 438 (2d Dep't 1949), aff'd, 302 N.Y. 668, 98 N.E.2d 478 (1951); *Application of Jacoby*, 33 N.Y.S.2d 621 (Sup. Ct. N.Y. County 1942).

⁶⁷ See *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 49 N.E.2d 489 (1943).

⁶⁸ *Lee v. Lee*, 184 Misc. 686, 57 N.Y.S.2d 97 (Sup. Ct. Nassau County 1945) (motion to dismiss money-damages count denied).

⁶⁹ *United States Plywood Corp. v. Hudson Lumber Co.*, 210 F.2d 462 (2d Cir. 1954).

⁷⁰ See *Campel v. Carrier*, 277 App. Div. 772, 97 N.Y.S.2d 1 (2d Dep't 1950) (complaint dismissed because insufficient).

⁷¹ N.Y. Civ. Prac. Act § 112-d.

In one decision of the Court of Appeals it was held that an action to recover on a contract as written, unsuccessful because the writing was so construed as not to include terms that the parties had orally agreed upon, was a bar to a subsequent action to reform the writing on the ground of mutual mistake.⁷² In a much later case it was held that the doctrine of election of remedies had no application to such a situation, since the first remedy (recovery on the contract as written) turned out to be non-existent.⁷³ Unfortunately this second court neglected to tidy up this dusty little corner of the case-law system by flatly overruling (or narrowly distinguishing) the prior case, and unfortunately Judge Cardozo, when in a still later opinion he came to comment upon the first case,⁷⁴ disapproved its doctrine so gently that he did not give it the kiss of death. Hence in 1935 the Appellate Division felt itself obliged to follow the old and erroneous ruling.⁷⁵ The statute has, I hope, succeeded in burying it. *In pace requiescat.*

RECOVERY OF BENEFITS CONFERRED BY PARTY IN DEFAULT UNDER CONTRACT

A study prepared at the direction of the Commission by the present writer showed that a party to a contract who wilfully defaulted in performance, whether it was an employment contract, a building contract, a contract to buy land or a contract to buy goods, was not allowed to recover for his part performance of the contract (before defaulting), no matter how much the other party's enrichment exceeded any damages that he suffered from the default.⁷⁶ One striking exception was the right of the defaulting seller of goods to recover for his part performance, both before and after the adoption of the Uniform Sales Act.⁷⁷ As a consequence of the discussion of these legal doctrines the Commission recommended three statutes, one allowing recovery for money paid or property delivered by the defaulting party, another giving a right of restitution to the defaulting buyer of goods, and a third which merely provided for the severability of contracts of employment. The first two were remarkable in that the Commission provided for a deduction, from

⁷² *Steinbach v. Relief Fire Ins. Co.*, 77 N.Y. 498 (1879). See Leg. Doc. No. 65(F) at 84, Report of Law Rev. Com. 288 (1939).

⁷³ *Baird v. Erie R. R.*, 210 N.Y. 225, 104 N.E. 614 (1914).

⁷⁴ See opinion of Cardozo, Ch. J., in *Schuylkill Fuel Corporation v. B. & C. Nieberg Realty Corporation, Inc.*, 250 N.Y. 304, 165 N.E. 456 (1929).

⁷⁵ *Allen v. U. S. Fire Ins. Co.*, 245 App. Div. 31, 282 N.Y. Supp. 420 (1st Dep't 1935), aff'd mem., 270 N.Y. 597, 1 N.E. 2d 348 (1936) (no reformation of fire insurance policy after unsuccessful attempt to recover on it as written).

⁷⁶ Leg. Doc. No. 65(F), Report of Law Rev. Com. 179-243 (1942). See note 9(4) supra.

⁷⁷ N.Y. Pers. Prop. Law § 125(1) (U. S. A. § 44).

the amount paid by the buyer of property, of a flat twenty per cent of the contract price, even though the seller proved no recoverable damages from the buyer's default. Speaking only as one of the draftsmen of this provision, I venture to say that it was intended *primarily* as an allowance for unspecified and non-provable damages (how much is an automobile dealer's business, storage and sales operations upset when a customer refuses to take a car assembled and tendered pursuant to the customer's contractual specifications?), and *secondarily* as a penal deterrent to contract-breaking. However, none of these statutes was enacted.

By 1951 the "lay-away" plan of selling goods, such as fur coats, furniture and household appliances, had introduced a new problem of buyer defaults. The seller retained both title and possession of the goods for the buyer (or, in some cases, did not set aside identified goods but merely promised to deliver goods of a specific description) until the buyer had made all of the installment payments. If such a buyer paid 80% of the price and then defaulted he would, under the existing law, get nothing back. By contrast, if he bought the goods under a conditional sale contract, the Uniform Conditional Sales Act would require a sale by which the seller would have to account for the payments made and the buyer would, under some circumstances, receive some benefit from his payments. To rectify this inconsistency the Commission authorized the making of a further study, and recommended a more elaborately drafted amendment to the Sales Act.⁷⁸ This statute was enacted in 1952 as §145-a of the New York Personal Property Law. It continues the unspecified-damage provision (twenty per cent of the contract price) of the earlier proposal, and allows the seller to set off in addition any provable damages, such as difference between contract price and market price. The study of recent New York cases, decided after the 1942 Study, uniformly denying the defaulting buyer recovery of anything, turned up only one case in which the buyer's partial payment exceeded twenty per cent of the contract price.⁷⁹ The only reference to the new statute in a reported decision is the commendation of the Commission's Studies and Recommendation (of 1952) by Judge Charles E. Clark in a case involving a contract made before the statute became effective.⁸⁰ Since this modest reform will apply (because of the twenty per cent clause) only in cases of excessive forfeiture, it is not likely to be decisive in very many reported

⁷⁸ Leg. Doc. No. 65(C), Report of Law Rev. Com. 83-101 (1952).

⁷⁹ *Bisner v. Mantell*, 197 Misc. 807, 95 N.Y.S.2d 793 (County Ct. Rensselaer County 1950) (buyer paid \$370 on a contract to buy furniture (not delivered) for the price of \$747.95).

⁸⁰ *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 106 (2d Cir. 1953), noted 39 Cornell L.Q. 736 (1954) (recovery was allowed defaulting buyer on the basis of a special provision in an act of Congress).

cases. It may, however, serve as a basis for settlements without litigation.

The persistent and unsuccessful efforts of the Commission to bring about the enactment in New York of a just and adequate statute providing for contribution between joint tort-feasors is worthy of extended comment that cannot be given to it in this article.

In conclusion, the work of the Law Revision Commission in the area of restitution has been successful in achieving several of the ends which Judge Cardozo pointed to in urging the creation of such a body. The Commission has cleared up obscure areas of private law, has avoided political controversy, and has left the courts relatively free to work out in the traditional common law way the details of restitution and unjust enrichment. The work of the Commission in this area has been worthy of the purposes for which it was created.