

held invalid. *Helson v. Kentucky*, 279 U.S. 245 (1929) (tax upon amount of gasoline purchased outside state and consumed by interstate ferry within state); *Bingham v. Golden Eagle Western Lines*, 297 U.S. 626 (1936) (tax upon gasoline consumed in state by interstate busses). The *Utah* case has been criticized on the ground that the electricity taxed did not come into existence until its interstate flow had actually begun. 42 Yale L. J. 96 (1932). As a practical matter, however, so long as generators at the power plant are operating, the plant is in effect manufacturing (converting) energy preparatory to its interstate transfer. Since the tax in the principal case was levied according to the plant's capacity to generate energy, it must be interpreted as a tax on the manufacture rather than on the use of this energy. The court therefore erroneously distinguished the *Utah* case; but its decision may be regarded as a desirable inroad upon the tenuous division of an instantaneous activity into "manufacture" and "transportation."

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Contracts—Quasi-contractual Relief for One Not Substantially Performing a Building Contract—[Wisconsin].—The plaintiff contracted to build a first-class roof upon the defendant's building for \$325. Upon completion, the defendant refused to pay, contending that it was not properly constructed and that it leaked soon after it was put on. A jury found that the cost of repairing the roof to make it conform to the contract would be \$75 and that the defendant had suffered \$75 damage because of leakage. The trial court accordingly awarded the plaintiff \$175. On appeal, *held*, reversed. The plaintiff could not recover on the contract because he had not substantially performed. Since there was no acceptance of the roof by the defendant, the plaintiff could not recover even the reasonable value thereof. To recover on a theory of unjust enrichment there must be such an acceptance as is something besides a keeping and using where there is no opportunity to return what has been received. *Nees v. Weaver*, 269 N.W. 266 (Wis. 1936).

This court's unqualified requirement of "acceptance" for the relief of one who has insubstantially performed his contract is indicative of widespread judicial unwillingness to consider each such case on its particular merits. For a considerable period, strict contract notions militated against the relief of one who had deviated even the slightest from his express obligation. 3 Williston, Contracts § 675 (2d ed. 1936). But the manifest injustice to those who, in good faith, had omitted some slight detail in performing their contracts led courts, especially in cases involving building contracts, to protect a contractor who had substantially performed. *Jacob & Youngs Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); 3 Williston, Contracts § 805 (2d ed. 1936). Where a contractor has performed a large but not a "substantial" part of his contract, further protection has been necessary to avoid uncompensated enrichment to the other contracting party. *Gale v. Dixon*, 91 Cal. App. 529, 267 Pac. 342 (1928). Thus many courts granted recovery on a *quantum meruit* count if an acceptance of the benefits resulting from the plaintiff's performance could be shown. *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N.W. 515 (1903); *Robinson Const. Co. v. Barry*, 135 Md. 275, 108 Atl. 688 (1919); *Everroad v. Schwartzkopf*, 123 Ind. 35, 23 N.E. 969 (1890). The measure of damages in these cases, although termed the reasonable value of materials and services furnished, was ascertained by deducting from the contract price the damages to the defendant resulting from the breach. *White Star Coal Co. v. Pursifull*, 189 Ky. 296, 217 S.W. 1020 (1920); *Ginsberg v. Myers*,

215 Mich. 148, 183 N.W. 749 (1921). See Rest., Contracts § 357 (1) (b), (3). The requirement of an "acceptance," while easily satisfied when the defendant has received chattels, has been practically prohibitive of relief in land cases: strong notions of landowner protection have led the courts to consider the mere taking of possession as insufficient evidence of an "acceptance" of the work done. *Manitowoc Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N.W. 515 (1903); *Falk v. Nitz*, 219 Mich. 650, 189 N.W. 921 (1922). Since so much acquiescence by the defendant is necessary to find an "acceptance" in building cases, this relief should more appropriately be termed recovery on an implied-in-fact contract. *Munro v. Butt*, 8 El. & Bl. 738 (1858). And in most jurisdictions this is the full extent of relief today.

Clearly such protection is still inadequate for those contractors who in good faith thought they had fully completed their contract but, because of their ignorance or incompetence, had not rendered substantial performance. The task of ascertaining the actual benefit received by the defendant and of balancing with it the plaintiff's state of mind in carrying on his work seems to present an obvious situation for equitable relief unhampered by broad reactions to breaches of contract. Thus, a few courts have given true quasi-contractual relief if there was a breach in good faith. *Peterson v. Sutter*, 4 La. App. 180 (1926); *Jackson Lumber & Supply Co. v. Deaton*, 209 Ky. 239, 272 S.W. 717 (1925); see Rest., Contracts § 357 (1) (a). Other courts, following the analogy of *Britton v. Turner* (6 N.H. 481 (1834)), have protected a contractor who willfully abandoned his contract. *Davis v. Barrington*, 30 N.H. 517 (1855); *Aetna Iron & Steel v. Kossuth Cty.*, 79 Iowa 40, 44 N.W. 215 (1890). This latter rule has frequently been criticized as making a breach of contract profitable, resulting in a greater disregard of the binding effect of contractual obligations. 6 N.Y.U.L. Rev. 211 (1928). The good faith rule is not subject to this objection, however, and presents a more compelling case for quasi-contractual relief, since a benefit has been conferred on the defendant with his consent and in good faith. Woodward, Quasi-Contracts §§ 7, 8 (1913); 1 Williston, Contracts § 3 (2d ed. 1936). It is evident that courts which require an "acceptance" before giving quasi-contractual relief are not speaking in terms of an "equitable" remedy. See 24 Col. L. Rev. 885 (1924). If in the pursuance of the latter type of relief the courts would substitute for talk of acceptance or waiver inquiries as to the causes of the plaintiff's breach and as to the amount of benefit to the defendant, breaches of contracts would not be encouraged nor would the other party be unjustly enriched.

In the instant case, the court made no attempt to inquire into the presence or absence of the plaintiff's good faith in failing to fix the roof to comply with the contract after he had been notified of its defective condition. If there was an unconscionable refusal to repair, no relief was merited. But if he *bona fide* thought that the roof was properly constructed and defects were not certain until found by a jury, the court's failure to find an "acceptance" in a building case can hardly be said to constitute a fair disposal of the plaintiff's claim.

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Corporate Reorganization—Limitation of Rent Claims under § 77B(b)—[Federal].—Upon rejection of his lease in § 77B proceedings the debtor's lessor filed a claim for the difference between the rent reserved and the present value of the term. The trial court allowed the claim but limited its participation in the plan, even as against the stockholders of the debtor, to an amount equal to three years' rent, approximately