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Anticipatory Breach of Contracts to Devise Property in Return for Personal Care

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INTRODUCTION

In the absence of guaranteed security from the "cradle to the grave" people who fear old age without the assurance of companionship, care and support will doubtless continue to make contracts to get that assurance. In the typical case the contract is between one who wishes the services of another for the rest of his life and one who is willing to live with and care for him in return for a promise that the farm or other property will be his on the promisor's death. It is not surprising that the parties often develop differences leading to a rupture of the relationship. While either party may be in default on the contract, this discussion is limited to the problems arising where the promisor is in default and the promisee is seeking a remedy before the promisor's death. But no abstract appraisal of the legal problems involved should obscure the intensely human nature of these situations.

The legal problems involved logically fall into three categories. The promisee, in order to obtain relief from the court, must (1) establish that a contract was actually entered into, (2) establish that it has been breached, and (3) convince the court that he has selected the proper remedy. The selection of the proper remedy, in turn, involves a choice between proceedings at law and equitable actions.

I.

ESTABLISHING THE CONTRACT

It is well settled that a contract to make a will can be valid and does not conflict with public policy.[1] While the courts have scrutinized with care attempts to set up such a contract after the death of the promisor, and have been cautious in the suspicion that all too often mere expectations ripen

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[1] See Atkinson, Wills §68 (1937); Page, Wills §1707 (3d ed. 1941).

into full-blown contracts after the promisor can no longer deny them,[2] this objection has no validity where the promisor is alive when the action is brought. Most of the courts have treated these agreements as controlled by the general principles of contract law.[3] Indeed, there seems to be no reason why the courts should treat them as different in any way from other contracts. Unfortunately, because the parties seldom secure legal advice, they are usually oral and informal which gives rise to vexing problems of proof and entangles the contract in the provisions of the statute of frauds.

A. Offer and Acceptance

The first question raised is whether there is an offer of sufficient definiteness and certainty to permit of an acceptance. The court must be able to understand from the offer not only what a party is undertaking,[4] but also, to the same degree of certainty, what he agrees to take in return for his promise.[6] The general rule is often announced that the terms must lend themselves to an exact meaning,[6] but an examination of the authorities reveals that the test actually applied is one of the reasonableness.[7] The promise is sufficiently certain if it is one to leave all or a specified share of what one owns at his death,[8] but is unenforceable if it is merely a promise to make a "substantial" gift to the plaintiff,[9] or if it is a promise to leave all property not willed to others.[10] Agreements to leave enough for plaintiff to live in the comfort previously

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[2] See Hamlin v. Stevens, 177 N.Y. 39, 47, 69 N.E. 118, 120 (1903). Hence the requirement that the contract be proved by clear, positive, and convincing evidence. Carlson v. Carlson, 211 Minn. 297, 300 N.W. 900 (1941); *see* Jannetta v. Jannetta, 205 Minn. 266, 285 N.W. 619, 621 (1939); Pound, *The Progress of the Law*, 33 Harv. L. Rev. 929, 933 (1920).

[3] Atkinson, Wills § 68 (1937); Page, Wills § 1710 (3d ed. 1941).

[4] Restatement, Contracts § 32 (1932); Williston, Contracts §§ 24, 37 (rev. ed. 1936); 23 Minn. L. Rev. 675 (1939).

[5] See note 4, *supra*.

[6] Williston, Contracts §37 (rev. ed. 1936).

[7] Restatement, Contracts §32; Page, Wills §1711 (3d ed. 1941). It is said to be sufficient to satisfy the requirement if the property may be ascertained at the promisor's death. Atkinson Wills § 68 (1937).

[8] *E.g.*, Howe v. Watson, 179 Mass. 30, 60 N.E. 415 (1901); Svenburg v. Fosseen, 75 Minn. 350, 78 N.W. 4 (1899).

[9] *See* Richardson v. Cade, 150 Ga. 535, 104 S.E. 207, 209 (1920).

[10] Beaver v. Crump, 76 Miss. 34, 23 So. 432 (1898).

enjoyed,[11] or enough to keep her free from the necessity of working,[12] have been held sufficiently certain.[13]

The offer may be for a bilateral or for a unilateral contract,[14] an issue resolved by the words used and the surrounding circumstances. Admittedly the courts have announced a "presumption" for a bilateral contract and have held that the assent of the offeree manifested in either words or acts is by implication the promise requested.[15] This issue will be pivotal in determining whether a contract has come into being in a jurisdiction where there is no binding contract until the acts requested in the unilateral offer are fully performed. However, if the offer is construed as one for a unilateral contract, under strict principles of contract law there can be no binding agreement until the requested act has been completely performed.[16] Because of the injustice resulting when the acts of acceptance are continuing in nature and extend over a considerable period of time, more modern authority takes the position that the original offer

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[11] Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N.W. 730 (1897); *cf.* Collins v Collins, 72 Iowa 104, 33 N.W. 442 (1887).

[12] Thompson v. Stevens, 71 Pa. 161 (1872); and see Elwood's Estate, 309 Pa. 505, 164 Atl. 617 (1932), where the original promise was to provide enough to keep plaintiff from working but the amount was rendered certain by provision in a subsequently lost will.

[13] The difficulties with respect to "certainty" are not because of inherent trouble in enunciating a rule; rather they are in applying the established rules to innumerable complex fact situations. It seems obvious that the degree of certainty required varies when different remedies are sought. For example, equity frequently requires greater certainty before granting relief than does a law court, and even though there is sufficient certainty for some equitable relief there may not be enough for specific performance.

[14] See Restatement, Contracts § 12 (1932); Williston, Contracts § 13 (rev. ed. 1936).

[15] Restatement, Contracts §31 (1932); Williston, Contracts §31A (rev. ed. 1936).

[16] Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928); Note, 13 Minn. L. Rev. 366 (1929); and see Williston, Contracts §60 (rev. ed. 1936), where the author states: "Doubtless wherever possible . . . A court would and should interpret an offer as contemplating a bilateral rather than a unilateral contract. . . "

cannot be revoked after performance has begun.[17] In the interests of logical consistency this view would necessitate a modification of decisions which have held that the offeree may quit at any time without liability unless the offeror has changed his position.

When a valid offer and acceptance have been established the promisor will be bound if a legally sufficient consideration can be found and if the contract does not violate the Statute of Frauds. A promise to will property is legally sufficient consideration on the one side, as is promising to give, or the act of giving, personal services on the other.[18]

B. Statute of Frauds

Because these contracts are usually informal and oral they often fall within the sweep of the Statute of Frauds.[19] It is necessary to distinguish between contracts involving realty, those involving personalty, and mixtures of the two for the purpose of examining the application of the Statute.

Oral contracts to devise realty, seem quite clearly to be within the provision of Section Four of the Statute, which provides that "no action shall be brought . . . upon any contract or sale of lands . . . or any interest in or concerning

[17] This is an over-simplification of an extremely complicated problem of contract law. The cases are in abject confusion as to *reasons* but tend to this result. No little expenditure of printer's ink has been made. Some of the theories advanced to sustain the result of holding the offeror bound after performance has begun are: (1) after performance has begun, the contract becomes bilateral; (2) there is an implied collateral promise to keep the offer open a reasonable length of time, commencement of performance is acceptance of this implied promise and the offer becomes irrevocable; (3) commencement of the acts is acceptance of the offer but with the offeror's duties conditioned upon completion by offeree; and, (4) promissory estoppel based, of course, on the offeree's detriment. For a good treatment of these theories see Note, 13 Minn. L. Rev. 366 (1929); and, in general, see McGovney, *Irrevocable Offers*, 27 Harv. L. Rev. 644 (1914); Ashley, *Offers Calling for a Consideration Other than a Counter Promise*, 23 Harv. L. Rev. 159 (1910); Ballantine, *Acceptance of Offers for Unilateral Contracts*, 5 Minn. L. Rev. 94 (1921); Wormser, *The True Conception of Unilateral Contracts*, 26 Yale L.J. 136 (1916). The Restatement,, Contracts §§45, 90 (1932), has adopted the third and fourth theories, *supra*, but with some limitations. The cases are collected and analyzed in Williston, Contracts §60A (rev. ed. 1936).

[18] Brock v. Noecker, 66 N.D. 567, 267 N.W. 656 (1936); Atkinson, Wills §68 (1937); Page, Wills §1712 (3d. ed. 1941) (many cases collected).

[19] 29 Car. 2, c 3 (1677), 4 Chitty's Eng. Stat. 1140 (6th ed., Aggs. 1911). American jurisdictions have substantially copied the original English statute. *E.g.*, N.D. Rev. Code §§ 9-0604, 9-0605, and 51-0105 (1943), and references will be to the working of the original English statute.

them . . . " That such contracts are almost unanimously so considered[20] is not surprising. The ratio decidendi is that such contracts are essentially to convey by appointment and are just as effective in transferring interests in land as are contracts for inter vivos transfers. Inherent in this result is the thought that there is just as much reason for declaring such contracts unenforceable as for the inter vivos contract to convey. As a matter of fact, if support is sought in the dubious realm of public policy there may be much more reason to declare the contract to devise unenforceable.[21] That the vast numerical majority of the cases hold the contract to devise to be a contract for the "sale" of land and violative of Section Four of the Statute cannot be doubted,[22] but the problem has not been without subtle distinction.[23]

Where only personalty is involved the question is whether Section Seventeen is applicable. It provides that: "No contract for the sale of any goods . . . shall be allowed to be good . . . " unless there is, among other things, part payment or earnest money. The argument that the contract to bequeath bears exactly the same relation to sale of goods as the contract to devise does to the sale of realty, and, therefore, should be treated exactly the same with respect to the Statute is a logically conclusive one. But an examination of the cases

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[20] See, *e.g.*, Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 (6th cir. 1917); Olsen v. Dixon, 165 Minn. 124, 205 N.W. 955 (1925); Restatement, Contracts §193, illustration 4 (1932); Williston, Contracts §488 (rev. ed. 1936); and for an excellent treatment of this general subject, see Schnebly, *Contracts to make Testamentary Dispositions as Affected by the Statute of Frauds*, 24 Mich. L. Rev. 749 (1926). It is evident that contracts to support and care for promisor do not come within the section relating to contracts not to be performed within one year because they *may* be performed within that time. Contracts to support for a definite time are not within the scope of this discussion.

[21] See note 2, *supra*, and text thereto.

[22] A large number of the cases are collected in Page, Wills §1717 (3d. ed. 1941).

[23] *E.g.*, in Stahl v. Stevenson, 102 Kan. 447, 844, 171 Pac. 1164 (1918), the court held that an agreement to leave a specified portion of the estate was not within Section Four in spite of the fact that the promisor owned realty both at the time the promise was made and at his death. This distinction has been labeled "plausible" by one writer, inasmuch as the promisor may die seized only of personality. Schnebly, *supra*, note 20, at 760. Whatever its merits, however, it seems to have been largely ignored except in that jurisdiction. See also Smith v. Nyburg, 136 Kan. 572, 16 P. 2d 493 (1932) (held not within the Statute because it did not deal with *specific* real property). It would seem that the parties intended the promise to cover both real and personal property when they refer to all or a given part of the estate.

yields no such simple solution. Not only are the cases badly split, but the secondary authorities disagree.[24] In those jurisdictions where the contract to bequeath is held not to be within Section Seventeen, the change in the wording of that Section by Section Four of the Uniform Sales Act would not appear to alter that result. Where the courts do find the contract to bequeath within the Statute, the theory usually is that the legatee takes as a purchaser just as does the devisee. Even conceding, arguendo, that such a legatee takes by purchase, it appears that since the Sales Act has omitted the requirement that part payment must be made at the time of entering the contract,[25] and since services rendered may constitute such part payment,[26] the requirements of the Statute have been met.

The third situation is where the contract involves both realty and personalty. In those jurisdictions which hold that contracts to devise are within Section Four but contracts to bequeath are not within Section Seventeen, the question of divisibility becomes pivotal. As has been pointed out,[27] there exists no good reason why the contract should not be enforced as to the personalty even though it cannot be as to the realty. In spite of this, however, the greater number of cases declare flatly that the contract is indivisible, and enforceable as to neither personalty nor realty.[28]

The usual "lineal descendant" of the original Statute of Frauds is construed to render the contract unenforceable

[24] Page, Wills §1717 (3d ed. 1941), states that the contract to bequeath violates Section Seventeen: Atkinson, Wills §68 (1937); 1 Schouler, Wills, Executors and Administrators §696 (6th ed. 1923); and Schnebly, *supra*, note 20, at 756, are contra.

[25] Uniform Sales Acts § 4, N.D. Rev. Code § 51-0105 (1943). See Vold, Sales §32 (1931).

[26] Driggs v. Bush, 152 Mich. 53, 115 N.W. 985 (1908); *cf.* White v. Drew, 56 How. Pr. 53 (N.Y. Sup. Ct. 1878). See Vold, Sales §32 (1931); Schnebly, *supra*, note 20, at 757.

[27] Schnebly, *supra*, note 20, at 765-67. The author was referring, however, to cases where the promisee has fully performed.

[28] See, *e.g.*, Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 (6th Cir. 1917); *In re* Estate of Roberts, 202 Minn. 217, 277 N.W. 549 (1938); Atkinson, Wills §68 (1937); Page, Wills §1717 (3d ed. 1941); Schnebly, *supra*, note 20, at 765; Note, 71 A.L.R. 479, 485 (1931).

[29] This, again, over-simplifies a problem about which there is much disagreement. That the contracts are merely unenforceable, see Browne, Statute of Frauds §115 A (5th ed. 1895); Vold, Sales §22 (1931); Williston, Contracts §527 (rev. ed. 1936). The last cited author collects the cases. As to compliance with the Statute subsequent to the oral contract, see Williston, Contracts §§566, 590 (rev. ed. 1936); Vold, Sales §22 (1931).

rather than void, and if the contract later fulfills the statutory requirements it may become enforceable.[29] Even when the wording of the statute is that such contracts are "void", it is arguable that proper construction is that they are merely voidable.[30] Properly speaking, the Statute of Frauds goes to "judicial authority to afford a remedy" rather than to the validity of the contract within it.[31]

The Statute of Frauds is being treated here only to determine whether or not the contract is enforceable at law. The question of when part performance will take the contract out of the Statute for purposes of equitable relief will be treated under the section dealing with equitable remedies. It is sufficient to point out here that enforceability in equity is not regarded as enforceability at law.

II.
THE BREACH

Since we are here concerned only with the situation where the party promising to devise or bequeath the property is still alive, it necessarily follows that in such a case the contract cannot be broken by non-performance. However, under the doctrine of anticipatory breach it is obvious that the promisor can be in default. All courts have not agreed that the promisee has a right of action during the lifetime of the promisor. Those courts which have refused the promisee a right of action while the promisor still lives have done so on the theory that the promisor has all his life in which to perform and it cannot be known until his death that he will not perform.[32] This view is analytically unsound in that the doctrine of anticipatory breach is totally ignored, and, in addition, is indefensible from the practical viewpoint because it refuses to the promisee the opportunity of proving the con-

[29] The argument is that it is to be doubted that the legislature intended to change the effect of the English predecessor even though it inserted "void." It has been said that, though the cases split, the tendency of more modern authority is to consider "void" as equivalent to "unenforceable." Williston, Contracts §531 (rev. ed. 1936).

[31] *See* Manufacturers' Light & Heat Co. v. Lamp, 269 Pa. 517, 112 Atl. 679, 681 (1921); Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 83 Atl. 54, 58 (1912).

[32] Warden v. Hinds, 163 Fed. 201 (4th Cir. 1908); *cf.* Fitzpatrick v. Michael, 177 Md. 248, 9 A.2d 639 (1939); *See* Skinner v. Rasche, 165 Ky. 108, 176 S.W. 942, 944 (1915); Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938, 940 (1906).

tract while the promisor is still alive. This is particularly true in view of the fact that years may elapse before the promisor's death. Thus, the better view, and that taken by most courts, is that the promisee may maintain an action during the promisor's lifetime, if, by the rules of contract law, there is anticipatory breach.[33]

The anticipatory breaches in these cases fall into three categories, the presence of one or more of which will support an immediate right of action.

A. Renunciation

Words or acts by the promisor which clearly show that he does not intend to perform the contract amount to a breach by anticipatory repudiation. The position has been taken that such repudiation does not, of itself, amount to a breach, but that there must be an election by the promisee to treat the repudiation as a breach.[34] The Restatement of Contracts adopts the view that the repudiation is itself a total breach of contract, but is subject to nullification if the statements are withdrawn, or if the facts constituting the repudiation cease to exist before an action has been brought or there has been other material change of position.[35] Assuming an action is being brought immediately, there would appear to be very little practical difference between these views (though it might affect the running of the statute of limitations). Where the election is required, the mere bringing of the action without delay is sufficient.[36]

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[33] *E.g.*, Richardson v. City Trust Co., 27 F.2d 35 (7th Cir. 1928); Stone v. Burgeson, 215 Ala. 23, 109 So. 155 (1926); Osborn v. Hoyt, 181 Cal. 336, 184 Pac. 854 (1919); Lovett v. Lovett, 87 Ind. App. 42, 155 N.E. 528, 157 N.E. 104 (1927); Mug v. Ostendorf, 49 Ind. App. 71, 96 N.E. 780 (1911); White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927); Chantland v. Sherman, 148 Iowa 352, 125 N.W. 871 (1910); Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917); Bird v. Pope, 73 Mich. 483, 41 N.W. 514 (1889); Carmichael v. Carmichael, 72 Mich. 76, 40 N.W. 173 (1888); Wold v. Wold, 138 Minn. 409, 165 N.W. 229 (1917); Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930); Gupton v. Gupton, 47 Mo. 37 (1870); Duvale v. Duvale, 56 N.J. Eq. 375, 39 Atl. 687, 40 Atl. 440 (1898); Davison v. Davison, 13 N.J. Eq. 246 (1861); Van Duyne v. Vreeland, 11 N.J. Eq. 370 (1857), *aff'd*, 12 N.J. Eq. 142 (1858). *See* Van Meter v. Norris, 318 Pa. 137, 177 Atl. 799, 780 (1935).

[34] Williston, Contracts §1332 (rev. ed. 1937).

[35] Restatement, Contracts §§318, 319 (1932).

[36] Williston, Contracts §1323 (rev. ed. 1937).

Before the defendant's refusal to perform will amount to an anticipatory breach, it must be positive and unconditional.[37] No good test has been laid down, nor has a definitive line been drawn, as to what statements constitute a repudiation; but it must be remembered that there is a difference between what will excuse performance by plaintiff and what is a total breach.[38] A mere statement of doubt by the promisor as to whether he will perform may excuse performance by the promisee, but will not be a breach, whereas an unequivocal denial of the contract is a repudiation and a total breach.

B. Conveyance of Land or a Contract to Convey to a Third Party

It is broadly stated that a total breach is committed by the promisor if he transfers, or contracts to transfer, to a third person an interest in specific land, goods, or in any other thing essential for the substantial performance of his contractual duties.[39] Thus, where the contract to devise does not refer to specific property, the promisor is not prevented from making conveyances during his lifetime even if they are gratuitous, so long as the conveyances are reasonable in amount and are not made to evade performance of the contract.[40] Consequently, where the contract calls for devising or bequeathing all he owns at his death, the test is whether the conveyance is a fraud upon the rights of the promisee or is made to evade performance of the contract.[41]

Where the conveyance is a breach of the contract and the grantee takes gratuitously, or with notice of the rights of the

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[37] New York L. Ins. Co. v. Viglas, 297 U.S. 672 (1936), 46 Yale L.J. 181 (1936); Restatement, Contracts §318 (a) (1932); Williston, Contracts §1324 (rev. ed. 1937).

[38] Restatement, Contracts §§280, 323 (1932); Williston, Contracts §1331 (rev. ed. 1937).

[39] Restatement, Contracts §318 (b) (1932).

[40] Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915); Van Meter v. Norris, 318 Pa. 137, 177 Atl. 799 (1935).

[41] Sample v. Butler University, 211 Ind. 122, 4 N.E.2d 545, 5 N.E.2d 888 (1936); Powell v. McBlain, 222 Iowa 799, 269 N.W. 883 (1936), 35 Mich. L. Rev. 1022 (1937).

promisee, recovery may be had against him,[42] but where the grantee has taken for value and without notice, he incurs no liability.[43]

C. Hindering Performance

Properly speaking, the prevention or hindrance of performance on the part of the promisee by the promisor is not an anticipatory breach. It is so treated for brevity, and it is anticipatory in the sense that it occurs before the promisor's performance is due.

The undertaking of each party to the contract includes by implication any promise which a reasonable man in the promisee's position would be justified in understanding was included.[44] Hence, the promisor impliedly promises not to prevent or hinder performance on the promisee's part which is requisite for the continuance of a right in favor of the promisee, or the discharge of a duty by him, and if the promisor does so hinder or prevent the promisee's performance, he has breached the contract.[45]

In the contracts under consideration it is apparent that the promisor can prevent performance by merely leaving the promisee, or by refusing to permit the promisee to remain on the promisor's land to give him the personal services and care called for by the contract. In such a case it seems obvious that since the contract requires the continuance of a personal relationship, it would be better to regard it as a total breach and let the parties' rights be determined. This is usually done.

III.

Remedies

The remedies available to the promisee depend, of course, upon the preceding. They also may depend upon the promisee's

[42] This relief takes the form of injunction against encumbering or disposing of the property, White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927); Davison v. Davison, 13 N.J. Eq. 246 (1861); a decree for reconveyance, Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917); cancellation of the conveyance, Hogan v. Hogan, 187 Mich. 278, 153 N.W. 678 (1915); or the imposition of a trust, Newman v. French, 138 Iowa 482, 116 N.W. 468 (1908); Van Duyne v. Vreeland, 12 N.J. Eq. 142 (1858).

[43] Robinette v. Olsen, 114 Neb. 728, 209 N.W. 614 (1926); White v. McKnight, 146 S.C. 59, 143 S.E. 552 (1928).

[44] Sacramento Nav. Co. v. Salz, 273 U.S. 326 (1927); Restatement, Contracts §5 (1932); Williston, Contracts §1293 (rev. ed. 1937).

[45] United States v. Peck, 102 U.S. 64 (1880); Restatement, Contracts §§315, 395, comment c (1932); Williston, Contracts §1293 A (rev. ed. 1937).

choice of which remedy he desires and, in some cases, whether he wishes legal or equitable relief. Assuming, then, that there is a contract in existence and that it has been breached by the promisor during his lifetime, the promisee may have one or more remedies.

A. Remedies at Law

1. Enforceable Contracts

a. Action for Damages. If the contract is in writing and not otherwise violative of the Statute of Frauds, it is legally enforceable, and upon the promissor's breach promisee may either maintain an action for damages or rescind and sue in quasi-contract. In an action on the contract for damages, the aim of the law is to place the promisee in the position he would have enjoyed had the promisor faithfully performed the contract, less what it would have cost him to finish the performance.[46] The measure of this will be the value of the property promised, less what it would have cost the promisee to perform and what the promisee could earn in other employment after the breach.[47] The exact elements of the damages vary with the promises and duties of the contract, and it is apparent that inasmuch as it is impossible to know how long the promisor will live the damages must always be difficult of proof and might conceivably violate the rules of certainty. Indeed, this very practical consideration has provided a basis for equitable action based upon the inadequacy of the remedy at law.[48]

b. Rescission and Restitution. The alternative remedy at law where the legally enforceable contract has been breached is an action in quasi-contract for restitution based on a rescission. Rescission of a contract is effected by the act of the party —usually by timely notice and a tender of the benefits which he has received.[49] However, there will not usually be any necessity of returning or tendering back to the promisor what the promisee has received under the contract in order to be en-

[46] Restatement, Contracts §329 (1932); Williston, Contracts §1338 (rev. ed. 1937).
[47] Roy v. Pos, 183 Cal. 359, 191 Pac. 542 (1920); Edwards v. Slate, 184 Mass. 317, 68 N.E. 342 (1903).
[48] McClintock, Equity §45 (1936).
[49] See notes 50, 51, and 52, *infra*.

titled to restitution. By the nature of the contracts, only board and room, or perhaps small money payments, are received by the promisee. These ordinarily constitute a comparatively small part of the total consideration and have been disposed of by the promisee without reason to anticipate the defendant's breach, and their value can be determined and credited to the defendant.[50] Despite these holdings the safe course would appear to be to make tender of the value.

Even though the tender be excused, it is still necessary to give prompt notice.[51] Though it has been held that formal notice is not always required, and that the prompt bringing of the suit may suffice,[52] difficulty may be avoided by notifying.

Since the restitution is sought for services rendered, it cannot be restitution in specie, but the money equivalent will be given. This raises the troublesome problem of how the recovery is to be measured. The action being in quasi-contract, it theoretically seeks the defendant's unjust enrichment. Thus, the measure of the recovery is the value of the services rendered. Where the benefit conferred upon the promisor coincides with the loss to the promisee, this has not been troublesome, but in the cases where they do not coincide the objective standard has been used.[53] It is the market value of the services, and not what the promisor could have procured them for under some special bargain,[54] nor is it the amount by which the promisor's total wealth has been increased.[55] The determination is a difficult one, and it has aptly been said that

> ". . . it is evident that an evaluation of the kind of services here involved is no simple matter."[56]

The sounder view in these cases limits the recovery to the value of the services rendered without regard to the terms of

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[50] In these circumstances the Restatement, Contracts §349 (1932), takes the view that tender is unnecessary. See also Restatement, Restitution §§65, 66 (1937).

[51] See, *e.g.*, Hennessy v. Bacon, 137 U.S. 78 (1890); Butler Mfg. Co. v. Elliott & Cox, 211 Iowa 1068, 233 N.W. 669 (1930); Williston, Contracts §1469 (rev. ed. 1937).

[52] Dwinell v. Boehmer, 60 N.D. 302, 234 N.W. 655, 15 Minn. L. Rev. 839 (1931); Moresco v. Foppiana, 92 Cal. 317, 60 P 2d 430 (1936).

[53] Thus, the market value is the measure. Chicago v. Tilley, 103 U.S. 146 (1880); Restatement, Contracts §347, comment c (1932); Williston, Contracts §1459 (rev. ed. 1937).

[54] *See supra*, note 53.

[55] Restatement, Contracts § 347, comment c (1932).

[56] *In re* Superior's Estate, 211 Minn. 108, 300 N.W. 393, 395 (1941).

the contract fixing the consideration for the services, but the contract terms may often be used as evidence of fair value.[57] Some courts have held the recovery could not exceed the contract price.[58] As a practical matter the value of the services probably would seldom exceed the value of the property promised while the promisor still lives, and since the terms of the contract price depend upon how long the promisor will live, which cannot be determined, there is great doubt that the contract will ever serve as a certain guide in ascertaining the measure of the recovery.[59]

2. Unenforceable Contracts

Where the contract is legally unenforceable because of the Statute of Frauds, the only action at law which the promisee can maintain is in quasi-contract. Obviously there is no question of rescission here involved. It has been said that the rules governing quasi-contractual recovery outlined immediately above are the same as those governing quasi-contractual recovery upon a contract unenforceable by virtue of the Statute of Frauds,[60] but it is here that the wording and the construction of the particular Statute becomes important. It will make no great difference whether the Statute makes the contract void or voidable since, for the reasons pointed out above, the contract should not control the amount of recovery in either case. But if the Statute makes the contract illegal, the effect of giving a restitutionary remedy would be to nullify the Statute, and re-

[57] This view conforms to the theory upon which the action is based, *i.e.*, that the contract is rescinded. *Accord*, Schwasnick v. Blandin, 65 F. 2d 354 (2d Cir. 1933); Laiblin v. San Joaquin Agr. Corp., 60 Cal. App. 516, 213 Pac. 529 (1923); Restatement, Contracts § 347, comment *c* (1932); Williston, Contracts § 1485 (rev.ed. 1937).See the excellent discussion in Keener, Quasi-Contracts 290 (1893). The author concludes that the price can be admitted on the theory of an admission against interest. There are decisions to the contrary, however.

[58] See *e.g.*, Oakley v. Duluth Superior Dredging Co., 223 Mich. 478, 194 N.W. 123 (1923); Bailey v. Furleigh, 121 Wash. 207, 208 Pac. 1091 (1922). Such cases seem unsound in that they permit the defendant to claim protection of a contract which, by hypothesis, he has totally breached.

[59] Naturally, life expectancy tables could be used for this purpose, but in addition to the inevitable uncertainty, there is the further problem that due to the nature of the contracts involved, what was really sought by the promisor was security for life, not merely the rendition of services for a definite period. There is no doubt that in the usual case the consideration promised exceeds the reasonable value of the services to be rendered if that be computed on the basis of life expectancy tables.

[60] Restatement, Contracts § 355 (1932).

lief will not be given.[61] The action will lie whether the contract is rendered void or voidable, so long as it is not rendered illegal by the Statute. Oral testimony relating to the contract for the purpose of proving a transaction whereby the defendant was unjustly enriched is admissible to negate a gratuity.[62] Even if the contract itself has been introduced upon the theory of an admission against interest by either party, the numerical weight of authority holds that the value of the thing promised cannot be shown.[63] Obviously the same rules apply where the contract is voidable rather than void.

Quasi-contractual recovery may be had where no contract came into existence at all because of mistake, uncertainty, or some other reason.[64] If the parties intended that the "promisee" should receive compensation for the services rendered, then he may recover the reasonable value of them. The reasonable value of services gratuitously rendered cannot be recovered. It is to be noted that there is a judicial presumption that when members of the same family live together no pecuniary compensation is expected, or will be paid, for services, care, or support.[65] Generally, whenever services are rendered, not gratuitously, and it appears that the promisor will be unjustly enriched if he gives the promisee no compensation for them, a suit in quasi-contract can be maintained.

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[61] Restatement, Contracts § 355, comment c (1932). *E.g.*, the usual rule seems to be that there can be no quasi contractual recovery for services rendered in procuring a purchaser of land under an oral contract for commission where the contract is declared void by the statute. See 12 Marq. L. Rev. 81 (1927); 4 Wis. L. Rev. 379 (1928). Thus, it is the purpose, not the form, of the Statute which is important. If quasi contractual recovery nullifies the purpose, it should not be allowed. See Restatement, Contracts § 355 (3) 1932).

[62] Gay v. Mooney, 67 N.J. L. 27, 50 Atl. 596 (1901); Woodward, Quasi-Contracts § 103 (1913).

[63] See *supra*, note 59. It is difficult to see how the price agreed upon for services to be performed for the rest of the promisor's life can be an admission of the value of services for a specific period. Moreover, a distinction is made between the case where the promisor has agreed to pay a sum certain in money for services of a known extent, and the case under consideration, *i.e.*, where property is to be given for services, the extent of which cannot be ascertained. Quirk v. Bank of Commerce, 244 Fed. 682 (6th Cir. 1917); Woodward, Quasi-Contracts § 105 (1913), and cases cited therein.

[64] See, *e.g.*, Schmetzer v. Broegler, 92 N.J.L. 88, 105 Atl. 450 (1918); Collier v. Rutledge, 136 N.Y. 621, 32 N.E. 626 (1892); Keener, Quasi-Contracts 267 (1893); Woodward, Quasi-Contracts § 45 (1913).

[65] E.g., Gopcevic v. Gopcevic, 39 Cal. App. 306, 178 Pac. 734 (1918); Hartley v. Bohrer, 52 Idaho 72, 11 P.2d 616 (1932); *In re* Docius' Estate, 215 Iowa 1193, 247 N.W. 796 (1933); Woodward, Quasi-Contracts § 51 (1913).

B. Remedies in Equity

1. In General

All of the problems of establishing the contract and its breach discussed above, with some exceptions as to the applicability of the Statute of Frauds, exist when the remedy sought is equitable. Moreover, the general principles of equity brought into play impose certain additional requirements. Thus, it is said that the contract must be clear and certain beyond that certainty required by law for the creation of a binding obligation.[66] The contract must be fair in light of the circumstances surrounding the transaction when entered;[67] and the mere fact that the promisor may die sooner than expected does not render the contract unfair ab initio if it was fair at the time it was entered.[68] The equity court grants the remedy, if at all, as a matter of discretion,[69] and if there is hardship on the defendant, inequitable conduct on the plaintiff's part, or mistake, the remedy may be refused even though there is no adequate remedy at law.

It is perhaps trite to say that equity is not bound to give its relief in any rigid or stereotyped form.[70]

2. Establishing Equity Jurisdiction

While law and equity are no longer separate, it is still necessary to establish a basis for the court's exercise of its jurisdiction to grant the equitable relief asked. Of the historical bases of equity jurisdiction which are still recognized, a good many have been or could be utilized by the courts when confronted by the type of case with which we are here concerned. All of these are encompassed within the general rule that where the legal remedy is not adequate, equity will intervene to give relief.[71] Equity jurisdiction can be tested from the viewpoint of both the plaintiff and the defendant. Regardless of the legal remedy available, where the contract involves realty

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[66] Restatement, Contracts § 370, comment *b* (1932); McClintock, Equity § 54 (1936).

[67] Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); Haubrich v. Haubrich, 118 Minn. 394, 136 N.W. 1025 (1912); Hamlin v. Stevens, 177 N.Y. 39, 69 N.E. 118 (1903).

[68] Howe v. Watson, 179 Mass. 30, 60 N.E. 415 (1901).

[69] McClintock, Equity § 21 (1936).

[70] *Id.* at § 28.

[71] *Id.* at §§ 38, 41.

equity has long taken jurisdiction on the theory that each tract of land is unique and the law could not give to the plaintiff the interest in the land to which he was equitably entitled, even though money damages might be ascertainable.[72]

Even though the contract does not involve realty there is a basis for equitable intervention irrespective of whether the contract is legally enforceable or not. The rule is laid down that if the services rendered are of such a peculiar personal and domestic nature as not to be adequately compensable in money, the legal remedy is inadequate.[73] Moreover, though the value of the services might be ascertained, the plaintiff's prospective profits cannot, and the mere fact that quantum meruit lies does not defeat equity jurisdiction. Usually the value of intimate family companionship and personal care cannot be measured in money,[74] but this is subject to the particular facts.[75] No rigid standard has been laid down, nor can one be, to determine what is compensable in money and what is not.[76]

Another possible basis for equitable jurisdiction exists where it can be shown that the promisor cannot respond in money damages.[77] Where the defendant is execution proof it may be a practical impossibility to collect money damages. The crux of the problem is whether an *ineffective* remedy at law is necessarily an *inadequate* remedy at law. If the equity court holds that it is, then it will take jurisdiction and give relief on the general principle of the inadequacy of the legal remedy.

Difficulties of a different type arise where the remedy at law is inadequate because the contract is within the Statute of Frauds and therefore unenforceable. Under the doctrine of part performance equity will take jurisdiction for the purpose of specifically performing such a contract. It might be noted that North Dakota has embodied this rule in a statute which

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[72] *Id.* at § 42.

[73] See *infra*, notes 74, 75, 76.

[74] See, *e.g.*, Sutton v. Hayden, 62 Mo. 101 (1876); Emery v. Darling, 50 Ohio St. 160, 33 N.E. 715 (1893).

[75] In Happel v. Happel, 184 Minn. 377, 238 N.W. 783 (1931), the court recognized the general rule, but did not apply it to the facts presented.

[76] For illustrative cases which have refused equitable relief where the services seemed of a highly personal nature, see Speck v. Dodson, 178 Ark. 549, 11 S.W.2d 456 (1928); Brennen v. Derby, 124 Ore. 574, 265 Pac. 425 (1928).

[77] See McClintock, Equity § 45 (1936); McClintock, *Adequacy of Ineffective Remedy at Law*, 16 Minn. L. Rev. 233 (1932).

provides that the Statute of Frauds does not abridge the power of the courts of equity to compel the specific performance of agreements in case of part performance thereof.[78] The performance of services should be considered such part performance as will take the contract out of the Statute of Frauds, for equity purposes, if the services cannot be adequately compensated by a money payment.[79] The result is that where the services rendered are peculiarly personal in their nature, the legal remedy is inadequate, the contract should be considered taken out of the Statute of Frauds, and equity will give relief.

The issue of equity jurisdiction has usually been raised in these particular cases by the plaintiff asking for specific performance on the basis that land is involved or the contract is within the Statute of Frauds. As will be pointed out below, it is technically impossible for equity to give specific performance in this type of case. However, it would seem that in spite of this, equity jurisdiction is doubtless justified in all cases where the services are not pecuniarily compensable, for the legal remedy is clearly inadequate.

3. EQUITABLE RELIEF

a. AGAINST THE PROMISOR. The court, having been induced to exercise its equitable powers, will adapt the relief to the particular facts of the case, being solely concerned with effectuating justice. Obviously this is no simple matter, and a review of the cases indicates that the courts have been faced with a virtual impossibility. The decrees rendered are not easily categorized but are constituted of those tending to continue the relationship, and those foreseeing its possible discontinuance.

[78] N.D. Rev. Code § 47-1001 (1943). This is not an unusual provision. See, e.g., 2 Minn. Stat. § 513.06 (1949).

[79] For cases which have regarded this as a sufficient part performance, see Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); Fierke v. Elgin City Bkg. Co., 359 Ill. 394, 194 N.E. 528 (1935); Whitman v. Dittman, 154 Minn. 346. 191 N.W. 821 (1923); Matheson v. Gullickson, 222 Minn. 369, 24 N.W.2d 704 (1946). And see O'Connor v. Immele, 43 N.W.2d 649 (N.D. 1950). Other jurisdictions do not recognize the performance of these services as sufficient part performance in the absence of a transfer of possession of realty, see Waters v. Cline, 121 Ky. 611, 85 S.W. 209 (1905); Kling v. Bordner, 65 Ohio St. 86, 61 N.E. 148 (1901); Richardson v. Orth, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455 (1902).
Much of the disagreement about what constitutes part performance has been cast in precedents formulated to govern ordinary real estate transactions. It is submitted that when the services are so clearly not compensable as in these cases, a stronger case is made out for equitable intervention by way of part performance.

Of the decrees tending to continue the relationship, "specific performance" is by far the most common, probably because the promisee usually desires the property itself since it is often far greater in value than any possible evaluation of the services rendered. The courts have used the term very loosely inasmuch as such a contract by its very nature can never be specifically enforced. This is true both before and after the promisor's death, because the promise is to devise something to the promisee and to enforce it would be to order the promisor to make the agreed will and then not revoke it. Even assuming that it is not against public policy to do so, the difficulty of enforcement would preclude the attempt. If it were possible to give specific performance, the doctrine of mutuality would have to be overcome, and this has troubled some courts[50] which have mistakenly thought such a contract could be specifically enforced in the technical meaning of that term. Where this issue has been squarely raised, it has been denied that a suit for an injunction against interference with the carrying out of the contract to care for and support the defendant is in reality negative specific performance. The court held that neither negative nor positive specific performance could be given, but that the injunction lies on the theory of a bill *quia timet* to preserve the plaintiff's rights in the contract and property, and to protect the plaintiff in performance, that he may ultimately derive the benefits of the contract.[51] Where the doctrine of mutuality is followed, since equity would not enforce a contract calling for personal services against the plaintiff because of public policy, as expressed in the prohibition against involuntary servitude, the contract will not be enforced against defendant, *though other equitable relief may be given.* The doctrine of mutuality applies only to specific performance and since these cases do not involve true specific performance, it should have no application. Moreover, the doctrine appears to be of sharply reduced efficacy, the modern view being that a mere lack of mutuality is not a sufficient reason for refusing specific performance if the future performance of plaintiff is well secured to the satisfaction of the court.[52]

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[50] See, e.g., Nunn v. Boal, 29 Ohio App. 141, 162 N.E. 724 (1928) (refusing relief).

[51] White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927).

[52] The Restatement, Contracts §§ 372, 373 (1932), adopts the modern approach. See generally, McClintock, Equity § 66 (1936).

Many courts recognize that specific performance cannot be given, but have afforded relief analogous to it. Such has been denominated "quasi-specific performance"[83] and "relief in the nature of specific performance".[84] It usually takes the form of a trust which is often coupled with an injunction. This relief, which proceeds on the theory of a bill *quia timet* to protect the plaintiff from future harm,[85] also has the effect of continuing the relationship. There appears to be no theoretical objection to allowing a bill *quia timet,,* but it is submitted that any relief which looks toward the continuance of the relationship ignores the practical aspects of the parties' situation. Where they have disagreed to the point of litigation, it seems obvious that no contract based upon a relationship so personal in its nature that money cannot compensate the promisee for his services, can be restored and continued with any degree of satisfaction by the courts. To base a decree upon the premise that the parties will continue to perform the contract would appear to make additional litigation probable. The courts sometimes clearly recognize the difficulty involved, as the New Jersey Court did in the *Davison* case,[87] when it stated—

> "It is eminently desirable that this controversy should be amicably adjusted, and the court repeats the hope expressed on the argument, that a settlement may be effected between the parties without further action on the part of the court. No present decree for the specific performance of the contract can be made. By the terms of the contract, promisee is to provide for his father during his life. If the father refuses to accept the services of the complainant, and no amicable adjustment can be made, further directions will be given for the management of the farm and the support of the father during his life."

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[83] *E.g.*, Notten v. Mensing, 3 Cal. 2d 469, 45 P.2d 198 (1935); Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 Harv. L. Rev. 237 (1915).

[84] *E.g.*, Matheson v. Gullickson, 222 Minn. 369, 24 N.W.2d 704 (1946): Simonson v. Moseley, 183 Minn. 525, 237 N.W. 413 (1931); Costigan, *supra* note 83.

[85] This approach had early been enunciated by the New Jersey courts, and has been widely used. See Van Duyne v.Vreeland, 12 N.J. Eq. 142 (1858); Davison v. Davison, 13 N.J. Eq. 246 (1861).

[86] There are obvious advantages to be gained through its use. While the evidence is still obtainable, the contract can be established and the decree, if properly recorded, can prevent a transfer to a bona fide purchaser.

[87] *Supra*, note 85, at 253.

But they sometimes appear to discount the difficulty, as the Minnesota court did in the *Matheson* case,[88] by stating—

> "In the exercise of its equitable jurisdiction, the court will find no difficulty in making satisfactory provision for the preservation of plaintiff's right with due regard to the full protection of the interests of the surviving promisor. Obviously, the surviving promisor is entitled to full use during her lifetime and no restriction should be placed upon her right to consume or dispose of the property except insofar as a disposition thereof may be a fraud upon her agreement with plaintiff. *She is likewise entitled to continued performance by the promisee until her death.*"

On the other hand some decrees look to the possibility that the relationship may be severed permanently, and attempt to provide not only relief for the promisee but also protection for the promisor. The relief granted is frequently conditioned upon the promisee continuing to perform, or remaining ready to do so if prevented by the promisor.

Thus, in *White v. Masee,* the maxim that "He who seeks equity must do equity" was applied by the court in ordering the successful plaintiff to make regular money payments to the promisor. In discussing the possibility that the duties of the contract might not be carried out in the future, the court said[89]—

> "Owing to the unfortunate breach with plaintiff, he (promisor) may find it morally impossible to return to her home. It is evident . . . that the son and his wife might refuse to take care of him. The court, in imposing conditions to the granting of equitable relief, is not restrained by the strict legal rights of the parties, but may impose such terms as are demanded by justice and regard for righteous conduct."

But this is protection for the promisor only if he successfully brings an action to set aside the injunction or trust imposed upon the property if plaintiff subsequently defaults, and this might be very difficult to do. It is also open to the objection that it requires another lawsuit. Moreover, while this view recognizes and attempts to provide for this very realistic problem, it would seem that there is an apparent logical inconsis-

[88] Matheson v. Gullickson, 222 Minn. 369, 24 N.W.2d 704, 709 (1946).
[89] White v. Massee, 202 Iowa 1304, 211 N.W. 839, 842 (1927).

tency. If the basis of equity intervention is the theory that the relief is necessary because mere money cannot compensate plaintiff for the rendering of peculiarly personal services, then, by the same token, the payment of money to defendant would not compensate him for the loss of future services. Hence he is not adequately protected against plaintiff's defaults in the future. But it is to be kept in mind that if either of necessity is to be inadequately protected, certainly the court should look first to the rights of the one who is not in default. It is submitted that of the approaches suggested, the *White* case comes closest to protecting both parties. In any event the promisor has probably lost that peculiarly personal companionship and affection for which he bargained no matter how the decree is framed, and the lack of protection as to the promisee's future performance of the contract may be of little importance to him from the practical viewpoint. It is, perhaps, the price he must pay for having breached the agreement, but an award of money so that he may secure such care as money will buy certainly seems to be amply justified. It is, of course, true that the decree must ultimately turn on the facts of the particular case and on the nature of the breach. As was said in the opinion handed down in the *Matheson* case—

> "The general principles which govern are well established. Their application, however, is difficult and involves a careful consideration of the total effect of the combination of facts and circumstances peculiar to each case. In doing equity, a common factual denominator for the reconciliation of all cases is out of the question. Similar facts produce and reflect different equitable considerations according to the varied setting in which they are found."[90]

b. AGAINST THIRD PARTIES. As has been pointed out above one of the ways in which the promisor may breach the contract is to convey the land to a third person. The question is raised as to whether the plaintiff can go against such third person. When the promisor has conveyed the land to be devised to a third person who takes gratuitously or with notice, the deed may be declared a fraud and the conveyance cancelled,[91] a trust

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[90] *Supra*, note 88, 24 N.W.2d at 707.

[91] See, e.g., Bird v. Pope, 73 Mich. 483, 41 N.W. 514 (1889); Hogan v. Hogan, 187 Mich. 278, 153 N.W. 678 (1915); Davison v. Davison, 13 N.J. Eq. 246 (1861).

imposed on the land,[92] a reconveyance decreed,[93] or an injunction given against a conveyance by the grantee.[94] Similarly, if the promisor has given a mortgage gratuitously, or for a consideration greatly less than the true consideration, equity will set it aside. Where the trust is imposed the third person is usually ordered to convey to the promisee upon the promisor's death. The reason assigned for this is that the promisee's right to the land will not vest until the promisor's death, and the promisee has no such right as will compel a present conveyance.

4. Conclusion

Many problems must be faced before the question of what remedy should be given is reached. Equity in these cases has been faced with a situation with which even its great elasticity has not, and cannot, completely cope. From the very nature of the case it seems impossible to devise a remedy which will adequately protect both parties, yet equity, by adapting its relief to the particular facts, can afford the only relief which even approaches a sound solution.

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[92] Osborn v. Hoyt, 181 Cal. 336, 184 Pac. 854 (1919); Newman v. French, 138 Iowa 482, 116 N.W. 468 (1908); Van Duyne v. Vreeland, 12 N.J. Eq. 142 (1858).

[93] Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917).

[94] White v. Massee, 202 Iowa 1304, 211 N.W. 839 (1927); Bird v. Pope, *supra*, note 91; Davison v. Davison, *supra*, note 91.

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