refused to answer questions on the grounds of possible federal incrimination; we upheld New York's contempt conviction of a witness before an *in camera* judicial inquiry who refused to testify without his lawyer being present; we again reiterated that the Fourteenth Amendment was not "a short-hand incorporation of the first eight amendments [to the Constitution] making them applicable as explicit restrictions on the States"; and we held that the state "could proceed with prosecutions of sedition against the State itself" and that the interests of the state might well outweigh [as they did in that case] "individual rights in an associational privacy."

What is the more important, I think, is the small number of cases that reach the Supreme Court which have been decided by state courts. While state courts must have decided literally millions of cases last year, we find that only 792 knocked on the door of the Supreme Court. We turned away 734 of them. We heard and decided only thirty of the remaining fifty-eight. Seventeen were reversed and thirteen affirmed. None were from Iowa. The thirty cases came from the courts of seventeen states. One state furnished six such cases, one came from each of ten states, and the remaining fourteen were scattered among six states.

It is true that indigent cases continue to take up a large part of the time and effort of both the Supreme Court and the state appellate courts. In recent years the numbers of *in forma pauperis* cases filed in the Supreme Court have run into the hundreds. For the most part, these petitions to us are *pro se*. The records are scant, revealing in many cases that trial was had without representation of counsel. This often raises serious problems that could have been averted had counsel been appointed. If trial judges would appoint counsel in all felony cases, I am sure this would be remedied. The Court continues to hold to its long standing rule that counsel must be appointed in state capital cases. Moreover, the Court has scrupulously adhered to the rule that it will not disturb judgments based on independent state grounds. Still "bad cases" continue to make what some think to be "bad law" through the invocation of the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. The Constitution, however, requires a fair trial and the Court continues to make certain that this right is enjoyed by every person regardless of his station in life.

In concluding, let me say that the Court's actions in constitutional adjudication have always been solely in response to its responsibility under the Constitution. It has consistently honored the principle of judicial self-restraint. But when constitutional rights are violated, the Court cannot take a back seat. The Court's worth is not so much in its restraints on power but in the part that it plays in arousing in every heart and mind the full meaning of Chief Justice Hughes' words carved in the marble of the Court's facade, "Equal Justice Under Law."

CONTRACTS IN IOWA REVISITED—PERFORMANCE, BREACH AND REMEDIES

RICHARD S. HUDSON*

The present article is concerned with what happens in contractual relations after the agreement is made.[1] The factual pattern of problems is that of a failure or refusal to perform a promise accompanied by assertions such as: "I don't have to perform yet, or I'm excused completely, because the other party hasn't done what he is supposed to do", or "I'm excused because he told me I would be", or "Maybe I ought to perform but he shouldn't get those damages he is asking for, or that decree of specific performance he wants". The reference, by legal categories as classified in the *Restatement of Contracts*,[2] is to conditions,[3] breach,[4] impossibility,[5] discharge,[6] and remedies.[7] Such phrases as constructive conditions, material failure, substantial performance, time is not of the essence, and remedy at law is inadequate float through the discussion in this area. In view of the collection of cases in *Iowa Annotations to the Restatement of Contracts*, published in 1934, the primary references here will be to the collection and analysis of cases decided after those collected in that volume.[8]

A party defending his failure to perform may do so on the basis that the other party has not done what he was supposed to do, that is, has not performed a condition precedent to the promisor's duty of immediate performance; he may argue further not only that no duty of immediate performance on his part has arisen but also that he is completely excused from any duty of

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[1] Previous articles by the same writer, in what may be described as a series, are: *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3 (1959); *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91 (1959); *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Mistake*, 7(2) DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957); *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments*, 6 DRAKE L. REV. 3 (1956); *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67 (1956); *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties*, 5 DRAKE L. REV. 3 (1955).

[2] RESTATEMENT, CONTRACTS (1932), is subsequently referred to as RESTATEMENT. Extensive discussion of all these matters is of course found in the standard treatises, CORBIN, CONTRACTS (1950), and WILLISTON, CONTRACTS (rev. ed. 1936), which will be referred to subsequently simply as CORBIN AND WILLISTON.

[3] RESTATEMENT §§ 250-311; CORBIN §§ 622-771; WILLISTON §§ 663-892.

[4] RESTATEMENT §§ 312-25; CORBIN §§ 943-58; WILLISTON §§ 1288-1337A.

[5] RESTATEMENT §§ 454-69; CORBIN §§ 1320-72; WILLISTON §§ 1931-79.

[6] RESTATEMENT §§ 385-453; CORBIN §§ 1228-1319; WILLISTON §§ 1793-1917.

[7] RESTATEMENT §§ 326-84; CORBIN §§ 990-1319; WILLISTON §§ 1338-1449.

[8] This volume will be referred to subsequently as IOWA ANNOTATIONS. Cases prior to Volume 215 of the Iowa Official Reports may be found in that volume under appropriate RESTATEMENT section numbers.

performance in the future because of failure of performance by the other party, sometimes described as failure of consideration. This relationship between performance or non-performance on one side and the duty, or release from duty, of performance on the other may arise because it was expressly contracted for by the parties and be an express condition, or it may have arisen simply by a process of construction by the court. *Sanford v. Luce*,[9] a 1953 Iowa case, illustrates both an express condition and the process of constructing a condition. This was an action to recover for certain construction work performed by the plaintiff (a former husband of the defendant) upon the defendant's apartment building, in which the plaintiff alleged that the defendant had promised to pay "upon completion thereof" of the work upon the apartment. Plaintiff's testimony was, variously, that the defendant promised to pay "when she got the apartment on a paying basis", "when she was financially able", "with the income off the apartment". The trial court directed a verdict for the defendant, holding there was a fatal variance between the pleading and the proof as to the time of accrual of a cause of action. The Supreme Court reversed, stating there was no fatal variance because whatever the defendant stated, considered as a promise to pay when able, would be construed, following a minority view, as not to be interpreted literally but merely to mean a reasonable time after completion. In the course of the opinion the Court observed that the promise to pay was dependent upon completion of the work, both because of the words of payment "upon completion", and because the promise to pay would have been dependent without a specific time being set, citing section 270 of the *Restatement of Contracts*. This section states that that performance which is to take time will be construed as a condition to that which is to be done immediately.

Even though a court may have concluded, from respective times of performance, as indicated in *Sanford v. Luce* and in other situations, that performance on one side is to be constructed as a condition precedent to performance on the other side, this does not mean that all or exact performance as promised is to be constructed as a condition. The courts generally hold, at least in the absence of an express condition, that the only condition constructed will be that of substantial performance; if the party has performed substantially the other party must perform his part of the contract less, of course, whatever damage may be suffered by such default as may be present;[10] approached from the point of view of discharge rather than from that of condition precedent the same idea is expressed in the statement that not every actual or prospec-

[9] 245 Iowa 74, 60 N.W.2d 885 (1953). An express condition of exhausting remedies within an association before suit was enforced in Ater v. Mutual Benefit Dep't of Order of Railway Conductors, 222 Iowa 1390, 271 N.W. 517 (1937). No such condition was found in Duncan v. Brotherhood of Firemen and Engineers, 225 Iowa 539, 281 N.W. 121 (1938), in provision that no action shall be commenced within six months of final rejection of claim by highest association tribunal.

[10] RESTATEMENT §§ 268, 274; CORBIN §§ 700-05.

tive failure of performance will discharge a party, but only those that are material, unless the parties have provided differently. This idea was illustrated in *Huffman v. Hill*,[11] an action in equity to recover (and to foreclose a mechanic's lien therefor) the sum of $175.93, as the balance due on an oral agreement for labor and materials for work on two porches, raising a garage, building a foundation and cement floor, and constructing a cement drive and sidewalk. The trial court granted a judgment for $100.93, which was affirmed. This was the amount asked less $75, which was ten percent of the total price, for defects such as the wrong slope in the garage, a bump in the driveway, and for using poured cement instead of blocks in the garage. The Court pointed out that technical, exact performance is not necessary, that all that is required is substantial performance after which the contractor is entitled to the contract price less damages. The opinion further articulated the pertinent factors[12] in determining there was substantial performance: the defects were unintentional; there was no bad faith; the defects did not impair the improvement as a whole; the injured party could be fairly compensated by deductions from the contract price. That the conclusion as to substantial performance is to be drawn as a composite of all these factors instead of only a few is emphasized in *Lautenbach v. Meredith*,[13] in which the Court found substantial performance in spite of the fact that certain omissions in a home, such as linoleum, outside lamp and picket fence, may not have been inadvertent; the opinion emphasized the retention of benefits by the defendant and that defendants were little damaged by these deficiencies.

This principle, that strict compliance with promises is not necessary to impose a duty of performance on the other party, is illustrated in other situations such as in *First Trust Joint Stock*

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[11] 245 Iowa 935, 65 N.W.2d 205 (1954). Other cases referring to the doctrine of substantial performance are: Farrington v. Freeman, ... Iowa ....., 99 N.W.2d 388 (1959); Peterman v. Hardenbergh, ... Iowa ....., 97 N.W.2d 152 (1959); Cota Plastering Co. v. Moore, 247 Iowa 972, 77 N.W.2d 475 (1956).

[12] RESTATEMENT lists various factors to be considered in determining materiality of failure to perform so as to operate as a discharge of the obligation to perform, in § 275:

> "In determining materiality of failure fully to perform a promise, the following circumstances are influential:
>
> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> (b) The extent to which the injured party will be adequately compensated in damages for lack of complete performance:
>
> (c) The extent to which the party failing to perform has already partly performed or made preparation for performance;
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The willful, negligent or innocent behavior of the party willing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

[13] 240 Iowa 166, 35 N.W.2d 870 (1949) (the Court also stated that equity is somewhat less strict than law).

Land Bank of Chicago v. Hanlon,[14] in which a mortgagor of real estate defeated a foreclosure action by alleging a compromise agreement even though he was late in performance; the Court observed that time would not be considered of the essence unless it would necessarily follow from the nature of the agreement.[15] The necessity, in land contracts, of specifically having a clause that time is of the essence, was emphasized in *Westercamp v. Smith,*[16] in which the Court granted specific performance to the buyer in spite of numerous alleged deficiencies in his performance and in spite of the failure of the vendee to repair these deficiencies within a thirty day period set by the vendor. The seller had asked for forfeiture of the land contract, apparently believing this would be in accordance with Iowa statutes because he had served a thirty day notice to comply with defaults,[17] but the Court held that no forfeiture was possible because the contract did not contain a clause providing for forfeiture or that time is of the essence, and that all the vendor could then do was sue for damages or foreclosure. The Court then held that because the forfeiture was not authorized and because the tender was good even though not at the time specified in the agreement, specific performance followed as a matter of right.

All of the foregoing discussion has assumed a general relationship in most contracts between performance on one side and the duty of performance on the other, or between non-performance on one side and an excuse for non-performance on the other; the discussion revolved around the process of construction, depending on times of performance and the character of performance. There are some types of agreements, however, in which the idea of relationship is denied. For instance, over the years there has been considerable discussion that in a divisible contract (where performance on both sides is split into installments) failure as to one installment could not, regardless of materiality, excuse the other party from going ahead, but that he must recoup in damages,[18] unless there has been a repudiation of the entire contract. One Iowa case during this period, *Paramount Pictures, Inc. v. Maxon,*[19] appears to continue this position of treating divisible contracts differently from others. This was an action to recover liquidated damages for the failure of the defendant to exhibit and pay for motion picture films according to a contract between the parties. Defendant had cancelled the agreement because of an alleged failure to make available to him for about two months after the scheduled date a particular movie which he states he had desired specifically to fill those stated dates, and because of the failure of higher authority to approve a settlement by supplying

[14] 223 Iowa 440, 273 N.W. 114 (1937).
[15] RESTATEMENT § 276; CORBIN § 713.
[16] 239 Iowa 705, 31 N.W.2d 347 (1948).
[17] IOWA CODE § 656.1-656.6 (1958).
[18] WILLISTON §§ 864-70.
[19] 226 Iowa 308, 284 N.W. 119 (1939).

three extra films free, which refusal reached him after he had shown this particular film and some others upon the faith of the compromise proposal. Without discussing the materiality of the failure, the Court concluded that the only remedy was a remedy of damages, not as a complete defense. The only other stated proposition was that in divisible contracts breach does not destroy the contract in toto. Although there is prior Iowa authority, not cited in the opinion, which supports such an approach,[20] there seems to be little reason to continue such an idea; just because an agreement exists does not mean the divisions are separate; it is still one contract and the dependency should exist.[21] Because of the Uniform Sales Act, in force in Iowa, dependency may be present in divisible contracts for sales of goods.[22]

General contract principles of dependency are also stated in the *Restatement of Contracts*[23] not to apply to leases and conveyances of land. Two Iowa cases during this period, however, do not display such a difference. *Phillips v. Smith* [24] was an action to establish and foreclose liens upon lots in a summer resort for unpaid payments under a covenant contained in conveyances in which the buyer agreed to pay annually "six dollars for supervision and maintenance of the grounds". The defendant contended, and the Court agreed, that the plaintiff had not supervised and maintained the grounds as a resort, had failed to keep up the roadways, had permitted cattle and horses to be loose, a well to fill with sediment and a tennis court to go into pasture. The Court, in ruling for the defendant, simply observed without discussion that whether covenants were dependent or independent was a matter of intention and that here the language required a conclusion the covenant to pay was dependent upon the covenant to maintain. Although not so articulated, presumably the Court was referring to the word "for", although that word in itself does not necessarily suggest anything other than that was the intended use for the money. In *Darnall v. Day*,[25] the Court affirmed a trial court order that a tenant, because of the failure of the landlord to install a new store front as promised, be granted damages for the failure in the past to do so, and also be relieved from paying a certain amount per month until the new front was installed. As the dissent observed, this makes the covenant to pay rent dependent upon the covenant to improve, a result not generally followed,[26] rather than independent; the majority did not even comment about this legal difficulty.

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[20] IOWA ANNOTATIONS § 317-III at 500-01.
[21] RESTATEMENT §§ 266(3), 268(2).
[22] IOWA CODE § 554.46 (1958).
[23] RESTATEMENT § 290. See CORBIN §§ 665 (collateral failure to perform), 686.
[24] 240 Iowa 863, 38 N.W.2d 87 (1949).
[25] 240 Iowa 665, 37 N.W.2d 277 (1949).
[26] *Id.* at 676, 37 N.W.2d at 283; 1 AMERICAN LAW OF PROPERTY § 3.79 (1952); CORBIN § 686.

Even if there be something considered as a condition, either because expressly so indicated or constructed by the court, this may be excused by certain factors. For instance, the condition may be excused by the impossibility of performing it if it is not a material part of the agreed exchange and discharge of the promisor would operate as a forfeiture.[27] This was illustrated in *McCoy v. New York Life Insurance Company*,[28] in which beneficiaries who had no knowledge of the policy were permitted to recover death and disability benefits on the policy even though there was no compliance with the provisions as to notice and proofs of loss, because of the impossibility of the insured, who was insane, to comply. Impossibility did not, however, excuse a condition precedent in *Salinger v. General Exchange Insurance Corporation*.[29] In that case a Cadillac automobile was stolen, and when it was later recovered the insured made an agreement of release (described in the opinion as an accord and satisfaction) on condition, so the opinion says, that the insurance company would repair and return the car to the insured. The car was never returned to the insured, because the finance company picked up the car for defaults in the underlying conditional sales contract which had started before the car was stolen. In an action by the insured on the policy, the Court affirmed for the plaintiff, and concluded there was no excuse by impossibility because the insurance company had reason to anticipate the impossibility[30] because it knew of the defaults at the time it made the promise. The opinion refers to it as a problem of excuse of duty, but in the writer's opinion it is a problem of excusing a condition, the condition to the release, because the suit is on the insurance policy and not on the promise to return the car. Approached in the light of a condition to the release, the return of the car would certainly be a material part of the agreed exchange, and thus no excuse even if impossible within recognized limits. In any event, however, the problem does not seem to be one of impossibility but one of excuse of a condition by prevention by the other party. It is generally stated that conditions are excused by prevention by the other party, unless the risk of such prevention is assumed.[31] Failure to pay the

[27] RESTATEMENT § 301(2); CORBIN § 1362.

[28] 219 Iowa 514, 258 N.W. 320 (1935). This case was distinguished in Kantor v. New York Life Ins. Co., 219 Iowa 1005, 258 N.W. 759 (1933), because there was no showing of inability to furnish proof of disability. It was followed in Levitt v. New York Life Ins Co., 230 Iowa 456, 297 N.W. 888 (1941), a suit for disability benefits by guardian of insured who became insane and thus unable to file proofs of loss, even though the father of the insured knew about the policy; the policy contained a clause excusing such failure if proofs were filed as soon as reasonably possible.

[29] 217 Iowa 560, 250 N.W. 13 (1933) (prior opinion in 214 Iowa 1021, 243 N.W. 183 [1932]. This case is the subject of comments in 19 IOWA L. REV. 615 (1934); 34 COLUM. L. REV. 364 (1934); and 18 MINN. L. REV. 355 (1934). The accord by itself might not be a discharge without performance. See note 39, infra, and accompanying text.

[30] RESTATEMENT § 457.

[31] *Id.*, § 295; CORBIN § 767.

installments of the car owner's debt would seem to have caused the failure to return the car, even if the insurance company did not fight the removal.[32] Looked at in the light of excuse by prevention, it is more difficult to say that the risk of non-payment was assumed by the insurance company than it might be to say they should have anticipated an impossibility of return.

Excuse of condition by prevention was illustrated in several other cases. In *Kollman v. McGregor*[33] an employee was promised a bonus if he stayed a year. The Court affirmed a judgment for the employee for an amount which was that proportion of the promised bonus that the actual time worked bore to the year, because the employer terminated the employment without reason and prevented the employee from working the year. In *St. Peter v. Pioneer Theater Corporation*,[34] where a promised "bank night" award was made dependent upon responding within three minutes after the winner's name was called, the Court, in reversing for the plaintiff, observed that any possible lateness of the claimant was caused by the action of an agent of the theater in announcing the wrong name.

Another frequent argument for excuse of a condition is that it has been waived.[35] This was illustrated in *Venz v. State Automobile Insurance Association*,[36] in which receipt of premiums with knowledge excused a term of the automobile liability policy that it did not apply to automobiles driven by drivers under sixteen years of age. A stipulation in a contract that no extra work would

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[32] The prior opinion indicates the insurance company and finance company were both wholly owned subsidiaries of the motor car manufacturer.

[33] 240 Iowa 1331, 39 N.W.2d 302 (1949).

[34] 227 Iowa 1391, 291 N.W. 164 (1940).

[35] RESTATEMENT § 297; CORBIN §§ 752-53; WILLISTON § 678.

[36] 217 Iowa 662, 251 N.W. 27 (1933). Other cases involving essentially allegations of waiver of conditions are: Ashby v. School Township of Liberty, ... Iowa ....., 98 N.W.2d 848 (1959) (clause in teacher's contract that "in case enrollment of said school becomes less than six this contract becomes null and void" was held not to have been waived by not declaring contract void at beginning of school term, because no showing plaintiff was misled into believing there was a waiver); Swanson v. Baldwin, ... Iowa ....., 93 N.W.2d 740 (1958) (in action by referee in partition to compel purchaser to pay rest of purchase price for land, Court held the fact that vendor did not deliver abstract within seventy-five day period could not be raised by vendee who had acquiesced in delay); Blunt v. Wentland, ... Iowa ....., 93 N.W.2d 735 (1958) (in action for real estate commission by broker, Court did not permit defendants to assert as defense that purchasers were not ready, willing and able to perform when they had to mortgage property to secure payment, because defendants had never raised this question before trial, but had refused solely because of objection to attorney representing purchaser; RESTATEMENT § 304 states where an inadequate reason is given this is immaterial and does not prevent the party from later asserting a good reason, unless failure to do so induces a failure by the other party; there is no discussion of this aspect, presumably in accord with the Iowa authority that does not refer to remediable character of defect; see IOWA ANNOTATIONS § 304); Rowe v. Stufflebeam, 249 Iowa 985, 89 N.W.2d 875 (1958) (in action on construction contractor's bond, condition of notice, by registered mail to home office of company, of breach of contract was waived where written notice was

be paid for unless agreed to in writing was held to have been waived by oral agreement, in *Berg v. Kucharo Construction Company.*[37] Akin to the idea of waiver is the principle that conditions may also be excused by repudiation or manifestation of inability by the other party,[38] as illustrated in *Dee v. Collins* [39] in which the Court held in an action by vendee for specific performance of a land contract that the tender of the money was excused because the vendor did not have good title and had conveyed title to another party.

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sent to resident agent and conference was held with surety's representative as to liability, without raising problem of written notice); Gordon Construction Co. v. Board of Supervisors, 246 Iowa 1368, 72 N.W.2d 551 (1955) (in appeal from board's deduction from compensation for construction work the extra cost of having another construct a certain section, the Court approved the board's action for the reason that, although contractor could have rescinded because of action of board in eliminating from project certain features amounting to 27% of footage and 40% of cost and this was a substantial breach, contractor lost right to rescind by waiver in not rescinding; it should be observed that RESTATEMENT § 297 which refers to excuse of condition by waiver applies it only to cases where it is not a material part of the agreed exchange, which the Court seems to admit this was; the action of the Court may, however, be supported in the idea of an agreement to modify the earlier agreement requiring no new consideration under the Iowa view of modifying mutually executory contracts without new consideration, referred to in Hudson, *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties,* 5 DRAKE L. REV. 3, 6 [1955]); Watson v. Chapman, 244 Iowa 56, 55 N.W.2d 555 (1952) (payment by check of amounts demanded in notice of possible forfeiture of land contract held unobjectionable, because vendor had not objected; see IOWA CODE § 538.8 [1958]; RESTATEMENT § 305); Schoeman v. Loyal Protective Life Ins. Co., 239 Iowa 664, 32 N.W.2d 212 (1948) (in action on health insurance policy, Court held in affirming for plaintiff that there could be waiver of conditions of proofs of loss and that plaintiff be attended by licensed physician, where company denied there was any disability and did not object prior to trial to failure to file proofs of loss or that plaintiff had been attended by chiropractor rather than licensed physician); Creel v. Hammans, 234 Iowa 532, 13 N.W.2d 305 (1944) (purchaser of land who takes and retains possession cannot refuse to pay the purchase price because of alleged lack of title in vendor, unless he rescinds and restores possession, and if he does not rescind it is considered he is willing to receive such title as vendor is able to give, content with the personal responsibility of the vendor upon his covenants in case the title fails and purchaser is dispossessed; see RESTATEMENT § 298, on accepting or keeping performance with knowledge of defects); Henriott v. Main, 225 Iowa 20, 279 N.W. 110 (1938) (condition of return of merchandise in suit on promise to repurchase was found to have been waived); Smith v. Bagmen Emergency Fund Ass'n, 222 Iowa 958, 270 N.W. 13 (1936) (no waiver of clause terminating insurance protection upon suspension of fraternal organization was found in acceptance of premiums by defendant without knowledge of suspension); McPherrin v. Sun Life Assur. Co., 219 Iowa 159, 257 N.W. 316 (1934) (clause in life insurance agency agreement terminating all commission claims in event of leaving company was found not to have been waived).

[37] 237 Iowa 478, 21 N.W.2d 561 (1946); *accord:* Webster County Buick Co. v. Nebraska Buick Automobile Co., 216 Iowa 485, 249 N.W. 203 (1933) (provision in agreement against changes in agreement could not take away right to modify by mutual agreement).

[38] RESTATEMENT § 306.

[39] 235 Iowa 22, 15 N.W.2d 883 (1944); subsequent appeal in 237 Iowa 429, 22 N.W.2d 333 (1946).

Contractual duties may be discharged in many ways including those alluded to above in connection with the discussion of conditions precedent, which, in *Restatement* terminology, are the cases where a duty is discharged by the failure of an unexcused condition precedent to occur within time to create a duty of immediate performance,[40] by a material failure of performance, sometimes referred to as "failure of consideration",[41] and by a material change of position by one party justified by the probable failure to receive an agreed exchange from the other party.[42] The Iowa Court in many cases simply refers to the party's being able to rescind[43] because of the failure or prospective failure of performance, although the language of failure of a condition precedent to occur was used in holding the defendant's duty was discharged, in a

[40] RESTATEMENT § 395; CORBIN §§ 1252-60.

[41] RESTATEMENT §§ 397-99, 274-76.

[42] RESTATEMENT §§ 398, 280-87. That Iowa cases do not always refer to a change of position here, see IOWA ANNOTATIONS to these sections and cases in note 43, *infra*.

[43] IOWA ANNOTATIONS § 274. Iowa cases not otherwise referred to herein involving the suggestion of avoidance of contractual liability because of the failure or prospective failure of the other part are: McCubbin v. Urban, 247 Iowa 862, 77 N.W.2d 36 (1956) (in declaratory judgment action by vendor requesting declaration that the title to land was marketable the Court affirmed trial court action in finding for plaintiff and dismissing vendee's cross-petition for rescission for claimed defect in title, stating, in part, that whatever the status of the title might be, the rule is that the title need be good only as of date when title was to be furnished which here was when all payments were made, and that there was nothing indicating acceleration of time to make such title good and that there was no contention title would not be made good at required time; see RESTATEMENT § 283 [b]); Storck v. Pascoe, 247 Iowa 54, 72 N.W.2d 467 (1955) (in action in equity, inter alia, to confirm certain alleged oral contract for purchase of partnership interest in a garage business, trial court's decision was affirmed for seller in holding that, even though seller's alleged repudiation of prior agreement by demanding more compensation may have justified rescission of the agreement, buyer did not rescind nor consider the agreement repudiated, particularly because as a condition to rescission he should have returned or offered to return the property previously transferred to him; compare also the Court's reference to the "preponderance of evidence" with the standard referred to in notes 118-22, *infra*, and accompanying text); Roder v. DeVries, 246 Iowa 841, 69 N.W.2d 425 (1955) (vendor in cross-petition for reformation and forfeiture of land contract, in answer to vendee's petition for rescission, was not prevented from recovery over when a tenant was in possession, partly because it was shown tenant could have been removed quickly); Barnett v. Burns, 235 Iowa 1, 15 N.W.2d 869 (1944) (no obligation to pay for course of instruction in correspondence school when there was no showing of performance by school); Danico v. Ford, 230 Iowa 1237, 300 N.W. 547 (1941) (repudiation by the other party in a business venture of a claimed partnership status was held to authorize the cancellation of a written contract with respect to the partnership providing disposition of partnership on death, in action to establish a prior partnership and for its dissolution and accounting; see RESTATEMENT § 280); Utley v. Boone, 230 Iowa 979, 299 N.W. 437 (1941) (action by vendor to quiet title supported in part by extended default of vendee so he would not be in position to demand a conveyance); Trammel v. Kemler, 226 Iowa 918, 285 N.W. 196 (1939) (action by vendee to rescind land contract and recover payments supported because of failure of vendor to remove mortgage, especially where amount unpaid was less than the mortgage; there was no waiver in making payments after default by vendor upon his representations he would perform); Hardin

suit to foreclose a mechanic's lien for erecting and equipping a quonset building for storing grain because of the failure to secure a government storage guarantee contract, in *Miller-Piehl Equipment Co. v. Gibson Commission Company.*[44]

Other methods of discharge might include performance or payment,[45] mutual rescission,[46] or novation,[47] principally illustrated by the substitution of a new obligor for the old.[48] An obligation also may be discharged by an agreement to accept a certain performance in satisfaction, in the future, referred to as an accord and satisfaction.[49] The oft-repeated statement that in such a situation there is no discharge without the satisfaction, that is, the performance of the accord, was mentioned in *Hughes v. National Equipment Corporation*[50] in partial support of the Court's conclusion that a claimed agreement, to satisfy a warranty claim on the sale of machinery by return of the machinery and cancellation and return of notes without return of any payment made, was not a defense to an action for return of the payments made because the accord was not performed when the notes were not returned within a reasonable time. The statement that an accord is not a discharge without a satisfaction should not be taken too literally. It is possible for the new agreement in itself

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v. Union Mutual Life Ins. Co., 222 Iowa 1283, 271 N.W. 176 (1937) (action in equity to rescind contract for purchase of real estate and for recovery of down payment supported because of extended failure by vendor to supply completed abstract as provided in agreement); Dolliver v. Elmer, 220 Iowa 348, 260 N.W. 85 (1935) (action in equity to recover payments made by vendee under land contract based on rescission by vendee of contract because of failure and inability of vendor to convey title for extended period after specified time of performance). See also some of the cases in note 102, *infra.*

[44] 244 Iowa 103, 56 N.W.2d 25 (1952) .

[45] RESTATEMENT §§ 386-94. In support of the action of the trial court in not submitting the defense of payment because of some small amounts turned over during lifetime, in an action against an estate for services rendered decedent, the Court pointed out that even if there were two promises, one to pay small amounts from time to time, and the other to pay on death, the presumption of application of payments to debt which was due would apply. *In re* McKeon's Estate, 227 Iowa 1050, 289 N.W. 915 (1940). See particularly RESTATEMENT § 394.

[46] RESTATEMENT §§ 406-09; CORBIN §§ 1236-37; WILLISTON §§ 1826-28; see Fulton v. Chase, 240 Iowa 771, 37 N.W.2d 920 (1949), and Kilpatrick v. Smith, 236 Iowa 584, 19 N.W.2d 699 (1945), referred to in note 102, *infra.*

[47] RESTATEMENT §§ 424-30; CORBIN § 1297.

[48] The following cases held for the creditors because of insufficient evidence to show a discharge of the old obligor: Tuttle v. Nichols Poultry & Egg Co., 240 Iowa 199, 35 N.W.2d 875 (1949); *In re* Eitzen's Estate, 231 Iowa 1169, 3 N.W.2d 546 (1942); Wade & Wade v. Central Broadcasting Co., 227 Iowa 422, 288 N.W. 439 (1939); Des Moines Joint Stock Land Bank v. Allen, 220 Iowa 448, 261 N. W. 912 (1935).

[49] RESTATEMENT § 417.

[50] 216 Iowa 1000, 250 N.W. 154 (1933) (the Court also believed no such agreement of settlement had been made).

Delivery of check itself, when check did not clear because of bank closing, and assignment of account in credit union when credit union did not have sufficient funds to pay, were not considered to be payment of a debt respectively in Kruidenier Cadillac Co. v. Manhardt, 220 Iowa 787, 263 N.W. 282 (1935), and Kelley v. Sigismund, 232 Iowa 1028, 6 N.W.2d 864 (1942).

to be the satisfaction of the old obligation, so that even if the debtor defaults the creditor's action must be on the new agreement.[51] Under the *Restatement of Contracts* classification, in section 419, there is a presumption that the agreement itself is a discharge if the previous duty is other than an undisputed duty to pay damages or to pay a liquidated sum of money. The *Hughes* case would appear to involve a disputed claim, so the presumption under the *Restatement* rule would be in favor of the agreement itself being a discharge. The case of *Munn v. Town of Drakesville*[52] supports the notion that the new agreement itself may be the discharge of the old contract. This was an action to recover upon an alleged contract to furnish electric service to the defendant, which was met by the defense that a new agreement had been entered into on different terms after a dispute as to the validity of the old cotnract. In sustaining the trial court's action in directing a verdict for the defendant, the Supreme Court, after noting the dispute, stated that the old arrangement was extinguished and that even if there were claims under the new agreement this would not revive the old agreement, and noted that the terms "accord and satisfaction" and "novation" are used interchangeably, that novation would here be a more accurate designation. This case would seem in essence to be following the *Restatement* presumption. Its use of the terminology of novation is not, however, in accord with *Restatement* terminology, because the *Restatement* requires either a new obligor or obligee.[53] In *Boyd v. Christiansen*,[54] although finding no defense for the debtor because the offer of accord was not accepted,[55] the Court did refer to a proposition that a promise without performance is not satisfaction except by express agreement.[56]

Discharge of a substantial contractual duty simply by waiver or renunciation without consideration generally is considered to have a limited scope.[57] However, in *Pond v. Anderson*,[58] without mentioning a contrary position taken in a prior case, *Pennebaker v. North American Life Insurance Company*,[59] the

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51 RESTATEMENT § 418; IOWA ANNOTATIONS § 419-II; CORBIN §§ 1275, 1293.

52 226 Iowa 1040, 285 N.W. 644 (1939).

53 RESTATEMENT § 424(c).

54 229 Iowa 1, 293 N.W. 826 (1940).

55 See discussion of this aspect of the case in Hudson, *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91, 98 (1959). In Stuart v. Beans, 221 Iowa 307, 263 N.W. 816 (1935), the Court reversed a lower court holding in equity and found an agreement of accord and satisfaction.

56 229 Iowa 1, 6, 293 N.W. 826, 828 (1940). It is not clear from the cases cited or the Hughes case, note 50, *supra*, that there is a requirement of an express agreement. The opinion also refers to Graven, *Outmoded Terminology of Accord and Satisfaction*, 24 IOWA L. REV. 697 (1939); discussing the various aspects of the rule that an accord is not a defense without a satisfaction.

57 RESTATEMENT §§ 410-16; CORBIN §§ 1240-41.

58 241 Iowa 1038, 44 N.W.2d 372 (1950).

59 226 Iowa 314, 284 N.W. 147 (1939), prior opinion in 278 N.W. 198 (1938).

Court held that a real estate agent who apparently had earned his commission validly discharged the claim by waiver, an indication he would not press his claim, which did not require consideration. In spite of the whittling away of the doctrine of consideration there seems to be little authority for this position.[60] The idea of a renunciation of a claim under a contract was also referred to in *Osceola v. Gjellefald Construction Company*, [61] mentioning what apparently is the Iowa view that acceptance of construction work bars an action for damages for defects known or discoverable.[62] In this case, however, the Court found the defects were undiscoverable. The *Restatement of Contracts*,[63] while supporting the doctrine that acceptance of a performance which was known or should have been known to be defective discharges the duty to perform, does so only if these is an assent to take defective performance as a discharge of duty, not just by an acceptance of defective performance.

Rights and duties may not mean too much except in terms of remedies provided. A party to an agreement may desire to have a court order the other party to perform as closely as possible to the action promised (specific performance), or to pay a monetary award for the loss caused and gains prevented (damages), or perhaps to pay the value of any benefits previously conferred upon him (restitution). Litigation on the appellate level in the area of remedies presents a picture mostly of reasons why the particular remedy sought should not be granted. Two Iowa cases are noted here as an introduction to the problems in remedies. In *Levis v. Hammond*,[64] a suit for specific performance of an alleged oral agreement by husband and wife to execute mutual wills in which plaintiff was to be a beneficiary, a majority of the Court denied specific performance because the agreement was not sufficiently "fair and reasonable" when the wife, who died first, had no property to leave to the husband. In *King Features Syndicate v. Courrier*,[65] involving a contract in which plaintiff was to furnish wire news service for a proposed radio station for a five year period, the suit was for specific performance or in the alternative for damages to include loss of profits. As to the specific performance the objection was raised and sustained by the Court that no equity decree would be granted because it would be too difficult to supervise.[66] As to the damage claim the defendants objected that the damages claimed were speculative, conjectural and too uncertain. The Court disagreed with the defendants and concluded the

[60] See discussion and authorities and other Iowa cases cited in Hudson, *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Contracts*, 5 DRAKE L. REV. 3, 13 (1955).

[61] 225 Iowa 215, 279 N.W. 590 (1938). There was found to be no waiver by the seller of a claim for damages against the buyer in the resumption of possession of goods by the seller after the buyer's rejection, in Appel v. Carr, 216 Iowa 64, 246 N.W. 608 (1933).

[62] IOWA ANNOTATIONS § 411.

[63] RESTATEMENT § 411; see CORBIN § 1245.

[64] ..... Iowa ....., 100 N.W.2d 638 (1960).

[65] 241 Iowa 870, 43 N.W.2d 718 (1950).

[66] RESTATEMENT § 371.

profits were reasonably certain, taking the promised amounts less wire charges and maintenance of machines, without deduction for overhead or fixed expenses because these would be constant whether the contract was performed or not.

A damage award should in general be geared to losses caused and gains prevented.[67] This means that recovery is generally limited to pecuniary damages. However, there are certain exceptions, as illustrated in suits for breach of promise to marry.[68] In *Benson v. Williams*[69] the Court affirmed a judgment for the plaintiff for $2,500, as against a contention that she should get no more than $17.50, for a purchased dress, and approved the inclusion of something for embarrassment and humiliation before defendant's final repudiation because of his campaign of delay and neglect. In *Merritt v. Leuck*[70] the Court approved an instruction in a breach of promise case that the jury might consider disappointment, mortification, humiliation, loss of worldly or pecuniary damage including a home and the comforts thereof.

Punitive damages are ordinarily not recovered in contract actions.[71] However, in *Kuiken v. Garrett*,[72] in a suit by a tenant against a landlord on a covenant for quiet enjoyment and also for wrongful eviction, even though the question was apparently not raised in the trial court, the Supreme Court opinion stated that punitive damages could be recovered in the contract action on the theory there was an independent tort, although it is doubtful just what the independent tort was. Extensive discussion of this case is contained in an article in a prior edition of this *Review*,[73] so no further discussion is contained herein.

Foreseeability of harm as a probable result of the breach is a necessary requirement of recovery.[74] This problem was referred to in *Huff v. United Van Lines, Inc.*,[75] where the Court approved the granting of expense of lodging plaintiff's family at a hotel during the period a shipment of household goods was not being transported with reasonable dispatch. Here the carrier, through an agent, allegedly had notice that the goods were to be used to furnish a new home and that the shipper's family would have no home until the goods were delivered.

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67 RESTATEMENT § 329; WILLISTON § 1338; CORBIN § 992.
68 RESTATEMENT § 541; CORBIN § 1076.
69 239 Iowa 742, 32 N.W.2d 813 (1948).
70 231 Iowa 777, 2 N.W.2d 49 (1942).
71 RESTATEMENT § 342; WILLISTON § 1340; CORBIN § 1077.
72 243 Iowa 785, 51 N.W.2d 149 (1952).
73 *The Theory and Application of Punitive Damages in Iowa*, 8 DRAKE L. REV. 36, 41 (1958).
74 RESTATEMENT § 330; WILLISTON §§ 1344-44A, 1355-57; CORBIN § 1007.
75 238 Iowa 529, 28 N.W.2d 793 (1947). In a suit against seller for damages for breach of contract to sell a store front for transfer from one building to another, it was held in Gildner Bros. v. Ford Hopkins Co., 235 Iowa 191, 16 N.W.2d 229 (1944), that, although ordinarily the measure of damages is difference between contract price and market price, where there was no market price, the party could recover such items as extra amount to purchase another front, plus architect's fees paid out for services not used.

Damages, or a particular element thereof, may be denied because the proof thereof is too speculative or uncertain.[76] The *King Features Syndicate* case, [77] *supra*, is an illustration of this problem, although the Court concluded that the profit to be made on a contract to supply wire news service was not too uncertain for recovery. Loss of profits was held to be too remote and speculative, in *Benshoof v. Reese*,[78] to sustain recovery for loss of earnings or profits in raising other hogs when a buyer of hogs kept and held certain hogs as a bailee of the seller after a claimed breach of warranty. Damages for breach of a promise to buy back a petroleum business at a value to be determined by an appraiser mutually appointed was not granted in *Barnsdall Refining Company v. Cushman-Wilson Oil Company*,[79] when promisor refused to appoint an appraiser, because of lack of evidence to show what formula would be used by appraisers.

Damage awards may also be cut down or denied because of the principle of mitigation of damages, that the injured party must make some reasonable move to cut down damages.[80] This was illustrated in *Bogren v. Conn*,[81] an action for damages for failure to accept a carload of cattle. Defendant objected to the instruction on mitigation which referred to the necessity for reasonable care and judgment in reselling. The Court affirmed the judgment for plaintiff, even though the cattle were shipped to Chicago, when there was doubt as to a market for them in Boone where they were to be delivered. The Court also rejected defendant's argument that his willingness to buy at a large discount in Boone should have precluded the plaintiff from sending the cattle to Chicago. *Lannom Manufacturing Company v. Strauss Company*[82] referred to the same idea of only having to use reasonable judgment, when the Court concluded in an action for the price of shoes to be produced that continuing to manufacture shoes after repudiation did not add to the damages. *Friedman v. Colonial Oil Company*,[83] an action to recover rent under a written lease, although affirming a finding favorable to the landlord, did refer to

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[76] RESTATEMENT § 331; WILLISTON §§ 1345-46A; CORBIN § 1020.

[77] King Features Syndicate v. Courrier, 241 Iowa 870, 43 N.W.2d 718 (1950). Other cases referring to loss of profits are: United States Cam-O Corp. v. Thomas, 246 Iowa 357, 67 N.W.2d 453 (1954) (counterclaim for damages for alleged breach of warranties of camera film and finished pictures was not sustained because of failure of evidence to establish alleged exclusive contract to photograph school pupils in county and because of insufficient evidence to prove alleged loss of profits on school and studio business); Berg v. Kucharo Construction Co., 237 Iowa 478, 21 N.W.2d 561 (1946) (profits to be made on construction job held not to be speculative and remote); Atlas Brewing Co. v. Huffman, 217 Iowa 1217, 252 N.W. 133 (1934) (profits to be made on beer, requested in suit for breach of exclusive agency, held not too remote and speculative).

[78] ..... Iowa ....., 97 N.W.2d 297 (1959).

[79] 97 F.2d 481 (8th Cir. 1938); see WILLISTON § 803.

[80] RESTATEMENT §§ 335-36; WILLISTON §§ 1353-54; CORBIN § 1039.

[81] 224 Iowa 1031, 278 N.W. 289 (1938).

[82] 235 Iowa 97, 15 N.W.2d 899 (1944).

[83] 236 Iowa 140, 18 N.W.2d 196 (1945).

the rule applied in Iowa that a lessor of land must use reasonable diligence to rerent when the tenant abandons the lease.[84]

Several particularized applications of rules of damages are worthy of note. *Hansen v. Andersen*[85] involved damages for failure properly to construct a granary in accordance with certain specifications. The trial court received evidence of the possible cost of proposed rebuilding of the roof to comply with specifications, which would be extensive as compared with the original compensation (cost plus ten percent) which the plaintiff already had paid to the contractor. The Supreme Court reversed and remanded for a new trial because of the admission of this testimony, and stated the proper rule of damages to be the difference between value of the building as it is and as it would have been if properly constructed, rather than the expense of rebuilding, because the expense would be substantial and greatly disproportionate to the importance of the results obtainable.[86] The rule of fair and reasonable cost of necessary repairs rather than the rule of difference in value of real estate without its improvement was applied to a failure to make repairs to pavement, in *Armstrong Paving Products, Inc. v. Nielsen.*[87]

Groff v. Crawford[88] concerned the measure of damages for breach of promise to lease land. The prospective lessee claimed $50 for time spent in hunting for other land to rent, $100 for inability to find other employment, and $850 profits which he would have earned on the land. The Court affirmed sustaining a motion to strike the element of profits as damages, apparently for the sole reason that early Iowa cases had stated profits could not be recovered in an action on a promise to lease. It is doubtful if the prior Iowa cases actually require any such arbitrary rule; the problem in those cases was apparently only that under some circumstances evidence of profits may be too speculative.[89] Even if the prior cases did hold to such an arbitrary rule, the Court's reluctance to reexamine the rule is open to question. The Court's opinion threw the whole problem to the legislature in the following language:

> The parties hereto argue as to what the majority rule is—appellant contending that it is against our holding while appellee insists the reverse. We are not called on to cast up the weight of authority but see note to Weiss v. Revenue Bldg. & L. Ass'n, 104 A.L.R. 129, 132. Adair v. Bogle, supra,[90] was decided in 1866 and Dilly v. Payns-

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[84] IOWA ANNOTATIONS § 336-I-C.

[85] 246 Iowa 1310, 71 N.W.2d 921 (1955).

[86] This is in accord with RESTATEMENT § 346(1)(a)(ii) and comment; see WILLISTON § 1363; CORBIN §§ 1089-90.

[87] 215 Iowa 238, 245 N.W. 278 (1932) (Court also held that words in the agreement of promising to repair "in consideration of payment" did not make payment a condition precedent to duty to repair).

[88] 230 Iowa 1264, 300 N.W. 521 (1941).

[89] See the discussion of the case referred to in note 88, *supra*, and of prior Iowa cases, in Note, *Damages for Breach of Contract to Make a Lease*, 31 IOWA L. REV. 650 (1946); see also WILLISTON §§ 1365-76.

[90] 20 Iowa 238 (1866).

> ville Land Co., supra,[91] was decided in 1916. During the intervening years twenty-eight sessions of the general assembly have passed with no action taken. These years have seen, as is a matter of common knowledge, the effect of the depression with its consequent hardship on tenants; and yet it was not thought necessary to change a rule so long in effect. Without venturing an opinion as to whether public policy now demands a change, it is sufficient for our purposes to say that if that should be thought to be desirable the legislature with its larger powers of investigation of all the factors involved is the proper body to make the change—until that is done, we are disposed to follow the rule of our cases cited.[92]

It is not clear why a court should feel called upon to await legislative action to overrule a doctrine which was judicially constructed. This obeisance to the legislature and its inaction as solidifying the position to be taken should be contrasted with several recent Iowa cases, involving questions of imputing negligence of a driver to the owner of a car in a suit against a third person[93] and the question of whether notice of cancellation of an insurance policy is effective only when received,[94] in which the Court overruled its previous interpretation of statutory language which had survived many years of legislative inaction and presumed approval.

Damages were limited, in a suit by a broker for breach of an exclusive real estate listing, to the amount expended in attempting to secure a sale (reliance element) and did not include the benefit of the bargain, in *Ferguson v. Bovee*.[95] This involved an exclusive real estate listing which promised a commission if the broker sold or purchased, and was a case where the owner revoked before any purchaser had been secured. This case is then granting recovery only for reliance elements and not for the benefit of the bargain, in a case of a promise supportable not by traditional bargained for consideration but by detrimental reliance (promissory estoppel).[96]

Interest as an element of damages[97] was considered in *Farrington v. Freeman*,[98] in which the Court allowed interest from ten days after substantial performance was completed because payment was to be made ten days after completion, even though there was an unliquidated counterclaim for improper performance.

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91 173 Iowa 536, 155 N.W. 971 (1916).

92 230 Iowa 1264, 1266, 300 N.W. 521, 522 (1941).

93 Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956), discussed in Note, *Owner-Liability and Contributory Negligence—"Pilgrim's" Progress?*, 5 DRAKE L. REV. 127 (1956).

94 Selken v. Northland Ins. Co., 249 Iowa 1046, 90 N.W.2d 29 (1958), discussed in Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 8-10 (1958).

95 239 Iowa 776, 32 N.W.2d 924 (1948) (two judges dissented, believing the full commission or bargain element should be recovered).

96 See Hudson, *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 84 (1956); and Hudson, *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91, 99 (1959).

97 RESTATEMENT § 337; WILLISTON § 1413; CORBIN §§ 1046, 1051.

98 ..... Iowa ....., 99 N.W.2d 388 (1959).

Many times parties attempt to provide in the contract itself for a stipulated amount of damages in the event of breach. Such agreement will be enforced if the damage is difficult of estimation and the amount stated is a reasonable forecast of what the damage might be.[99] This problem was illustrated in the very recent case of *Huntsman v. Eldon Miller, Inc.*,[100] an action to recover funds (earnings) withheld by the defendant under terms of an agreement which provided, inter alia, for surety bond or cash bond of $1,000 or withholdings of ten percent of earnings until $1,000 was accumulated, to be retained if the plaintiff failed to render full and faithful performance and also to be retained if there should be any default under the terms of the agreement, including keeping of records, obeying motor carrier safety regulations, and keeping equipment in good condition. The agreement had been terminated for intoxication on duty. The Court affirmed a judgment for plaintiff, and classified this clause as an unenforceable penalty clause for the principal reason that it provided for retention for violations of obligations of varying importance. In connection with the problem of enforcing penalty clauses in agreements it should be observed that there may be shelter in the Iowa Code provisions as to forfeiture of land contracts[101] for enforcement of agreements for retention of payments under such contracts that might under other circumstances appear to be penalties, although it is not clear that the Iowa Court would enforce such a clause if to do so would in effect enforce an extreme forfeiture or penalty.[102]

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[99] RESTATEMENT §§ 338-39; CORBIN §§ 1057-63, 1066.

[100] ..... Iowa ....., 101 N.W.2d 531 (1960). Other cases involving a contention of penalty rather than liquidated damages are discussed in Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 15 n. 54 (1958).

[101] IOWA CODE §§ 656.1-656.6 (1958); see CORBIN § 1075.

[102] See the cases collected in IOWA CODE ANN. § 656.1, in IOWA ANNOTATIONS §§ 302, 339, 357-III, and 374-IV, and in Comment, 13 IOWA L. REV. 93 (1927). RESTATEMENT § 302 refers to a rule that a condition will be excused if to do so involves extreme forfeiture and penalty; § 539 refers to the rule that penalty clauses will not be enforced; § 357 states that a plaintiff in default has no right to compensation for part performance if the contract provides it may be retained and the amount is not so great (considered in connection with the other party's harm) as to constitute a penalty; § 374 states the proposition that specific performance will not be refused if to do so would work an unjust penalty or forfeiture. In Watson v. Chapman, 244 Iowa 56, 55 N.W.2d 555 (1952), an action for specific performance by a buyer against whom a notice of forfeiture had been served, and against whom the complaint was made that full payment had not been made, the Court granted specific performance anyway and observed, in connection with the contention that the cost of serving the notice ($2.07) had not been paid, 244 Iowa at 63, 55 N.W.2d at 559: "It seems unthinkable that a court of equity would permit the forfeiture of all the rights of the purchasers, who had paid nearly $900 on their contract and had expended several hundred dollars in improving the property, because of this default. Forfeitures are not favored by the law, and a forfeiture such as defendants are attempting here has peculiarly little to recommend it. But we need not put our decision as to the matter of costs of serving notice on broad and general equitable principles alone. By holding the Passer checks as they did, without rejection or complaint, defendants lost any right

The remedy of specific performance is subject to the overall requirement that the remedy at law be inadequate.[103] The recent

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they might have had to insist upon a forfeiture. . . . They owed a duty either to return the tendered payment within a reasonable period of time or to accept it." Even though there was the alternative basis on the forfeiture feature about holding the checks, the *Watson* opinion indicates that the Court might examine such clauses from the point of view of being penalty. This should be contrasted with Lake v. Bernstein, 215 Iowa 777, 246 N.W. 790 (1933), *infra* note 140, which denied recovery of $1,200 paid on purchase price of $3,500 even though the contract did not contain a clause authorizing forfeiture of payments made under land contract.

Other cases, not otherwise mentioned, referring to IOWA CODE ch. 656 (on forfeitures of land contracts) are: Fulton v. Chase, 240 Iowa 771, 37 N.W.2d 920 (1949) (action in equity by buyer for rescission supported because notice of forfeiture improperly served by publication in newspaper, because seller was himself in default when he had made it impossible for himself to perform by conveying to another during the thirty day notice period, and because the Court thought taking property back amounted to mutual rescission); Kilpatrick v. Smith, 236 Iowa 584, 19 N.W.2d 699 (1945) (action in equity by buyer to rescind and to recover payments supported because during period of notice of forfeiture vendor executed lease and gave possession to another and thus disabled himself from performing, and because of mutual rescission found in surrender of possession by vendee and acquiescence, in repudiation, by vendor's leasing to another; Court also referred to rule that in mutual rescission parties are entitled to be returned to status quo and permitted recovery of payments paid less rent for period of possession plus interest; compare the position here that in mutual rescission parties are to be put in status quo, a position apparently followed in prior Iowa cases, IOWA ANNOTATIONS § 409, with the RESTATEMENT position that it is a question of interpretation whether the parties agreed to make restitution of payments made); Spangler v. Misner, 238 Iowa 600, 28 N.W.2d 5 (1947) (vendor succeeded in forcible entry and detainer action after serving notice of forfeiture as against objection that vendor could not perform, because claimed title defect in failure to probate estate of one of vendors could be removed, and as against claimed unconscionable character of action where there had been great rise in land values, because slight appeal to equity was found where vendee apparently had lived on the property and paid nothing for over five years); Sarazen v. King, 226 Iowa 1309, 286 N.W. 471 (1939) (action by vendee to cancel and avoid an attempted forfeiture of a real estate contract succeeded because of apparent inability of vendor to perform his undertaking when there had been attachment against property and sheriff's certificate outstanding at time of serving notice of forfeiture); Holman v. Wahner, 221 Iowa 1318, 268 N.W. 168 (1936) (vendee succeeded in action to cancel forfeiture through forcible entry and detainer because of fault of vendor in fraud as to property and also because he was not entitled to forfeiture when agreement did not have either a clause for forfeiture or one making time of essence); Schwab v. Roberts, 220 Iowa 958, 263 N.W. 19 (1935) (vendor succeeded in action to quiet title to land in cutting off buyer's claim because buyer had not made an unconditional tender of payments; there is no evidence here of penalty effect).

103 RESTATEMENT § 358; WILLISTON § 1418; CORBIN §§ 1136, 1142; MCCLINTOCK, EQUITY § 60 (2 ed 1948). Pleading inadequacy of remedy at law because damages could not be accurately ascertained (see note 76, *supra*, and accompanying text), in an attempt to secure an injunction restraining defendants from engaging in business as chicken sexers in violation of an agreement boomeranged when the Court denied an injunction because the restrictive periods had passed. The Court then refused to grant damages under a general request for "such other equitable relief as may be proper." Nitta v. Kuda, 249 Iowa 853, 89 N.W.2d 149 (1958). There is also the common statement that once equity has obtained jurisdiction it will determine all questions necessary to accomplish full justice even though it may be required to pass on

case of *Gingerich v. Protein Blenders, Inc.*[104] illustrates this point. This was an action, in part, for specific performance of a promise to buy shares of corporation stock. The defendant made motions to transfer the action to law and for a jury trial, both of which were denied. The Supreme Court reversed, stating that, in spite of an allegation of unknown and not easily ascertainable value of the stock, the remedy at law was adequate because a suit at law for the stated purchase price was maintainable where the buyer refused to accept a proper tender of the stock. Even though the proposition asserted, that a suit at law for the purchase price is maintainable when title to the shares had not passed, is questionable,[105] this is a clear-cut illustration of the proposition that the remedy at law must be inadequate before equitable relief will be granted and that this ordinarily is not true in cases involving contracts for sales of personal property. In land cases specific performance of promises to convey and of promises to buy and pay for land is always granted without actual showing of inadequacy in the individual case,[106] as was repeated in *Dee v. Collins*,[107] a suit by vendee for specific performance. Specific performance of a promise by the landlord to construct a new store front was refused, in *Darnall v. Day*,[108] because the remedy usually invoked is an action for damages, because the tenant had an option

matters ordinarily cognizable at law. Simpson v. Bostwick, 248 Iowa 238, 80 N.W.2d 339 (1957).

Adequacy of remedy at law was given as the reason for denying equitable relief to the insured, in a decree that defendant insurance companies had a right to a physical examination of plaintiff under an accident insurance policy at various times when plaintiff was bringing piecemeal suits on this policy. Eller v. Guthrie, 226 Iowa 467, 284 N.W. 412 (1939). It was also given for denial of specific performance of a promise to make disability payments as the disability continued where defendant stopped paying disability installments. Gephardt v. Metropolitan Life Ins. Co., 213 Iowa 354, 239 N.W. 110 (1931). The Court in the *Gephardt* case seemed disinclined to consider a multiplicity of suits sufficient basis for equitable interference and further doubted there was a showing of conditions requiring multiplicity . RESTATEMENT § 361(e) includes the factor of probability that full compensation cannot be had without multiple litigation as a factor involved in the determination of adequacy of a damage action. (Although the *Gephardt* opinion is in the volumes from which cases were collected in IOWA ANNOTATIONS, it is not indexed therein.) The *Gephardt* case does not discuss the possible adequacy of a remedy at law in the form of judgment for total breach. See RESTATEMENT § 318, WILLISTON §§ 1330A,B; CORBIN § 969.

[104] ..... Iowa ....., 95 N.W.2d 522 (1959). The Uniform Sales Act provisions as to suit for the price, IOWA CODE § 554.64 (1958), were held not to apply because the definition of goods excludes shares of stock.

[105] See the comment on the case referred to in note 104, *supra*, 45 IOWA L. REV. 433 (1960), criticizing the rationale and analysis of Iowa cases in this opinion. Neither the opinion nor the Comment refers to Patterson v. Bingham, 222 Iowa 107, 268 N.W. 30 (1936), in which the Court affirmed a judgment against defendant for purchase price of shares of corporate stock against the objection that specific performance should not be granted because the case was really an action at law for the price which was maintainable and no request to transfer to law had been made.

[106] RESTATEMENT § 360; CORBIN § 1143.

[107] 235 Iowa 22, 15 N.W.2d 883 (1944).

[108] 240 Iowa 665, 37 N.W.2d 277 (1949).

under the lease to cancel for failure to construct the new front, because the lease was for one year with yearly renewal options by the lessee[109] and because the expenditures for the improvement would be more than three times the annual rental, much of it wasted if the tenant did not renew. Presence of a clause for a stipulated amount of damages for breach, whether considered to be liquidated damages or a penalty,[110] was held not to prevent the issuance of an injunction to restrain the practice of medicine in violation of an agreement, in *McMurray v. Foust.*[111]

Mutuality of remedy has sometimes been referred to in connection with granting specific performance both in its negative aspect, that if one party is denied specific performance so is the other party, and in its affirmative aspect, if one party is granted specific performance so should the other party; but such a rule has been criticized.[112] The suggestion was made, apparently in argument, in *Gingerich v. Protein Blenders, Inc.*,[113] *supra,* that because the buyer of the shares of stock might have been entitled to equitable relief the seller should also be entitled to such relief. Without passing on the question of whether a buyer would have such relief, the opinion of the Court announced that, so far as Iowa cases hold that mutuality of remedy is essential to an action for specific performance or that if one party is entitled to the remedy the other must likewise be, they are specifically overruled.[114]

Another limiting factor on the granting of specific performance or any other equitable relief is the stated proposition that such relief is discretionary and not of right.[115] This proposition was emphasized in *Levis v. Hammond,*[116] *supra,* where the Court denied specific performance of a mutual will contract to bequeath property to a third person. A counterbalancing principle to this one is that, as referred to in the dissent to *Levis v. Hammond,* and in *Bjornstad v. Fish,* [117] involving an action for specific performance

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109 See RESTATEMENT § 376, stating that specific performance will not be denied merely because one has the power to terminate, unless the power can be used in spite of the decree in such a way as to deprive the defendant of the agreed exchange for his performance. Query if this objection by the Court could not have been removed by the decree being conditional upon a promise to continue in possession.

110 See notes 99, 100, *supra,* and accompanying text.

111 224 Iowa 50, 276 N.W. 95 (1937); see RESTATEMENT § 378.

112 WILLISTON §§ 1433-43; CORBIN §§ 1178-81; MCCLINTOCK, EQUITY § 181 (2d ed. 1948).

113 ..... Iowa ....., 95 N.W.2d 522 (1959).

114 RESTATEMENT § 372(2) stating that the affirmative aspect of mutuality is not a sufficient reason but is of weight is referred to in the opinion as having been cited by plaintiff's counsel.

115 First Trust Joint Stock Land Bank v. Resh, 226 Iowa 780, 285 N.W. 192 (1939) (Court apparently not satisfied, in action for specific performance, that buyer was ready, willing and able to pay money); RESTATEMENT § 359; WILLISTON § 1425; CORBIN § 1136.

116 ..... Iowa ....., 100 N.W.2d 638 (1960).

117 249 Iowa 269, 87 N.W.2d 1 (1957). Accord: Orr v. Graybill, 237 Iowa 628, 23 N.W.2d 414 (1946) (claim of incompetency and undue influences; should not be matter of caprice); Staley v. McNerney, 233 Iowa 1065, 10 N.W.2d 584 (1943) (must be sound legal discretion and not arbitrary).

of interests in partnership property, that specific performance should not be refused as a mere matter of caprice and should not be refused unless to do so would shock the conscience of the Court.

Another requirement which may or may not make a difference in result is the stated proposition that in actions for specific performance and certain other equitable relief the agreement itself must be proved by clear, satisfactory and convincing evidence rather than by a mere preponderance. This was announced in *Hunter Investment, Inc., v. Divine Engineering, Inc.*,[118] an action by a lessee against the lessor for specific performance of an option to purchase contained in the lease, with reference to the question of the oral exercise of the option; to an equitable action to establish and enforce an oral limestone and gravel lease, in *Snater v. Walters;*[119] and in both cases relief was denied. In *Bombei v. Schafer,*[120] an action for specific performance of a land contract for the unpaid balance of the purchase price, where the allegation of the plaintiff, contrary to the contention of the defendant and contrary to a statement in the deed already given that the full price had been received, was that the purchase price had not been entirely paid but that a certain amount was conditionally withheld until settlement of a controversy about a telephone easement, the Supreme Court reversed the trial court's order which had held for plaintiff. The opinion stated that parol evidence in equity to contradict what was said in an instrument should be more than a preponderance. Although this position in equity seems to be in accord with prior Iowa precedent, it is indeed strange that equity should insist on a higher degree of proof than would be required in a law action before a jury.[121] Especially is it difficult to understand its application to a case which, although started in equity, certainly had no basis for equitable intervention when the property had been conveyed and the legal remedy should have been adequate.[122] The defendant in this case, who submitted a motion for a jury trial, should have felt fortunate that it was apparently not ruled on.

The fate of equitable relief on the appellate level is clouded not only by the uncertain application of the stated evidentiary standard, but also by doubt whether the Court, under its power in Iowa to settle the matter de novo, will substitute its judgment on fact matters for that of the trial court, as was done in *Bombei v.*

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118 248 Iowa 1109, 83 N.W.2d 921 (1957).

119 ..... Iowa ....., 98 N.W.2d 302 (1959).

120 242 Iowa 619, 47 N.W.2d 842 (1951). Oral agreement for conveyance of land must be established by clear, satisfactory and convincing evidence: Nelson v. Nelson, 245 Iowa 1225, 65 N.W.2d 154 (1954); Abel v. Abel, 245 Iowa 907, 65 N.W. 2d 68 (1954) (also so as "to leave no substantial doubt" in alleged agreement with deceased); Williams v. Chapman, 242 Iowa 294, 46 N.W.2d 56 (1951).

121 See the statement, with cases cited, in Crandall v. Bankers Life Co., 245 Iowa 540, 549, 62 N.W.2d 169, 174 (1954), that questions of fact submitted to a jury in civil cases are to be determined by a preponderance of evidence.

122 RESTATEMENT § 360(b); CORBIN § 1145.

Schafer, referred to in the preceding paragraph, or adopt the other attitude of giving weight to the findings of the trial court and following it, especially where the credibility of witnesses is involved.[123]

A request for specific performance may also stumble over the obstacle of the proposition that in equity a greater degree of certainty is required than in a damage action.[124] Such a proposition was referred to in *Kelley v. Creston Buick Sales Company*[125] as a reason for denying specific performance of an alleged agreement to sell an automobile in which the agreement contained only such phrases as that the price would be "the price effective on date of delivery" and that the obligation to deliver was only "insofar as products of the factory and requirement of other customers will in your judgment permit."

Equitable relief may denied on the principle that for specific performance the consideration must be something more than just to meet the ordinary tests of technical consideration.[126] For instance, in *Levis v. Hammond,*[127] previously referred to, a nephew of a predeceased wife was claiming in specific performance from devisees of a husband who was alleged, during the life of the husband and wife, to have made an agreement to execute mutual wills leaving property to the nephew. Although the Court concluded there was sufficient evidence of such oral agreement, it decided specific performance would not be granted because the agreement was not sufficiently fair and reasonable when the wife at her death had no property and the husband acquired no benefits from the will, and further when the wills were executed the wife had no property on which the wills could operate; the opinion discounted

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[123] Simpson v. Bostwick, 248 Iowa 238, 80 N.W.2d 339 (1957). In Peddicord v. Peddicord, 242 Iowa 555, 47 N.W.2d 264 (1951), an action for specific performance of oral contract to convey land, the Court announced the standard of "clear, satisfactory, and convincing" and then, pursuant to power to try de novo affirmed the trial court although the stated standard in that court had been merely a preponderance.

[124] RESTATEMENT § 370, comment *b*; WILLISTON § 1424; CORBIN § 1174. Section 370 is cited in Pazawich v. Johnson, 241 Iowa 10, 39 N.W.2d 590 (1949), in support of a conclusion to deny specific performance. Specific performance was denied a stipulation in divorce settlement to support and maintain children at college, because of uncertainty, in Johnstone v. Johnstone, 226 Iowa 503, 284 N.W. 379 (1939).

[125] 239 Iowa 1236, 34 N.W.2d 598 (1948). The trial court had ruled for defendants only on the theory of no special value of the personal property. The Supreme Court affirmed, for the reasons indicated in the text, without discussing this aspect.

[126] RESTATEMENT §§ 366-67; WILLISTON § 1428; CORBIN §§ 1164-65.

[127] .... Iowa ....., 100 N.W.2d 638 (1960). *Accord:* Dullard v. Schafer, ... Iowa ....., 100 N.W.2d 422 (1960) (in suit in equity by trustee in bankruptcy to recover assets in estate of bankrupt's father pursuant to written instrument executed by father, intended wife, and bankrupt providing father was to leave all of his property to son and reciting consideration that son during majority had conducted himself as a dutiful and loving son, Court denied recovery to trustee partly for reason there was no consideration in technical sense, but also recited the idea that a court of equity will not decree specific execution of a contract unless it is fair and reasonable); *In re* Johnson's Estate, 233 Iowa 782, 10 N.W.2d 664, 148 A.L.R. 748, 29 IOWA L. REV. 130 (1943).

about $1,500 the wife had received twenty-three years before the wills were made which had been applied on a mortgage. Three judges dissented from the denial of specific performance, believing the husband did receive something under the will in view of the reduction of the mortgage and housewifely chores. In contrast, in *Bjornstad v. Fish*,[128] where the contention was made that there would be unfairness and undue advantage because the property had almost doubled in value, in granting specific performance of options to sell interests in partnership property, the Court observed that such remedy would not be denied merely because of lack of wisdom or folly.

This feature of the flexibility[129] of equitable relief and of going beyond certain legal principles in the granting or denying of relief, as just illustrated in the case of consideration, was also illustrated in *Vermeulen v. Meyer*,[130] a suit for specific performance of a promise to sell land in which the seller alleged she was mistaken as to the existence and identity of a prospective buyer who might have paid more. The Court held that even though the purchaser may not have been responsible for this, the Court would not grant equitable relief where inequitable to do so, as here, even though a unilateral mistake by itself would not be a basis for rescission.[131] Performance of conditions precedent may not be required in equity[132] as they might be at law, as in the case of *Utterback v. Stewart*,[133] which did not require a formal tender of a deed to real estate before suit was started. Also, in *Slack v. Mullenix*,[134] the Supreme Court reversed the trial court and granted specific performance, having settled in another portion of the same suit that there was good and merchantable title, because the defect in title was cured before the decree. Flexibility is especially illustrated in the rule referred to in *Peddicord v. Peddicord*[135] that upon the

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[128] 249 Iowa 269, 87 N.W.2d 1 (1957). *Accord:* Staley v. McNerney, 233 Iowa 1065, 10N.W.2d 584 (1943) (contract for exchange of real estate; Court did not find consideration to be unconscionable).

[129] See RESTATEMENT § 359; CORBIN § 1137. In Simpson v. Bostwick, 248 Iowa 238, 80 N.W.2d 339 (1957), an action to cancel a deed, and to grant specific performance by buyer of promise to reconvey an Iowa farm if proposed exchange of California trailer court was not consummated, the Court granted specific performance with allowances to original grantee for payments made on mortgage, and improvements made until time when it became clear exchange could not be made less rental value of Iowa land for period. In Fitchner v. Walling, 225 Iowa 8, 279 N.W. 417 (1938), an action by vendees to rescind a real estate contract and to enjoin the vendor from negotiating a note given in payment therefor because vendor had lost title by foreclosure of prior mortgage, Court permitted vendor to negotiate note to secure funds on condition he apply the proceeds to the mortgage indebtedness and then to pay the remaining mortgage indebtedness or suffer cancellation of the real estate contract and note.

[130] 238 Iowa 1033, 29 N.W.2d 232 (1947); see WILLISTON § 1427.

[131] See discussion of unilateral mistake in Hudson, *Contracts in Iowa Revisited—Mistake*, 7(2) DRAKE L. REV. 3, 13 (1958).

[132] RESTATEMENT § 374.

[133] 224 Iowa 1135, 277 N.W. 735 (1938).

[134] 245 Iowa 1180, 66 N.W.2d 99 (1954).

[135] 242 Iowa 555, 47 N.W.2d 264 (1951). Accord: Dahl v. Zabriskie, 249 Iowa 584, 88 N.W.2d 66 (1958) (release of dower); see IOWA

refusal of the vendor's wife to release inchoate dower in the land the vendee may elect to enforce specific performance to the extent of the vendor's ability to perform with allowance of an amount proportionate to the highest contingent interest of the wife to be held by the vendee without interest and to be paid over only if the inchoate right is released or the marriage is terminated.

Recovery of benefits conferred, restitution in monetary value or in specie, is under some circumstances a remedy in contract cases.[136] Specific restitution through an action in equity to cancel a deed for substantial failure to perform promises of support has been granted, in *Timberman v. Timberman*[137] and *Snider v. Godfrey*;[138] restitution was denied in *Nine v. Goode*,[139] where the Court felt there was insufficient evidence to show substantial breach of the agreement to support. Recovery of $1,200 paid on a purchase price of $3,500 was denied to a defaulting land buyer in *Lake v. Bernstein*[140] even under a contract that did not contain a clause authorizing forfeiture of payments made under a land contract, where the buyer had not responded to a notice of forfeiture and apparently had abandoned the contract. Recovery of a down-payment on a quonset building for storing grain by a buyer who elected to cancel (rescind) the contract for failure of a condition precedent of a storage guarantee agreement was held not to preclude granting, as an additional item so as to restore to status quo, the expense in leveling the ground and constructing a concrete slab, in *Miller-Piehl Equipment Co. v. Gibson Commission Company*.[141]

ANNOTATIONS § 365-B. Granting of specific performance and adjustment of the price, for the failure of one of three owners to consent, was denied in Jasperson v. Bohner, 243 Iowa 1275, 55 N.W.2d 177 (1952), for the reason that where the purchaser knows only a partial interest could be conveyed and also because of conclusion there was no contract, that consent of two was contingent on the third. See Morrow v. Goodell, 246 Iowa 982, 68 N.W.2d 916 (1955), an action by buyer for specific performance of contract for realty in which Court decreed specific performance and outlined rights and duties as to such things as allowing for fact only one of proposed two vendors was conveying, for crops on date possession was to be transferred, interest on money in escrow and the expense of continuing abstract.

136 RESTATEMENT § 347; CORBIN § 1104.

137 229 Iowa 835, 295 N.W. 158 (1940); see RESTATEMENT § 354; CORBIN § 1120.

138 232 Iowa 1, 4 N.W.2d 380 (1942).

139 241 Iowa 404, 41 N.W.2d 94 (1950).

140 215 Iowa 777, 246 N.W. 790, 102 A.L.R. 846 (1933). See IOWA ANNOTATIONS § 357-III. Section 357-I-A refers to prior Iowa cases allowing recovery in restitution for benefits conferred where employee quits with or without cause. In Westercamp v. Smith, 239 Iowa 705, 31 N.W.2d 347 (1948), referred to *supra*, note 16, and accompanying text, the absence of a clause authorizing forfeiture of contract effectively prevented seller from defending against specific performance action on basis buyer was guilty of numerous deficiencies.

141 244 Iowa 103, 56 N.W.2d 25 (1952). This position is apparently contrary to the position stated in RESTATEMENT § 384(1) that damages and restitution are alternative remedies, but is consistent with some earlier Iowa precedent referred to in IOWA ANNOTATIONS § 384 allowing in addition to the purchase price recovery of special expenditures made necessary by the performance.

CHARITABLE TRUSTS IN IOWA

ARLO F. CRAIG, JR.*

Charitable trusts are an inveterate part of the Anglo-American legal tradition. They were recognized and enforced by the Court of Chancery in England before 1601, and appear to have been used even before the Norman Conquest.[1] Parliament gave legislative recognition to charitable trusts in 1601, with the enactment of the Statute of Charitable Uses,[2] which stated several purposes for which charitable trusts could be created and gave the chancellor additional powers to enforce them.[3] In *Vidal v. Girard's Executors*,[4] Mr. Justice Story held that charitable trusts are a part of the common law, independent of the Statute of Charitable Uses. Charitable trusts in the United States, therefore, do not depend upon that statute for their validity, although the Statue of Charitable Uses has been considered part of the common law of Iowa.[5] Charitable trusts were recognized in Iowa as early as 1856, when the Iowa Supreme Court sustained two such trusts, one for an orthodox Congregational Church in Keokuk,[6] the other for the use of the Methodist Episcopal Church.[7]

In 1959 the Iowa legislature added to the laws governing charitable trusts a requirement for registration of such trusts with and provisions for their supervision by the Attorney General.[8] It is therefore appropriate to reexamine the subject of charitable trusts in Iowa. This will involve discussion of what a charitable trust is, what constitutes a charitable purpose, the attitude of liberal construction of trust instruments, the docrine of cy pres, what is the position of the trustee, what methods are available to assure the carrying out of the trust's objectives, and what the consequences of the new legislation have been and may be.

WHAT IS A CHARITABLE TRUST?

The Iowa Supreme Court has defined a charitable trust as "a gift to a general public use which extends to the poor as well as

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1 Shotwell v. Mott, 2 Sandf. Ch. 46, 51 (N.Y. 1844); 4 SCOTT, TRUSTS § 391 (2d ed. 1956).

2 Statute of Charitable Uses, 1601, 43 Eliz. 1, ch. 4.

3 2 RESTATEMENT (SECOND), TRUSTS § 368, comment (1959).

4 43 U.S. (2 How.) 127 (1844).

5 Klumpert v. Vrieland, 142 Iowa 434, 121 N.W. 34 (1909); Grant v. Saunders, 121 Iowa 80, 95 N.W. 411, 100 Ann. St. Rep. 310 (1903); Johnson v. Mayne, 4 Iowa 180 (1856).

6 Miller v. Chittenden, 2 Iowa 315 (1856). A demurrer to the original attack on this trust, sustained by the trial court, was overruled because the cestui que trust was not *in esse*, and the trial court was told to hold the deed creating the trust void, in Marshall v. Chittenden, 3 G. Greene 382 (Iowa 1852). After the Congregational Church, the cestui que trust, was organized, the deed again came before the court, which held it void, and was again reversed in the *Miller* decision, the court now overruling *Marshall*.

7 Johnson v. Mayne, 4 Iowa 180 (1856).

8 Iowa Laws, ch. 364 (1959).