CONTRACTS IN IOWA REVISITED—1959-1964

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Ten prior articles attempted a collection and commentary on various aspects of Iowa law of contracts,[1] as reflected in cases decided since the publication of the volume *Iowa Annotations to the Restatement of Contracts*[2] in 1934 and prior to the publication of each individual article. In the December, 1962, issue of this Review a supplementation was presented covering the first five articles.[3] In the December, 1963, issue a continuation of the supplementation covered two additional articles of the original series and a few cases in areas of the first five articles.[4] This article supplements the remaining three articles of the original series.

8. Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence.[5]

One of the requirements for relief because of misrepresentation has been stated to be a misrepresentation of present fact as opposed to opinion.[6] In one recent case the Court stretched this idea and allowed rescission of a contract to purchase lots, with return of payments, because of statements allegedly made which essentially recited that "another house and shopping center are going to be built nearby."[7] The Court's explanation of how this is a statement of fact is merely: "There was involved here than a mere statement of opinion or belief that such improvements would be constructed. . . ."[8] Without so articulating, the opinion is probably treating the words as a statement of present plans by somebody to do the thing mentioned.[9] In another case alleged statements that water was good and clear, that there would not be any trouble with a pump, that there was plenty of water and that the well was good were held to be for the jury to decide

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1 *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties*, 5 DRAKE L. REV. 3 (1955); *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67 (1956); *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments*, 6 DRAKE L. REV. 3 (1956); *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957); *Contracts in Iowa Revisited—Mistake*, 7(2) DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91 (1959); *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3 (1959); *Contracts in Iowa Revisited—Performance, Breach and Remedies*, 9 DRAKE L. REV. 66 (1960); *Contracts in Iowa Revisited—Scope and Meaning of Contracts*, 10 DRAKE L. REV. 87 (1961).

2 This volume is hereinafter referred to as IOWA ANNOTATIONS, and RESTATEMENT, CONTRACTS (1932) is referred to as RESTATEMENT. Standard treatises are referred to simply as WILLISTON and CORBIN. WILLISTON §§ 1-946A will be referring to the third edition (1957-63); other sections refer to the revised edition (1936-38). CORBIN sections are from the original volumes 2 (1950) and 4 (1951) and replacement volumes 1 and 1A (1963), 3 and 3A (1960), and 6 and 6A (1962).

3 *Contracts in Iowa Revisited—1955-1962*, 12 DRAKE L. REV. 41, (1962).

4 *Contracts in Iowa Revisited—1958-1963*, 13 DRAKE L. REV. 3 (1963).

5 9 DRAKE L. REV. 3 (1959).

6 *Id.* at 9, discussion and citing authorities. A promise to sell "good, clean second-calf heifers" was considered to be an express warranty, and not a mere statement of opinion, in Reed v. Bunger, 255 Iowa 322, 122 N.W.2d 290 (1963).

7 Rosenberg v. Mississippi Valley Constr. Co., 252 Iowa 483, 106 N.W.2d 78 (1960).

8 *Id.* at 487, 106 N.W.2d at 80.

9 See IOWA ANNOTATIONS 470-V-A-2.

whether opinion or fact; a jury finding for the purchaser in an action against the sellers for alleged misrepresentation was affirmed.[10]

The requirement of scienter (knowledge of falsity and intent to deceive) has been referred to during this period. As indicated in the prior article scienter should not be required in an action where the relief requested is rescission and restitution for misrepresentation.[11] However, several recent cases reiterate this requirement in equity cases, presumably because of unconscious repetition from law actions. See, for example, *Wyckoff v. A. & J. Home Benevolent Association*,[12] an action in equity by beneficiaries of a deceased member of the association, met by the defense of fraud in concealing the fact that the enrolled member was bedridden at the time of enrollment, and *Rosenberg v. Mississippi Valley Construction Company*,[13] an action for rescission of a contract to purchase certain lots, because of alleged fraud in assuring purchasers, *inter alia*, a shopping center would be built. In both cases there is a reference that there must be a showing of knowledge of falsity and intent to deceive. In view of the fact that relief was granted the cases should not be considered as authority requiring scienter in an action pleading for rescission, in spite of the listing of scienter as a requirement.

References to scienter in actions for damages are more strongly founded. Also, it is reasonable to suggest that scienter must be shown in an action for damages, whether it be at law, or in equity, as was stated in *Conrad v. Auto-Owners (Mutual) Insurance Company*,[14] a suit in equity by the insured to reform a liability insurance policy so as to add general liability coverage to an automobile liability policy to cover an injury sustained on plaintiff's dock, combined with a suit in the alternative for damages against the insurance agents who allegedly told the plaintiffs their policy contained such coverage. Compliance with the scienter requirement, even in a damage action, is simplified by statements such as are found in the *Conrad* case that: "Scienter may be shown by showing the statements made were as of knowledge by one in a position to know or one in a position that it was his duty to know as to the truth or falsity of the representation, in other words, by representations recklessly made."[15] Another stretched phrasing of scienter was used in a federal district court case, *Smith v. New York Life Insurance Company*,[16] an action for damages to the extent of the commuted value of an annuity, because of alleged fraud in the sale of an annuity contract in which there was a claim of misrepresentation by the agent that the insured could get the commuted value in the event of an emergency when the written contract did not contain such a clause. After stating that the theory under which the cause of action was asserted was not clear,

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[10] Christy v. Heil, --- Iowa ---, 123 N.W.2d 408 (1963).

[11] See 9 DRAKE L. REV. 3, 6 and authorities cited (1959).

[12] 254 Iowa 653, 119 N.W.2d 126 (1962), cited for elements of fraud and proposition that fraud is not presumed, in Phoenix v. Stevens, --- Iowa ---, --- N.W.2d --- (1964) (a law action for damages for fraud in sale of real property, charging fraudulent concealment of termite damage, the Court affirming a finding for defendant on insufficiency of evidence to establish false representation with intent to deceive and a finding that placing boards on the plate between joists at top of basement walls was not done with intent to deceive).

[13] 252 Iowa 483, 106 N.W.2d 78 (1960).

[14] 254 Iowa 157, 117 N.W.2d 53 (1962).

[15] Id. at 162, 117 N.W.2d at 55.

[16] 208 F. Supp. 240 (S.D. Iowa 1962).

the conclusion was that it was an action for damages for the tort of deceit.[17] The further statement of requirements for an action for deceit was: "The defendant knew these representations were false or were made as true with no reasonable ground for believing them to be true. . . . The Court has found from the evidence that the agent knew these representations were false or he made them with no reasonable grounds for believing them to be true."[18] This is, in essence, an action for negligent misrepresentation.[19]

Reliance is required for an action based on misrepresentation.[20] That sole reliance upon the representation is not required was repeated in In re *Woerderhoff Shoe Company*,[21] granting petition of creditors to reclaim shoes sold and delivered to the bankrupt, because of misrepresentation concerning the financial condition of the buyer. As indicated in the prior article it has been broadly stated that the reliance must be reasonable, both in belief as to truth and in taking action (*i.e.*, the fact must be material).[22] Reference has been made to these matters in several cases. In *Rosenberg v. Mississippi Valley Construction Company*,[23] referred to above as an action to rescind a contract for purchase of lots because of assurances as to building a shopping center nearby, the opinion discusses materiality and approves a finding of materiality there with a statement that a fact is material when it influences a person to enter a contract. In *Smith v. New York Life Insurance Company*,[24] concerning the sale of an annuity contract, the opinion emphasizes that, although hindsight would indicate Smith was not reasonable in relying upon the statement of the agent, the facts indicate a reasonable reliance.

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[17] A more likely theory is reformation of the contract to include the clause which the insured insists the agent promised would be in the contract. See Quinn v. Mutual Benefit Health & Acc. Ass'n, 244 Iowa 6, 55 N.W.2d 546 (1952), which granted reformation of a health and accident policy to remove an exclusion which the agent stated would not be in the policy.

[18] 208 F. Supp. 240, 243 (S.D. Iowa 1962). Reliance for this statement of Iowa law is placed on Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co., 312 U.S. 410 (1941).

[19] See 9 DRAKE L. REV. 3, 7 n. 14 (1959).

[20] In the following cases evidence was considered insufficient to establish reliance on alleged misrepresentations: Heaberlin v. Heaberlin, --- Iowa ---, 122 N.W.2d 841 (1963) (in action to obtain possession of trailer, insufficient evidence to show defendant relied on allegedly fraudulent statement by other as to amount of federal taxes he was to assume; evidence showed he relied on his own tax man); Test v. Heaberlin, 254 Iowa 521, 118 N.W.2d 73 (1962) (in action on note given to plaintiff, attorney for wife of defendant, insufficient evidence to show reliance by defendant on any alleged statement by plaintiff as to federal tax claim defendant was to pay; also pointed out that, if there is a desire to disaffirm for fraud, must do so promptly after informed of fraud, and offer to restore what has been received, neither of which defendant did; see IOWA ANNOTATIONS §§ 480-I, 484-II); Conard v. Auto-Owners (Mut.) Ins. Co., 254 Iowa 157, 117 N.W.2d 53 (1962) (no sufficient showing of reliance by insured on alleged representation by insurance agent that plaintiff had general liability coverage which he did not have); Patterson v. Wuestenberg, 239 Iowa 658, 32 N.W.2d 209 (1948) (insufficient showing of reliance in action for damages based upon alleged misrepresentation of financial condition of insurance company, followed by contribution to company's surplus).

[21] 184 F. Supp. 479 (N.D. Iowa 1960); *aff'd sub. nom.* O'Rieley v. Endicott-Johnson Corp., 297 F.2d 1 (8th Cir. 1961) (allegation of fraud in concealing intent not to pay, not sustained; see IOWA ANNOTATIONS § 473).

[22] 9 DRAKE L. REV. 3, 11 (1959).

[23] 252 Iowa 483, 106 N.W.2d 78 (1960).

[24] 208 F. Supp. 240 (S.D. Iowa 1962).

Another interesting case in the area of misrepresentation and reasonable reliance, or "right to rely", is *Crawford Lumber Company v. Abstract Guaranty Company*,[25] an action by a property purchaser for damages against an abstractor for failure to show certain judgment liens in the abstract upon which the purchaser allegedly relied in purchasing improved residential property. It appears from the opinion that the plaintiff purchaser had furnished building materials (for which he had a mechanic's lien) to the owner of the property, and that the plaintiff subsequently agreed to take the property in satisfaction of the claim with the agreement he would also assume a certain described mortgage and certain named tax liens, represented as all the liens. After the debtor had conveyed the property to the plaintiff, but before any liens had been paid, an attorney called the plaintiff and told of a judgment against the debtor. An officer of the plaintiff immediately notified his attorney, who advised an abstract should be obtained. This abstract was secured but it failed to list the judgment about which plaintiff had been notified. After examination of the abstract by an attorney, the plaintiff satisfied the mortgage, tax liens, and released his mechanic's lien. After execution was later issued on the other judgment, plaintiff paid it and then sued the abstract company to recover the amount paid plus attorney's fees. The trial court found the plaintiff had actual knowledge of the judgment before it expended moneys in clearing title, did not rely on, and had no right to rely on, and may not take advantage of, the abstractor's mistake. The plaintiff insisted it did rely on the certificate even though it was advised of the judgment, and suffered damage. The Supreme Court affirmed the trial court, but it is not clear whether the affirmance is upon the finding of no reliance or whether it is upon the finding of "no right to rely" because of knowledge of the judgment. The principal thrust of the opinion is that there was "no right to rely", which would seem to be more of a law-determining function than a fact-finding function. The Court's opinion states that "[T]he decisive question is whether the plaintiff had a right to rely upon the abstractor's certificate as showing the real situation"[26] and, after referring to an earlier Iowa case of a suit for damages against an abstractor,[27] states: "But as we read the italicized language in the quotation set forth above [the question of the plaintiff's own negligence being another matter, and for the jury to determine], it means there was a jury question—a question for the determination of the trier of the facts—whether the knowledge, or actual notice, of the plaintiff was sufficient to support a holding that he had no right to rely upon the defendant's mistake."[28] The opinion

[25] 253 Iowa 705, 113 N.W.2d 703 (1962). Another instance of "no right to rely" is illustrated in Silent Sioux Corp. v. Chicago & N.W. Ry., 262 F.2d 474 (8th Cir. 1959), in which the court held there could be no action against a railroad for damages allegedly resulting from a misquotation of freight rates at a higher rate than proper where the plaintiff used the misquotation in bidding for sale of space heaters and, consequently, lost a sale. This case was held not controlling, in Johnson Machine Works v. Chicago, B. & Q. R.R., 297 F.2d 793 (8th Cir. 1962), an action by a railroad against a shipper to recover balance allegedly due for freight charges. Conflict was between route designated and transit rate desired which was not applicable to that route; the court believed carrier owed duty to inquire whether shipper desired route or rate.

[26] 253 Iowa at 708, 113 N.W.2d at 704.

[27] Young v. Lohr, 118 Iowa 624, 92 N.W. 684 (1902).

[28] 253 Iowa at 709, 113 N.W.2d at 704-05.

then ends with the usual acquiescence in the finding of the fact-finder (here the court without a jury), if there is substantial evidence to support it, in the statements: "We think there was sufficient substantial evidence to support the trial court's findings that the plaintiff had actual notice, in fact, even knowledge, of the unsatisfied judgment and so of the abstractor's omission. Consequently there was a jury question as to whether it relied on the abstract to its detriment; . . ."[29] In spite of this statement, the case does not seem, predominantly, to be supported upon an inference, based on original knowledge of the judgment, that he did not later rely on the abstract, but, instead seems to be entirely a case of a legal, court-imposed, standard of care, that he did not have a "right to rely". The Court states that it is well settled that the liability of an abstractor of titles is based on contract, and that one who undertakes to furnish such abstracts is liable for failure to use ordinary care.[30] If the contract theory were carried out, it might be pertinent to ask why "right to rely" or reasonableness of reliance should be involved at all. Taking the approach of "right to rely" seems more like tort, like an action for negligent misrepresentation, to which contributory negligence may be a defense.[31] Even if the basic orientation of the action is tort, and contributory negligence is a defense, upon what basis may it be said that relying on an abstract which is secured after an indication of a lien is negligence? Do reasonably prudent persons do this? Does the Court really believe that the public would, or should, trot over to the courthouse to check on these matters? Our title examination system is based, to a great extent, on a practice of relying on abstracts. Interestingly, the opinion itself concedes some merit to the plaintiff's position, in the statement:

> It is true the judgment might have been satisfied in the meantime, or the attorney who told plaintiff's president of it might have been mistaken in his assertion it was a lien on the property. However, it is evident that the Carlsons were in financial difficulties, and it is a fair inference they were not in a position to pay any substantial judgment against them. Although both the plaintiff and its attorneys were specifically advised of the Cohoe judgment before it had paid out any sums or satisfied its mechanic's lien, it proceeded without any inquiry as to the judgment.[32]

Left unanswered still is the question why plaintiff should be compelled to inquire, and why it should not be able to rely on the abstract.

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[29] *Id.* at 710, 113 N.W.2d at 706.

[30] Citing Young v. Lohr, 118 Iowa 624, 92 N.W. 684 (1902), in which it was immaterial whether in contract or not, because the Court found privity, supposedly required in a contract action. Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N.W. 212 (1893), cited in the *Young* case for the proposition, concluded that a contract statute of limitations applied to an action against an abstracter. For general discussion of abstractor's liability, see Roady, *Professional Responsibility of Abstracters*, 12 VAND. L. REV. 783 (1959), which cites two other Iowa opinions on abstractor's liability, concerning the problem of causation and mitigation of damages: Roberts v. Leon Loan & Abstract Co., 63 Iowa 76, 18 N.W. 702 (1884), later opinion, 69 Iowa 673, 29 N.W. 776 (1886). See PROSSER, TORTS § 81 (2d ed. 1955), for discusion as to whether action is in contract or tort where there is misfeasance.

[31] PROSSER, TORTS §§ 88, 89 (2d ed. 1955).

[32] 253 Iowa at 710, 113 N.W.2d at 705.

Reasonable reliance also received attention in the recent case of *Christy v. Heil*,[33] an action by purchasers against vendors of real estate for damages for allegedly misrepresenting the condition of the water supply, as referred to in the first paragraph of this division, *supra*. The trial court instructed that plaintiffs must prove that they as ordinary reasonably prudent purchasers had a right to rely upon the representations, and that plaintiffs had a duty to investigate; no exceptions were taken to these instructions so they were treated as the law of the case. The Supreme Court opinion notes that the trend of recent cases is toward the doctrine that a vendor can not shield himself from liability by asking condemnation of the credulity of the purchaser, but stated it was not called upon to review prior opinions in the light of this trend.[34] The Court then, in affirming a jury finding for plaintiff, concluded that the mere fact an investigation has been made does not preclude recovery because preclusion is still for the trier of fact, and that ordinary reasonably prudent persons could rely upon a vendor's statements where the defects were not readily discernible particularly in view of a filter put in the system.

Again we have been confronted with a statement of a more onerous burden of proof. In *Wyckoff v. A. & J. Howe Benevolent Association*,[35] an action for death benefits tried in equity, where a defense of fraud was asserted, the standard was "preponderance of the evidence by proof that is clear, satisfactory and convincing—such as to overcome the presumption of fair dealing"; in *Rosenberg v. Mississippi Valley Construction Company*,[36] an action for rescission of a contract to purchase lots, "clear, satisfactory and convincing"; in *Conrad v. Auto-Owners (Mutual) Insurance Company*,[37] "clear, satisfactory and convincing evidence" is required before relief may be granted for reformation and damages, in an equity action, in connection with an insurance policy. The latter standard perpetuated the peculiar position referred to in the prior article of making the standard of proof depend upon whether the question of fraud is presented in a law or an equity action; in a law action the standard has been stated to be a preponderance of evidence.[38] In this connection attention is invited to the fact

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[33] --- Iowa ---, 123 N.W.2d 408 (1963).

[34] See particularly the discussion in PROSSER, TORTS § 89 (2d ed. 1955), that where there is intent to mislead (which was alleged in this case) contributory negligence should not be a defense, as in negligent representation, except to extent of facts apparent to observation or discoverable without effort.

[35] 254 Iowa 653, 119 N.W.2d 126 (1962).

[36] 252 Iowa 483, 106 N.W.2d 78 (1960).

[37] 254 Iowa 157, 117 N.W.2d 53 (1962).

[38] 9 DRAKE L. REV. 3, 6 (1959). In Christy v. Heil, --- Iowa ---, 123 N.W.2d 408 (1963), a suit by purchaser against vendors for alleged misrepresentations as to water supply, there is a reference to a trial court instruction that there must be proof by clear, satisfactory and convincing evidence that representations were made with intent to deceive. This was treated as the law of the case because no exceptions were taken. Caution must be observed in applying this standard to law actions, as indicated in the prior article where a different standard is referred to, especially considering that in the *Christy* case plaintiff won.

A cause of action for fraud may be lost by statute of limitations and laches, as illustrated in Anderson v. King, 250 Iowa 208, 93 N.W.2d 762 (1958), an action by daughter to reform deed, conveying property to parents with survivorship clause rather than in common, as allegedly was provided in prior contract between parents and vendors, which was lost partly because period of statute was considered to run from time deed was recorded. See IOWA CODE §§ 614.1(5), 614.4

that Rule of Civil Procedure 344(f), adopted September 17, 1962, states in pertinent part, that:

> The following propositions are deemed so well established that authorities need not be cited in support of any of them: . . .
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> 6. In civil cases the burden of proof is measured by the test of preponderance of the evidence. . . .
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> 11. Reformation of written instruments may be granted only upon clear, satisfactory and convincing evidence of fraud, deceit, duress, or mutual mistake.
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> 12. Written instruments affecting real estate may be set aside only upon evidence that is clear, satisfactory and convincing.[39]

These statements do not appear to be completely consistent with all the statements made in the cases above.

There were a few additional cases in the general area of undue influence, some concerning the question of whether there was a fiduciary relationship.[40] Others concerned the question of proof. For instance, the presence of a confidential relationship must in itself be found by clear proof; if this is established there is a presumption of undue influence, which must be rebutted by clear, satisfactory, and convincing evidence.[41]

9. Contracts in Iowa Revisited—Performance, Breach and Remedies.[42]

The secondary duty of performance may depend, by agreement of the parties, upon performance of an express condition precedent. Such a condition should be excused by the court, with consequent recovery without performance of the condition, only by such matters as impossibility of performing it where it is not a material part of the agreed exchange and

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(1962); U.S. Rubber Co. v. Brower, 253 Iowa 363, 112 N.W.2d 662 (1961); and 9 DRAKE L. REV. 3, 7, n. 21 (1959).

[39] See critical analysis of the new Rule, in Note, *Judicial Rule-Making: Propriety of Iowa Rule 344(f)*, 48 IOWA L. REV. 919 (1963), and response by Justice Thompson in *Purpose of Iowa Rule 344(4) (f)* [*sic*], 49 IOWA L. REV. 750 (1964). See also note 75, *infra*, for other references to standard of proof.

[40] Berger v. Amana Society, 253 Iowa 378, 111 N.W.2d 753 (1961) (directors of corporation are in fiduciary relationship to corporation and stockholders); Northern Lumber Co. v. White, 250 Iowa 801, 96 N.W.2d 463 (1958) (directors and major stockholders of a corporation stand in fiduciary relationship to other stockholders and the corporation; contract, accepting shares of stock in payment of debt to corporation and giving shareholders right to repurchase stock for same amount as was allowed in payment of debts, upheld).

[41] Harrison v. City Nat'l Bank, 210 F. Supp. 362 (S.D. Iowa 1962) (trust; between bank as trustee of intervivos trust and settlor, a fiduciary and confidential relationship); Kunz v. Kunz, --- Iowa ---, 125 N.W.2d 226 (1963) (trial court affirmed in refusing to set aside deed from widow to son; insufficient evidence (not clear showing) of confidential relationship to raise presumption against validity and not sufficient clear and convincing evidence to prove fraud, duress or undue influence); Oehler v. Hoffman, 253 Iowa 631, 113 N.W.2d 254 (1962) (grantee won; no presumption of confidential relationship because of kind and considerate treatment); Burns v. Nemo, 252 Iowa 306, 105 N.W.2d 217 (1960) (no confidential relationship shown between daughter and father who had set up joint-tenancy bank account with daughter); Luse v. Grenko, 251 Iowa 211, 100 N.W.2d 170 (1959) (involves savings account and change to joint account with daughter; held against daughter); *In re* Lundgren's Estate, 250 Iowa 1233, 98 N.W.2d 839 (1959) (contract by mother to convey to daughter; upheld); Van Emmerik v. Mons, 249 Iowa 1299, 90 N.W.2d 433 (1958) (no confidential relationship proved, in action to cancel mortgage).

[42] 9 DRAKE L. REV. 66 (1960).

there would otherwise be a forfeiture,[43] by prevention by the other party,[44] or waiver.[45] However, there is a statement in *Henderson v. Hawkeye-Security Insurance Company*[46] that an express condition precedent of giving notice to an insurer may be dispensed with by a showing there is no prejudice. This was an action by insureds against the insurer for a declaration that the insurer was liable under the "medical pay" provisions of an automobile liability policy for medical expenses arising when one of the insureds was struck by an automobile while standing beside the stalled insured automobile.[47] One point of contention was that there had been no notification to the insured until thirteen months after the injury, although

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[43] *Id.* at 71.

[44] Grady v. S. E. Gustafson Constr. Co., 251 Iowa 1242, 103 N.W.2d 737 (1960) (general contractor on highway project obligated to make final payment to subcontractor, even though there was an express condition precedent for payment after payment to general contractor of final estimate by Highway Commission, because contractor voluntarily delayed final payment for other reasons not connected with this subcontract claim; see also standard of proof in equity actions, stated in terms of preponderance of evidence); 9 DRAKE L. REV. 66, 71, notes 29-34 (1960) and accompanying text.

[45] United States v. Farmers Mut. Ins. Ass'n of Kiron, 184 F. Supp. 708 (N.D. Iowa 1960), *rev'd*, 288 F.2d 560 (8th Cir. 1961), for granting summary judgement for defendant when government should be allowed to introduce parol evidence to aid court in constructing ambiguous provision as to change of interest, whether it applies to an incumbrance, and where appellate court perceived material factual controversy as to waiver (trial court held insurer's payment of fire loss on corn not mortgaged did not operate as waiver of defense under the "any change of interest" condition in the policy, against demands for loss payment on corn which had been mortgaged); McElwee v. DeVault, 255 Iowa 30, 120 N.W.2d 451 (1963) (no waiver of grounds for termination of lease by acceptance of rent for period prior to date of termination); LeMars Mut. Ins Co. v. Tasler, 254 Iowa 604, 118 N.W.2d 524 (1962) (requirement of proof of loss waived by action of insurer, with full knowledge of fire and damage, in acting and talking in such a manner as to lull insured into believing proof of loss not required; extensive recitation of testimony included; trial court was reversed; in spite of fact adjuster, an attorney, for insured, testified he required proofs of loss be filed, other parties denied this, and the Supreme Court opinion states, considering action triable de novo, that it was not sensible or reasonable that such a statement would be inserted in discussion as to settlement); Briney v. Tri-State Mut. Grain Dealers Fire Ins. Co., 254 Iowa 673, 117 N.W.2d 889 (1962) (violation of "occupancy" clause in fire insurance policy waived by insurer's not cancelling policy after knowledge of increased hazard acquired by independent adjuster who investigated prior fire claim, the knowledge of the independent adjuster being imputed to insurer; argument of failure to file proofs of loss not permitted because not properly pleaded, in original answer, under Rule 98, Iowa R.C.P., which authorizes general pleading of performance of conditions precedent and requires denial in terms of facts relied on, and because the Court, in its proper discretion, could refuse to permit amendment to answer after the trial started); United States Hoffman Machinery Corp. v. Carlson, 253 Iowa 304, 111 N.W.2d 271 (1961) (provisions in conditional sales contract, that failure to give notice in writing of defect barred warranty claim, held waived by sending agent to rectify defects, and requirement for return of merchandise waived by request from seller to continue to use equipment; however, right to rescind for breach of warranty lost because continuing to use for three years after last effort to remedy defect); Siebert v. State Farm Mut. Ins. Co., 251 Iowa 1060, 103 N.W.2d 757 (1960) (payment to injured party under "medical pay" provisions of automobile policy was not waiver of conditions of policy so as to preclude insurance company from asserting defense, in action by injured party to collect on liability portion of policy, of non-cooperation by insured); 9 DRAKE L. REV. 66, 72 notes 35-36 (1960).

[46] 252 Iowa 97, 106 N.W.2d 86 (1960).

[47] The Court first disposed of the question whether she was injured while "in or upon or while entering into or alighting from the automobile" by affirming the finding in favor of insured, as a question of fact, on testimony that she was hit while leaning against the car attempting to put down the hood, which she had raised to look for the cause of the automobile's stalling.

the policy provided that notice should be given "as soon as practicable" and that "no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy."[48] The trial court determined that, even though there was no showing of excuse or legal justification for non-compliance with the condition precedent, the insurer must prove prejudice to it to avoid liability. The Court disagreed, stating:

> Even with the liberal construction usually given insurance contracts, we cannot justify the position that, unless the company proves prejudice, there can be no breach of the contract which would relieve the company of liability. Such a construction would truly rewrite the contract and be most unreasonable.[49]

However, after attempting to distinguish some prior Iowa cases with contrary language,[50] the Court then stated:

> We are inclined to the view that a substantial breach of a condition precedent in an insurance policy which involves the very essence of the agreement and which is not excused, legally justified, or which has not been waived, must be presumed prejudicial to the insurer. Although the presumption is rebuttable, unless overcome by a satisfactory showing of lack of prejudice by the claimant, it will defeat his recovery.

The Court concluded the presumption of prejudice was not overcome. It is submitted that this statement of a rule[51] is still subject to the same objections mentioned in the opinion itself, supra, that "such a construction would truly rewrite the contract." The contract is rewritten to interpolate the element of prejudice, in the face of an express condition precedent, whether it is the insured that has to prove lack of prejudice or the insurer that has to prove prejudice.

Where there is no express condition, the court may be confronted with the problem of constructing conditions, determining relationships between performance on one side and the duty of performance on the other, or nonperformance on one side and an excuse for nonperformance on the other.[52]

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[48] In a prior opinion the Court affirmed a finding of the trial court against insurer, relying on a statement that there was no express condition precedent of notice applicable to the medical payment portion of the policy, and that there was not the necessary showing of prejudice by the insurer. That opinion, handed down May 3, 1960, was printed in the advance sheets of the Northwestern Reporter at 103 N.W.2d 89; the opinion was apparently completely withdrawn because it was not reprinted in the bound volume of 103 N.W.2d.

[49] 252 Iowa at 105, 106 N.W.2d at 91.

[50] Such as Leytem v. Fireman's Fund Indem. Co., 249 Iowa 524, 85 N.W.2d 921 (1957) (in spite of failure to give notice of accident to insurer for more than year, Court held policy to be in force, basically interpreting phrase "as soon as practicable" in policy to include this, as a matter of interprtation for jury, but also considering delay to be excusable because it was a trivial accident and insured had no reason to believe he was liable therefor).

[51] Annot., 18 A.L.R.2d 443 (1951), collects cases on "notice" clauses.

[52] 9 DRAKE L. REV. 66, 74 (1960). In Heaberlin v. Heaberlin, --- Iowa ---, 122 N.W.2d 841 (1963), an action to obtain possession of a trailer court because of defaults in the performance, the Court concluded the breach was substantial when the default was as to at least one-half the dollar value of payments to be made; there is some indication in the opinion that "substantial breach" was not necessary before reconveyance. In City of Chariton v. J. C. Blunk Constr. Co., 253 Iowa 805, 112 N.W.2d 829 (1962), an action by city to recover damages for paving contractor's failure to comply with contract which required paving six inches in thickness, the Court considered that evidence of deficiency of slightly more than six-tenths of an inch was sufficient to justify jury finding of failure of substantial compliance;

This is sometimes described as the problem of "substantial performance" when considering what is necessary to show to permit a party to recover on the contract (less damages if applicable) when he has failed in some particular, or as "failure of consideration", "material failure", "substantial breach", or "total breach", when considering how much it is necessary to show as a failure by the other party before one party is excused or discharged from performance. *Maytag Company v. Alward*[53] is an interesting example of this problem of determining relationships between non-performance on one side and an excuse for non-performance on the other. In this case the employer brought an action in equity to rescind stock option agreements under which the employee claimed shares of the plaintiff's stock, 600 shares already acquired, and 400 shares which the plaintiff refused to deliver; the 600 shares were bought under a first-option agreement dated August 27, 1957, exercised February 22, 1960; under another agreement dated December 18, 1958, exercised March 24, 1960, the 400 shares were withheld when it was learned the defendant, a key employee, was leaving plaintiff's employment. Under the terms of the agreement the employee was to remain in plaintiff's employ until August 27, 1960 under the first and until August 27, 1963 under the second. The trial court found that at the time of the exercise of the second option the employee already had intended to leave and had not communicated this to the company, that this constituted fraud, but found no fraud as to the first. The employee left on April 1, 1960. The trial court decreed rescission of the option agreements, and a cancellation of all shares, upon repayment of amounts paid in exercising the option less dividends received, based on a finding that leaving the employment was a material and irrevocable breach, going to the essence of the stock sale contracts, and causing a substantial failure of consideration as to each contract. The Supreme Court, after dealing with an interpretation problem,[54] agreed that defendant's termination of employment was such a repudiation and breach of the contracts as to practically defeat their whole purpose and object, went to the essence of the contract, that consideration of a promise to stay in employment was not only for the agreement to grant an option but also for the promise to issue stock when the option was exercised, and that there was a failure of consideration entitling plaintiff to restitution of the stock.

Another illustration arose in connection with a contract for maintenance of a herd of beef cows on defendant's farm under which defendant was to furnish pasture, cornstalks, and use of farm equipment. Defendant's plowing

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this led to the result of no entitlement for work done, either in contract or on quantum meruit, so the city was held entitled to recover all the money it had paid.

[53] 253 Iowa 455, 112 N.W.2d 654 (1962).

[54] The defendant employee attempted to apply the doctrine of *expressio unius est exclusio alterius*, to the sentences: "Any termination of the Employee's employment during such period that is either (i) for cause or (ii) voluntary on the part of the Employee . . . shall be deemed a violation by the Employee of such agreement. In the event of such violation, any option or options held by him under the Plan, to the extent not theretofore exercised, shall forthwith terminate" (253 Iowa at 459, 112 N.W.2d at 656), so as to exclude any remedies as to options previously exercised. The Court refused to accept such an argument, pointing out that the sentences do not purport to apply to options already exercised, that an option exercised is no longer an option (offer) but a contract, and that legally recognized remedies are not excluded because some are referred to in the contract.

up of twenty acres of pasture was considered to be a minor breach, readily satisfied by damages, not a substantial default, and not justifying plaintiff's disposition of the herd.[55] In another case[56] the refusal of one party to a contract (for preparation for, opening of, and operation of a "supper club") to reduce to writing the oral agreement, as promised, was considered to be a sufficient reason for plaintiffs to terminate their connection with the enterprise and to justify a suit by them for that breach. The reduction to writing clause was considered to be a material and important part, the opinion pointing to the necessity of a written agreement to protect plaintiffs during the period they were waiting to become co-owners of the business. In another case[57] parties who, as a part of an agreement for selling a boat business, had promised not to engage in competition, were considered to be relieved of this promise when they were discharged from employment; furthermore, leaving employment was not a material breach so as to relieve the other party from his obligation as to the rest of the contract, because in the period of employment knowledge of the business and its operation had been acquired from the employees who had remained with it, and glass boats were no longer a novelty.

In the developing field of actions for breaches of contracts between employers and labor organizations, as authorized by section 301(a) of the Labor Management Relations Act,[58] the Iowa Court's holding[59] that violation of a "no-strike" clause in a labor agreement constituted a "waiver" of the arbitration provisions of the agreement, so that the union could not successfully compel arbitration of grievances as to discharge of employees (one employee was discharged, as were others who subsequently walked out), was rejected on appeal by the United States Supreme Court[60] with the statements, among others, that a strike is not automatically such a breach or repudiation of an arbitration clause as to excuse the company from arbitration, that arbitration agreements which in themselves have not been repudiated are meant to survive breaches of contract, even a total breach, that there was nothing in the agreement to indicate an intention to except from the employer's promise to arbitrate any dispute involving or following an alleged breach of a no-strike clause.[61]

Even assuming there is a recognized breach of promise, not otherwise discharged,[62] there remains the problem of what remedy will be granted for

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55 Mobley v. Boyt Farms Co., --- Iowa ---, 126 N.W.2d 280 (1964).
56 Shriver v. Cook, --- Iowa ---, 127 N.W.2d 102 (1964).
57 Decker v. Juzwik, 255 Iowa 358, 121 N.W.2d 652 (1963).
58 29 U.S.C.A. § 185(a).
59 Local Union No. 721 v. Needham Packing Co., 254 Iowa 882, 119 N.W.2d 141 (1963), commented on in 49 IOWA L. REV. 992 (1964), 38 N.Y.U.L. REV. 1009 (1963); 49 VA. L. REV. 1231 (1963).
60 84 S.Ct. 773 (1964).
61 The Court specifically stated it was not deciding whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for an arbitration would be a circumstance which would release an employer from his promise to arbitrate, and was not deciding what effect the determinations of the arbitrator would have on the related action in the courts by the employer on the no-strike promise.
62 Discharge of a contractual duty to pay damages for construction work because of acceptance of the work was referred to in City of Chariton v. J. C. Blunk Constr. Co., 253 Iowa 805, 112 N.W.2d 829 (1962), but the rule was held not to apply if the acceptance was induced by fraud, and there was considered to be sufficient evidence to support jury finding of fraud. See IOWA ANNOTATIONS § 411. Accepting

the breach, as damages, specific performance, or restitution.[63] An element of damages often sought is gain prevented by the breach, expectation damages, a monetary award to put the injured party in the position he would have been in if the promise had been performed.[64] A case in which this element of damages was allowed, rather than simply a reliance element of damages, was

a building for storage of onions and paying contract price did not amount to waiver of claim for alleged breaches, where there was evidence to support a finding acceptor did not know of the breaches when first occupying, and continued occupancy was in reliance on promise to remedy defects. Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960). Defense, to claim for damages for failure to finish subcontract to furnish and install floor tiling, that tiling had been stolen after delivery to job site, was rejected in Kern v. Maytag Co., 254 Iowa 39, 116 N.W.2d 430 (1962), partly on basis of insufficient evidence of stealing, and, apparently, partly on basis title had not passed to tile before incorporation in building, so risk of loss is on subcontractor.

Discharge of a duty may be accomplished by rescission, and rescission may be by an inconsistent agreement, as was illustrated in Imperial Refineries Corp v. Morrissey, 254 Iowa 934, 119 N.W.2d 872 (1963), in which, in an action by buyer for specific performance of option to buy real estate, the Court considered that any rights under an alleged exercised option in a lease to purchase for a "mutually satisfactory price not to exceed $22,000" were waived or rescinded by exercise of option by lessee under "first refusal" option, also contained in lease, to meet another offer for $45,000. Note that any possible consideration objection to such an argument of modification of rights is met by Iowa practice that mutually executory agreement may be effectively modified without any further consideration than in the original agreement. See *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties*, 5 DRAKE L. REV. 3, 6 (1955).

That a substantial duty may be discharged by waiver without consideration must be an implied premise in Williams v. Stroh Plumbing & Elec., Inc., 250 Iowa 599, 94 N.W.2d 750 (1959), an action on an assigned account to which defendant counterclaimed as an offset for materials furnished. The Court did not agree with plaintiff's contention that it appeared without dispute defendant waived its right to an offset; but there are definitions of waiver as the voluntary relinquishment of a right, as in Pond v. Anderson, 241 Iowa 1038, 44 N.W.2d 372 (1950), which stated no consideration was necessary for waiver and that waiver was a question of fact. See 9 DRAKE L. REV. 66, 76 (1960) for criticism of this use of waiver doctrine. The Williams case also seems to conclude that the counterclaim might be lost by estoppel in failing to respond to statements of account by the assignor sent by an auditor, followed by payments to assignor by assignee who thus believed the account was accurate, inasmuch as the Court deemed it error to refuse to permit assignee to testify as to her belief the account was accurate. See IOWA ANNOTATIONS §§ 422-II-A, 422-III, as to discharge by account stated method.

[63] IOWA ANNOTATIONS § 326.

[64] RESTATEMENT § 329. Recovery for damages for alleged breach of promise of landlord to furnish feeder cattle to be fed, and to furnish storage space for crops, was denied in action by tenant against landlord, because no substantial proof of loss. Shulz v. Hoffman, 254 Iowa 868, 118 N.W.2d 532 (1962). In Thompson v. Miller, 251 Iowa 324, 100 N.W.2d 410 (1960), the trial court's action, in granting new trial on ground judgment in action on alleged lifetime employment to sell "hitch pins" was excessive, was upheld because of speculation as to future earnings. In another action, against a motor carrier for damage to aluminum panels to be used in constructing a building, the Court affirmed awarding, as an element of damages, the price reduction to buyer to which shipper agreed because replacement panels failed to match undamaged panels, and held that such damage item was not "special damages", so as to require evidence that the carrier was informed of the purpose for which the panels were to be used; the Court thought this was the same as difference in value; it also allowed a proportion of overhead and operating expense, and direct cost of labor and materials, in replacing injured panels. Conditioned Air Corp. v. Rock Island Motor Transit Co., 253 Iowa 961, 114 N.W.2d 304 (1962); see IOWA ANNOTATIONS § 329-IX-D.

Instead of attempting to recover losses caused and gains prevented by the breach, an alternative measure of damages sought may be expenditures reasonably made in performance of the contract or in necessary preparation therefor; this is still an attempt, at least partially, to put the injured party where he would have been had the promise been performed. RESTATEMENT § 333; CORBIN §§ 1031-36;

In re *Carter's Estate*,[65] an action on a note against the maker's executrix in which the executrix counterclaimed for damages for breach of an alleged promise to obtain and keep in force credit life insurance. The Court, in response to the contention that the defendant failed to prove any damage because there was no proof Carter could have obtained credit life insurance from any other source, allowed recovery, without such proof, on the basis of the amount recoverable had a policy been issued, on the theory the injured person is entitled to be placed, so far as this can be done by money, in the same position he would have occupied if the contract had been performed,[66] with the amount recoverable had a policy been obtained. Another specific illustration of allowing expectation damages is contained in *Kaltoft v. Nielsen*,[67] an action to foreclose a mechanic's lien on a filling station, wherein there was a counterclaim against the contractor for delay of completion. The Court observed that the measure of damages for unexcused[68] delay in completion is the loss of rental for the period of the unexcused delay. In another action by a masonry contractor against a brick supplier for furnishing brick shorter than the specified length, extra expense incurred in laying additional brick

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WILLISTON § 1363A. A recent example of such recovery is Hardin v. The Eska Co., --- Iowa ---, --- N.W.2d --- (1964), in which the Court affirmed a trial court's judgment for the plaintiff for expenditures in advertising, employing salesmen, and "otherwise" before the defendant allegedly broke a promise for an exclusive territory in the Greater St. Louis area for the direct retail sale to consumers of a product known as "Port-a-Temp", an electrical fan and cooling appliance. The alleged breach was the selling of these units to a wholesaler for resale in the area without restrictions on the sale. The crushing blow apparently was the fact that a retail outlet to which the wholesaler sold, a chain of stores, advertised the product at $19.95 instead of the $59.95 at which the plaintiff had been attempting to sell them, and which was the price previously advertised by defendants. The Court affirmed the finding of a breach, stating that if direct selling in the agency agreement was exclusive only as to door-to-door sales, as urged, then there was a breach because of hampering performance by the other party (RESTATEMENT § 315; notes 67 and 68 *infra*), that circumstances (for reference to use of circumstances in connection with interpretation, see *Contracts in Iowa Revisited—Scope and Meaning of Contracts*, 10 DRAKE L. REV. 87, 100 n. 79-81 [1961]) surrounding the making of the contract, such as advertisements assuring salesmen who make calls a "big profit", show clearly the agreement was for exclusion of all other methods of selling as well as "door-to-door", and that, considering the seasonal character of the merchandise, the trier of facts' determination that orders were not to be expected until the beginning of the summer season after breach would be affirmed. Discussion will be deferred as to the Court's response to objections there was no mutuality and consideration for enforcement of the promise and that the doctrine of promissory estoppel (reliance) (RESTATEMENT § 90) did not support enforceability of the promise even to the extent of expenditures, the only items claimed by plaintiff. See prior discussion of these objections in *Contracts in Iowa Revisited—1958-1963*, 13 DRAKE L. REV. 3 (1963); *Contracts in Iowa Revisited—1955-1962*, 12 DRAKE L. REV. 41, 43 (1962); *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 84 (1956); *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91, 99 (1959).

65 254 Iowa 138, 116 N.W.2d 419 (1962).

66 *Id.* at 143, 116 N.W.2d at 422. The trial court had found the bank had negligently failed to perform an agreement to obtain and keep in force credit life insurance.

67 252 Iowa 249, 106 N.W.2d 597 (1960).

68 The Court, following the practice in equity cases of determining the matter for itself (note 73 *infra*), concluded that all but four months of the delay in completion were excused, for purposes of the owner collecting damages, either by a subsequent oral agreement modifying the original agreement or by conduct of the owner and his lessee in changing specifications and delaying completion. Note that this is a case of excuse of duty to pay damages, and not simply excuse of condition by waiver or prevention, referred to in notes 45-46, *supra*.

was granted, although there was some uncertainty as to the exact amount of extra expense, on the theory that where the question of the amount of damages is involved, exactness of damage proof is not as much demanded as in resolving the question of whether damages have been sustained; loss of profit and overhead on added expenses were not allowed, the first as not necessary to "make whole" and the second as lacking proof.[69]

Equitable relief will be granted if, as a basic requirement, the remedy at law is inadequate.[70] A recent illustration of this case in which the Court, reversing the trial court, granted specific performance of a promise, by a stepmother to a son and daughter of a deceased testator, contained in an agreement of settlement of testator's estate, to transfer certain shares of stock in a closed corporation, emphasizing that the stock could not be purchased on the market and that control was at stake.[71] In another case the Court affirmed granting injunctive relief to an automobile dealer against the levy of execution on a judgment for a purchaser, secured as the result of purchaser's successful appeal from the dealer's replevin action, and for setoff against that judgment of the dealer's claim on the purchaser's note, because the dealer had no adequate remedy at law in view of purchaser's insolvency.[72]

Equitable relief continues to be subject to the vagaries of such propositions as: suits in equity are triable de novo in the Supreme Court, that although weight is given to the findings of the trial court, the appellate court is not bound by them;[73] specific performance is granted in the discretion of

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[69] Natkin Co. v. R. F. Ball Constr. Co., --- Iowa ---, 123 N.W.2d 415 (1963). The Court was also concerned with interpretation of specifications, whether this was a case for application of the rule of interpretation in cases of ambiguity that words control over figures, but concluded that the words used did not clearly indicate a brick size so as to create an ambiguity. The Court was also concerned with interpretation of tolerance provisions and concluded they did not mean an average tolerance but referred only to individual bricks.

[70] 9 DRAKE L. REV. 66, 83 (1960), notes 103-110 and accompanying text; IOWA ANNOTATIONS § 358. That declaratory judgment relief should not be denied because there is a fully matured action at law for damages was repeated in Wright v. Thompson, 254 Iowa 342, 117 N.W.2d 520 (1962), involving a petition for declaratory judgment as to validity of an oral agreement. See IOWA R.C.P. 261.

[71] Tschirgi v. Merchants Nat'l Bank, 253 Iowa 682, 113 N.W.2d 226 (1962). The opinion contains an extensive discussion to the point that an agreement relating to corporate affairs, to which plaintiff was a party, was not contrary to public policy where there was no intent to defraud other stockholders. Further, bringing suit against stepmother, allegedly a breach of settlement agreement, even though considered a default under that agreement, did not bar equitable relief when suit was dismissed before trial and plaintiffs thus purged of default. See IOWA ANNOTATIONS § 375, as to effect of breach by plaintiff.

[72] Ritchie v. Hilmer, 254 Iowa 309, 117 N.W.2d 443 (1962). On insolvency as a factor in granting equitable relief of specific performance, see IOWA ANNOTATIONS § 361(d).

[73] IOWA R.C.P. 344(4)(f)(7); Sanborn v. Maryland Cas. Co., --- Iowa ---, 125 N.W.2d 758 (1964) (declaratory action by insured reviewed de novo because filed and tried as an equitable action); Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963) (claimed oral agreement to devise; trial court affirmed); Decker v. Juzwik, 255 Iowa 358, 121 N.W.2d 652 (1963) (specific performance action against buyers on agreement for sale of boat business; trial court overruled as to part of findings); Imperial Refineries Corp. v. Morrissey, 254 Iowa 934, 119 N.W.2d 872 (1963) (trial court reversed); *In re* Lindsey's Estate, 254 Iowa 699, 118 N.W.2d 598 (1962) (claimed oral agreement to divide father's property ten ways, contrary to provisions of will, in return for assistance of children not named in will to obtain commitment of father to institution, enforced by resistance to probate of will; trial

the court rather than as a matter of right, shaded in some cases by the statement that such discretion should not be arbitrary;[74] in some equitable ac-

court affirmed; assistance given was treated as sufficient consideration and also sufficient to dispense with need for writing under Statute of Frauds, apparently as part of purchase price and exclusively referable to contract, see *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63, 70 [1957]; also fact that certain children were not aware of agreement until father's death was held not to prevent enforcement by them of a contract as contract for benefit of third parties, see *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments*, 6 DRAKE L. REV. 3, notes 13 and 30 [1956]); LeMars Mut. Ins. Co. v. Tasler, 254 Iowa 604, 118 N.W.2d 524 (1962) (declaratory judgment action by insurer to establish non-liability because proofs of loss not filed, against argument of waiver; Court reviewed de novo and reversed trial court which had found for insurer); S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 111 N.W.2d 681 (1961) (gives weight to findings of trial court; see extensive discussion of evidence as to performance under construction contract); Christensen v. Iowa State Highway Comm'n, 252 Iowa 1351, 110 N.W.2d 573 (1961) (suit in equity upon an oral contract to move earth upon a highway project); Gilbrech v. Kloberdanz, 252 Iowa 509, 107 N.W.2d 574 (1961) (law action and suit in equity combined and tried in equity; trial court affirmed); Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106 N.W.2d 86 (1960) (declaratory judgment as to coverage of "medical pay" provisions of automobile casualty policy, treated as at law and not reviewable de novo; was treated as at law below; legal or equitable nature of declaratory judgment proceeding to be determined by pleadings, relief sought and facts of each case); James v. James, 252 Iowa 326, 105 N.W.2d 498 (1960) (equity action to enforce an alleged contract to devise; trial court affirmed in denying relief); Rhodes v. Rhodes, 251 Iowa 430, 101 N.W.2d 1 (1960) (declaratory judgment, treated as being in equity, to determine if beneficiary of group life insurance had been changed from wife to brother; trial court reversed).

[74] Decker v. Juzwik, 255 Iowa 358, 121 N.W.2d 652 (1963) (note adjustment of remedies by appellate court on alleged promise to compromise and settle unsecured claims; the Court was troubled by what it considered to be the indefiniteness of a promise, especially as to granting specific performance); Town of Wahpeton v. Rocklin, 254 Iowa 948, 119 N.W.2d 880 (1963) (specific performance decree of trial court reversed for various reasons such as injustice to compel defendant to accept a doubtful title in exchange, indefiniteness of agreement in part, lack of utmost good faith). "Authorities cited support the well recognized rule that specific performance is a matter of equity rather than strict right and rests with the sound discretion of the court and will be granted only when it is equitable to do so. . . . We do not disagree with these announced rules but with their application to this case." Imperial Refineries Corp. v. Morrissey, 254 Iowa 934, 945, 119 N.W.2d 872, 878 (1963) (trial court, denying specific performance, reversed; whether option contract so inequitable as not to be enforced is to be determined as of time of entering into contract; increase in value of land not sufficient ground for denying specific performance). Compare the statement, in Tschirgi v. Merchants Nat'l Bank, 253 Iowa 682, 689, 113 N.W.2d 226, 230 (1962): "Where a contract is made for a consideration and without fraud and is entered into fairly and understandingly between parties who are competent to contract, a court of equity will enforce it as a matter of right if there is no adequate remedy at law. . . . The granting of specific performance of such a contract is not a matter of caprice on the part of a chancellor", with the later statement, 253 Iowa at 693, 113 N.W.2d at 232: "We are aware of the discretion resting in the trial court in matters of this kind. We also note this discretion is not an arbitrary one. . . . ." The trial court, denying relief, was reversed. Also, in Petersen v. Olson, 253 Iowa 469, 112 N.W.2d 874 (1962), an action for specific performance of a contract giving a 20-year option to purchase a farm, specific performance was granted with a statement that the fairness of the option agreement was to be judged under conditions prevailing when it was given and that specific performance would not be refused because the fair value of the property had increased through economic conditions; the option was held not to terminate because of death of optionor, see RESTATEMENT § 46 and IOWA ANNOTATIONS § 46-III. The Court also held that a prior attempt in a quiet title suit, which had been dismissed by the Court, did not preclude maintenance of the present action on theory of abandonment or election of remedies, when the prior attempt was based on the contract and was simply an effort to obtain a remedy not available. See RESTATEMENT § 383. The same principle that the doctrine of election of remedies does not prevent assertion of another remedy, when the

tions the agreement itself must be proved by clear, satisfactory and convincing evidence, and not by a mere preponderance.[75]

Restitution, recovery in specie or recovery in value, of the performance rendered pursuant to contract, is available for a total breach of contract, to attempt to put the injured party back in the position he was before his performance as distinguished from damages to put the party in the position he would have been in if the promise had been performed.[76] In one case the Court granted restitution in specie of stock transferred under a stock option agreement with an employee, because of substantial default by the employee in failing to perform his promise to remain in the employment, because damages were not adequate, because the stock was of special value, and because of difficulty in placing money value on services lost.[77] In another,

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remedy first sought was unavailable, was illustrated in Ritchie v. Hilmer, 254 Iowa 309, 117 N.W.2d 443 (1962), note 72 *supra*, holding that unsuccessful attempt by auto dealer to maintain replevin action against purchaser did not preclude him from asserting claim on purchaser's note, in subsequent action to enjoin levy of execution on prior judgment for purchaser and to use note as offset against judgment. Further on election of remedies see notes 82 to 97, *infra*, and accompanying text.

[75] Cases in notes 35-37, *supra;* Vilter v. Myers, --- Iowa ---, 123 N.W.2d 334 (1963) (evidence of oral contract to execute mutual wills must be clear and convincing; evidence considered insufficient in Court under Court's de novo review of action for specific performance; trial reversed); Connell v. Hays, --- Iowa ---, 122 N.W.2d 341 (1963) (claimed oral contract to devise certain real property to plaintiff in consideration of services rendered during lifetime, held proved by necessary clear, satisfactory or convincing evidence; trial court affirmed); Mack v. Linge, 254 Iowa 963, 119 N.W.2d 897 (1963) (in partition action, defendant attempted to assert title based upon alleged oral agreement to transfer title to defendant in return for alleged promise to take care of parents, etc.; trial court affirmed in finding such agreement not established; stated standard of proof was: "so cogent, clear and forcible as to leave no reasonable doubt in chancellor's mind as to its terms and character"); *In re* Lindsey's Estate, 254 Iowa 699, 118 N.W.2d 598 (1962) (claim of oral agreement to divide property among all children contrary to provisions of will; case tried below, in resistance to probate of will, as case in equity with stipulation objectors to will would have no greater burden of proof than at law; trial court's finding an oral agreement established was affirmed, and Court concludes question of burden of proof under stipulation need not be resolved because it finds the agreement established by clear, satisfactory and convincing evidence); Hayne v. Cook, 252 Iowa 1012, 109 N.W.2d 188 (1961) (specific performance, of alleged contract arising out of written communication, granted); James v. James, 252 Iowa 326, 105 N.W.2d 498 (1960) (action in equity to enforce an alleged contract to devise; trial court's finding that evidence was insufficient was affirmed); see, however, Christensen v. Iowa State Highway Comm'n. 252 Iowa 1351, 110 N.W.2d 573 (1961), a suit in equity upon an oral contract to recover for moving earth upon a highway project, in which the statement was made that the subcontractor had the burden of proving his claim by a preponderance of the evidence. These statements should be compared with the statement, in R.C.P. 344 (f), referred to above in text accompanying n. 39, as to the "well established" proposition that in civil cases the burden of proof is measured by the test of preponderance of evidence, modified only as to reformation and setting aside written instruments affecting real estate.

[76] RESTATEMENT §§ 347-57; CORBIN §§ 1102-21; WILLISTON §§ 1454-85. See CORBIN § 996, distinguishing remedies of damages and restitution.

[77] Maytag Co. v. Alward, 253 Iowa 455, 112 N.W.2d 654 (1962); IOWA ANNOTATIONS § 354. In Loschen v. Clark, ... Iowa ....., ... N.W.2d ..... (1964), the plaintiff, who had turned $8,000 over to the vendor of a farm which was conveyed to plaintiff's daughter and son-in-law, allegedly in exchange for a verbal agreement with them to pay plaintiff $30 a month support for life, was granted a decree in equity for conveyance of the farm to him or $8,000 plus interest in cash, because of the son-in-law's repudiation of the promise to pay support money, asserted after marital difficulties and divorce; this was considered a situation for a constructive trust.

plaintiffs were allowed to recover the value of services in remodeling a building and preparing it for operations as a "supper club", rather than being compelled to recover on the basis of what the contract would have been worth to them had it been fully performed.[78] In this later case, according to the petition, there was an oral agreement to purchase, remodel and furnish a building and to operate it as a "supper club", with defendants to furnish the necessary funds and plaintiffs to assist in remodeling and preparing the building for use, to operate the kitchen when operations began, to receive $375 per month, living quarters, food and laundry for their services, and to receive a half-interest in the real estate and the business when the expenses of purchase, remodeling and furnishing had been repaid to defendants from the operation of the business. Plaintiffs quit, shortly after beginning of operations, because of certain breaches of contract by defendants, but the principal breach, considered material by the Court and sufficient to justify termination by the plaintiff, was the failure to reduce the oral agreement to writing upon commencement of operation of the supper club.[79] Defendants also argued that there was no showing the services benefited the defendants, but the Court's response is that the services were rendered in accordance with the contract, and the fact that the venture eventually proved unsuccessful does not prove lack of"legal benefit".[80] In support of the availability of the particular recovery the Court states:

> A party injured by a breach of a contract has three possible remedies: he may ask damages under the terms of the contract, he may disaffirm the contract and ask for the value of his own performance, or he may, in some cases, ask specific performance.[81]

Although the expression did not affect recovery in this case, it is unfortunate to perpetuate such a statement. The recovery in restitution, for performance rendered, is not necessarily dependent upon a disaffirmance of the contract, but, in essence, proceeds upon the contract and seeks a remedy, substitutionary of performance, in money, either of expectation or of benefits conferred; continued reference to "disaffirmance and rescission" causes complication in the cases raising the election of remedies argument, as discussed below.

Although originally there may be a choice of remedies, the doctrine of election of remedies[82] may preclude the easy exercise of remedies available, as was demonstrated in the recent case of *Mobley v. Boyt Farms Co.*[83] In a suit on a note, the defendant counterclaimed October 28, 1961 for breach of a contract for maintenance of a herd of beef cattle because plaintiff disposed of the herd in June, 1961. Defendant's counterclaim asked for the value of the performance furnished plaintiff, as pasture, cornstalks, supplies, hay,

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78 Shriver v. Cook, --- Iowa ---, 127 N.W.2d 102 (1964).

79 See discussion in CORBIN § 283 about the Statute of Frauds problem in a promise to reduce to writing an agreement required to be in writing.

80 RESTATEMENT § 348 states enrichment of defendant is not necessary unless performance is not that bargained for. For discussion as to measure of recovery, see CORBIN §§ 1107, 1112-13, supporting generally reasonable value of bargained-for performance rendered, with no recovery in restitution for preparation resulting in no actual advantage to defendant.

81 127 N.W.2d 102, 106 (1964).

82 For general discussion of election of remedies, see CORBIN §§ 1214-27; WILLISTON §§ 683-88, 1444A, 1464, 1469, 1528-28A; Note, *Election of Remedies A Delusion?* 38 COL. L. REV. 292 (1938). RESTATEMENT sections are §§ 381-84.

83 --- Iowa ---, 126 N.W.2d 280 (1964).

chains, meals, house rent, use of sprayer and tractor, as restitution of benefits conferred. He was held precluded by the doctrine of election of remedies from amending the counterclaim on November 13, 1961, to ask damages for value of supplies furnished and damages for breach of contract for the value of one-third of the calf crop at the normal weaning time in November, 1961, as promised in the agreement.[84] This is an unfortunate result in its insistence on a purely mechanical doctrine of election where there is no showing of adverse result to the other party from the prior assertion of one remedy, and it is one not necessarily required by any of the prior Iowa precedents cited in the opinion.

As an original conceptual proposition, independent of judicial precedent, it would seem indefensible that mere assertion in a pleading, in response to a total breach, of the remedy of money judgment for benefit conferred should prevent an amendment to put recovery on the basis of expectation damages (putting the injured party in the position he would have been had the agreement been carried out). The doctrine of election assumes inconsistent remedies and conduct manifesting a choice of one. The remedies for value of benefit conferred and for expectation damages are not really inconsistent, in spite of some discussion that restitution is based on rescission of the contract (thus proceeding on the basis of no contract), whereas the remedy of expectation damages is based on the contract continuing in existence.[85] Both remedies may assume the continued existence of the contract, may be only different measures of damages, and both are substantial remedies for the performance not received. Further, the question may arise as to why simply filing a law suit on one theory indicates a final election of one measure, even if inconsistent.

In view of the opinion's expression that Iowa case law requires the result of preventing the amendment here, let us consider further the status of Iowa authority on this problem. In the opinion it is stated:

> In the annotation, 6 A.L.R.2d 10, 18, 35, Iowa is listed with the jurisdictions holding the commencement of a suit is, of itself, a conclusive election precluding the plaintiff (here defendant) from thereafter pursuing a remedy inconsistent with the one first chosen.[86]

In fact, the annotation referred to conveys a somewhat less decisive statement of the Iowa position, stating:

> In Iowa the general proposition that the bringing of an action, with knowledge of all the material facts is a decisive act indicating a final choice between inconsistent remedies was stated in cases in which it was not necessary to determine this question. Other cases in which no such general rule was laid down are in harmony with the rule if limited to a choice of substantive rights as distinguished from remedies.[87]

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[84] The trial court's holding, affirmed, was that defendant was limited to restitution but because plaintiff in his reply offered an accounting of the calf crop in June, which was more advantageous to defendant, an offset to plaintiff's note would be allowed on that basis. On a reasonable value approach, the total would be $1910. Plaintiff's tendered accounting of one-third in June was $2,359.63. Presumably, because of the argument over election, permitting damages on the basis of calf crop at weaning time in November would have resulted in a larger offset.

[85] See WILLISTON § 1464.

[86] 126 N.W.2d 280, 283.

[87] Annot., "Conclusive election of remedies as predicated on commencement of

The annotation cites cases where the statement was unnecessary[88] and where the choice of substantive rights was involved, such as suing at law for damages for fraud (thus affirming the contract) instead of suing in equity to cancel the agreement (a true case of avoidance) and to get money back.[89] The principal case is not a case of choice of substantive rights, however they might be defined, but of different forms of remedy following from a total breach of the contract.

The specific Iowa case authority cited in the *Mobley* opinion does not convincingly support the result of denying permission to amend because of an election of remedies by bringing an action. Most of the cases cited were cases in which the doctrine was held inapplicable for various reasons, such as: the remedies were consistent,[90] the remedy first sought was not

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action, or its prosecution short of judgment on the merits," 6 A.L.R.2d 10, 34 (1949).

[88] Zimmerman v. Robinson & Co., 128 Iowa 72, 102 N.W. 814 (1905), cited as the first case on the proposition of election in the principal case, 126 N.W.2d 280, 283, and quoted at length with references that invoking one inconsistent remedy by bringing action prevents assertion of another, actually was decided on the basis there was no basis for prior assertion of remedy, so no bar to subsequent action to claim damages, Boysen v. Petersen, 203 Iowa 1073, 211 N.W. 894 (1927), referring to a statement that bringing an action with knowledge of fact indicates choice of inconsistent remedies and plaintiff is bound by election, but the actual question was whether reconveyance of land to vendor was accompanied by agreement to release defendant from alleged misrepresentation as to rocks on the land; also there was a question whether a statement was opinion or fact.

[89] Ellis v. Annis & Rohling, 187 Iowa 423, 173 N.W. 282 (1919) (commencement of action at law by vendee with knowledge of fraud held election to affirm contract, so he could not change form of action to suit in equity for rescission, with demand of return of consideration; also there was an alternative ground of laches; CORBIN § 1220 n. 40 cites this case to support the proposition that although some courts put the decision in terms of election the real ground for refusing restitution is that plaintiff has received and retained property, the return of which is required as a condition precedent to the remedy of restitution); Theusen v. Bryan, 113 Iowa 496, 85 N.W. 802 (1901) (couldn't sue alleged guarantors of cattle purchase on theory of rescission of contract, when buyer had previously been sued for purchase price; also considered no fraud by guarantors in simply stopping payment on checks); Richards v. Schreiber, Conchar & Westphal Co., 98 Iowa 422, 67 N.W. 569 (1896) (seller of goods, sold on condition, commenced action for purchase price, aided by attachment levied on buyer's real estate; held unequivocal election to treat goods as sold absolutely to buyer and to waive any right seller may have had to recover the goods as owner); Kearney Milling & Elevator Co. v. Union Pac. Ry., 97 Iowa 719, 66 N.W. 1059 (1896) (bringing an action to recover property obtained by fraud on theory plaintiff was absolute owner was conclusive election, so couldn't later amend complaint to allege right of stoppage in transit; however, a distinguishing feature is that plaintiff apparently had secured possession under the first theory); Klocow v. Patten, 93 Iowa 432, 61 N.W. 926 (1895) (commencement by seller of goods of action for purchase price together with proceedings garnishing the bank account of buyer, who had resold goods, precluded seller from asserting, upon intervention of third party claiming the bank accounts, that the proceeds of resale belonged to plaintiff).

[90] Miller v. Hartford Fire Ins. Co., 251 Iowa 665, 102 N.W.2d 368 (1960) (no election, so as to bar suit against adjuster for insurance company, on alleged oral contract, because of proceeding to file mechanic's lien claim against property owner; remedies are consistent); Pickford v. Smith, 215 Iowa 1080, 247 N.W. 256 (1933) (commencement of action of replevin to recover possession of promissory notes does not constitute election of remedy precluding substitute of petition in equity to cancel); American Sav. Bank v. Borcherding, 205 Iowa 633, 216 N.W.719 (1928) (mortgagor, who asks in foreclosure action for judgment against subsequent purchaser on the original contract of purchase, makes no election of remedies such as prevents him from subsequently asking for reformation of deed to purchaser to show purchaser had assumed mortgage, even after mortgagee's action to reform same deed failed; internal headnote describes this as "acts constituting

available,[91] or ignorance of facts.[92] The case first cited in the opinion, *Zimmerman v. Robinson & Co.*,[93] from which a quotation stating the rule as to election of remedies was given, was a case in which the Court concluded that the election doctrine was not applicable because the remedy first sought was not available. Only two cases cited held there was an election barring subsequent action; both involved claims of fraud, a matter of substantive rights as opposed to remedies, an affirmance of a contract found in treating title to property as having passed, followed by attempts to avoid the contract for the fraud; and in both there were additional features such as delay which affected the result.[94]

The *Mobley* opinion approved what is described as the "more liberal rule" stated in section 381, *Restatement of Contracts:*

> (1) When the alternative remedies of damages and restitution are available to a party injured by a breach, his manifested choice of one of them by bringing suit, or otherwise, followed by a material change of position by the other party in reliance thereon is a bar to the other alternative remedy.
>
> (2) The bringing of an action for one of these remedies is a bar to the alternative one unless the plaintiff shows reasonable grounds for making the change of remedy.

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non-inconsistent remedies", but direct words in opinion and headnote 2 simply state, without label of "consistent", that there is no election).

[91] Ritchie v. Hilmer, 254 Iowa 309, 314, 117 N.W.2d 443, 447 (1962) (original action in replevin, by auto dealer, unsuccessful in court, did not bar subsequent equity action by dealer against levy of execution on judgment for purchaser in replevin action); Reinertson v. Struthers, 201 Iowa 1186, 207 N.W. 247 (1926) (could amend petition to claim for damages for fraud after originally petitioning for return of money back, claiming rescission; statement was there was no election because rescission was not available, without any discussion); Zimmerman v. Robinson & Co., 128 Iowa 72, 102 N.W. 814 (1905) (in claim of breach of warranty previous assertion of rescission of sale for breach and claim for amount paid did not preclude subsequent action for damages when held no prior rescission was available); Redhead Bros. v. Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N.W. 144 (1905). Not cited but also applicable here are: Swanson v. Baldwin, 249 Iowa 19, 85 N.W.2d 576 (1957), in which purchasers were held not entitled to general damages against referee in partition sale for unintentional misrepresentation as to land sold, but were held entitled to amend pleading to ask for abatement of purchase price or rescission of entire contract of sale; and Petersen v. Olson, 253 Iowa 469, 112 N.W.2d 874 (1962), referred to in note 74, *supra*.

[92] Deere, Wells & Co. v. Morgan, 114 Iowa 287, 86 N.W. 271 (1901).

[93] 128 Iowa 72, 102 N.W. 814 (1905).

[94] Ellis v. Annis & Rohling, 187 Iowa 423, 173 N.W. 282 (1919) (suit for damages for fraud followed by amended petition in equity tendering a reconveyance and asking rescission and judgment for consideration paid; alternative ground was laches; also note comment in CORBIN § 1220 n. 40 explaining the case on theory plaintiff had received and retained property); Seeley v. Seeley-Howe-Le Van Co., 130 Iowa 626, 105 N.W. 380 (1906) (attempt by intervener in receivership to replevin property sold, on theory of fraud, precluded by prior attempts to collect the purchase price and participation in attempt to sell the property; the statement was made, at 632, 105 N.W. at 382: "Further, it is argued that, as no one was prejudiced, the doctrine of election does not apply. But this is not a sound proposition of law. If it were, there is enough in intervener's conduct to constitute an estoppel . . . . While the delay in this case was not in itself sufficient to indicate an election, the trial court was justified in finding that it was accompanied by such acts and conduct on the part of intervener as to evince an election on its part to treat the corporation as its debtor for the full amount of the goods shipped."

The RESTATEMENT, § 381 Comment *d*, points out that: "A choice between remedies for an injury must be distinguished from a choice between substantive rights and privileges. An offeree has a choice between acceptance and rejection; and a single communicated statement is operative as the final and only choice . . . .

The Court's comment is then that "Defendant here made no showing of a reasonable ground whatsoever."[95] Neither the opinion nor the Comments to the *Restatement* expand upon what are "reasonable grounds"; the assumption is that "just changed my mind" is not enough. The *Iowa Annotations,* section 381, citing none of the cases referred to in the opinion, states that certain cases are in accord with the rule that bringing of an action for damages or for restitution is a bar to the alternative remedy. It is submitted, without extensive discussion, that such cases do not directly support such a position.[96] There are three cases cited in the *Iowa Annotations* as in support of the proposition that bringing an action is not such an election as will bar alternative remedies if a reasonable ground for the change was shown, but only one refers to a reason for making the change—lack of knowledge of the fraud; that case involved a claim of fraud, a choice of substantive rights, with little guidance for the case where there is total breach authorizing recovery of benefits conferred (restitution) or expectation damages,[97] and in any event should not constitute a closed canon of reasons for being permitted to amend if there has been no prejudice.

10. Contracts in Iowa Revisited—Scope and Interpretation.[98]

The restrictive influence of the Parol Evidence Rule has been reinforced, as the Court of Apeals for the Eighth Circuit has affirmed[99] the conclusion of Judge Graven, then of the Northern District in Iowa, in *Nutrena Mills,*

The same is true as to the ratification and disaffirmance of the unauthorized act of an agent or of a contract that is voidable for fraud. These are choices between substantive legal relations, between contract and no contract. The relation that is chosen is created by a mere manifestation of assent. In these cases the bringing of a suit may be such a manifestation." Also see CORBIN § 1215. RESTATEMENT § 484 states the power of avoidance for fraud is lost by affirmance.

95 126 N.W.2d at 283.

96 Howell v. Jackson, 192 Iowa 70, 181 N.W. 788 (1921) (in action for damages the Court refused rescission, but simply stated that claimant didn't ask for rescission); Lewis v. Woodbine Sav. Bank, 182 Iowa 190, 165 N.W. 410 (1917) (general discussion of available remedies but concluding pleading too indefinite to tell what was asked); Hoyer v. Good, 182 Iowa 148, 161 N.W. 691 (1917) (merely refers to idea there should be only two satisfactions); International Harvester Co. v. Tjentland, 181 Iowa 940, 165 N.W. 180 (1917) (sales problem with fraud; couldn't sue for damages in addition to rescission; a problem of substantive rights as in RESTATEMENT § 381 Comment *d*); Bush v. Chapman, 2 G. Greene 549 (Iowa 1850) (question of amount of damages, when recovering for price on special contract; may not add damages for delay).

97 McConnell v. Newell, 133 Iowa 736, 111 N.W. 17 (1907) (in connection with contract for exchange of lands Court concluded failure of defendant did not justify plaintiff's bringing action for value of his land conveyed in trade; Court did not grant damages, stating there was no claim for damages; there is no discussion of reasonable ground for change); Deere, Wells & Co. v. Morgan, 114 Iowa 287, 86 N.W. 271 (1901) (seller of goods which commenced suit for price not precluded from commencing replevin to get back goods on basis of fraud not known at time of commencement of suit for price); Jackson & Sons v. Mott, 76 Iowa 263, 41 N.W. 12 (1888) (no question of changing remedy, but question of interpretation of what pleading was asking for).

98 10 DRAKE L. REV. 87 (1961).

99 Yoder v. Nutrena Mills, Inc., 294 F.2d 505 (8th Cir. 1961). S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 111 N.W.2d 681 (1961), concerning a construction contract, refers to the same idea with the statement that nothing can be claimed from prior oral agreements because they are merged in the written contract. See RESTATEMENT § 447(1).

Inc., v. Yoder,[100] discussed in the prior article,[101] that the Parol Evidence Rule in Iowa prohibited, in an action by the creditor on contracts and notes covering a turkey raising operation, the introduction of testimony by the debtor that the creditor's representative had orally promised, prior to the delivery of the writing, to finance him for the entire season (a promise not in the writing), when the debtor objected to the proposed writing and allegedly delivered the signed writing only on condition of continued financing.

A recent case, *Sanborn v. Maryland Casualty Company,*[102] however, manifested a less slavish adherence to the terms of a writing. This was a declaratory judgment brought by an insured to determine that coverage under an automobile liability insurance policy continued past the expiration date in the policy as issued, because of reliance on an insurance agent who, allegedly, in response to an oral request to issue and automatically renew a liability insurance policy until the agent was otherwise informed, issued a policy and for several subsequent years delivered yearly renewal policies without further request by the insured until one year when, without any particular explanation, the system for renewal "broke down" and no new policy was delivered, and an accident occurred several months after the formal expiration date on the last policy form issued. The Court affirmed the trial court's holding for insured that the company was estopped to deny an insurance policy was in force and effect at the time of the accident. Among other questions,[103] the Court was confronted with defendant's propositions that this policy contained the entire agreement and any oral agreement was merged in the policy, that each policy was a separate contract of insurance, and that the trial court's ruling had the effect of making a new contract between the parties. The Court's response to this was principally in the following words:

> [In certain cases cited] the general principle is recognized that parties contracting orally with the understanding a subsequent written version thereof will be executed are bound by the terms of the printed instrument designed to be the final consummation and accurate expression of the oral temporary agreement. . . . Here we have no evidence of any understanding between plaintiff and Timmons that the first or any subsequent policy was intended as a final consummation and expression of the oral agreement. The contrary is clearly established. By the evidence of the oral agreement followed by the custom established by Timmons of renewing the coverage each year, we conclude the parties' original understanding included an agreement for coverage until plaintiff advised

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100 187 F. Supp. 415 (1960). See the extensive comments in 3 CORBIN § 589 (1960) n. 64, in pocket parts, on the case in the two courts, and particularly the following: "it was his folly to rely on oral words and to fail to strike out the written ones. The parol evidence rule as thus applied goes W. C. Fields one better: 'Don't give the sucker any chance', but don't forget that even a rustic simpleton may be a liar."

101 10 DRAKE L. REV. 87, 91, 94 (1961).

102 --- Iowa ---, 125 N.W.2d 758 (1964).

103 The Court held with plaintiff on defendant's objections as to authority of agent, and rejected defendant's arguments that plaintiff had based his action on negligence, by which estoppel cannot be established, and that plaintiff had failed to prove freedom from contributory negligence. The Court was apparently not impressed with the argument the trial court's holding puts an unbearable burden on companies engaged in the liability insurance business.

> Timmons it was no longer wanted. The several policies issued were not entire and separate contracts into which the original agreement merged. They were only the means adopted by defendant's agent to carry out the agreement for coverage and automatic renewal.[104]

The defendant's attempt to remove from the controversy any prior oral agreement, particularly the language of merger, is an attempt to assert the objection of the parol evidence rule, that parol evidence is not admissible to alter, vary or contradict the terms of a written instrument,[105] although the opinion does not refer to this precise objection. The parol evidence rule should not be an obstacle to proving the prior oral agreement, although some courts might overestimate the sanctity of the written agreement. The parol evidence objection might be met by a claim for reformation, because of mistake, that the writing, the policies, with special reference to expiration date, should be changed to correspond to a claimed oral agreement, for continuous renewal on a yearly basis, until notice to the contrary.[106] As indicated in the excerpt from the Court's opinion, the evidence does not clearly indicate that the writing mistakenly varied from the oral agreement. The parol evidence rule objection might be met more properly by the observation, as indicated in the Court's opinion, *supra,* that the evidence clearly established that the writings were not intended as a final consummation (integration) of the oral agreement, and by other statements appearing in various places as exceptions to the rule, that oral evidence contemporaneous with a written agreement is provable if the oral evidence is complete in itself and does not contradict the written contract (although here there may be no separate consideration for the oral agreement, as sometimes is required), or that a single contract may be partly in writing and partly oral (although here not incomplete on its face, as sometimes is required), or on the *Restatement* approach in section 240(1) that an oral agreement is not superseded by a writing if it is such an agreement as might naturally be made as a separate agreement.[107] The apparently understood oral promise to renew without prior request would seem to fit in one of those categories allowing admissibility of prior oral agreements.

Finding a promise for automatic renewal of the policies would seem, subject to a possible argument of mitigation of damages if insured should have foreseen the harm and could have avoided it in view of the gap in time between the stated June expiration time and the October accident,[108]

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104 125 N.W.2d at 761.

105 RESTATEMENT § 447(1). The language of merger is also used in Anderson v. King, 250 Iowa 208, 93 N.W.2d 762 (1958), an action by daughter to attempt to reform a deed to parents to remove survivorship clause so as to conform to a previous contract by parents with vendor, when among other reasons in denying relief the Court stated the contract was merged in the deed. Additionally, the opinion stated there was no showing that the parents had not changed their minds before the deed. See CORBIN § 1319.

106 See *Contracts in Iowa Revisited—Scope and Meaning of Contracts,* 10 DRAKE L. REV. 87, 93 (1961), and *Contracts in Iowa Revisited—Mistake,* 7(2) DRAKE L. REV. 3, 7 (1958).

107 See *Contracts in Iowa Revisited—Scope and Meaning of Contracts.* 10 DRAKE L. REV. 87, 92-99 (1961), and authorities cited.

108 RESTATEMENT § 336; WILLISTON §§ 1353-54; CORBIN § 1039; *Contracts in Iowa Revisited—Performance, Breach and Remedies,* 9 DRAKE L. REV. 59, 79 (1960). In the principal opinion, 125 N.W.2d at 762, the Court refers to defendant's argument that the method of writing policies was changed in 1960 (apparently by requiring application) and that plaintiff had no right to rely on any custom or established

to support the trial court's decree that defendant was obligated to investigate and defend an action brought against insured for injuries received in the accident, and to pay any judgment resulting therefrom, without reference to estoppel arguments. The opinion, however, goes on to refer to estoppel in the following words: "The principles of equitable estoppel have been announced by us many times. It is based upon the idea that one who has made a certain representation should not thereafter be permitted to change his position to the prejudice of one who has relied on it."[109] The proposition of enforcing a promise of automatic renewal, such as described here, seems so reasonable that one wonders why there is introduction of an estoppel element. As to what is the party estopped? What is it that the company may not deny? This is not the traditional estoppel in pais, being forbidden to deny existence of certain facts, but is simply the enforcement of a promise.[110] Is this merely a case of not being permitted to deny there was bargained-for consideration and being compelled to accept reliance as an alternative, as was illustrated in *Miller v. Lawlor*,[111] enforcing the oral promise of an easement of view made by an owner of property to a person who was buying from another owner other property on a higher vantage point? Sufficient bargained-for consideration for the promise to renew may be found in the initial premium and subsequent premiums because the same consideration may support several promises;[112] the circumstances referred to in the opinion indicate the issuance of the original policy and request for policy and automatic renewal were all part of one "package". Perhaps, although the Court does not discuss it, estoppel might be applied to prevent possible assertion of a Statute of Frauds defense, particularly with respect to the section as to 'contracts' "not to be performed within the space of one year from the making thereof",[113] to a promise to automatically renew yearly policies until notified to the contrary. Although initially it may be doubtful if the section is applicable to this alleged promise to renew because of such features as full performance on one side, if the first premium is the exchange for the promise to renew, or the feature of possible performance

practice before that time, and answers that the record did not disclose such a change, that Timmons continued to be authorized to sign applications for renewal of plaintiff's coverage, and that if any change was to be made or the coverage was to cease plaintiff was entitled to notice, which was not given. This is simply a proposition that plaintiff had no reason to know that defendants had not carried out the promise of automatic renewal.

109 125 N.W.2d at 762.

110 See *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 79 (1956), notes 38-39, for prior Iowa cases asserting the proposition that estoppel may not be revoked to create a new liability. See also reference in *Contracts in Iowa Revisited—Mistake*, 7(2) DRAKE L. REV. 3, 12 n. 26 (1958), and *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3, 4 n. 5 (1959), to Hully v. Aluminum Co. v. America, 143 F. Supp. 508 (S.D. Iowa 1956), in which the court used the idea of estoppel, misrepresentation of fact, to support an action against an insurer which might better have been supported on a reformation theory or on theory of detrimental reliance.

111 245 Iowa 1144, 66 N.W.2d 267, 48 A.L.R.2d 1058 (1954), and discussion in *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 76 (1956).

112 *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 70 n. 5(h) (1956).

113 IOWA CODE § 622.32(4) (1962).

within a year by notification not to renew,[114] there is also some developing authority that the doctrine of estoppel (reliance and prejudice) should dispense with other sections of the Statute of Frauds than the land section.[115] However, even in view of the apparent lack of any other reason for introduction of the estoppel idea than the possible Statute of Frauds problem, it should not be assumed as an implicit proposition from this case that estoppel applies to the one-year clause, considering the fact it was apparently not argued and particularly because there was a 1963 case,[116] an action by an employee for an alleged breach of an oral contract for eighteen months employment, in which the Court sustained the trial court's refusal to permit amendment of the pleadings, after an unsuccessful attempt to get in oral testimony, to plead equitable estoppel based on leaving a former job. The Court thought this was within the discretion of the trial court, considering the request not timely and the evidence not admissible, with the statement: "To stultify the Statute of Frauds by admission, under the guise of equitable estoppel, of evidence that is incompetent by statute would amount to judicial repeal of legislative enactment. This we cannot do."[117]

The statement was again made that the Parol Evidence Rule does not apply in favor of or against one who is not a party to an instrument.[118] Caution should be exercised in applying this idea to cases where the only claim of the third person is under the contract, and some other exception to the Rule does not apply.[119] *Pedersen v. Bring*,[120] the most recent case in which this statement was made as to the nonapplicability of the Rule to third parties, concerned not rights under a contract but the question whether a document labelled "covenant not to sue" should be considered a discharge by operation of law of another tortfeasor than the person to whom it was given; further, the Court seemed to turn its conclusion on a determination that the document was ambiguous, which would permit introduction of extrinsic evidence in any case. The significance of the ambiguity feature is emphasized by a prior case, *Dungy v. Benda*,[121] where a document labelled "release" was held to discharge another tortfeasor allegedly responsible for the same injury, because the only intent important was that of the parties to the document after which the legal result as to the third party would follow, and the intent to "release" was clear.

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114 RESTATEMENT § 198; WILLISTON §§ 495-504; CORBIN §§ 444-459.

115 CORBIN §§ 459, 422A (pocket part); WILLISTON §§ 533, 533A. See discussion in *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957) passim, about incorporation in the Iowa statute of "part performance" and estoppel features.

116 Huston v. Gelane Co., 254 Iowa 752, 119 N.W.2d 188 (1963).

117 254 Iowa at 755, 119 N.W.2d at 190.

118 Pedersen v. Bring, 254 Iowa 288, 117 N.W.2d 509 (1962), commented on in 3 CORBIN § 596 n. 11 (pocket parts).

119 See 10 DRAKE L. REV. 87, 88 n. 13; CORBIN § 596; WILLISTON § 647.

120 254 Iowa 288, 117 N.W.2d 509 (1962). Similar is Schlotter v. Leudt, --- Iowa ---, 123 N.W.2d 434 (1963), an action in tort against alleged employer of truck-driver. Without referring to the Parol Evidence Rule the Court pointed out the injured party was not a party to the contract and was entitled to the benefit of all available evidence to show the actual relationship of driver and alleged employer, where contract does not contain entire agreement. The Court reversed the trial court and held there was not sufficient evidence to show the driver was an employee; instead he was an independent contractor.

121 251 Iowa 627, 102 N.W.2d 170 (1960).

There were the usual flood of cases involving questions of proper interpretation[122] of agreements, with the Court reciting certain precepts supposedly used as guides to solution of the problem, such as: parol evidence is admissible to aid a court in construing an ambiguous contract;[123] practical construction placed by parties will be adopted by courts;[124] construction of unambiguous agreement is for court,[125] whereas interpretation of ambiguous agreement is one of fact for jury.[126] One rule or standard that received the most intense workout is the rule that agreements are to be interpreted, or construed, most strongly against the party drafting it, usually an insurance company. However, lest it be thought there is a rule that insurance companies always lose, it has also been stated that this rule does not apply where the words are plain and unambiguous, not subject to "construction" or "interpretation".[127] The cases are of too dubious value in their effect on other cases to justify any more than footnote collection for most of them.[128]

[122] See notes 47, 54, 69, *supra*, for other references to interpretation problems. In Preston v. Oliphant, --- Iowa ---, 126 N.W.2d 329 (1964), an action by lot purchaser against vendor, to recover for special assessments for concrete paving ordered by city, who allegedly had promised to pay for them. The Court affirmed a trial court decision for the purchaser, finding that a phrase "hard-surfaced" used in conversations could not reasonably be interpreted to mean a gravel road, considering the circumstances, in spite of a dictionary definition of the term that included graveling.

[123] United States v. Farmers Mut. Ins. Ass'n of Kiron, 288 F.2d 560 (8th Cir. 1961); see 10 DRAKE L. REV. 87, 199 (1961), rules 78-81.

[124] Harvey Constr. Co. v. Parmele, 253 Iowa 731, 113 N.W.2d 760 (1962) (meaning of "adjacent and contiguous" in a lease); Christensen v. Iowa State Highway Comm'n, 252 Iowa 1351, 110 N.W.2d 573 (1961); see 10 DRAKE L. REV. 87, 102 (1961), n. 97.

[125] Rogers v. Maryland Cas. Co., 252 Iowa 1096, 109 N.W.2d 435 (1961); Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102 (1961).

[126] Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106 N.W.2d 86 (1960) (interpretation of "in or upon or while entering into or alighting from the automobile"); Thompson v. Miller, 251 Iowa 324, 100 N.W.2d 410 (1960).

[127] 10 DRAKE L. REV. 87, 102 (1961), n. 95.

[128] Eastern Iowa Light & Power Co-op. v. McKenzie, 296 F.2d 295 (8th Cir. 1961) (contract held unambiguously to require complete dredging of channel, even though contractor had no place to deposit unstable dredging material; trial court reversed; also note enforcement of clause giving engineer for one side final authority to interpret clauses); Pioneer Valley Sav. Bank v. Indemnity Ins. Co. of North America, 225 F. Supp. 404 (N.D. Iowa 1964) (transaction whereby person engaged in "check kiting" scheme constituted "false pretenses" under banker's bond); Stanley J. How & Associates v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963) (person who signed contract for architectural services as "agent for a Minnesota corporation to be formed who will be the obligor" held to be personally liable, in part based upon rule that ambiguous words are to be interpreted strictly against the person who used them); American Universal Ins. Co. v. Dykhouse, 219 F. Supp. 61 (S.D. Iowa 1963) (state-owned automobile furnished to state employee for limited use of traveling to convention was not furnished for "regular use" of employee as term was used in employee's own automobile liability policy which excluded non-owned automobile furnished for regular use; construe in favor of insured when words of doubtful meaning); Home Federal Sav. & Loan Ass'n v. Peerless Ins. Co., 197 F. Supp. 428 (N.D. Iowa 1961) (interpret bond coverage for "forgery" strictly in favor of insured); Degsir v. Mutual Benefit Health & Acc. Ass'n. — Iowa — 125 N.W.2d 19 (1963) (affirmed jury's finding for beneficiary in action on policy involving questions of answers on application form); Randolph v. Fireman's Fund Ins. Co., --- Iowa ---, 124 N.W.2d 528 (1963) (no room for construction of contract based upon conduct of parties where unambiguous, in case involving interpretation of farmer's comprehensive personal liability policy and attempt to include claim of injured farm employee not specifically listed; trial court, apparently thinking the policy ambiguous, was reversed; no effect to be given to parol evidence even if no

Two cases, however, offer interesting examples of this problem of determining if the words are ambiguous, in which the trial court concluded they were and the Supreme Court reversed.

Dolan v. Hoosier Casualty Company[129] was an action against an insurer for expenses incurred for treatment of a member of a family for "rheumatic fever", caused by scarlet fever. The trial court found an ambiguity and resolved it against the insurer, in the fact that, although the basic "Insuring Division" of the policy insured "against loss by reason of expense incurred for treatment of Specified Diseases [including scarlet fever but not rheumatic fever]", the "Expenses Payable" division covered expense incurred "If the insured shall incur expense for any of the services listed herein, by reason of the fact that a member of the family contracted a Specified Disease", emphasizing the words, "by reason of the fact". The Supreme Court considered the policy to be clear and unambiguous, emphasized that the services "listed herein" referred to "Hospital Services . . . of treating a Specified Disease" and held against the insured.

The presence of a clause under the heading of "Exclusions" taking away what appeared to be granted in basic insuring provisions received attention

objection on trial, because Rule is one of substantive law rather than one of evidence [see 10 DRAKE L. REV. 87, 88 (1961), n. 7-8]; punctuation is of little aid in interpretation; must read entire contract); Seymour v. Chicago & N.W. Ry., --- Iowa ---, 124 N.W.2d 157 (1963) (placing of railroad cars on passing track to bring material to paving contractor's facility adjacent to tracks was act that arose "from or in connection with" "existing operations and use" of facility, within terms of licensing agreement so as to call for payment by licensee for sums paid out by railroad to person injured at crossing; so clear no occasion for construction; trial court reversed); Allied Mut. Cas. Co. v. Dahl, 255 Iowa 208, 122 N.W.2d 270 (1963) (fact that phrase such as "arise out of and in course of employment" is used in Workmen's Compensation Law, with liberal interpretation, does not apply to other fields of law as in insurance contracts, where, unless language is clear and unambiguous, it is strictly construed against the insurance company; however, the company won); Westinghouse Elec. Corp. v. Mill & Elevator Co., 254 Iowa 874, 118 N.W.2d 528 (1962) (corporate surety bond; paid surety undertaking is in nature of insurance contract, so controlled by rules applicable to such contracts rather than rules applied to gratuitous surety who was a favorite of law; so most strongly construe against surety; this interpretation resulted in surety being liable to a subcontractor furnishing materials, on the construction bond to the owner, where bond conditioned on principal performing matters in contract and contract provided that "these subcontracts are a part of this total contract"; for general discussion of rights of third parties to recover on contracts to which they are not a party, see *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignment*, 6 DRAKE L. REV. 3 [1956]); Murphy v. Adams, 253 Iowa 235, 111 N.W.2d 687 (1961) (although benevolent associations are treated the same as insurance companies, no reason to interpret against association because no ambiguity present); Rogers v. Maryland Cas. Co., 252 Iowa 1096, 109 N.W. 2d 435 (1961) ("collapse of building or any part thereof" considered to be ambiguous, so affirmed finding of jury for plaintiff, where no sudden occurence resulted in complete falling down of wall; subject to rules of construction in favor of insured); Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106 N.W.2d 86 (1960) (provision of "medical pay" portion of automobile casualty policies to "incur upon or while entering into or alighting from the automobile" to receive a "broad and liberal construction"; applied to person leaning against car attempting to put down hood); Indianola Country Club v. Fireman's Fund Ins. Co., 250 Iowa 1, 92 N.W. 2d 402 (1958) (fire insurance policy held not to include underground electric cable not connected with building, and ending at transformer on pole 40 feet outside building, when language clearly and unambiguously limited coverage to wiring "while contained therein [building]" and "belonging to and constituting a permanent part of said building").

[129] 252 Iowa 1188, 110 N.W.2d 334 (1961).

in *Mallinger v. State Farm Mutual Automobile Insurance Company*.[130] This was an action by an administratrix for a declaration of the automobile liability insurer's liability for medical payments and funeral expenses by reason of an accident to the insured who was struck by a tractor-trailer while operating his farm tractor on the public highway. The tractor was not the specific automobile named in the policy. In one place, concerning medical payments and funeral services, the policy stated: "In addition [to the named automobile] . . . this coverage is extended to apply to any other land motor vehicle or trailer not operated on rails or crawler treads, but not (1) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads." This would seem to cover the incident referred to. However, on a subsequent page, under the heading "Exclusions", the policy stated: "This insurance does not apply . . . (2) while occupying or through being struck by any . . . land motor vehicle . . . if such vehicle is owned by the named insured." Thus the "right hand" seems to be taking away what was granted by the "left hand". Out of this situation the trial court found an ambiguity and resolved it against the insurance company, for recovery. Disapproving of some language in a prior Iowa case[131] which seemed to find an ambiguity when exceptions were not included with the basic insuring provision, the Court found no ambiguity, stating that all terms don't have to be at one place. The Court also found no repugnancy[132] or fraud. Three judges concurred in the result, with the somewhat plaintive statement: "I concur in the result and agree that the interpretation of the policy by the majority is technically correct. When there is as much trouble interpreting an insurance policy as we have here, it is difficult to say that it is free from ambiguity. Policies written and sold to the public should not require the services of an expert in semantics to determine coverage."[133] This is a strange concurrence. If it is difficult to say the policy is free from ambiguity, isn't this really saying it is ambiguous, that there are two reasonable meanings? If policies "should not require an expert in semantics", is this not speaking in imperatives, that cases ought to be decided in the area of interpretation not as exercises in semantics but as exercises in determining what a reasonable person might think the words mean. The acquiescence that the result is "technically correct" makes interpretation a "push-button" proposition, without even the satisfaction of seeing the merchandise displayed as in a vending machine,[134] maybe necessary in contracts of adhesion such as insurance, but

130 253 Iowa 222, 111 N.W.2d 647 (1961). In another case a medical payments provision of insurance policy excluding coverage "to any person . . . other than the named insured and a relative while occupying any vehicle not insured under Insuring Agreements I or II" was unambiguous and excluded plaintiff who was riding a bicycle when he collided with the insured car, giving words plain, ordinary meaning. The trial court was reversed. Barber v. State Farm Mut. Auto Ins. Co., 254 Iowa 1280, 121 N.W.2d 147 (1963).

131 Shain v. Mutual Benefit Health & Acc. Ass'n, 232 Iowa 1143, 1149, 7 N.W.2d 806, 809 (1943).

132 See 10 DRAKE L. REV. 87, 104 (1961), n. 108.

133 253 Iowa at 234, 111 N.W.2d at 653.

134 See discussion in WILLISTON §614 about the use of technical meanings contrary to intent of parties. Also see the argument that a technical meaning prevails over even clear and unambiguous words, in Vincent v. Kaser Constr. Co., --- Iowa ---, 125 N.W.2d 608 (1963), an action for rent due and allegedly to

a somewhat unappetizing prospect to insurance buyers who rarely take time to read all the policy, as the principal opinion seems to indicate they should.

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become due in which lessee tried to assert there was no further obligation to pay rent under lease, because of clause "Failure to make any such payments shall terminate this lease", that such words were clear and unambiguous in covering lessee's own failure to pay. The Court held that another principle of law prevailed over the words, that a condition that a lease shall terminate on failure to pay rent constituted a condition subsequent, giving lessor the option to terminate but not automatically terminating, because lessee may not take advantage of his own nonperformance of a contractual duty.

PARENTAL AND INTERSPOUSAL IMMUNITY

Spare The Rod and Speak Softly

The accelerated pace of modern living has resulted in profound changes in the relationships between individual members of a family. The rule of immunity from liability for torts between persons in this domestic relation, though still followed in the majority of the states, is being pierced by exceptions and in some states completely abandoned.[1] "Here is waged a battle between conflicting conceptions of the family, between individual and relational rights and duties."[2]

The two intra-family relations—parent and minor child, and husband and wife—are similar, for together they make up the family; the similarity is legally superficial, however, because the relationships have been treated differently by the law. Historically, parental immunity is of fairly recent origin. It owes its existence to a 1891 Mississippi case which cited no authorities, but found that such suits were against public policy.[3] On the other hand, interspousal immunity has a long history. Because marriage merged the legal identity of husband and wife, they could not sue each other at common law.[4] The troublesome statutory interpretations and constructions of the Married Women's Acts so prevalent in the interspousal litigation are wholly lacking both in the development of the parental immunity law and in its recent repudiation in some states.

In December 1963, a United States district court held in *Blunt v. Brown* that since plaintiffs' driver, who was husband and father of the injured wife and child, would have no liability to either, the common liability essential to claim over for contribution or indemnity was lacking.[5] Applying Iowa law, the court pointed out that a wife cannot maintain a suit against her husband for tort. However, the court decided the child would not be able to recover against the father driver because of the Iowa guest statute, thus it was not required to decide whether or not an unemancipated minor could maintain an action against his parent to recover damages for negligence. The federal court, noting the recent decision of *Cody v. Dodds*,[6] stated: "It appears that the question has not been determined in Iowa."[7] *Cody v. Dodds* held only that under the Iowa theory that a partnership was a legal entity an unemancipated child could maintain a suit against a partnership in which his father was a partner.[8]

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[1] Klein v. Klein, 580 Cal. 2d 692, 376 P.2d 70 (1962).

[2] McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

[3] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

[4] "By marriage, the husband and wife are one person in law, that is the very being or legal existance of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." 1 BLACKSTONE, COMMENTARIES 442 (7th ed. 1775).

[5] Blunt v. Brown, 225 F. Supp. 326 (S.D. Iowa 1963). See also Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); *In re* Estate of Dolmage, 203 Iowa 231, 212 N.W. 553 (1927); Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Peters v. Peters, 42 Iowa 182 (1875); *Recovery by a Wife for Injuries Due to Her Husband's Tortious Acts*, 4 DRAKE L. REV. 51 (1954).

[6] 252 Iowa 1394, 110 N.W. 2d 255 (1961).

[7] Blunt v. Brown, 225 F. Supp. 326, 329 (1963).

[8] Cody v. Dodds, 252 Iowa 1394, 110 N.W.2d 255 (1961).