

SERVICES IN THE HOME—A STUDY OF CONTRACT CONCEPTS IN DOMESTIC RELATIONS

HAROLD C. HAVIGHURST *

MR. JUSTICE HOLMES has suggested that most distinctions are distinctions of degree.¹ The thought has frequently been echoed. Yet legal science in large part moves on its way dichotomizing. We classify the black and the white. We may recognize gray borderlines. But the idea is not that. The idea is rather of a continuous gradual deepening of the shading from top to bottom. For example we may classify human conduct into "offers for a contract" and "non-offers", admitting there are borderlines where classification is difficult. But expectation aroused by conduct, the most significant element of an offer, may range all the way by minute gradations from complete assurance to faint hope. And so with other classifications.

This holds significance for legal science. Every determination by court or jury involves the evaluation of the varying elements of harm, benefit, the intelligence, morality, and social desirability of conduct, and the relation of conduct to harm and benefit. Each of these elements in turn is made up of innumerable sub-elements, each with its infinity of shading.² The reaction of a judge or a juror to a human situation must be the resultant of all the pulls of these elements this way and that.³ It is impossible

* Associate Professor of Law, Northwestern University School of Law; author of *The Constitutionality of the Transferee Provisions of the Revenue Acts* (1929) 29 COL. L. REV. 1052.

¹ *Haddock v. Haddock*, 201 U. S. 562, 631, 26 Sup. Ct. 525, 553 (1905). "I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it."

² Some idea of the complexity of the intertwining elements may be gained from an analysis of the way in which the expectation of the parties enters in. Disappointment of expectation is one phase of harm. Not only the degree of expectation is important, but the degree of disappointment, and the degree in which the other party's conduct has contributed to the expectation and to the disappointment. Intervening forces beyond the control of either party may contribute to disappointment, as well as cause other harms or benefits.

³ The strength of each pull will of course vary with the background and temperament of the person who is called upon to judge. For a beautifully phrased statement of the effect of background, see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 12. It will also vary with the vividness with which the particular element is brought to his consciousness. See Radin, *Permanent Problems of the Law* (1929) 15 CORN. L. Q. 1. The

to take account of all the pulls by means of any system of doctrine.⁴ If there were only ten elements and ten shades of each, that would make ten billion possible situations. Ten billion times ten billion would not begin to exhaust the number of different cases that might arise. By recognizing only the black and the white we seem to reduce our problems to less formidable figures. By rigidly adhering to this notion, we succeed in erecting doctrinal structures that doubtless exert influence upon judicial decision. Yet we must admit that no rigidly logical system can be devised that will not lead to results that often conflict in some degree with the felt needs of a particular situation. It must surely follow that the hope that logic will solve our problems is a false hope. We cannot escape the pull of the elements.

Where the competing elements in a given situation are found of nearly equal importance, the effort has with more or less frankness been abandoned. Great question-begging concepts have been created such as "material breach",⁵ "frolic of his own", "proximate cause". Each of the verbal symbols used contains some suggestion of one of the elements operating, but they are sufficiently incapable of definition to permit a full play for other elements. In equity with even greater frankness it is frequently conceded that a decision must depend on the weighing of various factors, as is illustrated by the idea of the balance of convenience.

In other situations where a few elements frequently stand out overshadowing all others, it has been found possible to build a concept of some vitality about them. Thus the concepts and doctrines of offer and acceptance have been erected about the element of expectation, the doctrine of consideration about the elements of benefit and certain phases of morality. The doctrine of impossibility is built around the supervening difficulties that defeat expectation and cause other harm. And so with other doctrines.⁶

sharpness with which the events stand out, particularly the mental processes of the parties, is a matter of degree.

⁴ It is probably too well known to require mention that the place of rules and doctrines in law administration and the difficulties of framing rules that may logically be applied to produce the desired result has been the main theme of a group of writers sometimes called "juristic realists". For a list of writings on the subject, see, Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1222.

⁵ It is interesting to note that the Restatement of the Law of Contracts of the American Law Institute makes no attempt to define "material breach", but merely enumerates the elements to be considered. See Tentative Draft No. 6, section 270. Probably the other two concepts mentioned will have to be treated in the same way.

⁶ That concepts create emphasis has been noted by Llewellyn. He says that "to classify is to build emphases, to create stresses, which obscure some

The difficulty is that each case involves a symphony whose quality we attempt to determine by listening to each instrument separately. When one instrument carries the motif, as often happens, this method gives fairly satisfactory results. The accompanying instruments are not loud enough to change the effect appreciably. Yet it is not infrequent that several blare out at the same time and the method becomes doubtful. The reason our past methods have yielded acceptable results is that even our more rigid concepts have been sufficiently elastic to permit of considerable leeway. Thus, to carry out the figure of the symphony, while we purport to evaluate one instrument at a time, we can always listen for the others. A decision is articulated in terms of one or two instruments, but it may be controlled by all.

Rules we have and must have for some purposes. Yet it is impossible to understand the working of the judicial process without also taking into account all the competing elements. Dean Pound has said that in one way or another almost all of the vexed questions of the science of law prove to be phases of the problem of adjustment between rule and discretion.⁷ If we adopt this terminology, the need is that we study discretion as well as rule.

These fragmentary observations may serve as an introduction to the study of a group of cases having to do with claims for services and care in the home. These are very numerous. They usually involve claims against the estates of deceased persons. Arrangements for the care of aged persons by relatives or others upon a promise to leave property at death are common and are a prolific source of litigation.

Nature of the Promise

We begin with the cases that involve the rendering of services without an express promise to give compensation. The doctrine by which these are handled grew up with the action of *assumpsit*. We are indebted to Professor Ames for a valuable historical study of the doctrinal development.⁸ Prior to 1609 there appears to be no case in the common law courts permitting recovery where the sum to be paid had not been fixed by the parties.⁹

of the data under consideration and give fictitious value to others." *A Realistic Jurisprudence—The Next Step* (1930) 30 Col. L. Rev. 431, 453.

⁷ POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 1.

⁸ AMES, *LECTURES ON LEGAL HISTORY* (1913) Lecture XIV.

⁹ As the first case permitting recovery on an implied promise Ames cites *Warbrooke v. Griffin*, 2 Brownl. 254 (1609). "Debt could not be maintained, for that action was always for the recovery of a liquidated amount. *Assumpsit* would not lie for want of a promise." AMES, *op. cit. supra* note 8, at 154.

But with the liberalization of *assumpsit* in the early seventeenth century, and as a part of it, the claims of those rendering service without a stipulated compensation came to receive recognition.¹⁰ Recovery was stated to be based on an implied promise, and thus the doctrine grew. This of course meant that any conduct that raised or fostered an expectation of compensation in the mind of the other party would give rise to a claim. Although other elements might affect the judgment or intuition of the court in these cases, the dominant one seemed to be the degree in which the defendant's conduct had created such expectation, and it was natural that the question should be stated in terms of that element.

In the modern cases the question is sometimes left to the jury with the formula that the plaintiff may recover if a reasonable person in his position would have expected payment.¹¹ Or that the defendant is bound if he reasonably should have expected to pay.¹² The application of the "reasonable" formula is prompted partly by the fact that the person who is judging usually has no better way to determine what the parties thought than to try to determine what he himself would have thought under the circumstances. And of course he is reasonable. In the rare cases where what the party thought stands out with distinctness that will have its effect. If the party has been particularly unintelligent, there is another element that may exert a contrary pull. The formula leaves room for that.

However, there is no uniformity of statement. In most jurisdictions the usual expression is that the plaintiff may recover if there was a mutual understanding or intention that the services be paid for.¹³ Probably this makes little or no difference in the results reached. Whether the judge or jury believes there was a mutual understanding or not will depend for the most part on the objective facts. The actual expectation will be obscured

¹⁰ Scholars differ as to the causes for the development of *assumpsit*. The expansion of commerce, the decline of the borough and pie powder courts, the extension of the business of the common law courts and the competition of chancery tribunals may have had something to do with it. It was partly a procedural reform. See Llewellyn, *What Price Contract?* (1931) 40 *YALE L. J.* 704, 741. "We do not know whether the fear of stout swearers or the growth of commercial transactions was the more vital factor in developing *assumpsit*."

¹¹ *Bryant v. Fogg*, 125 Me. 420, 134 Atl. 510 (1926); *Guild v. Guild*, 32 Mass. 129 (1833). See 1 *WILLISTON, CONTRACTS* (1920) § 36.

¹² *Spencer v. Spencer*, 181 Mass. 471, 63 N. E. 947 (1902).

¹³ *Bartlett v. Raidart*, 107 Conn. 691, 142 Atl. 398 (1928); *In re Hamlin's Estate*, 223 Mich. 156, 193 N. W. 833 (1923); *Bokelmann v. Bokelmann*, 230 N. W. 478 (Minn. 1930); *Peters v. Poro*, 96 Vt. 95, 117 Atl. 244 (1922). There is not always consistency of statement in the same jurisdiction. See *Theron Ford Co. v. Dudley*, 104 Conn. 519, 133 Atl. 746 (1926), a case (not of household services) stating the formula objectively.

by other circumstances in about the same degree as under the reasonable expectation formula.

It will be noted also that many courts employ an elaborate system of presumptions. It is said that whenever valuable services are rendered at the request of or with the knowledge of the recipient, an obligation to pay will be presumed, or that the law implies a promise to pay.¹⁴ If, however, the plaintiff was a member of the same family as the defendant, the presumption is that the services were gratuitously rendered.¹⁵ Usually the family relationship is said to exist only where the parties were members of the same household.¹⁶ But in this event there is no necessity of blood or marriage relationship.¹⁷ These presumptions are built consciously about the expectation element. They also take into account the degree of benefit, in that there are usually reciprocal services between members of the same family. Indeed where the presumptions break down is usually in the cases in which it appears that a son or daughter has cared for an aged parent while the others of the brothers and sisters are using their energies in building their own fortunes.¹⁸ These presumptions repeated with varying emphasis give to the judge some control over the jury. They frequently give the appellate court something upon which to hang a reversal.¹⁹

Many elements other than that of the expectation of the parties enter into the decisions of such cases by judge or jury, even when they do not fit into any doctrine or when for some reason the doctrine that gives them emphasis cannot be employed. These are the degree in which the work has benefited

¹⁴ *Newbert v. McCarthy*, 190 Cal. 723, 214 Pac. 442 (1923); *Peterson v. Johnson*, 205 Iowa 16, 212 N. W. 138 (1927). The subject of presumptions applicable to these cases is discussed in 3 PAGE, CONTRACTS (2d ed. 1920) §§ 1442, 1447-1454.

¹⁵ Many cases are reviewed in Note (1907) 11 L. R. A. (N. S.) 874. It is said that in some jurisdictions the relationship has the effect of overcoming the presumption that payment is to be made, in some there is a positive presumption that the services are gratuitous and in some this presumption may only be overcome by an express promise. Many of the cases cited in this article state these presumptions. For a statement of reasons for refusing to recognize a positive presumption see *Bryant v. Fogg*, *supra* note 11.

¹⁶ *Page v. Page*, 73 N. H. 305, 61 Atl. 356 (1905); *Kerr v. Wilson*, 284 Pa. 541, 131 Atl. 468 (1926). There is an occasional suggestion that blood relationship is enough. *Gopcevic v. Gopcevic*, 39 Cal. App. 306, 178 Pac. 734 (1918).

¹⁷ *Ruble v. Richardson*, 188 Cal. 150, 204 Pac. 572 (1922); *Ingram v. Basye*, 67 Ore. 257, 135 Pac. 883 (1913).

¹⁸ See *infra* note 32.

¹⁹ See, for example, *Nissen v. Flournoy*, 160 Ark. 311, 254 S. W. 540 (1923); *Ingram v. Basye*, *supra* note 17.

the defendant,²⁰ the profitableness of other employment open to the plaintiff,²¹ the hardship involved in the labor,²² the degree of the plaintiff's moral duty to render the service without compensation,²³ defendant's motive in having the work done,²⁴ the financial circumstances of the parties.²⁵ Most of these matters may have some probative value on the question of expectation.²⁶ But they also have independent significance. Some of them are avowedly to be considered in determining the amount of the recovery.²⁷ They also influence court and jury in the determination of the question whether there should be any recovery at all. Moreover the amount of the jury verdict will probably be affected by the degree of expectation and the vividness with which the evidence shows expectation. There is thus little to distinguish between the factors that determine liability and those that determine the amount of the damages except in the matter of emphasis.

The effect of these other elements is most sharply brought out in the case of *Ingram v. Basye*.²⁸ In this case the plaintiff, an orphan girl, was taken by the defendants, husband and wife, into their home at an early age. From reliable evidence it appeared that she had been mistreated and compelled to work long hours at difficult tasks, that she had become feeble in mind.

²⁰ This is probably the most important. It is of significance in nearly all the cases.

²¹ *Clerget v. Williams*, 176 Ark. 533, 3 S. W. (2d) 301 (1923); *Bokelmann v. Bokelmann*, *supra* note 13.

²² *Mayborne v. Citizens' Trust & Savings Bank*, 46 Cal. App. 178, 188 Pac. 1034 (1920); *Hudson v. Hudson*, 218 Ill. App. 559 (1920); *Wainwright Trust Co. v. Kinder*, 69 Ind. App. 88, 120 N. E. 419 (1918); *Mitchell v. Mitchell*, 204 Ky. 745, 265 S. W. 301 (1924) (little hardship).

²³ *Mayborne v. Citizens' Trust & Savings Bank*, *supra* note 22; *Wharton v. Denny*, 296 S. W. 183 (Mo. App. 1927); *Jones v. Jones*, 129 S. C. 8, 123 S. E. 763 (1924).

²⁴ *Ingram v. Basye*, *supra* note 17; *Carlson v. Krantz*, 172 Minn. 242, 214 N. W. 928 (1927) (not strictly household services).

²⁵ *Plath v. Brunken*, 102 Neb. 467, 167 N. W. 567 (1918). This is apt to have more weight with a jury than with a court. See *Carlson v. Krantz*, *supra* note 24.

²⁶ In *Guild v. Guild*, *supra* note 11, at 132, Chief Justice Shaw enumerates many elements that are to be considered as bearing on implied promise. See also *Peters v. Poro*, *supra* note 13. In *Bokelmann v. Bokelmann*, *supra* note 13, it is intimated that the profitableness of other employment could not be considered on the question of damages but was admissible as bearing on the plaintiff's expectation.

²⁷ Doubtless the financial circumstances of the parties would never be avowedly considered. In *De Fevers' Executor v. Brooks*, 203 Ky. 606, 262 S. W. 976 (1924), it is said that the hardship of the work should not be considered on the measure of recovery.

²⁸ *Supra* note 17. A case somewhat similar on its facts is *Plath v. Brunken*, *supra* note 25. There was no cruelty but the plaintiff was in great financial need.

At the age of thirty-six the plaintiff left at the instance of persons who discovered her predicament. She sought recovery for services rendered. The trial judge directed a verdict for the defendants. On appeal it was held that the question whether there was a family relationship should have been submitted to the jury. Obviously the blows of the defendant did not have any tendency to cause her to believe she would be paid. Yet it is perfectly clear that the harsh treatment was the principal factor in the decision. The stressing of the family relationship brought that into play. The submission of the case to the jury on that issue would draw attention away from the fact that there could hardly have been any expectation of payment. The fact that the defendants were saved the necessity of employing a farm hand and the plaintiff's financial need may also have had some influence. The harsh treatment might have formed the basis for recovery in tort, but for the fact that the statute of limitations had probably run.

It is impossible to understand the many cases that are brought to recover compensation for services rendered in the household in caring for the sick and aged without taking into account the fact that these are ordinarily claims against the estate of the deceased recipient of the services.²⁹ Quite frequently there is clearly no expectation of receiving wages. But the plaintiff has hoped and has often been encouraged to expect remembrance in the will. Recovery is usually allowed.³⁰ It must be noted that the conduct or expectation of the deceased can have little effect in these cases. Indeed this is true whatever the form of the promise. The controversy is between the plaintiff and legatees or distributees. Or it may be a contest between the plaintiff and the general creditors of the deceased.³¹ In the former case the conduct of the beneficiaries may have an important bearing on the decision. Relatives of the deceased who have given little or

²⁹ For a review of the Pennsylvania cases see Hutton, *Claims for Services, Attendance and Support Against Decedents' Estates* (1931) 35 *DIOK. L. REV.* 48.

³⁰ *Mayborne v. Citizens' Trust & Savings Bank*, *supra* note 22; *Bartlett v. Raidart*, *supra* note 13; *Wainwright Trust Co. v. Kinder*, *supra* note 22 (probably little thought given to compensation); *Peters v. Poro*, *supra* note 13. Recovery is denied on the ground that the only expectation was for a legacy in *Gilbraith's Estate*, 270 Pa. 288, 113 Atl. 361 (1921). It is said that "this excludes the idea of a contractual relation." If wages have been paid the expectation of a legacy in addition will not be the basis for a recovery is held in *Robinson v. Munn*, 238 N. Y. 40, 143 N. E. 784 (1924). The receipt of a legacy will also usually defeat a claim for services in addition. *Hapke v. Hapke*, 93 Okla. 180, 220 Pac. 660 (1923); *Brown v. McCurdy*, 278 Pa. 19, 122 Atl. 169 (1923). But see *Olson v. Hagan*, 102 Wash. 321, 172 Pac. 1173 (1918).

³¹ *Gardner's Administrator v. Schooley*, 25 N. J. Eq. 150 (1874); *Howell v. Howell*, 232 N. W. 816 (Iowa 1930).

no thought to his welfare while living and have left the burden to be borne by the patient plaintiff usually fare ill. The question of actual expectation of payment, although it may be remotely affected by such matters, is of little moment. Strong is the pull for the plaintiff created by the unfilial conduct of a son or daughter who has shirked the burden but is greedy to assert a birthright.³²

The presumption that services to relatives are gratuitous does not give much trouble. If the plaintiff has left another home for the purpose of taking care of the deceased, it is usually said that the presumption is not applicable, since it is confined to cases where the plaintiff was a member of the same household prior to the request for services.³³ Or it may simply be said that the presumption is overcome.³⁴

There is little difficulty of administration in cases of this type. The benefit received by the deceased and the hardship on the plaintiff are not capable of much distortion. Expressions to the effect that the plaintiff will be taken care of may be discounted without materially affecting the case.

This brings us to the cases where it is claimed that there is an express promise fixing the amount and nature of the compensation, either before or after the work is performed. When the claim is made after the promisor's death as is usually true when it is for services in the household, a consideration of administrative policy is involved similar to that of the Wills Acts. If too much weight is given to such promises, the possibility of fraud becomes great. In theory the worth of the services is not material.

If the promise is oral or written but unsigned, and is for the conveyance of real estate, the Statute of Frauds may be invoked.

³² Aldrich v. Aldrich, 287 Ill. 213, 122 N. E. 472 (1919); Snyder v. Nixon, 188 Iowa 779, 176 N. W. 808 (1920); Peters v. Poro, *supra* note 13. Seldom is it frankly admitted, yet it is refreshing to find one judge speaking what is in his mind. "It not unfrequently happens that those who are 'old and only in the way' are bundled off upon some more amiable member of the family, who uncomplainingly responds without the slightest assistance from the complacently selfish; and in the contest which ensues, really an effort to compel contribution based upon the same moral obligation, the selfish appear consumed with a 'righteous indignation' at the hardness of the claimant, which has as little sincerity as Judas exhibited in his protest against the waste of the precious ointment. . . ." Jones v. Jones, 129 S. C. 8, 12-13, 123 S. E. 763, 764 (1924). Occasionally the mass of litigation on the subject has caused judges to use severe expressions to discourage claimants. Zimmerman v. Zimmerman, 129 Pa. 229, 18 Atl. 129 (1889). But the claims are frequently so meritorious that they do not yield to suppression.

³³ Estate of McLain, 126 Ore. 456, 270 Pac. 534 (1928); Kerr v. Wilson, *supra* note 16.

³⁴ Nissen v. Flournoy, *supra* note 19; San Antonio v. Spencer, 82 Mont. 9, 264 Pac. 944 (1928).

Recovery is allowed on a *quantum meruit*.³⁵ The issues raised are much the same as if no promise had been made. The Statute is applied with varying degrees of strictness. Possession and possibly improvements may be required.³⁶ The services alone, being the compensation, may be regarded as sufficient.³⁷ The most flexible rule confines the Statute to the cases where the services can be adequately compensated for in money.³⁸ If the contract is taken out of the Statute under the less flexible rule requiring possession, however, it is said that the promise must be proved by clear and convincing evidence.³⁹ Courts that employ the test of possession are thus quite free to deny recovery if the benefits of the services were slight.

If there is the claim of a promise not within the Statute a safeguard may be found in the stricter rule of evidence.⁴⁰ Or it may be said that the words were merely expressions of intention to make a gift.⁴¹ The determination is frequently attended with much difficulty as is shown by one case where after reviewing the evidence in an opinion of twelve pages, the judge comes to the conclusion that "the presentation. . . of this claim was the result of a family conspiracy. . . to loot the estate of their deceased friend."⁴² And this was reversed on appeal.⁴³

In general the express promise in cases of this kind, even when in writing, is apt to have less effect upon one's judgment of the situation than accords with the emphasis which accepted legal theory gives it. In other words, freedom of bargaining is

³⁵ *Hensley v. Hilton*, 191 Ind. 309, 131 N. E. 38 (1921); *Walker v. Dill's Administrator*, 186 Ky. 638, 218 S. W. 247 (1920).

³⁶ *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273 (1922); *Maddison v. Alderson*, 8 App. Cas. 467 (1883). The statement that acts exclusively or unequivocally referable to the agreement take the contract out of the Statute is apparently used whether the court is strict or liberal. Cf. *Houlette v. Johnson*, 205 Iowa 687, 216 N. W. 679 (1927). The requirement of possession frequently permits considerable leeway. See *Warren v. Warren*, 105 Ill. 568 (1882); *Best v. Gralapp*, 69 Neb. 811, 99 N. W. 837 (1903).

³⁷ *Kissling v. Monticello State Bank*, 203 Iowa 62, 212 N. W. 314 (1927).

³⁸ *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710 (1896); *Flannery v. Woolverton*, 329 Ill. 424, 160 N. E. 762 (1928). Cases on the Statute of Frauds applicable to this type of case are reviewed at length in Note (1930) 69 A. L. R. 14.

³⁹ *Yager v. Lyon*, 337 Ill. 271, 169 N. E. 222 (1929); *Soho v. Wimbrough*, 145 Md. 498, 125 Atl. 767 (1924).

⁴⁰ *Davies's Estate*, 289 Pa. 579, 137 Atl. 728 (1927); *Herrick v. Hayes*, 173 N. W. 110 (Iowa 1919) (recovery allowed for the value of the services). The rule of evidence that a party making a claim against an estate may not testify as to a transaction with the decedent sometimes operates to exclude evidence of a promise. See *Ruble v. Richardson*, *supra*, note 17.

⁴¹ *Herrick v. Hayes*, *supra* note 40; *Mitchell v. Mitchell*, *supra* note 22; *Robinson v. Munn*, *supra* note 30.

⁴² *In re Estate of Brush*, 136 Misc. 581, 240 N. Y. Supp. 380 (1930).

⁴³ *In re McLaren*, 244 N. Y. Supp. 921 (App. Div. 2d Dep't 1930).

not so desirable in the situations with which we are here dealing. The strengthened expectation and the fact that the promisor has broken his promise may be overbalanced if the benefit is slight or the promisee was in a position to exert influence on the promisor. If the promisor is dead, the moral opprobrium connected with the failure to keep the promise is not much of a factor, and in any case it may be considerably mitigated by intervening factors that make performance more difficult or the plaintiff less worthy. The beneficial effect of the services and the relationship of the parties are thus the important factors. It is the attempt to apply here rules that were developed for the commercial world that compels the courts to find many ways to minimize the effects of the promise. As we have already seen, if the promise is oral, the Statute of Frauds and the strict rule of evidence may be employed. If the promise is contained in a signed writing or if a deed to property has been given, other methods of attack must be found. The well recognized doctrine of failure of consideration may be employed to defeat the promise or permit the recovery of property. It is frequently possible to say that the services have not been rendered as contemplated.⁴⁴

Another much used theory of attack is that of undue influence. The formulas for presenting this question are not standardized in wording, but they leave about the same impression. They usually are to the effect that undue influence consists of pressure or influence of persons in confidential relation so that the subject is not left to act voluntarily.⁴⁵ This puts the question as one of fact, so that it may be submitted to the jury.⁴⁶ Usually, however, the case is in equity and the court decides. Obviously this statement brings into the foreground very important matters. The mental condition of the promisor, and the pressure exerted by the plaintiff are factors in all the cases. The formula here, however, is sufficiently loose to permit taking into account the beneficial character of the services and the deserving qualities of the persons who will take if the plaintiff's claim is denied.⁴⁷

Creditors of the deceased may also attack a conveyance on the ground that it was fraudulent.⁴⁸ Although the state of mind

⁴⁴ Black v. Hill, 117 Ark. 228, 174 S. W. 526 (1915); Matthews v. Tobias, 126 Ore. 358, 268 Pac. 988 (1928).

⁴⁵ Peacock v. Du Bois, 90 Fla. 162, 105 So. 321 (1925). See also Burroughs v. Reed, 150 Ga. 724, 105 S. E. 290 (1920).

⁴⁶ Leedom v. Palmer, 274 Pa. 22, 117 Atl. 410 (1922).

⁴⁷ Benner v. Dove, 283 Ill. 318, 119 N. E. 349 (1918); Kissling v. Monticello State Bank, *supra* note 37; Watson v. Watson, 190 Ky. 270, 227 S. W. 270 (1921); Bade v. Feay, 63 W. Va. 166, 61 S. E. 348 (1907).

⁴⁸ Howell v. Howell, 232 N. W. 816 (Iowa 1930). The conveyance was upheld in Michaud v. Michaud, 151 Atl. 559 (Me. 1930) and Torrey Cedar Co. v. Eul, 95 Wis. 615, 70 N. W. 823 (1897).

of the grantor here becomes of importance, the beneficial character of the services is probably the most outstanding issue.

Thus far we have been dealing with promises made before the rendition of the services. Promises made after the services require a different treatment. The subsequent promise may make the case a little stronger for the plaintiff than if no promise had been made. But it has less significance than a prior promise. And we have already seen that such a promise may be easily overshadowed by other factors. Instead of relying on the various methods employed to control the effect of a prior promise, however, courts have usually submerged the subsequent promise by saying that it is not supported by consideration unless there was a prior enforceable claim.⁴⁹

A few courts have stressed the subsequent promise by stating the question as one of moral consideration.⁵⁰ This enables the court in a jury trial to direct a verdict for the plaintiff on the finding of the fact of the services and the promise without leaving the question to the jury as to the expectation of payment for the services previously rendered. It gives the appellate court more power in any case by removing this question from the consideration of the trier of the facts. But in general, juries are not apt to be too harsh toward the claimant in such cases. There has thus been no call for a doctrine that removes the issue from the trier of facts. Juries are well suited for passing upon the questions here presented, involving, as they do, many ordinary details of living. Furthermore in the case of an oral promise the doctrine of moral consideration as applied here, puts a heavier burden on administration since the fact of the promise, a difficult matter to determine, becomes the most material. It is probably for these reasons that most courts reject the doctrine.⁵¹ Whether there was consideration then depends upon a prior enforceable claim. The issue is thus presented as if the promise had never been made, except that if the amount is fixed in the promise, that will determine the amount of

⁴⁹ Walker v. Brown, 104 Ga. 357, 30 S. E. 867 (1898).

⁵⁰ Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902); Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572 (1918).

⁵¹ Graf v. Graf, 150 Ky. 226, 150 S. W. 58 (1912); Eatmon v. Penland, 119 Okla. 180, 249 Pac. 387 (1926); Ogdin v. First National Bank, 103 W. Va. 665, 138 S. E. 376 (1927).

In *Peters v. Poro*, *supra* note 13, the claimant had rendered services to her mother and brother, now deceased. The claim was brought against the estate of another brother to whom all the property of the first brother had been conveyed. The other claimants to this estate were sisters who had rendered no service. The court refused to support the promise of the deceased to pay for the services on the doctrine of moral consideration, but held that the case might be submitted to the jury on the theory of novation.

recovery.⁵² Even this may be avoided if the amount is excessive by the formula that if the deceased intended to go beyond the actual indebtedness and made the rest as a gift the recovery should be limited to the actual indebtedness.⁵³

Relationship of the Parties

The doctrines discussed thus far suffice in dealing with the questions that arise when the services are rendered by persons having no relationship to the recipient or by adult relatives. When the plaintiff is a wife, minor child, mistress or supposed wife, many of the same considerations are involved and many of the same doctrines may be employed. But there are also additional matters to consider and more doctrines.

It may be due in part to the relatively small importance of the promise that a wife who renders service in the household under an express promise for payment is denied recovery. There are also other factors. Here the mutual exchange of services and support makes the benefit slight. There is doubtless a feeling against commercializing the marriage relation. The law having provided for the widow, a court is reluctant to increase her share of the husband's estate at the expense of the children. The rights of creditors have also to be considered. The contest usually comes, however, between the widow and children by a former wife. If the claim is for services after the marriage, the doctrine of consideration may be applied, the performance being regarded as something the plaintiff was already legally bound to do.⁵⁴ In the case of a contract made before the marriage, it would seem that technically it is difficult to make use of the doctrine to deny recovery, yet it has been invoked in such a case also.⁵⁵ Public policy is also usually mentioned.

Because of the infrequency of cases, no technique has yet been

⁵² *Caldwell v. Lucas*, 233 N. Y. 248, 135 N. E. 321 (1922). The subsequent history of the case appears in *Caldwell v. Nicolson*, 235 N. Y. 209, 139 N. E. 243 (1923); *Keys, Administrator v. Keys*, 93 W. Va. 33, 116 S. E. 681 (1923).

⁵³ *Earl v. Peck*, 64 N. Y. 596 (1876). It has been held, however, that the promise for the full amount may be upheld even if part of it was intended as a gift. *Bade v. Feay*, *supra* note 47.

⁵⁴ *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334 (1895); *Coleman v. Burr*, 93 N. Y. 17 (1883); *Bohanan v. Maxwell*, 190 Iowa 1308, 181 N. W. 683 (1921). If the claim is for services before marriage it must be handled as any other claim. *Harper v. Davis*, 115 Md. 349, 80 Atl. 1012 (1911). Formerly recovery was denied even if the services were outside the household. See *In re Callister*, 153 N. Y. 294, 47 N. E. 268 (1897). But since women have become increasingly independent that is no longer true if there is an express promise. *In Re Estate of Cormick*, 100 Neb. 669, 160 N. W. 989 (1916).

⁵⁵ *Bohanan v. Maxwell*, *supra* note 54.

evolved to care for the rare case where the services have been of value out of all proportion to the support received and the amount of the widow's share in the estate given by law. If the claim of the widow is stronger due to the fact that no children are competing, this is ordinarily taken care of by the statute of distributions, which gives the widow a greater share of the estate in such cases.⁵⁶

A minor child stands on a different footing in that he may be disinherited and further he may be competing with brothers or sisters who have rendered no service. Although it is said that the parent is entitled to the services of a minor child,⁵⁷ if there has been a promise to pay for them it is ordinarily held that the child has been emancipated and he may recover against the estate.⁵⁸ or may succeed in competition with the parent's creditors.⁵⁹

Services by a mistress involve peculiar considerations. No provision by law is made for a share in the estate as in the case of a wife. A woman in such a position is a natural object of bounty. On the other hand social condemnation of the illicit relations may work to the prejudice of the claim. The weight given to this element will vary with the moral standards and tolerance of the judge and jury before whom the case is brought. It is usually although not universally held that there can be no recovery by a mistress on an implied promise.⁶⁰ This is not a presumption based upon probable expectation but apparently a rule of policy. Just why it should be such is a little difficult to see in view of the fact that recovery on an express contract is not always denied. It would seem to offer a convenient way in states not recognizing common law marriages to make provision for a faithful mistress. Denial of recovery on implied promises is doubtless merely a concession to the moral code. It should not be the occasion of much difficulty, since in nearly all cases something may be offered that will pass for an express promise.

The formula developed for this type of case is unique and brings rather directly into play the element of the value of the services. It is said that there can be no recovery if the contract is made in contemplation of the illicit relation or if the cohabitation formed part of the consideration.⁶¹ If the services were valuable, if they are worth the sum to be allowed, that would seem to indicate that the cohabitation was not a part of the

⁵⁶ 1 WOERNER, ADMINISTRATION (3d ed. 1923) § 67.

⁵⁷ Farley v. Stacey, 177 Ky. 109, 197 S. W. 636 (1917).

⁵⁸ Wright v. Dean, 79 Ind. 407 (1881); Hall v. Hall, 44 N. H. 293 (1862).

⁵⁹ McDaniel v. Parish, 4 App. D. C. 213 (1894).

⁶⁰ Brown v. Tuttle, 80 Me. 162, 13 Atl. 583 (1888).

⁶¹ Emmerson v. Botkin, 26 Okla. 218, 109 Pac. 531 (1910); Stewart v. Waterman, 97 Vt. 408, 123 Atl. 524 (1924).

consideration. This is a question that may be left the jury.⁶² Of course the formula permits full play for all the elements and for the moral biases of court or jury.

Services rendered to a supposed husband by a plaintiff who thought herself his wife seem to come in naturally here, although the question of recovery involves elements that are different. There is no moral condemnation for the plaintiff. Although she had no idea of receiving compensation, she will be disappointed in failing to receive a widow's share. There may be humiliation upon the discovery of the truth. There has been the possible loss of other prospects in life due to the deceitful conduct of the supposed husband. It is not difficult to see that these are the elements supposed to appertain to tort cases. It is not entirely without reason that the Massachusetts court has refused recovery in assumpsit in such cases and has allowed it in tort.⁶³ That the representation may be regarded as one of law is easily answered by holding that there may be recovery for deceit of this kind when there is a confidential relation.

The fact that the supposed husband has received a benefit is suggestive of quasi-contract. There is no great strain on legal theory if recovery is permitted in assumpsit for the value of the services. This may in a meritorious case offer a way to avoid the effect of the shorter period of limitation for tort claims and the rule that a tort claim dies with the tortfeasor.⁶⁴

The chief variable factor in these cases will be the knowledge of the woman. Did she have suspicion or cause for suspicion? A question of degree, of course. Cases that are close may hinge on the evaluation of this element. In tort it may be put as the question whether the woman was deceived.⁶⁵ In assumpsit good faith is made a requirement.⁶⁶ Since the lack of intelligence of the woman does not count much against her, the stricter requirement of reasonableness is not usually established. These cases at this point may merge into those involving services by mistresses. There may be other elements that will overcome the moral condemnation occasioned by the doubt of the plaintiff's belief in her wifehood.

Another situation that bears some similarity to the one just discussed is that of a child who lives and serves in the family of foster parents believing them to be his true parents. Because

⁶² *Stewart v. Waterman*, *supra* note 61.

⁶³ *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N. E. 609 (1929) (tort); *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892 (1888) (assumpsit).

⁶⁴ *Sanders v. Regan*, 172 N. C. 612, 90 S. E. 777 (1916); *Wolf v. Fox*, 178 Wis. 369, 190 N. W. 90 (1922). It is to be noted that in Massachusetts tort claims may be enforced against the estate of a deceased tort-feasor. MASS. GEN. LAWS (1921) c. 230, § 1.

⁶⁵ *Jekshewitz v. Groswald*, *supra* note 63.

⁶⁶ *Wolf v. Fox*, *supra* note 64.

the services are ordinarily slight and there is no element of humiliation caused by the foster parents' conduct, recovery has been denied both in *assumpsit* and *tort*.⁶⁷

Uncontemplated Termination of Services

So much for the question of recovery when the services have been carried through as contemplated. We now come to a group of cases involving the premature termination of the services. Here the considerations are somewhat different and call for the use of a different set of doctrines.

Services rendered without any definite arrangements as to the length of the service or the compensation present no question. Compensation is given for their value regardless of the causes for their termination.⁶⁸ The question arises, however, where there is a definite arrangement. The usual case involves the care of an old person for the rest of his life, and there may be a stated compensation, ordinarily a part or all of his property. The services may be brought to an end sooner than the parties expected by the sickness or death of the person who is rendering the service or by discord caused by unexpected difficulties that the care involves, by misunderstanding, or by personal friction in the little details of life. The alternatives are to deny the claimant any recovery, to allow the value of the services rendered, or to allow the whole compensation, usually certain property that the personal representatives of the recipient will be ordered to convey. Allowance may be made for the services unperformed by means of a conditional decree.⁶⁹ Remedies available before the death of the promisor must also be considered.

If performance is interrupted by sickness or death of the one rendering the service it might seem that there would be no question as to the recovery for the value of the services performed. That is true in ordinary cases of impossibility. However, this overlooks the fact that we are not dealing with a transaction that is truly commercial. It savors of an exchange of

⁶⁷ *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023 (1901) (*assumpsit*); *Miller v. Pelzer*, 159 Minn. 375, 199 N. W. 97 (1924) (*tort*). Another variation that may be mentioned here is involved in the case where persons seek recovery for care of a minor child who has been taken into the household. Recovery is usually denied. *Sherman v. Davidson*, 123 Kan. 69, 254 Pac. 351. (1927). But if the assumption was that the plaintiffs were to keep the child as their own and the parents obtain custody through a court proceeding, recovery has been allowed. *Hendryx v. Turnor*, 109 Wash. 672, 187 Pac. 372 (1920).

⁶⁸ *Platt v. Brunken*, *supra* note 25; *Ingram v. Basye*, *supra* note 17.

⁶⁹ *Gupton v. Gupton*, 47 Mo. 37 (1870). No allowance was made for services unperformed in *Clancy v. Flusky*, 187 Ill. 605, 58 N. E. 594 (1900). In *Alexander v. Lewes*, *supra* note 50, the conveyance was ordered subject to a mortgage placed on the property after the contract was made.

gifts.⁷⁰ This element may be insufficient to defeat the promisee when he is competing with others who have not been equally generous. But it may lead a court to feel that heirs of the promisee should not stand precisely in his shoes. The promisor may need all his property to induce others to take the place of the deceased in providing care and comfort for the remainder of his years. If the problem arises after his death the deserving character of the contesting claimants is apt to loom large. The virtue of the deceased performer of the services will in any event be of little significance. One court has suggested a flexible formula that makes the question depend upon whether it was the understanding between the parties when the services were undertaken that the promisor should pay for the value of the services in the event of the earlier death of the promisee.⁷¹ A case can be decided either way under this formula. Sometimes it is simply stated that such contracts are personal, and cannot be enforced if the performer dies.⁷² A promisee who becomes incurably ill will doubtless quite uniformly be permitted to recover the value of the services.⁷³

Services terminated because of discord between the parties present as their outstanding elements the degrees in which the respective parties are at fault. Their intelligence and especially the moral quality of their acts and motives are subject to infinite variation. The plaintiff who has been unreasonable, unkind, un-

⁷⁰ The gift nature of these transactions is recognized in inheritance tax cases which incline to hold the property received for services taxable. *People v. Porter*, 287 Ill. 401, 123 N. E. 59 (1919). Some statutes provide that transfers to take effect at death are to be taxed at an amount arrived at by subtracting the value of the consideration from the value of the property. See N. Y. CONS. LAWS (Cahill, 1930) c. 61, § 220. Some provide that devises and bequests for services should be taxed after deducting the reasonable value of the services. See W. VA. CODE (1931) c. 11, art. 11, § 6.

⁷¹ *More v. Luther*, 153 Mich. 206, 116 N. W. 986 (1908). Professor Williston expresses the opinion that this was a gratuitous conditional promise. 3 CONTRACTS (1920) § 1973 n. This suggests another way of handling such cases. Whether it was gratuitous or not might then depend upon whether the performer of the services lived.

The representative of the deceased performer was permitted to recover in *Stanley v. Kimball*, 80 N. H. 431, 118 Atl. 636 (1922); *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464 (1892). The same considerations are present when it is sought to set aside a conveyance of property to the performer after his death. This was permitted in *Beard v. Beard*, 200 Ky. 4, 254 S. W. 430 (1923). It was denied in *Flanagan v. Flanagan*, 133 Md. 332, 105 Atl. 299 (1918), the court saying that the only ground for setting aside the conveyance would be the fraud in not intending to perform the services, and there could be no presumption of such fraud where the performer died. See *infra* note 82.

⁷² *Alexander v. Lewes*, *supra* note 50.

⁷³ See *Preble v. Preble*, 115 Me. 26, 97 Atl. 9 (1916).

filial or unwilling to make any allowance for the infirmities of age, has little to commend his claim.⁷⁴ Though his task may have been more disagreeable than anticipated, he cannot bundle the old man off to the poorhouse and still have the benefits of his contract. A court or jury can without any qualms even see him go unrecompensed for services rendered or money expended for support. The rule that one who breaks his contract cannot recover for the performance rendered finds acceptable application.⁷⁵

There has been no occasion to use the method of handling such cases employed in some jurisdictions in labor cases whereby recovery is allowed on a *quantum meruit* in spite of a breach and the defendant left to a counterclaim.⁷⁶ This permits a nice adjustment but it gives the jury much power. It would not work well here. Damages for the plaintiff's breach are difficult to ascertain if the recipient of the service is living. If he is dead the plaintiff might profit from his early demise. That would scarcely meet with approval.

If the parties are nearly equal in fault or if the recipient is clearly at fault, the problem bears a different aspect. When a person with no family ties undertakes the service and a severance of the relation would not leave the other party without provision for his old age, the sympathy of the court will usually be for allowing a recompense. A way may usually be found for giving the value of the services, even if it is not desirable to have the property tied up. It may be held in the event of misunderstanding that there has been no contract, and recovery may be had on a *quantum meruit*.⁷⁷ The contract may be regarded as within the Statute of Frauds.⁷⁸ If action is brought on a *quantum meruit*, it may be held that the defendant has broken the contract and the action constituted an election to rescind.⁷⁹ A plaintiff who has been turned off without any cause may not have specific performance to compel the acceptance of the services but may have a claim for damages.⁸⁰ If giving a home during life was not a part of the contract it may be necessary to invoke the

⁷⁴ Ptacek v. Pisa, 231 Ill. 522, 83 N. E. 221 (1907). In Roberts v. Johnson, 152 Ga. 746, 111 S. E. 194 (1921), recovery was denied on the contract. Probably it would have been denied on a *quantum meruit* also.

⁷⁵ Ptacek v. Pisa, *supra* note 74.

⁷⁶ Lynn v. Seby, 29 N. D. 420, 151 N. W. 31 (1915); Britton v. Turner, 6 N. H. 481 (1834). This doctrine was considered and rejected in Thurston v. Nutter, 125 Me. 411, 134 Atl. 506 (1926).

⁷⁷ Thurston v. Nutter, *supra* note 76.

⁷⁸ Carter v. Witherspoon, 126 So. 388 (Miss. 1930).

⁷⁹ Welch v. Gunn, 281 Pac. 704 (Cal. App. 1929); Hayman v. Davis, 182 N. C. 563, 109 S. E. 554 (1921). See also Thurston v. Nutter, *supra* note 76.

⁸⁰ Poe v. Kemp, 206 Ala. 228, 89 So. 716 (1921).

doctrine of anticipatory breach.⁸¹

The discord occasioned by the unreasonable demands and idiosyncrasies of age give us more perplexing problems. Here is a delicate human situation calling for utmost tact, ingenuity, knowledge of human nature and ability to allow for the needs of the particular case. The courts have met the demand well.

The person performing the service may have given up other prospects in life. He may have treated the old person with consideration and kindness. He may have performed disagreeable duties, or put up with unpleasant personal habits of the recipient. Such merit cannot go without its expected reward. On the other hand although the old person has been unreasonable in his demands, although he has been imposed upon by designing individuals who have tried to upset the arrangement, a court cannot with equanimity see him entirely deprived of his property or force him to accept the proffered care or be thrown on the world a public charge. This element is overshadowing, but still it does not eclipse the performer's merit. To meet all these demands requires flexibility and judicial tact. If reconciliation is possible, a few suggestions may bring the parties together. A disposition of the case that would thwart a re-establishment of the relation should be avoided. Here a trial judge may find opportunity for effective work in chambers.

The elements, each varying in degree, that must determine the disposition are the merit of the performer, the amount of service already rendered, the existing state of feeling between the parties, the desire of the performer for the particular property promised, the hardship involved if the performer is compelled to change his living arrangements, the amount of other property owned by the aged persons, the state of feeling between him and other persons who might take charge of him, the general fairness of the arrangement as originally entered into, pressure exerted to influence the aged person to make the arrangement. The reasonableness of the action of the aged person blends with many of the other elements. In itself it is probably of minor importance.

Whether the property has been conveyed or whether it has merely been promised will make a difference as to who has the laboring oar. It has little effect on the nature of the disposition to be made. In the event that the property has been conveyed, a suit will be brought to set aside the conveyance on the ground of undue influence or failure of consideration. If the defendant's merit is not great, if he is not in possession or there would be no great hardship in ousting him, if the plaintiff is in need of a place to stay, the conveyance may be set aside and the aged

⁸¹ Carter v. Witherspoon, *supra* note 78.

person reestablished in the possession of the property.⁸² It may be required that compensation be given for the value of the services.⁸³ That, however, may be too onerous for a meritorious performer. It may be desirable to permit him to retain the property. If the aged person has other means of support, or has subsequently died, that is, perhaps, all that is necessary.⁸⁴ But in many cases that will leave him penniless. It may then be required that provision be made out of the property for his support. The theory on which that may be done is not so clear. A promise to do so may not be found. Performance may have been rendered in so far as it has not been prevented by the recipient of the services. But on broad equitable grounds it has been found possible to make such a disposition.⁸⁵

A case of considerable human interest which shows us a court of equity at its best is *McKnight v. McKnight*.⁸⁶ The plaintiff in that case was the stepmother of one of the defendants, the other defendant being the husband of the first. After the death of the plaintiff's husband, an arrangement was made whereby the defendants were to come to live with the plaintiff and care for her. In exchange they were to receive the plaintiff's property amounting to about \$7,000, including the home. They sold their own home and furniture in pursuance of the arrangement, but were not able to realize a good price. The property was conveyed by plaintiff to the defendants. The parties lived harmoniously for more than a year. The plaintiff then left for a visit with friends and did not return except for short intervals. After a year and a half the plaintiff demanded the return of her property. Upon refusal, the suit was brought to set aside the conveyance on the ground of undue influence and failure of performance. It appeared that the defendants had treated the plaintiff with kindness. Such grievances as she was able to muster seemed to be afterthoughts. The arrangement as origi-

⁸² *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107 (1908); *Lockwood v. Lockwood*, 124 Mich. 627, 83 N. W. 613 (1900); *Tipton v. Tipton*, 118 Tenn. 691, 104 S. W. 237 (1907). It may be noted here that some courts, doubtless because they treat these cases as analogous to those in which a money consideration has partly failed, say the conveyance cannot be set aside for failure of consideration. *Schott v. Schott*, 168 Cal. 342, 143 Pac. 595 (1914). It is then necessary to say there was fraud in not intending to give the promised care. See *Hyman v. Langston*, 210 Ala. 509, 98 So. 564 (1923).

⁸³ *Hensan v. Cooksey*, *supra* note 82.

⁸⁴ *Brackenbury v. Hodgkin*, 116 Me. 399, 102 Atl. 106 (1917); *White v. Mooney*, 73 W. Va. 304, 80 S. E. 844 (1913).

⁸⁵ *McKnight v. McKnight*, 212 Mich. 318, 180 N. W. 437 (1920). In *Neyland v. Black*, 238 S. W. 304 (Tex. Civ. App. 1922), it is suggested that damages could be allowed that would constitute a lien on the property although it does not appear that the grantees were at fault.

⁸⁶ *Supra* note 85.

nally made was fair and the old lady had been the first to suggest it according to the evidence. It was difficult to escape the suspicion that the parties whom she had visited had fermented dissatisfaction. The plaintiffs remained willing to take her back. The old lady had no other means of support. If she did not return and no provision was made for her she might become a public charge. After the trial while the appeal was pending she was taken ill and returned to the defendants. The court denied the relief sought. Very wisely it left the way open for a reconciliation, but remanded the case with instructions that if it could not be effected, an allowance was to be made to the old lady for her support and care by the defendants.

In the event that there has been no conveyance the court must state the disposition in another form. The suit is then brought by the performer of the services. The defenses will be undue influence, the defendant's failure of performance, or general lack of equity. In some cases a sufficient remedy for the plaintiff will be an action at law for damages, or merely for the value of the services. The allowance of a large claim in the lifetime of the recipient, however, may leave him with inadequate provision for support. Frequently the plaintiff in such a suit is given possession or protected in his existing possession of the property and the conveyance of the property is enjoined.⁸⁷ Of course no subsequent purchaser could defeat the claim, since the possession would constitute constructive notice. If the aged person has insufficient other property, an allowance may be made to him in the form of rent.⁸⁸

Summary

Throughout all these cases bargaining plays a part but a subordinate one. For that there are a number of reasons. The semi-gift nature of the transaction softens the outlines of the bargain. The frequently waning intellectual powers of the person receiving the service puts him on an inequality. The evidence of the terms is often unsatisfactory. The persons interested may not have been parties to the bargain and may bear other relations to the parties that cannot be ignored.

The adaptability of our system of law administration is most cogently illustrated in the handling of these cases. Here are the

⁸⁷ *White v. Masee*, 202 Iowa 1304, 211 N. W. 839 (1927). Or the decree is that the defendant hold as trustee. *Gupton v. Gupton*, *supra* note 69. If it is desirable that the aged person should have possession, the decree may be that the plaintiff is entitled to a deed, possession being reserved for the defendant. On the subject generally of remedies during the promisor's lifetime on contracts to convey property see Note (1930) 66 A. L. R. 1439.

⁸⁸ *White v. Masee*, *supra* note 87.

same rules and doctrines used in the commercial field made to yield acceptable results in a field that is concerned with vastly different problems.⁸⁹ And in general we can but admire the solutions reached. That is probably due in part to the fact that courts are here dealing with situations that the rapidly changing character of society in the last century has for the most part left untouched. Furthermore, the concepts that have been generally used, although they serve the purpose of emphasizing the dominant elements in the cases, have been sufficiently flexible to permit free play for all the elements. Finally and most important of all, the situations are simple in the sense that they are within the range of common experience. Judges have had little difficulty in seeing vividly just what has been involved and what the parties were trying to accomplish. In the grasp of the realities of a situation, whatever may be the field, lies the chief assurance of acceptable law administration.

⁸⁹ Cf. Llewellyn's statement: "Perhaps . . . contracts in what we may broadly call family relations do not work out in general as they do in business." *Op. cit. supra*, note 4, at 1240.