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COMMENTS

QUASI-CONTRACTUAL RECOVERY — Breach of Oral Contract to Perform Services In Exchange for Compensation by Will

By JOHN POULOS*

AN AGREEMENT to perform services in exchange for compensation to be made by will is within the California Statute of Frauds,¹ and unless there is either compliance therewith in the form of a sufficient writing, or the party seeking to enforce the oral contract can bring himself within the purview of one of the recognized exceptions to the statutory requirement of a sufficient writing,² no action may be maintained upon the oral contract.³ However, if there has been performance of services under such an oral contract which does not qualify as one of the above exceptions, although no action may be brought on the oral contract, recovery of the reasonable value of the services thus performed may be had under a quasi-contractual theory.⁴

Effect of Statute of Frauds

It is clear that the Statute of Frauds will prevent parol proof of an oral contract that is within the scope of the Statute when an action is brought upon that oral contract. This is so by direct command of the Statute. But when an action is brought not upon the oral contract, but in quasi-contract to recover the reasonable value of the performance rendered pursuant to the oral contract, the Statute should not prevent the admission of the parol contract into evidence to establish a necessary element of the cause of action. Thus most jurisdictions which permit recovery of the reasonable value of the services so performed, aside from any issue involving the application of the appropriate statute of limitations, do so permit the oral contract, albeit unenforceable as it may be, to be introduced into evidence to establish the elements of the quasi-contractual recovery;⁵ that the perform-

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¹ CAL. CIV. CODE § 1624 (6); CAL. CODE CIV. PROC. § 1973 (6).

² See generally I WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* §§ 87-93, 108-14 (7th ed. 1960).

³ As to part performance and estoppel in California, see *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951); Note 37 CALIF. L. REV. 151 (1949); Note 20 CALIF. L. REV. 663 (1932).

⁴ E.g., *Zellner v. Wassman*, 184 Cal. 80, 193 Pac. 84 (1920). See Annot., 31 A.L.R. 129, 138-45 (1924); RESTATEMENT, CONTRACTS § 355 (1932); RESTATEMENT, RESTITUTION § 108 (d) (1936); 3 WILLISTON, CONTRACTS § 534 (rev. ed. 1960).

⁵ See RESTATEMENT, CONTRACTS § 217 (2) (1932).

ance was not gratuitously rendered,⁶ and as evidence of the reasonable value of the unjust enrichment.⁷

If prior to 1926 any doubt existed in California as to the effect of the California Statute of Frauds upon the oral contract it was dispelled in *Offeman v. Robertson-Cole Studios*.⁸ In that case the court clearly recognized the majority view that the Statute of Frauds does not forbid the existence of a parol contract that is within its purview and does not comply therewith, but rather that the contract is rendered unenforceable when the defense which the Statute creates is appropriately invoked. Thus when the defense of the Statute of Frauds was set up on an action on the oral contract, all parol proof of the existence or terms of that contract must be excluded. If the action was not on the contract itself, since such an action was not what the Statute of Frauds was intended to prevent, the terms of the contract could be proved. The fact that admission included the terms of the unenforceable contract was completely immaterial; therefore, the terms of the

⁶ *E.g.*, *La Rue v. Barr*, 279 Pac. 1019 (Cal. D.C.A. 1929), *aff'd*, 208 Cal. 493, 282 Pac. 10 (1929); *Downey v. Guilfoile*, 96 Conn. 383, 114 Atl. 73 (1921); *Appeal of Beardsley*, 83 Conn. 34, 75 Atl. 141 (1910); *Humphrey v. Johnson*, 73 Ind. App. 551, 127 N.E. 819 (1920); *Longhofer v. Herbel*, 83 Kan. 278, 111 Pac. 483 (1910); *Laughnan v. Laughnan's Estate*, 165 Wis. 348, 162 N.W. 169 (1917); *Martin v. Martin's Estate*, 108 Wis. 284, 84 N.W. 439 (1900).

⁷ The weight of authority allows introduction of the oral contract on the issue of the reasonable value of the services when the promise is to pay a sum of money. *Carter Coal Co. v. Nelson*, 91 F.2d 651 (4th Cir. 1937); *Offeman v. Robertson-Cole Studios*, 80 Cal. App. 1, 251 Pac. 830 (1926) (contract not to be performed within one year); *Wilbur v. Cedar Rapids & M. R. Ry. Co.*, 116 Iowa 61, 89 N.W. 100 (1902) (contract not to be performed within one year); *Wise v. Midtown Motors*, 231 Minn. 46, 42 N.W.2d 404, 20 A.L.R.2d. 735 (1950) (contract not to be performed within one year); *Cochran v. Bise*, 197 Va. 483, 90 S.E.2d 178 (1955); *Annot.*, 49 A.L.R. 1121 (1927); *cf. Crocker v. United States*, 240 U.S. 74 (1915); *Clark v. United States*, 95 U.S. 539 (1877). Where the promise is to convey or devise an interest in land the apparent weight of authority will allow introduction of the oral contract on the issue of the reasonable value of the services. *Oxborough v. St. Martin*, 119 Minn. 72, 210 N.W. 854, 49 A.L.R. 115 (1926) (promise to convey in return for professional services rendered); *Dean v. Wilson*, 178 N.C. 600, 101 S.E. 205 (1919) (promise to convey in exchange for personal services); *Lisk v. Sherman*, 25 Barb. 433 (N.Y. 1857); 2 CORBIN, CONTRACTS § 328 (1950); 3 WILLISTON, CONTRACTS § 536 (rev. ed. 1960); See cases collected *Annot.*, 49 A.L.R. 1121, 1124. *Contra*, *La Rue v. Barr*, *supra* note 6; *Fuller v. Reed*, 38 Cal. 99 (1869); see cases collected *Annot.*, 49 A.L.R. 1121, 1124. See also *Annot.*, *Ann. Cas.* 1913 A, 288. Additionally, the unenforceable contract has also been admitted into evidence as between the parties to the contract to show, for example, the circumstances under which plaintiff went into possession of land and expended money for which he seeks to recover, *Blank v. Rodgers*, 82 Cal. App. 35, 255 Pac. 235 (1927), and to explain possession in an action of unlawful detainer, *Covina Manor, Inc. v. Hatch*, 133 Cal. App. 2d Supp. 790, 284 P.2d 580 (1955). By the great weight of authority the oral contract cannot be attacked by a third person on the basis of the Statute of Frauds, and it can form the basis of a tort action against the third person. *E.g.*, *Ryan v. Tomlison*, 39 Cal. 639 (1870); *Yarber v. Iglehardt*, 264 S.W.2d 474 (Tex. Civ. App. 1954).

⁸ 80 Cal. App. 1, 251 Pac. 830 (1926).

oral contract could be admitted as some evidence of the reasonable value of the services performed. The court then distinguished the case of *Fuller v. Reed*,⁹ which refused to admit the oral contract for the purpose of establishing the reasonable value of the services rendered, on two grounds: 1. That the court in that case had in mind the question of admitting the oral contract, not as *some proof* of the reasonable value of the services, but as the *measure* of recovery, and; 2. That the Statute of Frauds in effect at the time the case was decided¹⁰ had been interpreted as making the oral contract void in toto rather than unenforceable.

The narrow issue, as to whether or not the oral contract could be used as evidence of the reasonable value of the services, was again before the courts in the case of *La Rue v. Barr*.¹¹ In that case the court of appeals refused to admit the terms of the oral contract as evidence of the reasonable value of the services sought to be recovered, under an oral contract for compensation of the services by devise, although admitting the oral contract for the purpose of establishing the existence of the cause of action. The court distinguished this aspect of the *Offeman* case on the grounds that the promise contained in the contract in that case was for a sum of money, rather than a promise to devise land, which, of course, has no face value. This court reasoned that the jury would then have to hear evidence as to the value of the land and this, they asserted, would be the creation of a new issue and as such it would lead to confusion, therefore it must be excluded for these purposes. The court then cited *Fuller v. Reed* with approval.

The reasons given by the court in the *La Rue* case are not compelling. The *Offeman* case demonstrated that the factor of unenforceability did not prevent the contract's admission into evidence. Strictly speaking, as far as the Statute of Frauds is concerned, there is no logical distinction to be drawn on the basis of the subject matter of the promise of the oral contract and its admission into evidence. It would appear that once the Statute has been interpreted so as to make a contract unenforceable, but admissible as some evidence in an action not on that contract, then it would equally apply to all contracts within the Statute. If the refusal to admit the terms of the oral contract as evidence of the reasonable value of the services is independent of the fact of its enforceability, does lack of a face value of the subject matter of the promise justify the exclusion, as an absolute rule, merely because the jury must then hear evidence as to the value of the subject promised? It would appear not.¹² Admittedly the question of the

⁹ 38 Cal. 99 (1869).

¹⁰ Cal. Stat. 1850, ch. 114, § 8, p. 267.

¹¹ 279 Pac. 1019 (Cal. D.C.A. 1929), *aff'd*, 208 Cal. 493, 282 Pac. 10 (1929).

¹² In an action to recover the reasonable value of services rendered the promisor under an alleged oral contract to compensate by will, the court admitted a will which was

reasonable value of the services, in most cases, is for the trier of the facts. In many instances it is difficult to arrive at a reasonable figure. If admission of the oral contract into evidence would aid the jury in arriving at that figure, it should clearly be admitted even though it would necessitate, as a secondary issue, hearing evidence as to the reasonable value of the land. The answer to the question turns on an issue independent of the fact that the subject matter of the promise is either a sum of money or land. It turns upon the elementary issue of whether the evidence sought to be introduced actually does reflect the reasonable value of the services.¹³ If, when the oral contract was entered into, the length of the term of the services was uncertain and the promise was to leave an uncertain amount of money or land,¹⁴ two variables are encountered. It is to the extent that these two variables reflect a reasonable value placed on the services, that the admissibility of the terms of the oral contract for this purpose become dependent. If the period over which the services are to extend is certain and the promised compensation is either a specified sum or a specified parcel of land, since computation would then be more or less a mechanical process, it should be clearly admissible. Where the contract involves one or two of these variables, the more reasonable rule would leave it to the discretion of the trial judge as to whether or not the evidence of the oral contract tends to reflect the reasonable value of the services in question and accordingly whether or not to admit or exclude the evidence, rather than flatly exclude all such evidence. Such discretion would then be reviewable only for abuse.

Accrual of Cause of Action—Three Theories

When the statute of limitations is drawn into question, the additional problem of the date of the accrual of the cause of action in quasi-contract is squarely in issue.¹⁵ Once the cause of action is recognized, there are three apparent theories and equally as many judicial holdings. They are:

1. The cause of action accrues from time to time on the rendition of the services;

not subject to probate as evidence of the reasonable value of the services. The will purported to devise certain interests in land to plaintiff along with certain bequests. Apparently the court did not here feel that the creation of this secondary issue defeated its utility. *Mayborne v. Citizens' Trust & Sav. Bank*, 46 Cal. App. 178, 188 Pac. 1034 (1920).

¹³ See *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917).

¹⁴ Care must be taken not to apply the contract "price" which contemplated full performance as evidence of the reasonable value of a partial performance without first making an adjustment allocating the appropriate pro rata share, so as to accurately reflect the reasonable value placed on the part performance, where possible.

¹⁵ CAL. CODE CIV. PROC. § 312: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued. . . ." The cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time. *Dillion v. Board of Pension Comm'rs*, 18 Cal. 2d 427, 116 P.2d 37, 136 A.L.R. 800 (1941).

2. The cause of action accrues on the termination of the services, and;

3. The cause of action accrues only when the oral contract, pursuant to which the services were rendered, is breached.

Courts which give countenance to the first above mentioned theory, that the cause of action accrues from time to time on the rendition of the services, ignore the existence of the oral contract for any purposes of the statute of limitations.¹⁶ They refuse to allow reference of the services performed to the oral contract to establish their continuity. The assertion is that as the services are performed, a benefit has been conferred for which the performing party can recover in a quasi-contractual action. And yet, the oral contract can be introduced into evidence for the limited purpose of establishing the existence of the cause of action itself by showing that the services were not gratuitously rendered.¹⁷ As a logical proposition, the sanctity of this additional element is difficult to see. This rule apparently is an attempt at compromise between the flagrantly unjust result of allowing the promisor to obtain without liability services performed by the promisee in good faith reliance upon the oral contract and an unfounded fear of enforcing the oral contract. The result of this theory is the creation of a hard and fast rule which at any particular point in time bars the right to recover beyond the statutory period. This is so regardless of the intention of the parties that the performance was rendered as part of the whole contemplated performance for which the promisor was to compensate by will, and regardless of the extent of the benefit conferred. The Statute of Frauds is thus made to qualify the application of the statute of limitations by completely limiting the situation to which it can apply. The result appears to nullify one of the most pervasive rules in the law of the Statute of Frauds—that the Statute was enacted to prevent fraud, rather than promote it. As long as the performing party continues in good faith to perform and fails to repudiate the oral contract, the statute of limitations bars recovery beyond the statutory period. The effect is to permit the promisor to take advantage of the performing party, die without making the will called for in the oral contract, and leave his estate liable only for those services which have been performed prior to the running of the statutory period when the performing party brings his action. The performing party is forced to choose between performing the contract in good faith, and, if the performance so rendered continues for longer than the statutory

¹⁶ *Murphy v. Burns*, 216 Wis. 248, 257 N.W. 136 (1934); *Leiser v. Pagel*, 172 Wis. 530, 179 N.W. 796 (1920) (overruling all inconsistent authority); *Taylor v. Thieman*, 132 Wis. 38, 111 N.W. 229 (1907).

¹⁷ "But where there is an oral promise to compensate by a devise of real estate in whole or in part, the agreement is utterly void, and can be resorted to for no purpose except to rebut the presumption, where it exists, that the services were gratuitously rendered." *Owen, J. in Leiser v. Pagel*, *supra* note 16 at 535, 179 N.W. at 798.

period, remain without a remedy to that extent, or to repudiate the terms of the oral contract and sue the promisor on the basis of quasi-contract at a time when the benefit conferred cannot properly be considered an unjust enrichment. For, up until this time, the promisor has only received part performance of that which the parties originally contemplated to be the agreed exchange. If the promisor receives no more than this, and the date set for his performance has not yet arisen, there is little basis for claiming that the retention of a part of the agreed exchange constitutes such an enrichment, at the expense of the performing party, as to at that time be classified as unjust. Accordingly, few jurisdictions have adopted this theory.

The second theory, that the cause of action accrues on the termination of the services, unlike the first, gives full recognition to the unjustness of allowing the promisor to receive the benefit of the services performed, with no liability, and accordingly allows the performing party to recover for all of the services which have been continuously performed in reliance upon the oral contract. The oral contract is admitted into evidence to establish that the rendition of the services constituted a single parcel of performance in return for the promised consideration.¹⁸ The statute of limitations begins to run from the date of the termination of the continuous services.¹⁹

The majority of cases which fall into this category of the Statute of Frauds seem to call for the services to be performed until the death of the promisor rather than for performance until a specified date. In this factual context it is apparent that the date of the termination of the services is the same as the date of the breach of the contract by the promisor's dying without leaving the contracted for will. To this extent the second theory and third—that the cause of action accrues only when the oral contract, pursuant to which the services were rendered, is breached—reach the very same result. It is exactly at the time when the promisor breaches the oral contract that the performance which he has accepted has become an unjust enrichment. At that time the injustice is determined, for at any prior date there has been only a performance of the agreement. If the promisor does carry forth his bargain, can it be said that at the very moment before the valid will becomes eligible for probate that the promisor has been unjustly enriched? Surely not, for the time for his performance, as was seen above in the discussion of the first theory, had not yet arisen. But the result reached by the second theory, in this case, is due to a factual coin-

¹⁸ See *Longhofer v. Herbel*, 83 Kan. 278, 111 Pac. 483 (1910).

¹⁹ *Engelbrecht v. Herrington*, 101 Kan. 720, 172 Pac. 715 (1917) (dictum). See *Heine v. First Trust Co.*, 141 Kan. 370, 41 P.2d 767 (1935) (alternative holding: contract not to be performed within one year). If this issue was squarely before the Kansas court today and the terms of the oral contract were clearly proved, it appears doubtful whether the above theory, if ever the settled law in that jurisdiction, would be followed. See *Parker v. Ray*, 180 Kan. 634, 306 P.2d 190 (1957).

vidence. When the oral contract calls for performance until a specified date short of the promisor's death, the statute of limitations commences to run from the date of termination of performance, and yet the time for performance by the promisor has not arrived. Apparently this would be true even if the terms of the oral contract were clearly and definitely proved.

The justification for the second theory is an attempt to minimize the possibility of plundering the estate of the deceased by the fraudulent assertion of a claim based upon a contract which is the result of perjured testimony.²⁰ It is felt that the silence of a party after the continuous services have been terminated and which can only be explained by parol proof, leaves too much of an opportunity to the unscrupulous. The services rendered are extrinsic facts which can more readily be proved or disproved, and reference of the services to the unenforceable oral contract to establish their continuity does not involve the same degree of opportunity for fraud as is involved when there is a substantial gap in time between the performance of the services and the assertion of the claim. In the latter case, work rendered in the distant past almost carries the presumption that the party so performing has been compensated for them, but his silence is consistent with the existence of a contract. Those who would apply this theory evidently feel that the evidential aspects do not warrant a different result.

This attempt, by use of the second theory, to strike a balance between the conflicting interests of allowing the performing party to recover the reasonable value of his entire performance, and that of protecting the estate of the decedent from fraudulent claims, though far superior to the first theory discussed, would seem to be too harsh. It forces the performing party to repudiate the oral contract which, by the better view, is a valid agreement between the parties but unenforceable by action in the courts, and requires the promisor to pay the reasonable value of the services before he has been unjustly enriched. This type of agreement is usually entered into by elderly persons who not only desire, but are in actual need of the services of the performing party. In many such cases these persons can not afford to hire the services done, as in the usual case of employment; thus this type of contract allows them to obtain the services and still retain their meager estates during life. To force the promisor then to pay the reasonable value of the services prior to his death is to completely destroy the value of this type of contract when it is oral. The answer, of course, is to reduce the contract to writing, but when the parties have failed to do so, does this second theory provide the best result?

In many jurisdictions, the performing party cannot, after the death

²⁰ For a discussion of the fears of plundering decedents' estates, see Arnoldy, *Plundering the Estate of Decedents*, 12 CAL. S. BAR J., 126, 149, 179 (1937).

of the promisor, himself testify as to the terms of the oral contract.²¹ If the courts then require that the terms of the oral contract be clearly and definitely proved, especially in the case where there is to be performance until a specified date short of the date of the death of the promisor, the third theory produces the most equitable result when viewed from both sides, and the weight of authority supports it.²²

Ambiguous Position in California and Resolution

The California cases have been somewhat ambiguous as to which of the above theories has been adopted. Two factors are largely responsible:

1. Similarity in the fact situation which lends itself to the application of either theories two or three above with the same result; that is, the promisee is to perform the services for the life of the promisor in return for compensation by will;
2. A long line of cases which speak of the statute of limitations starting to run on the termination of the services.

Confusion of Theories; Long v. Rumsey

There are many cases in California which permit a party who has rendered services in performance of an oral contract within this section of the Statute of Frauds to recover the reasonable value of the services without requiring that the plaintiff prove the terms of the unenforceable contract.²³ All that the plaintiff need prove is (a) that the services were continuously rendered,²⁴ and (b) that from all of

²¹ CAL. CODE CIV. PROC. § 1880 (3). For an extended discussion of this code provision, advocating repeal thereof and adoption of the South Dakota-Connecticut approach, see Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization*, 4 U.C.L.A. L. REV. 175 (1957).

²² E.g., *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S.W. 767, 8 Ann. Cas. 112 (1906); *Cochran v. Bise*, 197 Va. 483, 90 S.E.2d 178 (1955); RESTATEMENT, CONTRACTS § 355 (4) (1932); 2 CORBIN, *op. cit. supra* note 7, §329; 6 WILLISTON, CONTRACTS § 2028 (rev. ed. 1938); 1 WOOD, LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY § 119 b(2) (4th ed. 1916). See cases collected Annot., 8 Ann. Cas. 113 (1908).

²³ See e.g., *Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672, Ann. Cas. 1913A 479 (1911); *Turell v. Anderson*, 16 Cal. App. 2d 445, 60 P.2d 906 (1936); *Wax v. Adair*, 16 Cal. App. 2d 393, 60 P.2d 904 (1936); *Burr v. Floyd*, 137 Cal. App. 692, 31 P.2d 402 (1934); *Lauritsen v. Goldsmith*, 99 Cal. App. 671, 279 Pac. 168 (1929); *Warder v. Hutchison*, 69 Cal. App. 291, 231 Pac. 563 (1924).

²⁴ "The word 'continuously' . . . means, 'With continuity or continuation, unbrokenly, uninterruptedly; without intermission or cessation; without intervening time, implying an unbroken sequence'" *Belletich v. Pollack*, 75 Cal. App. 2d 142, 146, 171 P.2d 57, 60 (1946). But where the "continuity" is broken, the statute begins to run on the first part when the services were terminated, in absence of proof of the oral contract. *Demartini v. Katz*, 49 Cal. App. 2d 67, 120 P.2d 944 (1942). Thus where the "continuity" is in fact broken, resort must be had to the terms of the oral contract in order to establish that the services were rendered as part of the bargain in a single contract to be compensated by will. *Seib v. Mitchell*, 10 Cal. App. 2d 91, 52 P.2d 281 (1935). But the temporary cessation of the services due to the wrongful act of the promisor does not break the "continu-

the circumstances it can be inferred that the party who received the benefit of the services was to pay for them at their termination.²⁵ Some of the cases assert that all that need be shown is the continuity of the services and a fair inference from all of the circumstances that payment was to be made and under these circumstances the law will imply a promise to pay at the termination of the services.²⁶ A close reading of the particular facts in each case, along with the presumption of a monthly hiring at a reasonable monthly wage contained in the California Labor Code²⁷ shows that something more is needed.²⁸ It appears that there must be evidence presented from which one could reasonably infer that payment was to be made for the services at their termination.²⁹ Thus proof short of the establishment of the terms of the unenforceable contract will support recovery in this type of case.³⁰

The opportunity to confuse this line of cases, which speak of the statute of limitations commencing to run on the termination of the continuous services, with the second theory above discussed is apparent. There is, however, a crucial distinction. The second theory creates a rule of law which is applied when the oral contract is clearly and definitely proved, the contract being admissible (1) to establish that the services were not gratuitously rendered; (2) as evidence of the reasonable value of the services; and (3) to establish that the services were rendered in performance of the contract as a single parcel for the promised consideration. On the other hand, in the cases presently being considered the oral contract need not be proven if the elements above discussed are present. These cases neither affirm nor negate the application of either theories two or three above because the factual context would lead to the same result regardless of which approach was applied.

However, in *Long v. Rumsey*³¹ the facts were such as to require a distinction to be drawn. The plaintiff alleged that he had performed services until the agreed specified date pursuant to an oral contract to be compensated by will. The lapse of time between the date of the termination of the services and the death of the alleged promisor was

ity." *Lloyd v. Kleefisch*, 48 Cal. App. 2d 408, 120 P.2d 97 (1941). Compare *Konchina v. Turner's Estate*, 154 Cal. App. 2d 134, 315 P.2d 723 (1957); *Collier v. Landram*, 67 Cal. App. 2d 752, 155 P.2d 652 (1945).

²⁵ *Lloyd v. Kleefisch*, *supra* note 24.

²⁶ *Mayborne v. Citizen's Trust & Sav. Bank*, 46 Cal. App. 178, 188 Pac. 1034 (1920).

²⁷ CAL. LABOR CODE § 3002.

²⁸ *Corato v. Corato's Estate*, 201 Cal. 155, 255 Pac. 825 (1927).

²⁹ *Robinson v. Chapman*, 98 Cal. App. 278, 276 Pac. 108 (1929). *But see* *Johnstone v. E. & J. Mfg. Co.*, 45 Cal. App. 2d 586, 114 P.2d 658 (1941). See also *Tabata v. Murane*, 24 Cal. 2d 221, 148 P.2d 605 (1944).

³⁰ Where there is no evidence from which the jury could reasonably infer that the continuous services were to be paid for on termination, the oral contract must be proved. *Ferrari v. Mambretti*, 58 Cal. App. 2d 318, 136 P.2d 326 (1943).

³¹ 12 Cal. 2d 334, 84 P.2d 146 (1938).

longer than the period of the statute of limitations. Plaintiff argued that his action was not barred by limitations because his cause of action did not accrue until the promisor died without leaving the contracted for will. The court rejected his argument and held that the statute of limitations³² had barred his action, not however on an application of the second theory, but because plaintiff had not clearly and definitely proved the terms of the oral contract. The court then cited the California cases which speak of the statute of limitations as running on the termination of the services. The decision in *Long v. Rumsey* did little to clarify the law in California in this respect, but did suffice to warn counsel that when there was a gap between performance of the parties the terms of the oral contract must be clearly and definitely set forth, or an adverse ruling on the basis of the statute of limitations might ensue.

Adoption of Third Theory

Some of the cases subsequent to *Long v. Rumsey* have been equally ambiguous as to what theory has been applied,³³ but several very recent cases have definitely settled the question.³⁴ California has adopted the third theory. Where the terms of the unenforceable contract are clearly and definitely proved the statute of limitations does not begin to run, in an action for the reasonable value of the services performed pursuant to a promise to compensate by will, until the oral contract is breached. And this is true whether the plaintiff breaches the contract³⁵ or whether the defendant breaches the contract,³⁶ either by anticipatory repudiation³⁷ or by failure to leave the contracted for will on his death.³⁸

Manner, Incidents, Effect of Breach — Third Theory

How is the breach determined? For this purpose the oral contract is treated exactly as an enforceable contract and the applicable contract law is applied to determine if there has been a breach of the contract.³⁹ This is clear enough. The Statute of Frauds creates a de-

³² CAL. CODE CIV. PROC. § 339 (1).

³³ E.g., *Beard v. Melvin*, 60 Cal. App. 2d 421, 140 P.2d 720 (1943).

³⁴ *Vito v. McDonald*, 179 Cal. App. 2d 509, 3 Cal. Rptr. 842 (1960); *Rooney v. Sulivan*, 169 Cal. App. 2d 432, 337 P.2d 543 (1959). Both cases cited RESTATEMENT, CONTRACTS § 355 (4) (1932).

³⁵ *Laffey v. Kaufman*, 134 Cal. 391, 66 Pac. 471 (1901) (oral contract to convey); *Thompson v. Schurman*, 65 Cal. App. 2d 432, 150 P.2d 509 (1944) (oral contract to convey).

³⁶ See cases cited note 22 *supra*.

³⁷ *Maddox v. Rainoldi*, 163 Cal. App. 2d 348, 329 P.2d 599 (1958) (citing RESTATEMENT, CONTRACTS § 355 (4) (1932)). *Tipple v. Tipple*, 189 App. Div. 28, 177 N.Y. Supp. 813 (1919) (citing *Hochester v. De la Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (Q. B. 1853)). See *Campbell v. Campbell*, 65 Barb. 639 (N.Y. 1866). See also *Lloyd v. Kleefisch*, 48 Cal. App. 2d 408, 120 P.2d 97 (1941).

³⁸ See note 34 *supra*.

³⁹ See e.g., *Murdock v. Swanson*, 85 Cal. App. 2d 380, 193 P.2d 81 (1948); *Parady v. Lewis*, 338 Mass. 800, 157 N.E.2d 531 (1959); *Meyers v. Teitelbaum*, 19 Misc. 2d 1080, 193 N.Y.S.2d 862 (1959).

fense to an action on the oral contract rendering the contract unenforceable, but the defense must be asserted in the appropriate manner. Thus prior to the filing of the action and the raising of the defense, or if the defense is not asserted, it is seen that the law of enforceable contracts is applied to the oral contract to determine if the contract has been breached. The subsequent imposition of the Statute as a defense does not alter the applicable rules of law.

What are the incidents of the breach? They are the same as they would be if the unenforceable contract was in fact an enforceable contract. Thus, assuming that the plaintiff materially and substantially breached the oral contract, the defendant would be excused from performing on his side.⁴⁰

What is the effect of the breach? The effect of the breach is to alter the legal relations between the parties in respect to the quasi-contractual action to the same extent that it would do so if the contract under which the performance was rendered was enforceable.⁴¹ The fact that the oral contract is within the Statute of Frauds should not put the plaintiff in a better position than he would be in if the contract is enforceable.⁴² It would appear that the purpose of the Statute is not to penalize performance which is made under an unenforceable contract, therefore the plaintiff should not be placed in a worse position than he would be in if the contract was enforceable. Thus given a case where, for example, the plaintiff has materially and substantially breached the oral contract under such circumstances as to be a wilful breach within the jurisdiction in question, and assuming that the jurisdiction will not allow restitution for part performance when the plaintiff is a wilful contract breaker,⁴³ then the plaintiff should, accordingly, be denied recovery.

This conclusion may be criticized as requiring the plaintiff to perform the unenforceable contract unless the plaintiff in default, in the case of an enforceable contract, could so recover. This is true. Is it not socially desirable to have all such contracts carried out? Few would argue that it was not, for under these circumstances there can be no fraud perpetrated. Yet the plaintiff is being forced to perform when he has no security that the defendant will likewise perform. Of course, this is true in most contract cases. While the plaintiff may not maintain an action for damages, he may recover in quasi-contract when the defendant breaches the contract.

Nevertheless, there are situations in which a hardship would be worked on the plaintiff. One such case is where the plaintiff has per-

⁴⁰ *Dubke v. Kassa*, 29 Wash. 2d 486, 187 P.2d 611 (1947) (oral contract to convey land).

⁴¹ *Dysart v. Remington Rand, Inc.*, 32 F. Supp. 477 (D.C. Conn. 1940); RESTATEMENT, CONTRACTS §§ 217 (1)(b), and illustration 2, 355 (1) and (4) (1932).

⁴² RESTATEMENT, CONTRACTS § 355, comments *e*, *f* (1932).

⁴³ *Ibid.*

formed to a certain date as specified in the oral contract and in return for compensation by will and the promisor dies after the period of the statute of limitations, running from the date of the termination of the services, has lapsed—in short the situation before the court in *Long v. Rumsey*. If the plaintiff had brought an action in quasi-contract prior to the defendant's death, the defendant could have effectively resisted the action as being premature by setting up the terms of the oral contract in defense. But if the plaintiff waits until after defendant dies and the statute of limitations has run from the date of the termination of the services, the plaintiff runs the great risk of receiving an adverse judgment as in *Long v. Rumsey* if he is unable to clearly and definitely prove the terms of the oral contract.

An answer has been suggested. If the plaintiff requests the defendant to execute a writing sufficient to satisfy the Statute of Frauds and the defendant refuses, the plaintiff may then maintain his action.⁴⁴ Such a rule is clearly justified. Certainly the defendant cannot assert that he has not been unjustly enriched when he has refused to merely execute a writing. The defendant has been receiving the benefit of the performance of the contract. It would be unjust on his part to refuse merely to execute a writing so as to enable the plaintiff to secure the performance due him. If the defendant refuses, it may be treated as tantamount to a repudiation of the oral contract. The courts would be justified in applying the doctrine of anticipatory repudiation to the unenforceable contract and thus allow the plaintiff to presently maintain an action against the defendant for the reasonable value of the services. This would clearly apply when the plaintiff had only partially performed, but if the plaintiff had fully performed the contract,⁴⁵ then according to a recent California case,⁴⁶ the doctrine of anticipatory repudiation would not apply. Perhaps this example illustrates the necessity for a re-evaluation of the rule that a contract fully performed on one side cannot be anticipatorily breached. No more can be done than direct the reader's attention to Professor Corbin's eloquent criticism of the case and the rule it expounds.⁴⁷

⁴⁴ RESTATEMENT, CONTRACTS §§ 217 (1)(b), 355 (4) (1932); RESTATEMENT, (SECOND) AGENCY § 468 (3) (1958); WILLISTON, *op. cit. supra* note 7, § 538; WOODWARD, QUASI-CONTRACTS § 98 (1913).

⁴⁵ Full performance of the services by the plaintiff will not take the oral contract out of the Statute of Frauds and enable the plaintiff to obtain quasi-specific performance unless the services are of such a peculiar, extraordinary or exceptional character that it is impossible to estimate or to adequately compensate for them in money. *Kobus v. San Diego Trust & Sav. Bank*, 172 Cal. App. 2d 574, 342 P.2d 468 (1959); *De Hermsillo v. Morales*, 146 Cal. App. 2d 819, 304 P.2d 854 (1956); *Palmer v. Phillips*, 123 Cal. App. 2d 291, 266 P.2d 850 (1954); *Walker v. Calloway*, 99 Cal. App. 2d 675, 222 P.2d 455 (1950); *Shive v. Barrow*, 88 Cal. App. 2d 838, 199 P.2d 693 (1948) (nor did complaint state a cause of action for declaratory relief).

⁴⁶ *Minor v. Minor*, 184 Cal. App. 2d —, 7 Cal. Rptr. 455 (1960).

⁴⁷ 4 CORBIN, CONTRACTS § 966 (pock. part 1960).