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Acts, which were enacted for the benefit of the highway victim. The General Assembly might well consider changing this rule based purely upon legal reasoning without sufficient regard to practical considerations.

JOHN BRYAN WHITLEY

Oral Contracts to Devise Realty—Right of Third Party Beneficiary to Recover on Quantum Meruit

In North Carolina an oral contract to devise real property is void under the Statute of Frauds,¹ and part performance by the promisee will not remove the contract from the operation of the Statute.² However, the promisee who performs services pursuant to such a contract has a remedy on implied assumpsit or *quantum meruit* to recover the value of the services rendered.³

*Pickelsimer v. Pickelsimer*⁴ presented the question of whether the third party beneficiary of a contract that is void under the Statute of Frauds may recover on *quantum meruit* the value of services rendered by the promisee pursuant to the contract. In this case the father of an illegitimate child had orally promised the child's mother that he would devise and bequeath to the child a one-fifth part of his estate if she would refrain from instituting bastardy proceedings

out in the HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 218 (1955), provides: "(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them *even though judgment has not been recovered against all or any of them*. . . . (d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." (Emphasis added.)

¹ N.C. GEN. STAT. § 22-2 (1953).

² *Duckett v. Harrison*, 235 N.C. 145, 69 S.E.2d 176 (1952); *Ebert v. Disher*, 216 N.C. 36, 3 S.E.2d 301 (1939); *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933); *Albea v. Griffin*, 22 N.C. 9 (1838). Part performance by the promisee will remove the oral contract from the operation of the Statute in all but three states. *E.g.*, *Betterly v. Granger*, 350 Mich. 651, 87 N.W.2d 330 (1957); *Holt v. Alexander*, 207 Okla. 140, 248 P.2d 228 (1952); *Patton v. Patton*, 201 Va. 705, 112 S.E.2d 849 (1960). See generally RESTATEMENT, CONTRACTS § 197 (1932); 1 PAGE, WILLS § 10.13 (Bowe-Parker rev. 1960).

³ *Gales v. Smith*, 249 N.C. 263, 106 S.E.2d 164 (1958); *Daughtry v. Daughtry*, 223 N.C. 528, 27 S.E.2d 446 (1943); *Grantham v. Grantham*, *supra* note 2.

⁴ 257 N.C. 696, 127 S.E.2d 557 (1962).

against him and perform certain domestic services. The father died having breached his promise.⁵ The child sued her father's estate for damages for breach of the oral contract to devise or, alternatively, on *quantum meruit* for the reasonable value of services performed by the mother pursuant to the contract. The North Carolina Supreme Court held that the plaintiff's action for breach of the oral contract to devise was barred by the Statute of Frauds,⁶ and that no recovery could be had on *quantum meruit* because "it was her mother who performed the services—not the plaintiff."⁷

The court recognized the right of a third party to enforce a contract made for his benefit.⁸ However, the court pointed out that since this right is necessarily dependent upon the existence of a valid contract,⁹ it could not arise from an oral contract that is void under the Statute of Frauds. In determining that the plaintiff was not entitled to recover on *quantum meruit*, the court stated:

While the law will not permit one person to take the labor of another without compensation when it was performed and received in expectation of payment, it does not follow as a corollary that a third-party beneficiary under a void contract can recover for labor which another performed, even though such labor provided the consideration for the void contract.¹⁰

It is believed that the principal case marks the first direct determination of a third party beneficiary's rights on *quantum meruit* in any jurisdiction.¹¹ Notwithstanding the novelty of the question

⁵ The complaint alleged the value of a one-fifth part of the father's estate to be approximately \$250,000.00. By her father's will, the child was bequeathed the sum of \$1,000.00, plus \$75.00 a month until she reached the age of eighteen.

⁶ "An indivisible oral contract to devise both real and personal property is also void." 257 N.C. at 698, 127 S.E.2d at 559. *Accord*, *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962); *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957).

⁷ 257 N.C. at 703, 127 S.E.2d at 563.

⁸ *Accord*, *Brown v. Bowers Constr. Co.*, 236 N.C. 462, 73 S.E.2d 147 (1952); *Canestrino v. Powell*, 231 N.C. 190, 56 S.E.2d 566 (1949).

⁹ See *Lammonds v. Aleo Mfg. Co.*, 243 N.C. 749, 92 S.E.2d 143 (1956). See generally RESTATEMENT, CONTRACTS § 140 (1932); 4 CORBIN, CONTRACTS § 818 (1951); 2 WILLISTON, CONTRACTS § 364A (3d ed. 1959).

¹⁰ 257 N.C. at 704, 127 S.E.2d at 563.

¹¹ The research for this note has disclosed no cases in which the third party beneficiary of a void contract was denied the right to recover the value of services rendered by the promisee pursuant to the contract. However, in *Graham v. Graham*, 134 App. Div. 777, 119 N.Y. Supp. 1013 (1909), the defendant had orally agreed with the plaintiff to convey land to a third person in consideration of services to be performed by the plaintiff. The

presented, the court was compelled to deal extensively with cases supporting the plaintiff's position.

One such case was *Redmon v. Roberts*.¹² In *Redmon*, the father of an illegitimate child had orally promised the child's mother that, if she would refrain from instituting bastardy proceedings against him, he would devise the child a share of his estate equal to that of his other children. When the father died intestate, the child sued his estate for breach of the oral contract to devise. In answer to the defendant's contention that recovery was barred by the Statute of Frauds, the court, citing prior North Carolina cases,¹³ stated, "this Court and Courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered."¹⁴ The plaintiff, a third party beneficiary, was permitted to recover. In *Pickelsimer* the court, in overruling *Redmon*, pointed out that the general proposition announced there was not sustained by the North Carolina cases¹⁵ cited in support thereof. Indeed, in none of the cases cited in *Redmon* did the court uphold and enforce the oral contract to devise or convey. Rather, the defendant was compelled to pay the reasonable value of what he had received on the theory that it would be inequitable to allow the defendant to repudiate the oral contract and at the same time retain benefits derived thereunder at the expense of the plaintiff.

Two Kentucky cases¹⁶ were also cited in support of the general proposition announced in *Redmon*. In each case, the father of an

plaintiff fully performed and, upon repudiation of the contract by the defendant, brought an action to recover the reasonable value of his services. Apparently speaking to the defense that the action lay in the third party, the New York court stated: "In the case at bar the premises were not to be conveyed to the promisee, but to a third party. But, the agreement was unenforceable because not written. There was no contract, therefore, upon which the beneficiary could sue. To the promisee alone is raised the implied contract to repay the value of the services rendered in performance of the voidable parol contract, which the promisor afterwards refused to perform." *Id.* at 779, 119 N.Y. Supp. at 1014.

¹² 198 N.C. 161, 150 S.E. 881 (1929).

¹³ *Brown v. Williams*, 196 N.C. 247, 145 S.E. 233 (1928); *Deal v. Wilson*, 178 N.C. 600, 101 S.E. 205 (1919); *McCurry v. Purgason*, 170 N.C. 463, 87 S.E. 244 (1915); *Faircloth v. Kenlaw*, 165 N.C. 228, 81 S.E. 299 (1914); *Lipe v. Houck*, 128 N.C. 115, 38 S.E. 297 (1901); *Whetstine v. Wilson*, 104 N.C. 384, 10 S.E. 471 (1889).

¹⁴ 198 N.C. at 164, 150 S.E. at 883.

¹⁵ See cases cited note 13 *supra*.

¹⁶ *Bowling v. Bowling's Adm'r*, 222 Ky. 396, 300 S.W. 876 (1927); *Doty's Adm'r v. Doty's Guardian*, 118 Ky. 204, 80 S.W. 803 (1904). These two cases were based on the prior case of *Benge v. Hiatt's Adm'r*, 82 Ky. 666 (1885).

illegitimate child had orally promised the child's mother, in consideration of her surrender of custody or her forbearance to institute bastardy proceedings against him, that he would give land to the child or make him an equal heir with his other children. The father, having received the promised consideration, breached his promise. The child brought suit in each case to enforce the father's oral promise. The Kentucky Court of Appeals held the promises unenforceable under the Statute of Frauds, but allowed the plaintiff to recover the value of the property orally promised because the mother's performance could not be accurately valued in monetary terms.¹⁷

These cases were particularly favorable to the plaintiff's position in *Pickelsimer*, since Kentucky, at the time the cases were decided, was one of the small minority of states, including North Carolina, which did not recognize the doctrine of part performance.¹⁸ Nevertheless, the court refused to follow the Kentucky cases, pointing out that in neither opinion had the Kentucky court mentioned the fact that the plaintiff, a third party beneficiary of an unenforceable con-

¹⁷ Kentucky, in a long line of decisions, had fashioned a unique measure of damages for the situation in which the services rendered were not adaptable to accurate monetary evaluation. In such a situation, the measure of damages was deemed as a matter of law to be the value of the promised realty. *Walker v. Dill's Adm'r* 186 Ky. 638, 218 S.W. 247 (1920); *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209 (1905). Kentucky, in the recent case of *Miller v. Miller*, 335 S.W.2d 884 (Ky. 1960), has apparently abandoned the rule. See note 18 *infra*. In *Redmon v. Roberts*, 198 N.C. 161, 150 S.E. 881 (1929), the North Carolina court uttered a dictum approving the trial court's application of this standard. It may have been followed in *Hager v. Whitener*, 204 N.C. 747, 169 S.E. 645 (1933), although it is difficult to determine whether the recovery in that case was limited to the value of the plaintiff's services. It was dealt with and disapproved in *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933), though it has been suggested that the facts of that case would not warrant interpreting the court's treatment to be an express repudiation. See Note, 39 N.C.L. Rev. 98 (1960). If the *Grantham* case did not operate as an express repudiation of the rule, it is believed that there is language in the principal case sufficient to prevent its adoption in North Carolina in the near future.

¹⁸ *Doty's Adm'r v. Doty's Guardian*, 118 Ky. 204, 80 S.W. 803 (1904). In *Miller v. Miller*, *supra* note 17, the Kentucky court may have adopted the doctrine of part performance. The plaintiff, a third party beneficiary of a contract within the statute of frauds, was permitted to recover the promised realty. Therefore, when the value of services rendered pursuant to the oral contract was impossible of monetary evaluation, the person suing had been permitted to recover the value of the promised realty as a matter of law. See note 17 *supra*. Whether *Miller* should be interpreted as placing Kentucky among those states which recognize the doctrine of part performance is questionable, since nowhere in the opinion is the doctrine mentioned, and it is not certain that the same result would be reached in cases where the services are possible of monetary evaluation. For further reflection on the Kentucky position, see 50 Ky. L.J. 220 (1961).

tract, was recovering on *quantum meruit*. Indeed, in one of the cases, the Kentucky court implied that the plaintiff was recovering for breach of the oral contract, although in the same case it held the oral contract unenforceable under the Statute of Frauds.¹⁹

With *Redmon* and the Kentucky cases disposed of, the court then had to decide whether or not the law will imply a promise on the part of one who receives services from another to pay their reasonable value to a third person. This question was partially resolved by reference to the measure of damages in a *quantum meruit* action. The court stated that recovery on *quantum meruit* "is always on the basis of the reasonable value of the services rendered by the one and accepted by the other, less any benefits received by the one."²⁰ It was reasoned that since the plaintiff had not rendered the services, the law would not imply a promise to pay her their reasonable value. Instead, if any action on *quantum meruit* arose from the facts of the principal case, it belonged to the mother who had rendered the services.

The principal case reflects a desire to eliminate the confusion engendered by the loose language employed and the result achieved in the *Redmon* case. An analysis of that case would indicate that a *quantum meruit* recovery is predicated on the oral contract to devise, subject only to a limitation on the amount of damages recoverable. Such a position would be wholly inimical to the Statute of Frauds, since the policy of that Statute dictates that no agreement to devise realty, whether express or implied in fact, can be enforced unless

¹⁹ In *Doty's Adm'r v. Doty's Guardian*, *supra* note 18, the defendant contended that no recovery could be had on the contract since it contemplated future illicit relations between the mother and the father. The Kentucky court, in answering this contention, stated: "If this were a suit by the mother for her services we have no question the principle should be applied, *but it is not a suit for her services. It is a suit by the child.*" *Id.* at 219, 80 S.W. at 807. (Emphasis added.) The court held the oral contract unenforceable, pointing out that part performance would not cure the result, and then stated: "*The contract is not otherwise within the statute of frauds, and while appellee can not be adjudged the land, the value of the thing promised may be estimated, and compensation for the breach of the contract may be adjudged . . .*" *Id.* at 220, 80 S.W. at 808. (Emphasis added.) The language employed and the result achieved in this and other Kentucky cases lead this writer to wonder whether Kentucky is not actually allowing an action for breach of the oral contract to devise subject to a special measure of damages to vindicate the policy behind the statute of frauds.

²⁰ 257 N.C. at 704, 127 S.E.2d at 563. *Accord*, *Doub v. Hauser*, 256 N.C. 331, 123 S.E.2d 821 (1962); *Gales v. Smith*, 251 N.C. 692, 111 S.E.2d 854 (1960).

reduced to writing. Thus, in recent cases,²¹ the court has been careful to point out that a *quantum meruit* recovery is not based on the oral agreement between the parties, but rather on a contract which the law implies to prevent unjust enrichment. If this theoretical distinction is actually sustained in practice, then the principal case would appear to be beyond question.

The court in *Pickelsimer* was faced essentially with the question of whether or not there may be a third party beneficiary of a contract implied in law. Ordinarily, the right of a third party to maintain an action on a contract is dependent on the manifest intention of the parties to the contract to benefit the third party thereby.²² On the other hand, a contract implied in law arises wholly without regard to the intentions of the parties. Instead, it arises from the equities of a particular situation. It is not a contract at all in the true sense, but rather a legal fiction created by the court as a means for vindicating the policy against unjust enrichment.²³ If the intention of the parties does not control the creation of the contract implied in law, then the requisite intent for the creation of third party rights would also be lacking. Nothing else appearing, when one has received services from another under circumstances which permit the inference that the recipient intended to pay and the other party expected compensation for the services, the law will not imply a promise to pay their reasonable value to a stranger.

Yet, it is not altogether clear from the cases that the only contract being enforced in the *quantum meruit* situation is the contract implied in law. In the absence of some agreement between the parties, it would be difficult to prove facts giving rise to a contract implied in law. Accordingly, evidence of the oral contract is admissible to show facts and circumstances permitting the inference that payment for the services was intended on the one hand and expected on the other.²⁴ Such evidence may also be used to rebut any presumption that the services were rendered gratuitously.²⁵ Though evidence of the oral contract for these two purposes would be suffi-

²¹ *E.g.*, *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E.2d 764 (1947).

²² See *Traders Land Co. v. Abbott Realty Co.*, 207 N.C. 453, 177 S.E. 335 (1934).

²³ *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953); *Queen v. DeHart*, 209 N.C. 414, 184 S.E. 7 (1936); *Montgomery v. Lewis*, 187 N.C. 577, 122 S.E. 374 (1924).

²⁴ *Gales v. Smith*, 249 N.C. 263, 106 S.E.2d 164 (1958); *Nesbitt v. Donoho*, 198 N.C. 147, 150 S.E. 875 (1929).

²⁵ *Wells v. Foreman*, 236 N.C. 351, 72 S.E.2d 765 (1952).

cient to establish facts giving rise to the contract implied in law, the use of such evidence is not limited to these purposes. Indeed, the contract price is admissible as evidence, though not conclusive, of the reasonable value of the services.²⁶ It has been observed that use of the contract price, notwithstanding proper instructions to the jury, may result in enforcement of the oral contract itself.²⁷ Certainly, in cases where the promisee has fully performed and the services are not susceptible of monetary evaluation, the contract price might well be the only evidence on this subject for the jury to consider.

Heretofore, the court has been confronted with the situation in which only two parties were involved—the promisor and the promisee of the oral contract. In that situation, the only question to be decided is whether the law implies a promise from the promisor to the promisee to pay the reasonable value of the services. It would never be contended that payment should go to anyone other than the promisee who rendered the services, since no other parties are involved. Even if there is a third party beneficiary of the oral contract, this result should not be altered if the terms of the oral contract are excluded from consideration in this determination. But once the terms of the oral contract are admitted to show circumstances permitting the inference that the services are to be paid for,

²⁶ When the defendant has promised to devise the plaintiff specific property in consideration of the services, the value of the property is admissible as some indication of what the parties deemed the services to be worth. In *Grantham v. Grantham*, 205 N.C. 363, 171 S.E. 331 (1933), the oral promise was to devise and bequeath all the property which the promisor might own at her death. The court held the value of the estate to be admissible as some evidence, though not conclusive, of the value of the services. *Accord*, *Norton v. McLelland*, 208 N.C. 137, 179 S.E. 443 (1935); *Deal v. Wilson*, 178 N.C. 600, 101 S.E. 205 (1919); *Faircloth v. Kenlaw*, 165 N.C. 228, 81 S.E. 299 (1914). *But cf.* *Doub v. Hauser*, 256 N.C. 331, 123 S.E.2d 821 (1962), where the defendant promised to devise the plaintiff "his share of the farm." The plaintiff attempted to introduce the value of the defendant's estate as some evidence of the value of the services rendered. The court held the evidence inadmissible for this purpose. *Accord*, *Sawyer v. Weskett*, 201 N.C. 500, 160 S.E. 575 (1931). Conceivably, had the tendered evidence been limited to the value of "his share of the farm," it would have been admissible. See generally *ANNOT.*, 65 A.L.R.2d 945 (1959).

²⁷ "While this rule purports to fix the amount of compensation, it practically overrules the statute of frauds; since the jury will ordinarily fail to discriminate between evidence of the contract as an enforceable obligation, and evidence of the contract to show what reasonable compensation is." 4 *PAGE, WILLS* § 10.29 (Bowe-Parker rev. 1961). See also 2 *CORBIN, CONTRACTS* § 328 (1950).

should they not also be admitted to show circumstances permitting the inference that payment is to be made to a third party?

Two writers, in anticipating the question presented, have expressed conflicting views as to the result achieved in the principal case. Professor Williston prescribes the view adopted by *Pickelsimer*,²⁸ whereas Professor Corbin apparently approves the decisions in *Redmon* and the Kentucky cases.²⁹ Neither writer gives reasons for his view. It is believed that if the court's announced policy against enforcing the oral contract is actually realized in the *quantum meruit* situation, the result in the principal case is desirable. But if, as assumed in *Redmon*, the court is actually enforcing the oral contract subject only to a limitation on the amount of damages recoverable, then, perhaps, it is somewhat arbitrary to deny recovery to the third party beneficiary solely on the ground that she did not render the services.

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²⁸ 5 WILLISTON, CONTRACTS § 1455A (rev. ed. 1937). The same result is prescribed by implication in RESTATEMENT, CONTRACTS § 356 (2), comment *b* (1932).

²⁹ 4 CORBIN, CONTRACTS § 810 n.1 (1951).