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# Specific Performance -- Oral Contracts to Devise -- Statute of Frauds

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this era of supermarkets and shopping centers; and under the holding of the principal case, they are certainly of questionable validity without such a saving clause.

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**Specific Performance—Oral Contracts to Devise—Statute of Frauds.**

In a recent Kentucky decision,[1] an illegitimate daughter brought suit against her father's estate on his oral promise to devise real property to her in consideration of her mother's foregoing the institution of bastardy proceedings against him. The trial court held the oral contract unenforceable under the Statute of Frauds, but awarded damages on the basis of *quantum meruit,* measured by the value of the property promised to be devised. On appeal, the court of appeals remanded with directions to enter a decree for specific performance of the contract if the property was still vested in the heirs of the decedent and still available for transfer to the plaintiff.

Uniformly, it is held that oral contracts to devise realty are within the section of Statute of Frauds relating to contracts for the transfer of real property.[2] However, the majority of jurisdictions will grant specific performance of the contract on the theory of part performance where there has been a performance by the promisee which is incapable of monetary evaluation.[3] The rationale of these courts is that the Statute of Frauds, which was designed to prevent fraud, should not be used to perpetuate a fraud and that the equity of the promisee who has performed in reliance upon the oral contract requires the specific deliverance of the thing promised.[4]

Prior to the decision in the principal case Kentucky had repudiated the doctrine of part performance as taking the oral contract out of the

[1] Miller v. Miller, 335 S.W.2d 884 (Ky. 1960).

[2] *E.g.,* Pocius v. Fleck, 13 Ill. 2d 420, 150 N.E.2d 106 (1958); Griggs v. Oak, 164 Neb. 296, 82 N.W.2d 410 (1957); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Hill v. Luck, 201 Va. 586, 112 S.E.2d 858 (1960); 49 AM. JUR. *Statute of Frauds* § 215 (1943).

[3] Jones v. Adams, 67 Idaho 402, 182 P.2d 963 (1947); Jatcko v. Hoppe, 7 Ill. 2d 479, 131 N.E.2d 84 (1956); Betterly v. Granger, 350 Mich. 651, 87 N.W.2d 330 (1957); Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956); Patton v. Patton, 201 Va. 705, 112 S.E.2d 849 (1960). The courts have varied widely in terminology and in description of the particular acts necessary to take the oral contract out of the statute. See Parker v. Solomon, 171 Cal. App. 2d 125, 340 P.2d 353 (Dist. Ct. App. 1959) (equitable estoppel); Hurd v. Ball, 128 Ind. App. 278, 143 N.E.2d 458 (1957) (fraud). See generally Annot., 101 A.L.R. 923 (1936); Comment, 36 U. DET. L.J. 316 (1959).

[4] Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Anselmo v. Beardmore, 70 Idaho 392, 219 P.2d 946 (1950); Gladville v. McDole, 247 Ill. 34, 93 N.E. 86 (1910); Gossett v. Harris, 48 S.W.2d 739 (Tex. Civ. App. 1932).

Statute.[5] North Carolina,[6] Mississippi,[7] and Tennessee[8] have also rejected the doctrine of part performance. The question arises whether the reasoning used by the Kentucky court in reversing its position would be persuasive if and when the North Carolina Supreme Court is faced with the problem presented by the instant case. In examining this question it is necessary to consider the rules existing in Kentucky at the time of the decision as compared with the present North Carolina holdings.

Kentucky has held that, although the oral contract is unenforceable, the party performing the contract is entitled to recover the reasonable value of his services, where they are capable of monetary evaluation.[9] Where the performance by the promisee was not susceptible of monetary evaluation, Kentucky had awarded the party performing the value of the land promised to be devised.[10] In the instant case the Kentucky court concluded that awarding the plaintiff the value of the land promised to be devised but refusing to give the plaintiff the land itself was unreasonable and illogical. The court stated:

> Where the statute of frauds is so circumvented as to allow proof of the terms of an oral contract and recovery of the value of the property agreed to be devised or conveyed then to say that 'though the thing itself cannot be recovered nor the contract specifically enforced' . . . because the statute is still applicable is pure sophistry. . . . Originating in Victorian circumlocution, the fiction does not measure up to the practical requirements of justice and common sense.[11]

[5] Vest v. Searce's Adm'r, 312 Ky. 181, 226 S.W.2d 942 (1950); Rudd v. Planters Bank & Trust Co., 283 Ky. 351, 141 S.W.2d 299 (1940); 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); Grant v. Craigmiles, 4 Ky. (1 Bibb) 203 (1808).

[6] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937). For earlier discussions of *quantum meruit* in North Carolina as a basis of recovery where the oral contract is unenforceable because of the Statute of Frauds see Notes, 1 N.C.L. REV. 48 (1922) and 15 N.C.L. REV. 203 (1936).

[7] Collins v. Dunn, 233 Miss. 636, 103 So. 2d 425 (1958); Milam v. Paxton, 160 Miss. 562, 134 So. 171 (1931); Howie v. Swaggard, 142 Miss. 409, 107 So. 556 (1926); Fisher v. Kuhn, 54 Miss. 480 (1877); McGuire v. Stevens, 42 Miss. 724 (1869). Where the promisor has executed a will devising the property to the promisee, it cannot subsequently be revoked. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). See Note, 18 MISS. L.J. 328 (1947).

[8] Burce v. Scruggs Equip. Co., 194 Tenn. 129, 250 S.W.2d 44 (1952); Goodloe v. Goodloe, 116 Tenn. 252, 92 S.W. 767 (1906); Newman v. Carroll, 11 Tenn. 18 (1832).

[9] Vest v. Searce's Adm'r, 312 Ky. 181, 226 S.W.2d 942 (1950); Carpenter v. Carpenter, 299 Ky. 738, 187 S.W.2d 282 (1945); Rudd v. Planters Bank & Trust Co., 283 Ky. 351, 141 S.W.2d 299 (1940).

[10] 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); Benge v. Hiatt's Adm'r, 82 Ky. 666 (1885).

[11] Miller v. Miller, 335 S.W.2d 884, 889 (Ky. 1960).

North Carolina has consistently held that neither specific performance nor damages may be awarded on the oral contract to devise or to convey realty.[12] Although the contract itself is unenforceable, monetary relief has been awarded on a *quantum meruit* basis in order to prevent unjust enrichment where the promisee has performed.[13] If the promisee's performance has been in the nature of services which were capable of monetary evaluation, the measure of damages is the value of the services.[14] Where the performance is incapable of monetary evaluation, the North Carolina position is not clear. *Redmon v. Roberts*[15] presented facts almost identical to those in the principal case. There an illegitimate daughter brought suit against the estate of her deceased father to recover on his oral promise to adopt her and to leave her a part of his estate if the plaintiff's mother would not bring bastardy proceedings against him. The court stated, in a dictum,[16] that the measure of damages would be the value of the property agreed to be devised, and cited a Kentucky case as authority for the rule. In *Hager v. Whitener*,[17] the plaintiff moved his family to the deceased's home, worked the land, and took care of the deceased in his old age in consideration of the promise by the deceased to devise all of his property to the plaintiff.[17a] The court adopted the dictum in *Redmon v. Roberts* and awarded the plaintiff the value of the land promised to be devised although the services were apparently capable of monetary evaluation. In a later case, *Grantham v. Grantham*,[18] the plaintiff also rendered personal services in consideration of the deceased's oral promise to devise realty. The court reversed its position taken in the *Hager* case, holding that the promisee was entitled to the value of the services, but that the

[12] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Ballard v. Boyette, 171 N.C. 24, 86 S.E. 175 (1915); Hall v. Fisher, 126 N.C. 205, 35 S.E. 425 (1900); East v. Dolihite, 72 N.C. 562 (1875); Albea v. Griffin, 22 N.C. 9, (1838).

[13] Jamerson v. Logan, *supra* note 12; Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943). Plaintiff is entitled to nominal damages even though there is no allegation or proof as to the reasonable value of the services. Gales v. Smith, *supra* note 12.

[14] Stewart v. Wyrick, *supra* note 13 (plaintiff rendered services to and advanced money in behalf of the deceased); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

[15] 198 N.C. 161, 150 S.E. 881 (1929).

[16] The defendant failed to reserve the question for appeal so it was not before the court.

[17] 204 N.C. 747, 169 S.E. 649 (1933).

[17a] It has been held that such performances are not susceptible of monetary evaluation. Walker v. Calloway, 99 Cal. App. 2d 675, 222 P.2d 455 (Dist. Ct. App. 1955); Hanson v. Urner, 206 Md. 324, 111 A.2d 649 (1954). The general rule, however, is that such performances may be adequately compensated for in money. Hays v. Herman, 213 Ore. 140, 322 P.2d 119 (1958); Gossett v. Harris, 48 S.W.2d 739 (Tex. Civ. App. 1932). See generally 49 Am. Jur. *Statute of Frauds* § 524 (1943); Annot., 101 A.L.R. 923, 1101-05 (1936).

[18] 205 N.C. 363, 171 S.E. 331 (1933).

value of the land might be admitted only as evidence to be considered by the jury in determining the reasonable value of the services. In *Grantham,* however, as well as in all of the later decisions in which the rule of the *Grantham* case has been applied,[19] the court has been concerned with cases in which the performance by the promisee was capable of monetary evaluation. Thus it is questionable whether the *Grantham* decision would be a repudiation of the dictum in the *Redmon* case since in *Redmon* the performance by the promisee was not capable of monetary evaluation.

Should the *Redmon* dictum be applicable on its facts, the prior Kentucky rule and the existing North Carolina rule would be the same. This should add to the persuasiveness of the Kentucky decision. However, should our court decide that the *Grantham* rule applies also to the cases in which the performance is not capable of monetary evaluation, it is arguable that the North Carolina and prior Kentucky rules are distinguishable. That is, whereas Kentucky awarded the value of the land as damages, North Carolina has determined that the value of the land is only evidence of the value of the performance. It has been suggested that such a distinction is without substance because the jury will ordinarily accept the standard set by the parties as the reasonable worth of the performance by the promisee.[20]

In considering cases presenting facts similar to the instant case, two questions are posed: "(1) whether the policy of the statute [in preventing fraud] is saved, and (2) whether there is something in the particular case that calls for dispensing with a formal compliance with the statute, its policy being saved, and makes it more equitable to go forward and complete what the parties have begun."[21] The Kentucky court discerned the inconsistency of its answer to these questions. Its prior decisions had required a strict adherence to the Statute in holding the contract unenforceable. Yet, the court would, in effect, enforce the oral contract by awarding damages measured by the terms of the contract.

Where the performance by the promisee is not susceptible of monetary evaluation, there is no way to determine the value of the performance without accepting, or at least considering, the value set by the parties themselves. Thus practicality requires dispensing with strict

[19] Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Coley v. Dalrymple, 225 N.C. 67, 33 S.E.2d 477 (1945); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944), Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937); Lipe v. Citizens Bank & Trust Co., 206 N.C. 24, 173 S.E. 316, *aff'd on rehearing,* 207 N.C. 794, 178 S.E. 665 (1935).

[20] 4 PAGE, WILLS 895 (3d ed. 1941).

[21] Pound, *The Progress of the Law, 1918-1919—Equity,* 33 HARV. L. REV. 929, 944 (1920).

adherence to the Statute and admission of the terms of the oral contract for the purpose of measuring damages. Since this does not violate the policy and purpose of the Statute, it would seem more logical and equitable to award the specific thing promised rather than to attempt its measurement in damages. In doing so, the statutory policy and purpose would be preserved equally as well. It is submitted that the Kentucky court has adopted the preferable position.

J. LEVONNE CHAMBERS

**Workmen's Compensation—Neutral Risks—Causal Relation Between Employment and Injury.**

The workman's compensation statutes of most states prescribe as one of the requirements of compensability that an injury must "arise out of" the employment[1] of the worker, thus demanding a causal relation between the job and the injury. Professor Larson has adopted a useful threefold classification of the tests employed by the courts to determine if an injury meets this requirement. Risks are designated as personal, job related and neutral.[2] An injury resulting from personal risk is one completely unrelated to the employment and therefore not compensable.[3] The injury from a job related risk is strictly confined to the hazards of employment and is always compensable.[4] The third category, neutral risk, includes all risks not personal or job related.[5] The establishment of the causal relation, the "arising out of" the employment, is a difficult problem in these neutral risk injuries. In determining compensability in such cases the courts have used three theories—increased risk, actual risk and positional risk. This note will examine each of these theories and will attempt to determine the present position of North Carolina in this area.

In *Pope v. Goodsen*[6] a carpenter took shelter during a storm in a partially completed building. He was wet from the rain and had a nail pouch around his waist. As he stood near the window, lightning struck the house, traveled down the window frame and passed through

[1] *E.g.*, N.C. GEN. STAT. § 97-2(6) (1958); S.C. CODE § 72-14 (Supp. 1959); VA. CODE ANN. § 65-7 (1950). *Contra*, N.D. REV. CODE § 65-0102(8) (1957); UTAH CODE ANN. § 35-1-44 (1953). For a discussion of "arising out of," see Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

[2] 1 LARSON, WORKMEN'S COMPENSATION § 7 (1952).

[3] Compensation was denied to an employee assaulted while working, where the assault was motivated by domestic difficulties. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).

[4] Compensation is so clearly appropriate that the issue is seldom litigated. For instance, if an operator of a saw were injured by a malfunction in that tool, the risk is clearly job related.

[5] In neutral risks the cause of the harm may be known or unknown; this note treats only the former type cases.

[6] 249 N.C. 690, 107 S.E.2d 524 (1959).