UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 26 | Number 4 Article 12

6-1-1948

Pleading -- Oral Contract to Devise -- Recovery on Quantum Meruit

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the fact that this is due to no fault of the insane defendant. In view of the discussion in this note it seems that the suggested legislation is now in order to make the divorce picture complete for the good of the parties and the public as well. It might be suggested that the amendment should embody a limitation such as the courts have put on the right to bring the action against an insane spouse for cause—a requirement of a showing that a reasonable time has elapsed to allow for return to sanity; and in view of the strides in medical approach to insanity, there might be added some such requirement as affidavit by medical authorities as to the permanence of the insanity.

It has not been overlooked that there are statutes that would give some degree of protection to the estate of a husband or wife when one spouse has committed a marital offense, and it is understood that the courts might offer other protection too.[39] But in view of the fact that the statutes and the court relief referred to could not alleviate injustice that might arise from the operation of the rule that binds an insane spouse to his marriage despite any breach of the relationship by the sane spouse, and the fact that public policy seems to demand some relief where the relationship is so debauched, this further legislation is in order at this time. It does not appear that the guardian could possibly use this power arbitrarily since he is in reality an officer of the court and under its surveillance at all times.

R. W. BRADLEY, JR.

Pleading—Oral Contract to Devise—Recovery on Quantum Meruit

P brought action for breach of contract, alleging that deceased promised to devise all of his property to *P* if she and her husband

[39] I. N. C. GEN. STAT. §28-11 (1943) (Elopement and adultery of wife is forfeiture of her right to a distributive share in the husband's personalty); §28-12 (Abandonment and living in adultery at time of death of wife, or if wife gets divorce *a mensa*, husband forfeits his right to distributive share in wife's personalty); §30-4 (Adultery of wife is bar to dower if she is not living with husband at time of his death); §52-21 (Following acts of wife bar right to dower, distributive share in husband's personalty, right to year's provision, right to administer on his estate, and right to all estate in property of the husband settled on her on the sole consideration of the marriage: elopement with adulterer, abandonment, divorce *a mensa* at the instance of the husband); §52-22 (Same provisions as in §52-21 made applicable to the husband and his forfeiture of rights).

II. *Re* Miegocki, 34 Luzerne Leg. Rep. (Pa.) 257 (1940) (At least this one case has been found that indicated that the wife of an incompetent, in order that she may not become a public charge should be allowed her necessary support from his estate, *unless it appears that she is guilty of such conduct as to warrant the conclusion that she has forfeited her right to support.*).

III. There is possibility that illegitimate children may be precluded from sharing in the estate of the insane party, for illegitimacy of child born in wedlock is an issue of fact, resting on proof of husband's impotency or non access to wife during period in which child was begotten. *See* State v. Green, 210 N. C. 162, 185 S. E. 670 (1936).

would live with him and care for him during his lifetime. *P* lived in the home of deceased for six years, during which time she rendered valuable services, but deceased left all of his property by will to his wife. *P* was allowed recovery of damages for breach of contract in the trial court. *Held:* The special contract, being within the Statute of Frauds, is unenforceable; however, the complaint is broad enough to support a recovery on *quantum meruit* without amendment, hence the case is remanded for trial on this theory.[1]

While the general rule in North Carolina[2] is that a parol contract to devise realty, or real and personal property, is within the Statute of Frauds, a few cases[3] seem to indicate that such a contract is not rendered unenforceable. Hence actions are sometimes brought on the special contract. Under code pleading, recovery should be allowed the plaintiff regardless of whether the remedy is on the contract or in *quantum meruit* for the reasonable value of nongratuitous services rendered so long as the facts showing such service are alleged and proven.[4] In 1878 Chief Justice Smith speaking of the Code System said,[5] "It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which a plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. In the present case the essential facts are contained in the pleadings, and whether the remedy is on the special contract or on what are called the common counts, it ought not be denied."

Since this decision declaring that a plaintiff will not be denied relief when the facts alleged show a good cause of action, regardless of the fact that the plaintiff misconceived his remedy, numerous cases[6] have held that the failure to prove an alleged express contract does

[1] Jamerson v. Logan, 228 N. C. 540, 46 S. E. 2d 561 (1948).

[2] N. C. GEN. STAT., §22-2 (1943); *E.g.*, Stewart v. Wyrick, 228 N. C. 429, ——S.E. 2d—— (1947); Dunn v. Brewer, 228 N. C. 43, 44 S. E. 2d 353 (1947); 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 466 (1943); Price v. Askins, 212 N. C. 583, 194 S. E. 284 (1937).

[3] Hager v. Whitner, 204 N. C. 747, 169 S. E. 645 (1933) (oral contract to devise land. Court held Statute of Frauds not applicable to the facts in this case.); Redmon v. Roberts, 198 N. C. 161, 150 S. E. 881 (1929) ("This court and the courts generally have upheld and enforced oral contracts to devise or convey land in consideration of services rendered."); Lipe v. Houck, 128 N. C. 115, 38 S. E. 297 (1901) (court allowed an action for breach of an oral contract to devise land). *But cf.* Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933); 15 N. C. L. REV. 203 (1937).

[4] Wittkowski v. Harris, 64 F. 712 (C.C.W.D.N.C. 1894) ("New and liberal rules of pleading established that a party may recover judgment for any relief to which the facts alleged and proved entitle him, although not demanded in his complaint."); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §370 (1929).

[5] Dissenting opinion in Jones v. Mial, 79 N. C. 164, 167 (1878). This dissent was followed by the court on rehearing in Jones v. Mial, 82 N. C. 252 (1880).

[6] *E.g.*, Coley v. Dalrymple, 225 N. C. 67, 33 S. E. 2d 477 (1945); Grady

not preclude recovery on *quantum meruit* for services proved to have been rendered. In *Stokes v. Taylor*[7] the plaintiff declared on an oral contract, proved services performed, but failed in the proof of the special contract. The court held that the facts were stated broadly enough to allow recovery either on the special contract or upon *quantum meruit* without amendment of the complaint. In *Grantham v. Grantham*[8] action was brought for specific performance of an oral contract to devise property in consideration of support and care. The contract was held unenforceable because within the Statute of Frauds, but an action in *quantum meruit* was said to be enforceable upon the complaint since the prayer for specific performance does not determine the scope of the plaintiff's right to relief when sufficient facts are alleged to show services rendered. In *Edwards v. Matthews*[9] the plaintiff declared on an express contract. In affirming the trial court's submission of the express contract to the jury along with the issue of *quantum meruit*,[10] the court held that the failure to prove the express contract did not preclude recovery for services which the evidence shows the plaintiff rendered to defendant's testator upon a *quantum meruit*.

However, two cases have caused confusion in this field. In 1921 the court said,[11] "As the plaintiff is suing on a *quantum meruit*, she thereby renounces all right to recover on the special contract. She is not entitled to recover on both causes, as they are inconsistent remedies, and, therefore, she is required to make her election between the two." This case, however, can be distinguished from the principal case in that the action was based on part performance, with the promisor still living.[12]

v. Faison, 224 N. C. 567, 31 S. E. 2d 760 (1944); Lipe v. Citizens Bank and Trust Co., 206 N. C. 24, 173 S. E. 316 (1934); Grantham v. Grantham, 205 N. C. 363, 171 S. E. 331 (1933); Brown v. Williams, 196 N. C. 247, 145 S. E. 233 (1928); Edwards v. Matthews, 196 N. C. 39, 144 S. E. 300 (1928); Deal v. Wilson, 178 N. C. 600, 101 S. E. 205 (1919); Debruhl v. New Bern Bank & Trust Co., 172 N. C. 839, 90 S. E. 9 (1916); Moffitt v. Glass, 117 N. C. 142, 23 S. E. 104 (1895); Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566 (1889); Miller v. Lash, 85 N. C. 52 (1881).

[7] 104 N. C. 394, 10 S. E. 566 (1889).

[8] 205 N. C. 363, 171 S. E. 331 (1933).

[9] 196 N. C. 39, 144 S. E. 30 (1928).

[10] The doctrine of election of remedies is beyond the scope of this note. Although the question as to the propriety of submission of the issues of express contract and *quantum meruit* to the jury in the alternative is not settled, it seems that under proper instructions it should be permitted and several decisions seem to so indicate. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§354, 401 (1929).

[11] Hayman v. Davis, 182 N. C. 563, 109 S. E. 554 (1921).

[12] Action on the express contract could not be brought until the death of the promisor since a breach would not occur until then. Hence by suing for the value of services rendered before breach, the plaintiff repudiates the contract, although it would still be admissible in evidence to prove the services were not rendered gratuitously. *Cf.* Miller v. Lash, 85 N. C. 52 (1881); Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18 (1914).

In *Graham v. Hoke*,[13] however, the plaintiff rendered personal services to deceased in reliance on his promise of $2,000 to be paid out of his estate at death. The court held that "the plaintiff having declared on a 'written agreement' as a special contract, she is not allowed to likewise declare upon an implied contract of *quantum meruit*, and in truth she has not so declared. True she may have pleaded an implied contract as well as a special contract in the alternative, but when the case came on for trial she could have been compelled to elect upon which declaration she would proceed." This decision was a departure from the established line of decisions, as well as from the spirit and purpose of the Code System. Sufficient facts were set out to establish a cause of action in *quantum meruit*, and in allowing a demurrer the court was reverting to the technical pleading of common law by placing more emphasis on the form or theory of the action than on the facts presented.

The principal case clarifies the position of the court and indicates a return to, and reaffirmance of, the liberal policy of the Code to allow any relief to which the facts proven may entitle the plaintiff to recover.[14] It establishes the rule that a plaintiff may declare on an express oral contract to devise realty and, if sufficient facts are alleged and proven of services rendered, recover on *quantum meruit* when the contract is unenforceable because within the Statute of Frauds, thus clearly indicating that there will be no *binding* election in this situation.

Notwithstanding that relief may be secured under this mode of pleading, it is submitted that the desirable method is to set out the express contract and implied contract separately, or to state the express contract as an inducement or explanation of the implied contract and allege that the deceased received the benefits of service induced thereby.[15]

ROBERT G. STOCKTON.

Taxation—Interrelation of Income and Gift Taxes—Gift Tax Status of Income of Trust Which Is Taxable to Donor

The Commissioner assessed gift taxes against the respondent for the net gains and profits from trading in securities and commodity futures of two trusts created by the respondent and his wife for the benefit of their three children. The trusts were irrevocable, and the settlor retained no right to alter or amend the trust instrument, or to change the beneficial interests. The trusts consisted of trading accounts on the books of a partnership composed of the respondent, his

[13] 219 N. C. 755, 14 S. E. 2d 790 (1941).
[14] CLARK, CODE PLEADING §43 (2d ed. 1947).
[15] McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §410 (1929); 1 MORDECAI, LAW LECTURES 127 (2d ed. 1916).