Washington and Lee Law Review

Volume 19 | Issue 1 Article 3

Spring 3-1-1962

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Edward S. Graves

CARE OF THE AGED AND THE VIRGINIA STATUTES OF FRAUDS

EDWARD S. GRAVES*

A problem which perennially recurs[1] in the administration of estates is the disposition of a claim that the decedent orally promised, but failed, to make a testamentary gift to one who attended him in his last years. An obstacle to the claimant, where real estate is involved,[2] is, of course, the traditional Statute of Frauds;[3] in Virginia there is also a special statute[4] requiring written confirmation of the promise.

The traditional Statute of Frauds is treated differently and the recovery is different, where the claimant institutes a suit for specific performance and where he brings an action at law or files a claim before the Commissioner of Accounts. Consequently, there are two sep-

*Partner, Edmunds, Baldwin & Graves, Lynchburg, Va. Lecturer on Legal Draftsmanship, Washington and Lee University.

Because of the assistance given by Macon Putney, John Paul, and Robert Ketcham, the writer is able with a clear conscience to encourage other practicing lawyers to undertake a "practical" article like this one. These law students, all in their third year and busy with their class work and other responsibilities, have done a fine job, not only of obtaining and checking citations, but of contributing materially to the substance and organization of this writing. I am also indebted to L. Bradford Waters, Esquire, Commissioner of Accounts of both Lynchburg courts, for his suggestions and criticisms. The study would have been more learned and complete if S. J. Thompson, Jr., of the firm of Caskie, Frost, Davidson and Watts had been able to carry out his original purpose of serving as co-author; even so, discussions with him have been stimulating and productive.

[1]Annot., 69 A.L.R. 14 (1930) collecting cases, covers over two hundred pages; and the citator lists numerous additional cases. Since all of these are in appellate courts, the claims presented, settled, or finally decided in trial courts must be legion. No effort is here made, as will be apparent, to do more than analyze some of the Virginia cases. It is believed, however, that many lawyers will have the problem here treated thrust upon them, either by a claimant or by an estate; and it is hoped that this article will serve as a checklist of points which may have to be covered, either in legal research or an investigation of the facts.

[2]Neither of Virginia's two Statutes of Frauds applies to personal property. Where real estate is the subject of the promise, the Statutes apply even though personalty may also be involved. Ricks v. Sumler, 179 Va. 571, 19 S.E.2d 889 (1942); Cochran v. Bise, 197 Va. 483, 90 S.E.2d 178 (1955).

[3]Va. Code Ann. § 11-2(6) (1950). This statute appears in the same form as § 5561 of the Va. Code of 1919, § 2840 of the Va. Code of 1887 and Tit. 43, ch. 143, § 1 of the Code of 1849.

[4]Va. Code Ann. § 55-2 (1950). Code of 1919, § 5141; and Code of 1887, § 2413.

arate lines of cases, which will be herein separately discussed, one[5] dealing principally with the part performance exception to the Statute of Frauds, and the other[6] with the *quantum meruit* type of recovery. There is no difference, however, in the court's treatment of the special statute; and since it seems to be now chiefly of historical interest, it will be discussed first.

I. Sec. 55-2: the Special Statute of Frauds

Prior to the revised Code of 1887, there were a number of cases[7] holding that the oral promise of a landowner to convey real estate to another if the latter would move upon and improve the land resulted in a contract enforcible in equity if the promisee had performed. The Revisors of the Code, feeling that this was a " 'most prolific source of fraud' ",[8] added to the statute the part shown in italics:

> "No estate of inheritance or freehold, for a term of more than five years, in lands, shall be conveyed unless by deed or will * * *; *nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him.*"[9]

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[5]Patton v. Patton, 201 Va. 705, 112 S.E.2d 849 (1960); Wright v. Dudley, 189 Va. 448, 53 S.E.2d 29 (1949); Clark v. Atkins, 188 Va. 668, 51 S.E.2d 222 (1949). Adams v. Snodgrass, 175 Va. 1, 7 S.E.2d 147 (1940); Couch v. Cox, 165 Va. 55, 181 S.E. 433 (1935); Cannon v. Cannon, 158 Va. 12, 163 S.E. 405 (1932).

[6]Cochran v. Bise, 197 Va. 483, 90 S.E.2d 178 (1955); Burke v. Gayle, 193 Va. 130, 67 S.E.2d 917 (1951); Simpson v. Scott, 189 Va. 392, 53 S.E.2d 21 (1949); Rorer v. Taylor, 182 Va. 49, 27 S.E.2d 923 (1943). Ricks v. Sumler, 179 Va. 571, 19 S.E.2d 889 (1942); Hendrickson v. Meredith, 161 Va. 193, 170 S.E. 602 (1933); Doughty v. Thornton, 151 Va. 785, 145 .SE. 249 (1928); Jackson v. Jackson, 96 Va. 165, 31 S.E. 78 (1898).

[7]Halsey v. Peters, 79 Va. 60 (1884); Stokes v. Oliver, 76 Va. 72 (1882); Burkholder v. Ludlum, 73 Va. (30 Gratt.) 255 (1878).

[8]Wohlford v. Wohlford, 121 Va. 699, 704, 93 S.E. 629 (1917). The extent to which one apprehends fraud in this situation would affect the stringency of the requirements that one would advocate as conditions precedent to recovery. Not only have writers of fiction presented the lonely old person as a natural prey to fraud (e.g., Kind Lady, dramatized by Edward Chodorov from a short story by Hugh Walpole); the Virginia Supreme Court of Appeals indicated the same feeling in Cook v. Hayden, 183 Va. 203, 31 S.E.2d 625 (1944). More recently, however, the Court quoted with approval a commentator's statement that the danger of fictitious claims of the existence of the contracts here considered was "more apparent than real," and that old people may benefit from their being sanctioned by the courts. Burke v. Gayle, 193 Va. 130, 135, 67 S.E.2d 917, 919 (1951).

[9]Va. Code of 1887, § 2413.

Was this remedial legislation, in view of its use of words of gift, intended to apply only where no consideration moved from the grantee, so that contracts are beyond its purview?

The answer, despite the choice of words, appears clearly to be in the negative. The amendment was intended to reverse the doctrine of such cases as *Halsey v. Peters*,[10] that equity would enforce an oral promise to convey real estate where the donee was put in possession and induced by the promisor to make valuable improvements on the property. The language of the opinions in this case and in the leading case of *Wohlford v. Wohlford*,[11] the first to interpret the new Code provision, shows that oral contracts were proscribed as well as oral promises, unsupported by consideration, to make gifts.

Moreover, the facts in cases decided before and after the Code revision show that contracts were involved. In *Burkholder v. Ludlum*,[12] decided in 1878, the claimants moved from one city to another, and made improvements on the promisor's dwelling, in reliance on the oral promise to convey. In the *Halsey* case, decided in 1884, at the owner's request and in reliance on his promise to convey his farm to the claimant, the latter moved upon the farm, giving up his business, and made some investment of his earnings in the land. In the *Wohlford* case, decided in 1917, the court reluctantly denied relief to a son who, at his father's request, moved on the latter's land, sold his own place, and applied the proceeds of sale as well as his own labor and earnings to the improvement of the land, all in reliance upon the father's oral promise that he would devise the land to his son.

In each case, benefit was conferred upon the promisor when the promisee improved his land; and there was certainly detriment to the promisee. There is consequently little doubt that oral contracts, as well as gratuitous promises, to convey real estate were intended to be included within the scope of the remedial legislation.

In a series of decisions beginning in 1928,[13] the court has, without overruling the *Wohlford* case, held that section 55-2 does not require a contract to devise real estate to be in writing. Of this series, the case of *Clark v. Atkins*[14] presents a close modern parallel to the *Wohlford*

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[10]Supra note 7.

[11]Supra note 8.

[12]Supra note 7.

[13]Dickenson v. McLeMore, 201 Va. 333, 111 S.E.2d 416 (1959); Clark v. Atkins, and Wright v. Dudley, supra note 5; Frizzell v. Frizzell, 149 Va. 815, 141 S.E. 868 (1928.)

[14]Supra note 5.

situation.[15] Here the son of the landowner went to work for his father in the latter's meat market, receiving $25 per week at the beginning, under the father's promise that if the son would work and learn the business, the father would leave it to him. Less than five months later, the father died, making no testamentary gift to the son. In affirming a decree of specific performance, the court, following the lead of an earlier case,[16] disposed of the remedial legislation in the following words:

> "We do not think that the section quoted has any application to the case at bar. Prior to the adoption of section 2413 of the Code of 1887, now section 5141 of Michie's Code of 1942, an oral promise to give or devise land, followed by possession and improvements, was sufficient to support a right to a conveyance from the heirs or devisees of the donor, but since the adoption of this section such a promise must be in writing in order to be enforced. * * * In the case at bar there was not a parol gift of land. Atkins relied upon and proved an oral contract for the purchase of the meat business and what pertained to it in exchange for his services in conducting and operating said business for the lifetime of Clark. This consideration on his part has been fully performed."[17]

There is this difference in the facts of the *Clark* and *Wohlford* cases: in *Wohlford* there was express evidence that the father changed his mind before his death, whereas in *Clark* the father without any explanation neglected to make the necessary amendment of his will.

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[15]A comparison of the facts of the two cases is as follows:

Wohlford	*Atkins*
The father promised to devise land if the son would move on and improve it.	The father promised to devise and bequeath a butcher shop and business if the son would go to work in it and learn the business.
The son moved on the land.	The son went to work in the shop.
The son sold his land.	The son sold nothing.
The son moved his family from the former home to the "promised" land.	The son was already there, having returned from the wars.
The son not only worked on and improved the land over a period of about four years prior to his father's death, but expended his own money thereon.	The son worked in the butcher shop and apparently learned the business, all over a period of less than five months prior to the father's death.
The son presumably enjoyed all the benefits of the land.	The son was paid $25 per week at the beginning.
All that the son did and expended was upon the express promise of the father to devise the land to the son.	The son went to work pursuant to the father's offer.

[16]Frizzell v. Frizzell, supra note 13.

[17]Clark v. Atkins, supra note 5 at 677.

That this difference does not constitute a true distinction is demonstrated by *Wright v. Dudley*.[18] Here the landowner, an old lady, moved from her farm after the caretaker (and her husband) had been living with her for about nine years, and went to live with a niece in West Virginia, to whom she conveyed the property which the claimant said she had promised to devise to her. The claimant brought suit, during which the old lady died, to set aside the conveyance and enforce the oral agreement. The court held that the landowner had committed an anticipatory breach; set aside the decree of the lower court, which had denied relief on the ground that the complainant was entitled to monetary damages only and had received as much value as she had given; and ordered specific performance.

This case shows that the difference mentioned between the *Clark* and *Wohlford* cases is not substantial; it also shows, rather dramatically, that once the caretaker is admitted into the home, he may be there for good.

Section 55-2 may retain vitality in some variations of the situation discussed. Since the *Wohlford* case has not been expressly overruled, the same result might be reached if the same situation recurred—the claimant's moving upon land and spending money in improvements upon the owner's promise to give the land to the claimant by his will. Such a result would bring two innovations into statutory interpretation: a remedial statute, although phrased generally, would be confined to the particular evil which induced the legislature to act; and "although" would be construed to have the same meaning as "if."[19]

It seems, therefore, highly doubtful that the court will in a future case hold that section 55-2 bars the enforcement of an oral promise unless, to paraphrase a recent observation of Mr. Justice Frankfurter,[20] the names of both parties litigant should be Wohlford. A defendant in these proceedings would be ill-advised to place substantial reliance upon the statute, whether the claimant asked for specific performance or a *quantum meruit* recovery; he should, rather, assume that the legislature's effort to impose a requirement that these contracts be evidenced by some writing has failed.

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[18]Supra note 5.

[19]The Statute, supra, n. 9, provides that no right accrues to the donee "*although* such gift or promise" be followed by possession and improvement. Should the Court hold that the Statute is applied only where the promise was followed by possession and improvements, the last clause would limit what precedes it; and should have been introduced by such a conjunction as "if" or "where."

[20]Frankfurter, J., partially concurring in Still v. Norfolk & W. Ry., 368 U.S. 35, 17 (1961).

II. Sec. 11-2(6): the Traditional Statute of Frauds

A. *Suit for specific performance*

The portion of the traditional Statute of Frauds here applicable reads as follows:

> "No action shall be brought in any of the following cases:
> * * *
> "Upon any contract for the sale of real estate, or for the lease thereof for more than a year; * * *
> "Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; * * *"[21]

It was only nine or ten years after the enactment of the original Statute of Frauds that the doctrine of part performance was applied and relief granted on an oral contract to convey real estate.[22] Confronted with such a well established exception to the English Statute, upon which ours was modelled, the Virginia court would hardly have been expected not to recognize and adopt the same exception to our Statute.

It is accordingly well established, in the particular situation under discussion, that the requirement of writing does not bar specific enforcement of the contract if there has been sufficient part performance. The conditions precedent to enforcement are that the oral agreement must be definite; the acts done in part performance must be in pursuance of the agreement; and denial of specific performance would operate as a fraud on the promisee and inflict on him an injury which is not adequately compensable in damages.[23]

The application of the part performance doctrine to the situation here involved does not appear particularly alarming; and actually, when one reads many of these cases, the results seem so just that one is inclined to forget the safeguards that the Statute of Wills[24] and

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[21]Va. Code Ann. § 11-2(6) (1950).

[22]Annot., 101 A.L.R. 923 (1936); Butcher v. Stapeley, 1 Vern. 303, 23 Eng. Rep. 524 (1685).

[23]Cannon v. Cannon, supra note 11 at 18-19. Hence, where the court feels that the contract is not established by clear and convincing evidence relief will be denied. Hill v. Luck, 201 Va. 586, 112 S.E.2d 858 (1960); Clay v. Clay, 196 Va. 997, 87 S.E.2d 812 (1955); Taylor v. Hopkins, 196 Va. 571, 84 S.E.2d 430 (1954). Also, relief will be denied where the acts done by the claimant were not solely referrable to the contract; were not such as to corroborate that the contract was entered into, and were not of such peculiar value as not to be compensable in damages. Frizzell v. Frizzell, supra note 13.

[24]See Harnsberger v. Wright, 185 Va. 586, 39 S.E.2d (1946).

Statute of Frauds were designed to establish. The three conditions, properly applied, would appear to set up sufficient safeguards to protect the decedent in his absolute right to dispose of his property and at the same time to prevent him from receiving the claimant's services and support and, either through intent or neglect, failing to give the promised compensation.

It is, however, their application by the court that may cause trepidation to the successors of the decedent.

The first condition precedent, proof of a definite contract, may be easily fulfilled by the claimant. In a typical case, all the claimant needs to show is that he promised to live with and look after the decedent, and the decedent promised to make a testamentary gift to him. The duties promised by the claimant can be proved by what he in fact did do. The decedent is not available to testify what additional services may have been contemplated. The claimant may actually have derived considerably more benefit than the parties contemplated. The decedent's failure to make the promised testamentary provision may have been due to a feeling that the claimant had not performed his part of the bargain, rather than to neglect or an effort to cheat the caretaker. Doubtless these considerations were before the legislature when it imposed the simple safeguard that the promise must be evidenced by some writing.

The second condition, that the claimant must show that he would not have performed the acts except for the decedent's promise, appears on its face to be formidable, but it can be met even though the claimant's evidence shows that he derived considerable benefit from the arrangement during the decedent's life; and although a family relationship exists which might at least be partially responsible for the services.[25]

The third condition precedent, that the claimant demonstrate that he has suffered injuries which will not be compensable at law, is loosely applied. In some of the cases, it is very difficult to see why the claimant will not be adequately paid for his services if he is given money damages. All the claimant did in the *Clark* case, for example, was to work for something over four months in his father's meat market and manage it for a few weeks during the decedent's last illness. His beginning wage was $25 per week. The court's opinion does not show why it is impossible to evaluate in money the services rendered by one who has worked in and managed a meat market, whether or not

[25]Doughty v. Thornton, 151 Va. 785, 145 S.E. 249 (1928); Jackson v. Jackson, 96 Va. 165, 31 S.E. 78 (1898); Stoneburger & Richards v. Motley, 95 Va. 784, 30 S.E (1898).

the individual is a relative of the owner. In other cases, it is true, more difficulty may be encountered in ascertaining the value of the services rendered, as where a farm rather than a small business is operated, and the claimant, in addition, renders some personal services. But surely the claimant's failure to bear the burden of proving his case does not of itself demonstrate that the services rendered are of the requisite extraordinary nature. It is believed, for example, that many registered or practical nurses or paid companions would be delighted and flattered to learn that seven men, schooled in a completely objective and judicial approach, and careful in their protection of decedents' estates, would in measured periods term their services so special and unpurchasable as not to be compensable in money. Especially ought members of a family to be gratified to learn how unique they are when they look after a mother or a brother in the last years of their lives.

The reply made by the court when an argument of the adequacy of monetary compensation was pressed seems an interesting example of the technique of answering a question by changing the subject:

> "It is urged that the services of Atkins were not of a particular or personal nature; that they could have been compensated in damages at law, and that under such circumstances he was not entitled in equity to the specific execution of the agreement. The trial court, in its opinion, had this to say: 'Whatever may have been his reason therefor, the evidence convinces me that Arthur Clark had a real and worthy interest in the welfare and future of Wm. A. Atkins, wanted to do something worthwhile for him and intended that Atkins should have a substantial part of Clark's considerable estate. The *meritorious* outweigh the *valuable* considerations as it seems to me. Both, taken together, are amply sufficient to support the contract, if there was one. Clark, in words and conduct seems to have recognized a high moral obligation to Atkins which equity will in a proper case treat as meritorious consideration. Pomeroy's Eq. Jur., 5th ed., Sec. 588; Adams v. Snodgrass, 175 Va. 1, 7, 7 S.E.2d 147.' "[26]

All in all, the claimant may fare well if the person he attended promised him property, and he brings his proceeding in equity for specific performance.

B. *Recovery on a quantum meruit and quantum valebant basis*

Since the doctrine of part performance applies only in suits for specific performance, and is equitable, the traditional Statute of Frauds

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[26]Clark v. Atkins, supra note 11 at 677.

bars other proceedings based on breach of the oral contract between the decedent and the caretaker.

This does not mean, however, that the claimant must fail if he seeks remedies other than specific performance. If he makes a claim for the value of services rendered and goods supplied, or if he asks for specific performance and it is denied because of the Statute of Frauds he may nevertheless be awarded compensation based on the value of the services and goods.[27]

Since the contract is not enforced, the measure of recovery is the value of what has been furnished to the decedent, and not the value of the property promised. It is this value objectively appraised, and not the value to the particular decedent.[28] When the value of the claim has been thus established, the value of what the claimant has received must be deducted.[29]

The procedure followed may be by filing a claim with the Commissioner of Accounts;[30] by motion for judgment for the value of the services and goods;[31] by motion for judgment for breach of contract;[32] or by suit for specific performance in which the chancellor may order an issue out of chancery if the contract is not specifically enforcible.[33]

One interesting phase of the law in this line of cases is the significance of the contract in determining the effect of the Statute of Limitations. If the claimant does not prove a contract, then he is limited to the value of what he furnished over the three years preceding the institution of the action.[34] If, however, the claimant alleges and proves a contract, even though it is not enforcible, the Statute runs from the date of death, since it is only then that the breach of contract is held to occur.[35] It is difficult to follow the reasoning that supports this latter result. The contract is made unenforcible by the Statute of Frauds, so that it may not be used to ascertain the measures of damages. Yet it fixes the date of payment.

The use of the date of death to start the statute running might more logically be placed, whether or not there is a contract, on the ground that the statute was tolled by the decedent's action, or perhaps more accurately failure to act, which is equivalent to a fraudulent con-

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[27]Supra note 6.
[28]Hendrickson v. Meredith, and Ricks v. Sumler, supra note 6.
[29]Hendrickson v. Meredith, and Cochran v. Bise, supra note 6.
[30]Rorer v. Taylor, supra note 12.
[31]Doughty v. Thornton, and Hendrickson v. Meredith, supra note 12.
[32]Simpson v. Scott, and Cochran v. Bise, supra note 6.
[33]Supra note 23.
[34]Harnsberger v. Wright, supra note 24; and Cochran v. Bise, supra note 6.
[35]Supra note 24.

cealment of the cause of action. Or it might be said that the implied contract contains an implied term that payment is not to be made until death. At any rate, under the present reasoning, failure by the claimant to allege and prove a contract in this situation may drastically reduce his recovery.

One other factor considered in this line of cases is the relationship between the parties. All of us normally feel an affection for and an obligation to supply the needs of members of our families who require our services and help. Three cases in Virginia have accordingly held that a relative may recover only if he proves an express contract to pay.[36]

If this principle is accepted at its face value, it might appear that a close relative would be stymied. He cannot recover on the express contract because of the Statute of Frauds; and he cannot recover on the *quantum meruit* and *quantum valebant* basis because that would be allowing recovery on an implied contract. It is not believed, however, that such an interpretation would be correct, but that the court in the three cases is only emphasizing that the proof must be clear where the relationship between the parties is such that they would be expected to help each other without remuneration. Certainly the court has gone far in the specific performance line of cases in permitting recovery by close relatives; and there is no logical reason to hold that they must fall between two schools if they seek the *quantum meruit* type of recovery.

In fact, there seems to be no logical reason why the court insists on the effect of the family relationship in one line of cases and does not mention it in the other.

The claimant may not fare too poorly if he does not seek, or is denied, specific performance. In fact, where the net amount of what he has furnished is as great as the estate,[37] he is as well off in one line of cases as the other.

It should not be overlooked, however, that where the claimant proceeds on the implied contract, the value of what he received during the period he cared for the decedent must be charged against him, and, as the trial court thought in the *Wright* case,[38] might be worth as much as the goods and services he furnished. The claimant who can prove a case entitling him to specific performance, however, never has to worry about what he has received; and if the property promised exceeds the value of the services and goods furnished, he stands in a

[36]Supra note 25.
[37]Ricks v. Sumler, supra note 6.
[38]Wright v. Dudley, supra note 5.

much better position than one who proceeds on the implied contract theory.

Counsel for the claimant will consequently, if there is an option on the facts presented to him, prefer to ask for specific performance.

III. Corroboration

Corroboration is treated separately, since it affects recovery in both lines of cases.

The Virginia "dead man" statute[39] declares that where one of the parties is incapable of testifying, no decree shall be entered against him or his successors on the uncorroborated evidence of the adverse party. One recent case in this field is a good illustration of a careful corroboration of all the elements of the claim.[40] Another illustrates the denial of recovery where the court feels that the testimony of disinterested witnesses is as consistent with the theory of the defense as of the claimant.[41]

In several others,[42] however, there was a failure to obtain independent evidence corroborating all the elements of the claim. Recovery was nevertheless approved; and the court explained that the legislature did not intend to require independent corroboration of the claim in every particular; it was sufficient that the evidence of the interested party should be "confirmed" and "strengthened" by disinterested persons. Precisely what this test means is not apparent from the decisions. It is sufficiently fluid so that the court may find corroboration or not, depending upon whether it feels that the claimant should recover.[43]

IV. Conclusion

Courts have never hesitated to apply the limitations of the Statute of Wills, and to hold testamentary dispositions not sanctioned by the legislature to be of no effect.

Where a contract claim against a decedent is involved, however, courts in both this country and England have enforced oral claims against decedents' real estate, despite the legislative mandate requiring some written evidence. The Virginia Supreme Court of Appeals has

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[39]Va. Code Ann. § 8-286 (1950).

[40]Patton v. Patton, supra note 5.

[41]Taylor v. Hopkins, supra note 22.

[42]Clark v. Atkins, supra note 5; Timberlake v. Pugh, 158 Va. 397, 163 S.E. 402 (1932); and Simpson v. Scott, supra note 6.

[43]Note, for example, the court's distinction of the Clark case, supra note 5, in the Taylor case, supra note 22, 196 Va. 580.

gone further than most courts. It has permitted claimants to travel two roads to recovery, despite the traditional Statute of Frauds; and it has emasculated a special statute directed toward protecting decedents' real estate against oral claims.

All of the cases, to judge from the written opinions, seem to result in an equitable or sensible distribution of the decedents' property but it is difficult not to be disturbed by their implications, and to wonder whether the court would ever accept a legislative determination that there must be written evidence in order to obtain a recovery in this field. One approach that might succeed would be to follow a path already travelled by the court. This would be the adoption of a statute authorizing a *quantum meruit* recovery when the claimant cannot prove a writing. The limit of recovery would be the value of what the claimant has furnished the decedent offset by the value of what he has received. Under such legislation, the claimant would not be greatly harmed and if recoveries could be kept within these limits the possibility of asserting fraudulent claims would be minimized.