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Contracts—Property—Evidence—Oral Contracts to Devise

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act of a public officer committed in the performance of his official duties. *Kilcup v. McManus* was cited as controlling, and the dictum of *Kilcup* became the holding in *Brink*.

CONTRACTS

Property—Evidence—Oral Contracts to Devise. Nearly twenty years after it was announced, the Washington court has amplified an announced intention[1] to enforce stringent technical rules in its consideration of oral contracts to devise. In an action for specific performance of his deceased employer's alleged oral contract to devise realty, plaintiff presented an uncontroverted line of evidence dating from 1937. At that time plaintiff was a friend and neighbor of decedent and her husband, and was employed as a logger at a wage of $5.60 per day. Shortly after the husband's death, plaintiff left his logging job and commenced operation of decedent's farm for $1.50 per day plus board and room. Three months later his wages were reduced to $.50 per day, and remained at that figure until mortgages on the property were satisfied in 1942. The wage of $1.50 per day was then reinstated and continued 19 years. During this 24 year period, plaintiff took only one vacation "that amounted to anything";[2] the rest of his time was spent working on decedent's property. Plaintiff, at his own expense, erected permanent farm buildings in 1949 and 1958 on decedent's property rather than on his own adjoining property. "A considerable time" prior to her death in 1961, decedent made out a holographic will devising her farm to plaintiff, but failed to sign it. Nine neighbors of decedent gave undisputed testimony of her intention to devise the farm to plaintiff. A neighbor who contacted decedent about acquiring a right of way across her property was referred to plaintiff to see if he would agree. However, no witness was able to testify as to the existence of an express contract between plaintiff and decedent. The trial court decreed specific performance and defendant administrator appealed. *Held:* Following death of the alleged promisor, circumstantial evidence is not sufficient to establish an oral contract to devise. *Bicknell v. Guenther*, 65 Wash. Dec.2d 726, 399 P.2d 598 (1965).

The facts in the principal case, while failing to establish by direct evidence the existence of an oral contract, leave little doubt that one did exist. Plaintiff's uncontroverted circumstantial evidence was con-

[1] *E.g.*, Jennings v. D'Hooghe, 25 Wn.2d 702, 172 P.2d 189 (1946); Resor v. Schaefer, 193 Wash. 91, 74 P.2d 917 (1937).

[2] Bicknell v. Guenther, 65 Wash. Dec.2d 726, 730, 399 P.2d 598, 601 (1965).

sistent with the alleged contract terms. No evidence or suggestion of fraud was offered by defendant. The trial court found in its oral decision that "the evidence overwhelmingly supports the Plaintiff's contention that there is a contract . . . ."[3] Reversing the trial court, a majority of the Washington Supreme Court found that the uncontradicted circumstantial evidence offered was not necessarily insufficient to prove the existence of the contract, but was insufficient to prove its existence "beyond legitimate controversy."[4]

The policy underlying the Washington court's decision in the principal case is concern for potential fraudulent claims against a decedent's estate.[5] Circumstantial evidence which would support an allegation of the existence of an oral contract to devise may often exist, even though no contract is in fact made. The court has therefore adopted a "skeptical view of such agreements."[6] Little weight is accorded the trial court's findings on review, and the equivalent of de novo examination of the evidence is undertaken by the supreme court.

Judge Finley's dissenting opinion challenges the majority's requirement that oral contracts to devise be proved "beyond legitimate controversy." He would require, instead, that oral contracts to devise be proved by "clear, cogent and convincing" evidence. The cases cited by Judge Finley in his criticism of the majority's standard of proof suggest that he would test the existence of an alleged oral contract to devise by the standards applied to other implied contracts.[7]

Judge Finley's opinion did not discuss the majority's concern with potential fraud. He presented an opposing policy consideration—the social utility of the oral contract to devise for people of modest means who act without advice of counsel.[8] Judge Finley's position was that:

A contract to make a will is an equitable doctrine, designed to overcome

[3] *Id.* at 731, 399 P.2d at 601.

[4] 65 Wash. Dec.2d at 738, 399 P.2d at 605.

[5] *Id.* at 736-37, 399 P.2d at 604-05; See also Payn v. Hoge, 21 Wn.2d 32, 40, 149 P.2d 939, 944 (1944). SPARKS, CONTRACTS TO MAKE WILLS 24-26 (1956).

[6] 65 Wash. Dec.2d at 732, 399 P.2d at 602. This skepticism is exemplified by the majority's statement that: "In the absence of the requisite proof of the existence of a contract to devise the farm to him, neither law nor equity can now make such a contract for the parties, no matter how strongly the court may feel that as an abstract concept of natural justice he should have been given the farm and contents." 65 Wash. Dec.2d at 734, 399 P.2d at 603.

[7] Of ten cases cited, only one involved an oral contract to devise arising after the death of the promisor. Judge Finley relies primarily on the opinion of Judge Steinert in Ross v. Raymer, 32 Wn.2d 128, 201 P.2d 129 (1948), a typical case of implied contract. *Cf.* the opinion by Judge Steinert in Resor v. Schaefer, 193 Wash. 91, 74 P.2d 917 (1937). Judge Hamilton also dissented in a brief opinion stating his concurrence with the views of Judge Finley and specifically objecting to the majority's dismissal of the trial court's findings of fact.

[8] *Cf.*, SPARKS, *op. cit. supra* note 4, at 187-200.

> the legalistic requirements of the law dealing with commercial contracts and wills. It is not inconceivable to me that the law could formulate a slightly different type of contract, at least proof of it, to cover this social problem; in fact, I think it is the duty of the law to recognize and give effect to these arrangements.[9]

The court's decision in the principal case is consistent with its earlier holdings. Beginning in the late 1930's, the court reversed its prior liberal approach to the question of oral contracts to devise.[10] The decision in the principal case has polarized the conflicting viewpoints in the court as to the validity of the present approach.

CRIMINAL LAW

Constitutional Law—Search and Seizure—Admissibility of Evidence Incident to Arrest. Defendant was riding as a guest in a car when Seattle police stopped the car and arrested the driver for twice turning without signaling and for failure to produce a valid driver's license. Defendant and the other passengers in the automobile were also arrested and taken to jail. The car was impounded. A search of the car the next day, accomplished without a search warrant, disclosed two revolvers hidden under the dash. At defendant's subsequent trial on robbery charges, the revolvers were admitted in evidence despite defendant's motion to suppress and objection. The trial court ruled that, although defendant's arrest was unlawful, he had no standing to claim the privilege against unreasonable searches and seizures. On appeal from defendant's conviction, *held:* A search of an impounded car without a warrant, conducted one day after an arrest, is not incident to the arrest, and evidence so obtained is inadmissible in a criminal prosecution of a passenger in the car. *State v. Riggins,* 64 Wn.2d 897, 395 P.2d 85 (1964).

The Washington court, long before the Supreme Court's historic decision in *Mapp v. Ohio,*[1] indicated approval of the federal "exclusionary rule."[2] This rule declares that evidence obtained by an unlawful search

[9] 65 Wash. Dec.2d at 743, 399 P.2d at 608.

[10] See, *e.g.,* Resor v. Schaefer, 193 Wash. 91, 74 P.2d 917 (1937); Payn v. Hoge, 21 Wn.2d 32, 149 P.2d 939 (1944); Jennings v. D'Hooghe, 25 Wn.2d 702, 172 P.2d 189 (1946). As late as 1939, however, a student writer was able to state that "The Washington Court has, heretofore, been liberal in finding a contract to devise when orally made." Comment, 14 WASH. L. REV. 30, 34 (1939). See Shattuck, *Contracts in Washington, 1937-1957,* 34 WASH. L. REV. 24, 503-05 (1959).

[1] 367 U.S. 643 (1961).

[2] See State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936), and cases cited therein; Comment, *The Washington Law of Arrest Without Warrant—Incidental Search,* 36 WASH. L. REV. 501, 510-11 (1961).