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Contracts to Adopt

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(Continued Frome First Page)

and unjust, is government by men and not government by law. It is Roman administrative law. When a legislative body has set up such a system it finds it difficult to undo what it has done, because the chief executive has the power of veto.

Mr. Roosevelt takes the view of the other social planners that you can't conduct administrative government affecting all the affairs of the people if you permit the people to carry their appeals into a court for a review of the facts and of the rulings based upon them. Government business has become the biggest business in the country and affects all other business, determining conduct and the relations of one person to another. Executive authority demands freedom from the restraints which the courts of law put upon it.

That is another way of saying that such a government is a dictatorship and must work as one. If administrative law is in the hands of fair minded men its operation may be as fair as circumstances will permit, but whether it is fair or unfair its word is final and if it does an injustice the injury is without a legal remedy. This theory is contrary to all previous thinking of the American people who, until they were taken in hand by the New Deal, had been careful to preserve for each man his day in court.

The new system of administrative law and the old system of protected liberties can't live together. It's quite apparent now which one is getting the worse of it.

SEC.

INVITATION

The members of the Association are invited to attend a conference of the United States Circuit Court of Appeals to be held at the United States Court House in St. Louis, Mo., on March 7th, 1941. An open session will be held, at which time Justice Bolitha J. Laws, of the District Court of the District of Columbia, will deliver an address on Pretrial Procedure and Henry P. Chandler, director of the Administrative Office of the United States Courts, will also deliver an address.

CASE NOTES—CONTRACTS TO ADOPT

In the United States adoption exists only by statute, and apparently the general rule is that the statute must be strictly construed and followed. In re Session's Estate, 70 Mich. 297, 38 N. W. 249 (1888); In re Estate of Williamson, 205 Iowa 772, 218 N. W. 469 (1928). However, because of the hardships which may arise from such a rule, courts have in many instances liberalized, if not, substantially altered its effect. Rockford v. Bailey, 322 Mo. 1155, 17 S. W. (2d) 941 (1929). In some jurisdictions substantial compliance is held to be sufficient.

It is said that adoption, being recognized by statute is no longer contrary to public policy as at common law, and that if an express promise of inheritance is enforceable, it necessarily re-

sults that an implied promise, assumed from the acts and intentions of the parties, can also be enforced. The question involved in many of these cases resolves itself into one of evidence and proof sufficient to establish such implied contracts. However, where there has been no legal adoption, the agreement to adopt may be drawn from the acts and conduct of the parties. Chehak v. Battles, 133 Iowa 107, 110 N. W. 330 (1907); Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30 (1913); Hickox v. Johnston, 113 Kan. 99, 213 Pac. 1060 (1923); Roberts v. Roberts, 223 Fed. 775 (1915).

Contracts to adopt are of two distinct types, namely, an executory contract to adopt and an executed contract or agreement of adoption. The latter constitutes an act of adoption, in some jurisdiction, the result of which is equivalent to that of judicial proceedings prescribed in the majority of the states, and by it the child who is the subject of the agreement becomes, in legal effect, the child of the contracting party. An executory contract or agreement to adopt does not, in and of itself, make the child an heir of the promisor. 1 Am. Jur. Adoption of Children, sec. 15. While the cases are not in entire harmony, in most jurisdictions, executory contracts to adopt, not performed by effectual adoption proceedings during the life of the adoptive parent, will, upon the latter's death, be enforced to the extent of decreeing that the child occupies in equity the status of an adopted child, or, at least, is entitled to such right of inheritance from the estate of the adoptive parent, as a natural child would enjoy, where the child in question has fully and faithfully performed the duties of a child to the adoptive parent, and the circumstances require the relief as a matter of justice and equity. Roberts v. Roberts, supra; Odenbreit v. Othein, 131 Minn. 56, 154 N. W. 741 (1915).

Contracts to adopt may be in several forms, either written or oral. An oral contract to adopt, so far as it relates to the establishment of relations of paternity and filiation, is generally regarded as valid nor is such a contract rendered invalid by statutory provisions requiring the execution of wills to be in writing. Chehak v. Battles, supra. Contracts of this nature may be taken out of the statute of frauds by the part performance thereof by the parties, where such proof of part performance is clear and unequivocal and is clearly applicable to the contract in question. Laird v. Vila, 93 Minn. 45, 100 N. W. 656, 43 L. R. A. 427 (1904).

The consideration necessary to support such contracts of adoption may be any consideration sufficient to support an ordinary contract, may consist of the surrender of the child by the natural parent, the marriage to the adopting parent of the other party to the contract, or the performance of services by the child. Where the child performs such duties and services required and is never legally adopted according to statutory adoption proceedings, courts of equity will enforce any property rights or rights of inheritance in favor of the child upon the death of the alleged parents, if the facts and circumstances brought in the evidence, including the acts of the parties, are such as to raise a convincing implication that such contract was actually made and to satisfy

the court of its terms and performances. Odenbreit v. Uthein, supra; Lynn v. Hockaday, 162 Mo. 11, 61 S. W. 885 (1901). Equity will decree that to be done which should have been done.

In many states contracts of adoption must be shown by the strength and cogency of evidence to conclusively exist. Johnson v. Antry, 5 S. W. (2d) 405 (Mo. 1928). The courts in these states take the position that in enforcing such implied contracts upon mere parole or oral evidence an opportunity is left open for the working of fraud upon the estates of deceased persons by those who have been befriended and cared for by them during their lifetime, but never legally adopted as provided for under the existing statutes. Henry v. Taylor, 16 S. D. 424, 93 N. W. 641 (1903); Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744 (1913); In re Hack's Estate, 166 Minn. 35, 207 N. W. 17 (1926). It would seem from this line of authorities that regardless of the conclusiveness of the evidence to support such implied contract, it would not be given effect. These same jurisdictions should tend toward liberality of such decisions wherein justice demanded it.

In the recent case of Horner v. Larson, 293 N. W. 836 (N. D. 1940) our Supreme Court, in holding against the parties maintaining that they were adopted children of the deceased through an agreement to the statute, said:

"The decedent took the children into his home, called them his adopted children, presented them for confirmation in the church as his adopted children, and evidently considered that they were adopted. No written contract for adoption is in evidence, and there is not sufficient evidence to show any terms of such contract with reference to distribution, or to gifts, or grants of property. There are general statements to the effect that the children were taken for adoption and were to be adopted and to be treated as the children of the decedent. However, there being no evidence whatever showing compliance with the statutory requirements relative to adoption, such children cannot now be said to be the adopted children of the deceased."

It would appear from this decision that North Dakota follows the line of decisions construing strict adherence to adoption statutes in order to enforce rights coming to an adopted person, where no written contract of adoption is in evidence.

In construing the rights of adopted persons it would seem to be a sound and acceptable rule that although the mechanical or statutory provisions of an adoption were not specifically complied with, the acts and intentions of the parties should, in most cases, be given weight in order to do justice and equity to all involved. A person's intentions may have been to adopt and make a child his own, but through negligence in conforming to statutory procedure of adoption such was not done. Would it not seem just in such a case that a contract implied from the intention and acts of the deceased be given effect and the adoption allowed? Courts of equity in many jurisdictions have so held.

Whether or not contracts of adoption are valid and enforceable often resolves itself into a question of the sufficiency and conclusiveness of the evidence available. Roberts v. Roberts, supra; Hickox v. Johnston, 113 Kan. 99, 213 Pac. 1060 (1923). Many of the cases where the intention and acts of the parties must be shown to make an oral or implied contract have little evidence and much of it is conflicting and not conclusive. In such cases courts of equity have carefully adjudged the available evidence and have attempted to construe such contract in a manner that would be just and equitable to all parties concerned.

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OUR SUPREME COURT HOLDS

In Leo DeRochford, et al., Pltfs. and Applts., v. Bismarck Banking Company, a corporation, et al., Defts. and Respts.

That the court's instructions to the jury are to be considered in their entirety, when portions thereof are specified as error; and upon a review of the specifications of alleged error in the instructions given in this case, is held that when the instructions as given are considered as a whole, no reversible error has been shown.

That where the evidence on the issue of a contract of agency said to exist between H., one of the defendants, and the plaintiffs in this case is squarely in conflict, the verdict of the jury finding for the defendants and against the plaintiffs on this issue is decisive.

That an order of the trial court denying a motion for a new trial based upon the insufficiency of the evidence to justify the verdict will not be disturbed where it appears that there is substantial conflict in the testimony and the discretion of the trial court in passing upon the motion for a new trial was not abused.

Appeal from the District Court of Burleigh County; Hon. R. G. McFarland, J.

AFFIRMED. Opinion of the Court by Swenson, District Judge, sitting in place of Burke, J. disqualified.

In State of North Dakota, Pltf. and Respt., v., M. W. Dimmick, Deft. and Applt.

That no error can be predicated upon the admission of competent evidence bearing directly on the issue of fact involved in the case.

That error can not be predicated upon the refusal of the trial court, at the close of the state's case, to advise an acquittal.

That corrobation of an accomplice requires the production of such other evidence as tends to connect the defendant with the commission of the offense charged, and it is not sufficient if it merely shows the commission of the offense. Evidence is examined, and it is held: that the independent testimony furnished in the case at bar, if believed by the jury, is sufficient to meet the requirements of corroboration.

That evidence examined and it is held: that the verdict of the jury is amply sustained by the evidence produced.

Appeal from the District Court of Cass County, Hon. M. J. Englert, Judge.

AFFIRMED. Opinion of the Court by Burr, Ch. J.