Washington Law Review

Volume 1 | Number 1

6-1-1925

Recent Cases

J. W.

RECENT CASES

CONDITIONAL SALES—ANTECEDENT DEBT AS CONSIDERATION.—S turned over a used car to a certain "Auto Company" in part payment for a new car, paying the balance in cash. The Auto Company fraudulently induced S to sign a conditional sales contract for the new car, representing the paper to be a Bill of Sale of the used car. S, relying on their statement, signed it without reading it.

The conditional sales contract was turned over to the defendant as part payment of an antecedent debt due him from the Auto Company and was properly recorded by the defendant. S sold the new car to the plaintiff, who paid cash therefor. At this time S obtained a Bill of Sale to the new car from the Auto Company, which he turned over to the plaintiff.

The payments on the conditional sales contract not being made, defendant seized the new car and plaintiff brings this action of replevin. *Held*—(1) While both parties are innocent of any wrongdoing, yet S (to whose rights plaintiff succeeded) is less innocent of negligence than defendant, as he signed the paper without reading it. Judgment should therefore be for the defendant if he paid value for the conditional sales contract. (2) Payment of an antecedent debt is a sufficient parting with value to entitle defendant to the rights of a bona fide purchaser for value. *Long v. McAvoy*, 33 Wash. Dec. 310, 233 Pac. 930.

The basis of the decision is that one taking personal property in payment of an antecedent debt cannot be placed *in statu quo* should the property be taken from him. He is changed from one who has been paid to one who holds a doubtful account. Between the time he received payment and the time he would be made to return it, his position (and that of his debtor) may have changed.

In this case relying on the payment defendant had waited until he was in a position where it was impossible for him then to collect his debt. J.W

INSURANCE—INVALIDITY OF CONFISCATION INSURANCE.—A novel question, which caused the court to reverse itself, was presented to the Montana Supreme Court in the case of *Midland Motor Company v. Norwich Union Fire Insurance Society, Limited, et al.*, 234 Pac. 482.

The court first held that a contract of insurance which insured the vendor, who retained title as security for the remainder of the purchase price of an automobile which had been sold under a conditional contract of sale, against loss or damage by reason of confiscation for any violation (otherwise than by the said vendor) of the laws of the United States relating to the transportation of articles subject to restricted sales, was void and unenforceable as against public policy.

The first decision was based on §3450 of the Revised Statutes of the United States and the decision of the Supreme Court in *Goldsmith v. United States*, 254 U. S. 505, which held that the automobile itself became the offender without regard to the criminal connection of the individual owning it. The court said, "The fact, therefore, that the offense for which the car was forfeited in the instant case attaches primarily to the automobile, thereby making it the offender, is of itself a reason for holding the contract illegal, and of

course, it is elementary that a contract of insurance indemnifying the assured against the consequences of his own illegal act is void."

On a rehearing of the case the court reversed itself and held that at the time that this car was confiscated (January 4th, 1921) and in accordance with the cases of *United States v. One Haynes Automobile,* 274 Fed. 926; *Lewis v. United States,* 280 Fed. 5; *United States v. One Packard Truck,* 284 Fed. 394; *McDowell v. United States,* 286 Fed. 521, and *United States v. Yuginovich,* 256 U. S. 450, insofar as it provided for the confiscation and forfeiture of an automobile used in the illegal transportation of intoxicating liquors, the provisions of §3450 were repealed by the National Prohibition Act, therefore, that the confiscation of this car was under §26 of the National Prohibition Act. This decision held, "It is not question in this case but that it is competent and legal to insure the vendor of an automobile against confiscation thereof for a violation of the National Prohibition Act by a person other than the vendor. Since this in effect is all that the policy and confiscation clause in question did, we must hold that the same are not void and unenforceable as against public policy."

Whether or not an innocent lien holder or the innocent vendor of a conditional sale should be allowed to intervene and assert his right and show cause why a vehicle used for illegal transportation should not be forfeited under §26 of the National Prohibition Act is a question which is in conflict. As stated in *McDowell v. United States, supra,* it seems that the better rule would be to allow the innocent party to assert his right. In the *One Haynes Automobile* case the court said, "It was not to be assumed that Congress intended to provide for the forfeiture of vehicles under §26 of the Volstead Act, with its provision for preserving the rights of third persons and still leave them subject to be forfeited under the more drastic provisions of Revised Statute §3450." *United States v. Sylvester* 273 Fed. 256, also holds that the interest of the innocent lien holder should be protected. This case was cited with approval in the case of *Jackson v. United States,* 295 Fed. 620.

There is a long line of authority which holds that §3450 of the Revised Statutes of the United States provides for a forfeiture only in those cases where the vehicle is being used to transport articles with the intent to defraud the United States of the tax payable on such articles, and that it can not be applied to the mere transportation of illicit liquor in violation of the Prohibition Act. *United States v. One Buick Automobile,* 300 Fed. 584; *United States v. One Kissel Automobile,* 298 Fed. 120; *United States v. One Kissel Automobile,* 296 Fed. 186; *United States v. One Ford Automobile,* 286 Fed. 204; *United States v. One Studebaker Automobile,* 298 Fed. 191, *United States v. One Premier Automobile,* 297 Fed. 1007, *United States v. One Ford Automobile,* 292 Fed. 207, and *The Cherokee,* 292 Fed. 212.

In view of this interpretation of §3450 of the Revised Statutes it is clear that it does not apply to this case, but that §26 of the National Prohibition Act applies. It follows that in the instant case, the innocent conditional vendor has the right to intervene, in the case of a confiscation, to protect his lawful interest, and that a contract of insurance, issued to protect such an interest, would seem to be valid and enforceable because it is not against public policy.

R. A. (Mont.)

CRIMINAL LAW—MALE WITNESS—PRIOR ACTS OF UNCHASTITY.—The recent case of *State v. Arnold,* 130 Wash. 370, 227 Pac. 505, was a trial for robbery. The accused, a married man, takes the stand and is asked by the Prosecuting Attorney· "Is it not true that you are living a portion of your time with a certain woman in Seattle?" This was objected to, and on appeal the Supreme Court said, "The testimony has shown that defendant was a married man and we think the question was a proper one as affecting his credibility as a witness" (page 374 of opinion). Court cited *Carr v. State,* 81 Ark. 589, 99 S. W 831, in which case an appeal was made from decision of lower court in not sustaining objection to question asked, "If accused had not been criminally intimate with a woman named." The court did not condemn this line of cross-examination, but in both the Washington case (*State v. Arnold*) and this Arkansas case (*State v. Carr*) the court stated that if this was error, it was not prejudicial, the defendants in both cases having answered in the negative.

Do these cases suggest that these courts will allow the State to show the specific acts of immorality of male witness to affect his credibility as a witness? As far as the writer has been able to ascertain, only one state, Missouri, is willing to go that far. Specific acts of unchastity of male witnesses were allowed to be shown to affect the credibility as a witness, in the cases of *State v. Rider,* 95 Mo. 474, 8 S. W 723; *State v. Shroyer* 104 Mo. 441, 16 S. W 286; *State v. Raven,* 110 Mo. 419, 22 S. W 376. Missouri has always allowed the specific acts of unchastity affecting the credibility of female witnesses. See *State v. Grant,* 79 Mo. 133.

The opinion of our own court has been clearly stated as regards female witnesses. The first case, *State v. Coella,* 3 Wash. 99, 28 Pac. 28, held it was an error for the court to sustain an objection to asking the witness if she was a prostitute. This may be shown as affecting her credibility as a witness. (The question of self-incrimination was not raised.) The case of *State v. Katon,* 47 Wash. 1, 91 Pac. 250, states that a witness may be examined on matters foreign to the issue when it reasonably tends to affect his or her credibility. The dissenting opinion of Chadwick, J., in the case of *State v. Workman,* 66 Wash. 292, 119 Pac. 251, to the effect that a female witness' general reputation for unchastity should be allowed to affect credibility in all cases, has been generally followed by the later cases. On page 428 of the opinion in the case of *State v. Gay,* 82 Wash. 423, 114 Pac. 711, the court said, "It is a general rule that in prosecutions for rape specific acts of unchastity on the part of prosecutrix cannot be shown to offset her credibility *although her general reputation for chasitity may be shown for that purpose."* Other cases supporting the general rule that one may introduce evidence of general reputation for chastity, affecting credibility of female witnesses are *State v. Jackson,* 83 Wash. 514, 145 Pac. 470; *Gardner v. Spelt,* 86 Wash. 146, 149 Pac. 647, (it was here declared proper cross-examination to ask witness in action for money paid if she had not been convicted of keeping a house of prostitution—allowed to affect her credibility as a witness) *State v. Terry,* 99 Wash. 21, 168 Pac. 513 (follow the *Coella* case in re prostitution as affecting credibility). *State v. Godwin,* 131 Wash. 591, 230 Pac. 831.

While above cases allow general reputation for unchastity of female witness to be shown, the writer has not been able to find a single case in

this state which allowed specific acts of unchastity as affecting credibility unless it be a case of where the chastity of the witness is directly placed in issue such as in the case of *State v. Jones,* 80 Wash. 588, 142 Pac. 35 (Seduction. Previous chaste character was an issue). Many cases state absolutely that the specific acts of unchastity of female witness may not be shown to affect her credibility as a witness. Unchastity must be proven by the general reputation. See *State v. Holcomb,* 73 Wash. 653, 132 Pac. 416. See also *State v. Gay, supra,* p. 428.

In discussing the status of the law in Washington on the question we cannot disregard the case of *State v. Pickel,* 116 Wash. 600, 200 Pac. 184, reversed on rehearing, 204 Pac. 184. The original case followed the general Washington rule as established by *State v. Coella, supra.* But on the rehearing the court said this rule should not be extended to other witnesses than the accused. It is difficult to understand the reversal when the original question arose as to an application of the rule to the defendant, Florence Pickel, being charged as an accessory to the crime of rape.

So far our discussion has been limited largely to female witnesses and the great significance of the case in point (*State v. Arnold*) is that it expresses a tendency to apply the same rule to male witnesses. In the case of *State v. Schutte,* a Connecticut case, 117 Atl. 508, the great weight of authority is expressed contrary to Washington, Arkansas and Missouri. There they held, "In a prosecution for first degree murder a witness for defendant cannot be cross examined as to whether he had lived in adultery with a married woman, solely to affect his credibility as a witness, since such testimony, the court said, does not indicate lack of veracity on the part of the witness, but indicates bad moral character." In a discussion in the 53 Amer. State Reports 479, the authorities for each state are cited. See also 48 L. R. A. (N. S.) 272. The reason evidently behind the majority rule, is stated in the case of *State v. Larkin,* 11 Nev. 330. "A witness may be chaste and yet untruthful."

The Supreme Courts of Washington and Arkansas have frequently cited with approval Underhill's Criminal Evidence, 237 (2nd Ed.) wherein he says: "In most cases evidence involving the whole moral character of the witness will be received upon the reasonable theory that a man who is addicted to vicious habits or who is prone to commit immoral acts, may be presumed to have lost respect for truth and to be ready to perjure himself when it is in his interest to do so."

Why should evidence of general reputation for unchastity be allowed to affect credibility of female witnesses and not as to male?

The Missouri courts early recognized that there should be no distinction. Arkansas seems to have followed and now the Washington case discussed cites with approval the Arkansas decision and says so in so many words that such a line of cross-examination is proper. The age-old discussion of the single standard is involved and though our Supreme Court is with the minority, it is in keeping with the spirit of the social and economic changes of the times.

J. H.

BILLS AND NOTES—PRESENTMENT FOR PAYMENT—TITLE TO CHECK.—X sold merchandise to Y, who gave him his check on D bank in payment. X deposited the check in A bank, in which he had an account, endorsed in blank and with no special agreement. A bank sent the check on to its correspondent bank B,

which in turn sent it on to bank C. C sent the check to D bank for payment. D marked the check paid and debited the account of Y, who had sufficient funds on deposit. Instead of sending the cash back to C bank, D drew on M bank in favor of C. C accepted this draft in payment and sent it on to M bank to be honored. The draft was protested for non-payment, D having failed the day before. The check was returned to X by the same channels, and X now sues Y on the debt, Y setting up payment.

Held, that Y was not liable. The check was duly presented to the D bank where he had sufficient funds to pay it; the check was cancelled, his account debited, and what happened afterward could not prejudice his rights. *Jenson v. Meat Company,* 230 Pac. 1081 (Mont.). If X's agent accepted a draft rather than cash, it did so at its peril (citing *Mollay v. Federal Reserve Bank,* 281 Fed. 997). While this point is of interest to many, it is enough to say here that the last legislature was dissatisfied with the rule and promptly passed Senate Bill No. 57, Chapter 65, 1925 Session Laws. Now the rule in Montana is that a collecting bank can safely take a draft or check of the bank on which paper is drawn, and the drawer of the check is not released from liability in case of the failure of such item to be paid.

But the most interesting part of the case has to do with points which were incidental and perhaps decided only by dicta. In the first place the court holds that a check indorsed in blank and deposited at a bank is presumed to be deposited for collection in the absence of special agreement, and title is retained in the depositor even though credited to him so that he can draw on it provisionally. It is significant to note that the current authority is overwhelmingly against this view, and the presumption usually is that such an indorsement passes title to the bank. *Burton v. U S.,* 196 U. S. 283; *Metropolitan Nat. Bank v. Loyd,* 90 N. Y. 530; *Aebi v. Evansville Bank,* 124 Wis. 74; 7 Corpus Juris 599· 7 L. R. A. (N. S.) 694; 47 L. R. A. (N. S.) 552n; 47 A. S. R. 389; Scott's *Cases on Trusts,* page 67. This point would not have been controlling here because on the theory of the court C bank was liable to the depositor for having accepted a draft rather than cash; and also because of R. C. M. 6109. But this dictum might become very vital in case the initial bank becomes insolvent before final payment and the depositor seeks a preferred claim against an agent bank which is solvent. See Scott's *Cases on Trusts,* p. 77.

The court said that the relation which existed was one of agency. It mentioned the rule of *Mackersay v. Ramsays* (9Cl & F 818), which was that the initial bank for collection was an independent contractor and was liable absolutely for the defaults of any sub-agent banks. 7 C. J. 606, citing many cases. Montana followed this rule in *Power v. First Nat. Bank,* 6 Mont. 251, 12 Pac. 597, but the rule was changed by §6108 Revised Codes of Montana 1921, which made collecting banks agents of the depositor and not of the initial bank. Logically the relation is not one of agency but of trusts. 18 Harvard Law Review 300, citing *Com. Bk. v. Armstrong,* 148 U. S. 50; 22 Harvard Law Review 150; 28 Harvard Law Review 206. It follows then that the trustee should not be liable for a diminution of the trust res. The doctrine of *Mackersay v. Ramsays* above always was considered wrong on trust principles. The Montana law after R. C. M. (21) 6108 and 6109 is thus the better rule according to trust theory although it expressly mentions an agency

relation. Practically it is probably better than a strict trust rule because any bank can be sued directly by the depositor.

It is submitted that Montana, especially since the amendment of R. C. M. 6108 as mentioned above, has a very liberal and reasonable law on this matter. Commercial practice is given full legal effect, unhampered by antiquated theories, and all those dealing in checks are bound by conditions they know to exist. R. D. N. (Mont.).

NEGOTIABILITY OF MORTGAGE SECURED PROMISSORY NOTES.—Because of the peculiar provisions of the Montana code, 9467 R. C. M. 1921, which allows but one action, that of foreclosure, in case of a debt secured by a mortgage, there has been considerable speculation in Montana as to the rights of an innocent purchaser of a note secured by a mortgage when the note does not recite on its face that it is secured by the mortgage. Interest in the proposition has been heightened by the fact that in two cases, *Cornish v. Wolverton,* 32 Mont. 456, 81 Pac. 4; and *Buhler v. Loftus,* 53 Mont. 546, 165 Pac. 601, the Supreme Court of Montana has mentioned the question but has each time avoided a decision of the point.

The court has recently handed down a case, *Wood v. Ferguson,* 230 Pac. 592 (Mont.), which throws some light on the matter and is therefore interesting from the viewpoint of bankers and security holders. In an action on a note by a holder in due course against the makers and indorsers, the defense of mortgage security was held not available to an indorser, the question of the availability of the defense to the maker not being before the court.

In deciding this point the court makes reference to §8472 and §8473 of the Montana code—sections in the body of Montana's negotiable instrument law—which make a general indorser of negotiable paper a guarantor of payment. By this same negotiable instrument law, a holder in due course is protected against all equitable defenses, 8464 R. C. M. 1921. This may well be construed to mean that the court feels that the provision of the code above cited does not apply to mortgage debts, at least where the mortgage is not mentioned in the note. In discussing the case the court says "there does not seem to be any question but that, as between the plaintiff and the makers and indorsers of those notes, she was a holder in due course and as such, entitled to maintain this action, and that the defense of the existence of the mortgage security was not available to the defendant."

The language quoted indicates that the court would decide the question in the same way in case the maker of the note were involved. A recent act of the legislature has helped to remove the doubt, for it provides that "an instrument otherwise negotiable in character is not affected by the fact that it was at the time of the execution or subsequently secured by mortgage on real or personal property. Laws 1923, ch. 143. This statute makes it unlikely that the question will ever come before the court for final determination.

The *Wood v. Ferguson* case seems to be sound on principle, and to show that in spite of the effect of the code section first referred to, Montana will line up with those jurisdictions supporting the common law rule, best stated in *Thorp v. Mindeman,* 123 Wis. 149, 101 N. W 417, "The holder of the note

may discard the mortgage entirely and sue and recover on his note." This makes the statute mean that a holder in due course would cut off all equities, but in order to get a deficiency judgment, foreclosure would be necessary.

A. S. (Mont.).

INJURY TO WIFE AS CAUSE OF ACTION FOR COMMUNITY—RIGHT OF WIFE TO SUE.—Plaintiff was struck and injured by defendant's automobile. Plaintiff's husband, without her knowledge or consent, accepted the sum of three hundred dollars from defendant in full settlement of all damages resulting to the community by reason of the injuries thus received. The husband at the time of making the alleged settlement was not supporting plaintiff or her children but had in fact deserted them. *Held*—that a complaint alleging these facts stated a cause of action and hence the trial court erred in sustaining the demurrer thereto. A husband who has deserted his wife or children has no right or authority to release her claim or dismiss her action for personal injuries, since authority to control or manage community property ceased on repudiating its duties. *Wampler v. Beinert,* 125 Wash. 494, 216 Pac. 855.

Under the code, R. C. S. §6892 the husband is made the manager of the community and has disposition of community personalty. Therefore the husband is a necessary party to all actions arising because of personal injuries to the wife, if the parties were living together as husband and wife at the time injury was received. *Haakins v. First Street Railway Co.,* 3 Wash. 592, 28 Pac. 1021, *Schneider v. Biberger* 76 Wash. 504, 136 Pac. 701. The reason for this is that a cause of action arising out of an injury sustained by the wife through the negligence of another is community property It follows therefore that the refusal of a husband to join in an action instituted by the wife to recover damages for personal injuries received by her would not give the wife power to sue where they are living together. *Haynes v. Colman Dock Co.,* 108 Wash. 647, 185 Pac. 617. Section 181 R. C. S. states that the husband be joined as a party with the wife except under certain conditions. One of these conditions is that when she is living apart from her husband she may sue or be sued alone.

In the principal case the cause of action arising out of the injuries received by her was community property and hence under the general rule laid down in the cases cited, the action to recover the damages would have to be brought in the name of the husband as party plaintiff. But the facts alleged in the complaint if true, would seem to bring the case within the statutory exception, namely, where the wife is living separate and apart from her husband. It appeared from the allegations of the complaint that the husband had made a settlement entirely out of proportion to the injury received by plaintiff, and that the money received by him was used for the purpose of instituting a divorce action against plaintiff. As stated by the court, the husband had repudiated his duties toward the community and the court, citing *Dority v. Prity,* 96 Texas 215, appears to lay down the rule that where a husband repudiates his obligation or duties toward the community, his authority to control or manage community property ceased.

The decision in the principal case can be sustained on the ground that the complaint alleged facts that showed the plaintiff to be living separate and apart from her husband and the further fact that the plaintiff's husband

attempted to assert the rights and powers of his position to accomplish his own purposes. The right of the husband to manage and control community property does not give him authority to beggar his family or to dispose of some of the property for his own use. The injury to plaintiff being an injury to her as well as to the community, the release given to defendant by plaintiff's husband did not preclude her right of action because the husband had no authority to give the release as the plaintiff was living separate and apart from him. A. R.

STATUTE OF FRAUDS—PART PERFORMANCE—CONSTRUCTIVE FRAUD.—This is an action at law for deceit in which the plaintiff relies for his cause of action on an oral contract between himself and the defendant, whereby the defendant promised to lease certain premises to the plaintiff for three years if the plaintiff would give up his option on certain other premises. The plaintiff gave up his option and the defendant refused to lease, the plaintiff being put to great expense in securing other premises. *Held*: Complaint stating these facts and that the defendant did not intend to perform at the time of his promise, stated a cause of action at law even though the plaintiff was forced to prove a contract unenforceable by reason of the Statute of Frauds (Rev. Codes Mont., 1921, §7519), the court saying that part performance will take the case out of the Statute of Frauds when it works a fraud on the party so performing. *McIntyre v. Dawes*, 229 Pac. 846.

That a promise made to do an act in the future without intent to perform will ground an action of deceit is sustained both by the Statute (§7575) and the decisions. (*Edgington v. Fitzmaurice*, 29 Chan. Div. 459; *Swift v. Rounds*, 19 R. I. 527.) The court feels that as a general rule under §7519 and §10613, Rev. Codes Mont., 1921, a plaintiff cannot prevail even in an action of deceit when he is driven to rely on a contract within the provisions of the Statute. But the court here takes the case out of the Statute on the grounds of part performance. Two objections may be raised to the grounds on which the court got around the Statute.

First. There does not seem to be any authority either in Montana or elsewhere for avoiding the Statute of Frauds in an action at law because of part performance. Pomeroy says (Equity Jurisprudence, 5th Ed., §2240)· "The doctrine of part performance is purely a creation of equity and is not recognized at law. No distinctly legal action can be maintained on an oral contract within the Statute of Frauds." This contract is so barred, being an oral contract to lease for three years. (Rev. Codes Mont., 1921, §7519 and §10613, [5].) All of the cases cited by the opinion are actions in equity and, in fact, the case cited at length, *Wood v. Rabe*, 96 N. Y. 414, says in another place that the doctrine of part performance is one "peculiar to equity." It is true this is not an action on the contract, but the opinion itself states the general rule concerning actions where the plaintiff is driven to rely on a contract within the Statute, and it is elsewhere clearly recognized. (*Dreidlein v. Manger*, 220 Pac. 1107.) It would seem, then, that this case goes a long way in a new direction and that Montana law is again borrowing from equity. Nor do the Montana statutes give any authority for this. Section 7519 expressly declares an oral lease for more than a year invalid and no exception of any kind is made. Section 7593 says agreements for the sale of real

property or estates therein must be in writing, but specifically excepts the equitable jurisdiction of courts to specifically enforce contracts partly performed. Thus it is obvious the Code contemplated no such jurisdiction at law.

Second. But even in equity, is a case of this kind sound in principle and supported by the decisions? Certainly if it is so, it is another extension of an already overly extended doctrine. Not any and every part performance will take a case out of the Statute of Frauds in equity. The Montana cases have in the main been cases of possession of land plus improvements. (*Stevens v. Trafton,* 36 Mont. 520, 93 Pac. 810; *Wright v. Brooks,* 47 Mont. 99, 130 Pac. 968.) The reason commonly given for taking the case out of the Statute in such cases being, as stated in *Ducie v. Ford,* 8 Mont. 233, 19 Pac. 414, that the possession and improvement point unequivocally to a contract between the parties. But surely the giving up of an option on other premises would not point unequivocally to a contract to lease the premises in question. Subsequent to *Ducie v. Ford,* Montana courts, together with a majority of American jurisdictions, have further extended the doctrine to include cases where the plaintiff has given services in reliance on defendant's oral promise. (*Burns v. Smith,* 21 Mont. 251, 53 Pac. 742; *Wilburn v. Wagner* 59 Mont. 386, 196 Pac. 978.) In so extending the doctrine they have followed the early New York case of *Rhodes v. Rhodes,* 3 Sandf. Chan. 279, which has not been followed in New York (*Mahaney v. Carr* 67 N. E. 903.) In this connection it is interesting to note the statement of Lord Blackburn in *Maddison v. Alderson,* Law Reports, 8 Appeal Cases 467, made in 1883, that the doctrine of allowing possession to take a case out of the Statute was an anomaly and "ought not to be extended."

The opinion implies that fraud alone will not take the case out of the Statute. It is rather remarkable, then, that the court should go ahead and take the case out on the ground that the defendant's failure to perform his promise after the plaintiff's part performance would work on the plaintiff what the court calls a "fraud." If *actual* fraud will not take a case out of the Statute, should *constructive* fraud do so? It should also be borne in mind that the doctrine laid down in *Mullet v. Halfpenny,* in 1699 (Precedents in Chancery, 404, and cited in 2 Vernon 373), that actual fraud will take a case out of the Statute in a court of equity, is still generally, if not universally, followed in this country (*Halligan v. Frey,* 141 N. W 944; *Ryan v. Dox,* 34 N. Y. 307 *Martin v. Martin,* 170 Ill. 639.)

G. B. (Mont.).

LEGAL ETHICS—DIVORCE ACTION.—A Mrs. Sisson, desiring to obtain a divorce, employed Coleman, an attorney, orally agreeing to pay him whatever fee he saw fit to charge. Coleman accepted the employment. After two preliminary hearings were had, but before the main trial, Coleman and Mrs. Sisson signed an agreement whereby Mrs. Sisson agreed to pay Coleman the sum of $1,000 if successful in obtaining a judgment for divorce and alimony of $5,000 or over. Coleman obtained a judgment for $5,000 and his wife, as assignee, is now suing on this written contract.

Held—Coleman's assignee, failing to allege or prove circumstances which led up to the execution of the written contract and circumstances surrounding

its making, failed to allege or prove facts sufficient to constitute a cause of action. The court said, "The law permits an attorney and client, before the fiduciary relation begins, to enter into any contract respecting the attorney's compensation so long as it is not prohibited by law or does not contemplate an illegal act." *Coleman v. Sisson,* 230 Pac. 582 (Mont.), R. C. M. 1921 §8993, and *Haley v. Hollenback,* 53 Mont. 494, 165 Pac. 459. If any contract is entered into after fiduciary relation exists, the burden is upon the attorney to show that undue influence was not used, advantage was not taken, and that the client knew and understood its provisions.

The court further justifies this decision on the grounds of public policy. Montana decisions are in accord with the weight of authority, to the effect that contracts generally between attorney and client, contingent on the outcome of litigation do not contravene public policy. *Haley v. Hollenback, supra.* But in *Coleman v. Sisson* the court says, "This contract, entered into while a divorce action was pending, providing for an attorney's fee contingent upon the amount of alimony awarded the wife in that action, is void as against public policy."

This case is in harmony with the weight of authority and is eminently sound. H. O. (Mont.).

CHARITIES—VALIDITY—PURPOSES—PUBLIC POLICY.—The testator made a residuary devise providing for the teaching of homeopathic treatment confined to the doctrine of certain named text-books. Testimony of physicians of modern schools was to the effect that the proposed system would be ineffective and that bad results would follow in their opinion from a lack of some treatment approved by them. *Held*—Devise void as detrimental to public health and against public policy.—*In re Hill's Estate,* 119 Wash. 62, 204 Pac. 1055, 207 Pac. 689.

One may will his property for any purpose that is not illegal, immoral, or against the public policy of the state.—*Thomas v. Natl. Christian Association,* 88 N. W 683 (Nebr.). A bequest in trust for the purpose of giving premiums for treatises on subjects conducive to the advancement of medical science and for printing and distributing the treatises to which premiums shall have been awarded, is a valid charitable bequest.—*Chapman v. Newell,* 146 Iowa 415, 125 N. W 324.

The holding of the principal case is based on the fact that the teachings required by the bequest are not supported by any modern school of medicine, hence detrimental to the public health and therefore making the bequest void as against public policy. No authorities were cited except some dicta from a New York case to the effect that legacies tending to endanger the public health are void. The dissenting opinion by Hovey, J., pointed out the right of a testator to make any disposal of property that was not illegal, the fact that the evidence to the dangerous effects of such teachings was the testimony of physicians of modern schools and concluded, that there was evidence "that the proposed system would be ineffective but there was nothing to show that it would be injurious. For the courts to say what is or is not the proper method of treating the sick or afflicted is entirely beyond their province." The testimony of aleopathic physicians here would seem to be analogous to the determi-

nation of the validity of a bequest to a Catholic institution by Protestant witnesses or vice versa. L. S.

CONTRIBUTION—ATTACHMENT—QUASI-CONTRACT.—The plaintiff and defendant in this action and another become sureties on the bond of one Robinson to the Montana Oil Company. Robinson defaulted and the company sued the parties to the bond. This litigation resulted in a judgment against the plaintiff in the present case. The plaintiff here paid the judgment and had been unable to reimburse himself. Later he discovered that the defendant owned certain real estate within the state and brought suit for contribution for the defendant's one-third share of the judgment, suing out a writ of attachment in aid of the action. Service of summons was made by publication, as the defendant was in California. The defendant appeared specially, moving to discharge the attachment upon the contention that the action was not one of those for which attachment was allowed.

Section 9256 of the Montana Revised Codes permits attachment "in an action on a contract, express or implied, for the direct payment of money." The court points out that this is not an action on the original contract, but upon an implied assumpsit for money paid for the use of the defendant. It then concludes that nevertheless it is an action on an implied contract within the meaning of the above statute. *Wall v. Brockman,* 232 Pac. 779, (Mont.).

The result of this case seems to be that the term "implied contract" as used in §9256 is to be interpreted so as to include quasi contracts, as in the case of conversion where the plaintiff elects to waive the tort and trust to his remedy in assumpsit, 14 Mont. 508, 137 Pac. 326. The court cites with approval the case of *Nevada Co. v. Farnsworth,* 89 Fed. 164, deciding, under an attachment statute similar to that of Montana, that an attachment was properly issued in case of conversion where the tort is waived. This view of the import of the case is further strengthened by the fact that the Montana court has not fallen into the common error of confusing quasi contract and actions in true contract. *Schaeffer v. Miller* 41 Mont. 417, 100 Pac. 970.

At first blush the case under consideration seems inconsistent with the case of *Schaeffer v. Miller supra,* where it was decided that a suit in quasi contract was an action on an "obligation not founded upon an instrument in writing other than a contract" and not on "contract." However, in the latter case the court was confronted with the application of one of two limitation statutes and applied the one which more nearly conformed with the legislative classification of actions for the purpose of limitation. In the present case the court does not disregard the distinction between contracts implied in fact and those implied in law, but rather considers them merged in the term "implied contract" as used in §9256.

It seems that the court overlooked one basis upon which it might have rested its decision. That is the rule that a statute borrowed from another jurisdiction brings with it all prior judicial construction. *Miller v. Miller* 131 Pac. 22. Section 9256, enacted in 1895, was taken from the California Code of Civil Procedure. As early as 1879 the California court had laid down the proposition that attachment was authorized in actions in quasi contract under this statute. *Peat Fuel Co. v. Tuck,* 53 Calif. 304.

This case is very important from a practical point of view, especially in

actions against defendants who are out of the jurisdiction but who have property within the state. If the opposite result had been reached, no redress would be available in the Montana courts against one guilty of conversion unless he remained within the state, for under the doctrine of *Pennoyer v. Neff* 95 U. S. 714, the court must get the property before it prior to granting a judgment in an action quasi in rem.

T. J. AND A. B. (Mont.).

PLEADING—FILING SUPPLEMENTARY ANSWER.—Plaintiff sued defendant on an open account and defendant filed general denial in February, 1922. In April, 1922, defendant was adjudicated a bankrupt and on July 18, 1923, he was duly discharged from all debts, including the one sued on in this action. The case was set for trial in December, 1923, and a few days thereafter defendant filed and served notice of motion and motion for leave to file supplemental answer, setting forth his adjudication and discharge in bankruptcy. The Supreme Court affirmed the lower court in denying defendant's motion. *Held,* that the court did not abuse its discretion. *Pue v. Bushnell,* 233 Pac. 124 (Mont.).

This is a case of first impression in this state on this question. In the case of *Henderson v. Daniels,* 62 Mont. 373, 205 Pac. 964, this court defined "reasonable time" to be "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case." This definition was given in connection with a motion for leave to amend and the court here applies the same definition on the motion to file a supplemental answer. It may be said, then, construing §9181, Rev. Codes 1921, that a party cannot file a supplemental answer as a matter of right but it rests within the discretion of the court whether the application has been made "within a reasonable time after the facts material to the cause come to the knowledge of the moving party."

However, in the case of *Drought v. Curtiss,* 8 How. Pract. (N. Y.) 56, the court said, "Where the facts to be incorporated and pleaded in the supplemental answer, go to divest the plaintiff of the right to maintain the action, * * * it is the duty of the court to grant the motion. The word 'may' (in the statute) in such case means 'must', and it would make no difference whether the motion be made at the earliest day or not." Probably the fact that the discharge in bankruptcy does not extinguish the plaintiff's right to prosecute the action if he does not plead it, distinguishes the instant case from the N. Y. case. See 7 C. J. 414 *et seq.* It may be remarked that the supplemental action under the code is a substitute for the old plea of *puis darrien continuence,* except that the code provision is less restrictive in its requirements.

ANON (Mont.).

CHATTEL MORTGAGES—PROPERTY SUBJECT—GROWING CROP—STATUTES—CONSTRUCTION.—A executes a chattel mortgage to B, March 11, 1922, on all of his "crop of apples now growing or to be grown during the crop season of the years 1922 and 1923." April, 1923, A executes to C a chattel mortgage covering the 1923 crop of apples on the same premises. *Held*—C's mortgage prevails over B's. *Kennewick Supply & Storage Co. v. Fry, et al.,* 33 Wash. Dec. 209, 233 Pac. 658. Rem. Com. Stat. § 3779 provides that "chattel mortgages

may be made upon all kinds of personal property * * * and upon growing crops and upon crops before the seed thereof shall be sown or planted. Provided, that the mortgages of crops before the seed shall have been sown or planted, for more than one year in advance, is hereby forbidden, and all securities or mortgages hereafter executed on such unsown or unplanted crops are declared void and of no effect, unless such crops are to be sown or planted within one year from the time of the execution of the mortgage." Thus no authority is given for chattel mortgages upon crops yet to be grown which are not crops for which seed is planted or sown (such as grains). And as applied to such a crop as is under consideration, "growing crops" must be held to relate only to crops grown and harvested the year the chattel mortgage is given. The fact that at the time B's mortgage was executed, "fruit spurs" had already formed, from which in the following year the blossoms and fruit would develop, does not aid the situation. It could equally well be said that when the tree was yet nursery stock it contained the rudiments of the crop of 1923. H. S.

BOOK REVIEWS

THE FEDERAL TRADE COMMISSION. By Gerard C. Henderson. New Haven: Yale University Press, 1924, pp. xiii, 382.

This is the first of a series of intensive studies carried on under the supervision of the Committee on Administrative Law and Practice appointed by the Legal Research Committee under the Commonwealth Fund. It is intended as a part of the program "which should reveal the workings of carefully selected administrative organs, in so far as their activities mean law and not mere internal administration." The author very carefully limits himself to "a study in administrative law and procedure" and does not attempt a consideration of such parts of the work of the Federal Trade Commission as have to do with special investigations and reports, the issuing of licenses or the administering of the Webb-Pomerene Act.

The discussion is divided into a relation of the history of the political and legislative factors leading up to the passage of the Act, an elucidation of procedure, discussion of findings, an enumeration of practices which have come before the Commission for action, and finally a very valuable chapter in which are made conclusions and suggestions which point the way to a possibility of even more valuable service in the future than has been rendered in the past.

Throughout the book a thoroughness of investigation, a keenness of analysis, and a maturity and balance of judgment are displayed which one might wish could be more often found in studies of our agencies of government.

The Federal Trade Commission is at present in a position to understand and sympathize with the tribulations of the Supreme Court in those days prior to the appointment of John Marshall. It is a cause for sober reflection and some sadness to the lawyer, the student of government or the student of business that an agency so fraught with potentialities for good or evil as the Federal Trade Commission should find its position so uncertain, its procedure so unorthodox, its power so ill-defined and its whole status so affected by political changes or vicissitudes as its history up to the present time would indicate.

There is need for a clearing of the atmosphere in regard to the attitude of government toward monopoly and restraint of trade. Perhaps in view of our existing legislation it would be more accurate to say that there is need for a clearer understanding of just what *is* monopoly or restraint of trade. The underlying economic tendencies and the effect of modern business methods