Washington Law Review

Volume 6 | Number 2

5-1-1931

Recent Cases

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Recommended Citation
H. S., Recent Cases, *Recent Cases*, 6 Wash. L. Rev. 88 (1931).
Available at: https://digitalcommons.law.uw.edu/wlr/vol6/iss2/4

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RECENT CASES

CONTRACTS—EXTENSION OF TIME—CONSIDERATION. Plaintiff agreed to sell a farm to defendant who assumed a mortgage of $3,000.00; made a small payment down and agreed to pay the balance with interest at 6%, $1,000.00 on Aug. 12, 1928, $3,000.00 on Aug. 12, 1929, and $250.00 semi-annually until balance was paid.

Defendant delivered her note for $3,000.00 with interest payable monthly to cover payment due 1929, the whole to be payable at option of plaintiff in case of default in interest payments. Defendant became in default. Plaintiff demanded payment of all due on contract and the whole note plus interest. Defendant alleged that at that time an agreement was entered into orally that defendant should have 30 days in which to pay the amount due on the contract. Plaintiff sued within two days.

Held: Instructions to the effect that unless the defendant expressly agreed to pay interest for the agreed 30-day period, such agreement was without consideration, were erroneous.

The agreement to pay the contract rate of interest for the extended period is implied in law and is sufficient consideration to support the agreement of extension. *Stankey et al. v. Godwin*, 58 Wash. Dec. 331, 291 Pac. 725 (1930)

That the rate of interest of the original contract or note is an implied term of the agreement to extend in the absence of an express promise, admits of little discussion. *Nelson v. Flagg*, 18 Wash. 39, 50 Pac. 571 (1897) See also *Commercial Bank of Tacoma v. Hart*, 10 Wash. 303, 38 Pac. 1114 (1894)

The more perplexing question is whether the implied agreement to pay this interest is sufficient consideration. The case of *Nelson v. Flagg, supra*, treated the question as one previously undetermined by this court, seemingly ignoring or not cognizant of *Stickler v. Giles* in which the court said that an agreement to pay interest on an account which would not otherwise draw interest is founded on consideration, but such an agreement would constitute no consideration if, without it, the account would draw the same rate of interest. *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293 (1894) The language was but *dictum*, however, for the extension lacked the necessary element of being for a definite time. Neither was any authority cited to support the statement.

An earlier case indicated the problem, deciding that a promise to forbear to sue for a definite time, when the promise is based upon a sufficient consideration, can be pleaded in bar to the action. *Staver & Walker v. Missimer et al.*, 6 Wash. 173, 32 Pac. 995 (1893) However, the court was directly confronted with the problem, for there was in fact additional security given for the extension which met the demand for consideration.

The proposition that such an extension without more than an implied agreement to pay interest is not binding is not without support outside of the *dictum* above quoted. A leading case for the proposition holds that it is essential to a valid extension of time of payment that it involve the essentials of a binding contract. There must be a reasonably definite time agreed upon and agreed equivalent rendered for the extension, and that agreed equivalent must be a real consideration—something more than the payee would be entitled to in case of mere indulgence of the payor by allowing the debt to run "past due." *Fanning v. Murphy et al.*, 126 Wis. 538, 105 N. W 1056, 5 Ann. Cas. 435, 4 L. R. A. (ns) 666 (1906). See also the cases of *Harburg v. Kumpf*. 151 Mo. 16, 52 S. W 19 (1899) *Kellogg v. Olmsted*, 25 N. Y. 189 (1862) and *Olmstead v. Latimer et al.*, 158 N. Y. 313, 53 N. E. 5 (1899)

That the agreement to extend must be for a definite time was early held to be essential, *Fowler v. Brooks*, 13 N. H. 240 (1842) and is now the weight of authority 5 Ann. Cas. 435 note. The *Fanning* case, *supra*, may be distinguished from the main case on this ground, for in the *Fanning* case the agreement was in fact for no definite time.

Another Washington case, *Price v. Mitchell et al.*, 23 Wash. 742, 63

Pac. 514 (1901), on first blush seems to support the doctrine of the *Fanning* case, holding that an agreement to pay a lesser rate of interest for the extended time is no consideration. On closer examination, however, the case appears to be an agreement for a period from due date up to the time of the new agreement, being thus but an agreement to pay what was already legally due or less.

The weight of reason and authority, however, seems to be with *Nelson v. Flagg, supra*, which is relied on to support the main case. It would seem that there is sufficient consideration, for the creditor forbears to sue for a definite time in exchange for the promise of the debtor to keep the money and pay interest thereon for this time. Without such agreement, it would be the privilege of the debtor to pay at any time after maturity and thus stop the running of interest. *Reed v. Tierney*, 12 App. D. C. 173 (1898) *Dissent of Fanning v. Murphy, supra, Nelson v. Flagg, supra, Van de Ven et al v. Overlook Mining Co.*, 146 Wash. 332, 262 Pac. 981 (1928).

The problem is not simple though, for there is always the question: Was the extension mere sufferance on the part of the creditor or was there in fact a promise to keep the money and pay interest for the full extended time? The question might be the basis of distinction between the cases of the quite numerous minority and the majority, *Benson v. Phipps*, 87 Tex. 578, 29 S. W 1061 (1895).

Once having found such promise on the part of the debtor, the main case is undoubtedly correct. H. S.

NUISANCE—CEMETERY—RIGHT TO INJUNCTION. Plaintiffs seek to enjoin the enlargement of a cemetery across the road from their homes, contending: First, that their wells will be contaminated, as the water table flows towards them; second, salability of their land has been lessened and will continue to be lessened; third, the use of the cemetery interferes with the comfortable enjoyment of life and property. *Held*: Mere presence of a cemetery is not ground for injunctive relief, unless there is offensive or injurious drainage or fumes; the evidence not only fails to show that wells of the plaintiffs would be contaminated, but conclusively shows that it would be highly improbable for them to be damaged at all; therefore, judgment for the defendants is affirmed. *Hite v. Cashmere Cemetery Association*, 58 Wash. Dec. 267, 290 Pac. 1108 (1930).

This is in accord with American weight of authority to the effect that a cemetery is not a nuisance per se; *Kullman v. City of Beloit*, 123 Kan. 645, 256 Pac. 806 (1927) but it may become one because of its operation, *Farb v. Theis* (Tex. Civ. App.), 250 S. W 290 (1923) or location, *Union Cemetery Co. v. Harrison*, 20 Ala. App. 291, 101 So. 517 (1924) although usually pollution of the atmosphere by odors or contamination of springs or wells from the cemetery's drainage must be shown, *Rea v. Tacoma Mausoleum Association*, 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541 (1918).

A burial ground will not be enjoined on account of proximity *Allen v. Acacia Park Cemetery Association*, 145 Wash. 571, 261 Pac. 96 (1929) depreciation in value of land; *Village of Villa Park v. Wanderer's Rest Cemetery Co.*, 316 Ill. 226, 147 N. E. 104 (1925) unpleasant reflections suggested by being reminded constantly of death; *McDaniel v. Forrest Park Cemetery Co.*, 156 Ark. 571, 246 S. W 874 (1923) or because offensive to the esthetic sense of the adjoining owner of property· *Sutton v. Findlay Cemetery Association*, 270 Ill. 11, 110 N. E. 315, L. R. A. 1916B 1135, Ann. Cas. 1917B 559 (1915) because places for the disposal of the dead are necessary and, therefore, private convenience must give way to public convenience; *Hardin v. Huckabay* (facts almost identical with the principal case), 6 La. App. 640 (1927). However, when a person's health is endangered from pollution of air or water, the courts do not consider the convenience of the public in reading a decision. *Symmonds v. Novelty Cemetery Association* (Mo. App.) 21 S. W (2d) 889 (1929).

Just as the continuance of a cemetery as a nuisance may be adjudged, so may the establishment of one. But it must be proved that the in-

juries will be probable; *Braasch v. Cemetery Association of the Evangelical Lutheran Christ Society*, 69 Neb. 300, 95 N. W 646, 5 Ann. Cas. 132 (1903) and substantial, *Nelson v. Swedish Evangelical Lutheran Cemetery Association*, 111 Minn. 149, 126 N. W 723, 127 N. W 626, 34 L. R. A. (n.s.) 565, 20 Ann. Cas. 290 (1910) and not merely speculative; *Payne v. Town of Wayland*, 183 Ia. 659, 109 N. W 203 (1906)

When the public health or convenience is damaged, as from a graveyard being in a thickly settled residential district, the cemetery is subject to regulation by the local authorities; *Mensi v. Walker* 160 Tenn. 468, 26 S. W (2d) 132 (1930) and may be enjoined entirely· *Board of Health of Buncombe County v. Lewis*, 196 N. C. 641, 146 S. E. 592 (1929) On the other hand, even the public authorities may not regulate or destroy a burial ground without reasonable cause. *Wygant v. McLaughlan*, 39 Or. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. Rep. 673 (1901)

The law of nuisance touching cemeteries might be deemed to be a nice "balancing of the equities" among the cemetery owner, the private individual, and the public, with, perhaps, the last receiving the most consideration. A. D.

COMMUNITY PROPERTY—INTERNAL REVENUE—INCOME TAX RETURNS. Seaborn and wife earned during the year 1927 an income, admittedly community amounting to $38,448.17. Each spouse made a separate return, setting forth as their respective incomes one-half of the full community income for the year. The tax liability of plaintiff Seaborn upon the income so reported by him was the sum of $152.38, and his wife's tax liability was $168.32, which they duly paid to the defendant Collector of Internal Revenue. The latter determined that all of the income should have been reported in the husband's return, and made an additional assessment against him in the sum of $720.93, which plaintiff paid under protest; and thereafter, upon the rejection of his claim for a refund, instituted this suit. The statutes involved are Sec. 210(a) and 211(a) of the Revenue Act of 1926, providing, " there shall be levied, collected, and paid for each taxable year upon the net income of every individual " By the wording of the act, it appeared that the word "individual" referred to a human being, and inasmuch as the word "of" denotes ownership, the question turned on what was the law of Washington as to the ownership of community property and community income. *Held*: Judgment for plaintiff affirmed, the District Court being right in holding that the husband and wife were entitled to file separate returns, each treating one-half of the community income as their respective incomes. *Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 27, 51 Sup. Ct. 58 (1930).

The decisions of the United States Supreme Court, regarding this same question as to taxation of community incomes in Texas, Louisiana, and Arizona, three other community property states, are to the same effect. *Hopkins v. Bacon* (Texas), 282 U. S. 122, 75 L. Ed. 34, 51 Sup. Ct. 62 (1930) *Bender v. Pfaff* (*Louisiana*) 282 U. S. 127, 75 L. Ed. 35, 51 Sup. Ct. 64 (1930) *Goodell v. Koch* (Arizona) 282 U. S. 118, 75 L. Ed. 32, 51 Sup. Ct. 62 (1930)

For an exhaustive discussion of departmental and legislative history in connection with the filing of separate returns by husbands and wives in community property states, see an article by Judge George Donworth in 4 Wash. L. R. 145.

It is a fundamental holding of the United States Supreme Court that, as a matter of settled policy it will follow the state decisions interpreting state laws governing property and property rights; and that the whole subject of domestic relations of husband and wife belongs to the laws of the states and not to the laws of the United States. *Warburton v. White*, 176 U. S. 484, 44 L. Ed. 55, 20 Sup. Ct. 404 (1898) *Buscher v. Buscher* 231 U. S. 157, 58 L. Ed. 166, 34 Sup. Ct. 46 (1913) *DeVaughan v. Hutchinson*, 165 U. S. 566, 41 L. Ed. 827, 17 Sup. Ct. 461 (1897) See also *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367 (1910).

In *U. S. v. Robbins*, 269 U. S. 315, 70 L. Ed. 183, 46 Sup. Ct. 148 (1926), it was held that under the community property law of California, where the

"expectant heir," rather than the "vested right" theory prevailed up to 1927, the husband was liable for the whole tax, since the wife had but a mere expectancy, the husband's interest being proprietory in its nature and falling little short of absolute ownership. The husband had the entire present proprietory interest, and that of the wife was a right in the nature of an expectancy, held in abeyance until dissolution of the community· during his lifetime, the husband, notwithstanding the statutory limitation upon his power of disposition, was the owner of the community property. *Spreckles v. Spreckles*, 172 Cal. 775, 158 Pac. 537 (1916) *Dargie v. Patterson*, 176 Cal. 714, 169 Pac. 360 (1917). The *Robbins* decision is therefore no authority on the question involved in the principal case, since in Washington and in the other six community property states, the husband and wife, both, have vested interests in the community property, though the quality of their titles may vary in the respective states. It should be noted that by an amendment of the Civil Code of California, effective July 29, 1927, California adopted the "vested right" theory of community property, and while this new act has no retroactive effect *Stewart v. Stewart*, 204 Cal. 546, 269 Pac. 439 (1928) the husband and wife may hereafter report in original separate returns one-half of salaries, wages, fees earned by either after July 29, 1927, and income received from community property acquired after said date. Cumulative Bulletin VIII-9-4122; I. T. 2457.

In view of the well established holding in Washington that the community property system of this state vests equally in husband and wife, the ownership and enjoyment of all community property, it is submitted that the decision in the instant case is a correct interpretation of the Income Tax Act. —P. R. G.

EQUITY—LACHES—STATUTES OF LIMITATION. Plaintiff seeks to set aside as fraudulent a transfer of stock in a hotel corporation made by his judgment debtor to her son and son-in-law. The transfer was made in 1924, at which time the corporation was heavily incumbered, the transferees having formed an operating company and taken over the operation of the two hotels in an attempt to recoup the losses of the corporation. Plaintiff obtained a default judgment against defendant in 1929 on notes issued by defendant and her deceased husband, which he as indorser had been forced to pay shortly after the death of the husband in 1924. The evidence tended to prove that plaintiff was a relative of defendant's, had been frequently consulted about the affairs of the corporation, knew of the attempt to save the corporation, and of the transfer of the stock. *Held*: Plaintiff has stood by, with full knowledge of his rights and permitted the transferees to carry the burden of the corporation for five or six years in an attempt to give some value of its stock, and can get no relief because of his laches. *Carstens v. Morck*, 59 Wash. Dec. 17, 292 Pac. 262 (1930).

Laches is a negative equitable doctrine which finds its origin in the maxim that equity aids the vigilant, not those who slumber on their rights, and rests upon consideration of public policy. *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986 (1917) *Castner v. Walrod*, 83 Ill. 171, 25 A. R. 369 (1876). Although it has always been held that its operation is akin to estoppel, *Pomeroy Equity Jurisprudence* (4th Ed.) Vol 4, page 3418, a number of modern courts hold the doctrine is grounded on equitable estoppel, *Young v. Jones*, 72 Wash. 227, 130 Pac. 90 (1913) *Bowe v. Provident Loan Corporation*, 120 Wash. 574, 208 Pac. 22 (1922) *State v. Plummer* 130 Wash. 135, 226 Pac. 273 (1924) *Elder v. Western Mining Co.*, 150 C. C. A. 616, 237 Fed. 966 (1916) *Powell v. Bowen*, 279 Mo. 280, 214 S. W 142 (1919) *State v. McPhail*, 156 Tenn. 459, 2 S. W (2d) 413 (1928). Mere lapse of time is insufficient to bring the doctrine into activity, *Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804 (1902) *Eno v. Sanders*, 39 Wash. 238, 81 Pac. 696 (1905) *Neppach v. Jones*, 20 Ore. 491, 26 Pac. 569, 23 A. S. R. 145 (1891) *Galliher v. Caldwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738 (1891), *McWilliams v. Excelsior Coal Co.*, 298 Fed. 884 (1924) *United States v. Work*, 13 Fed (2d) 302 (1926) *Mary-*

land Casualty Co. v. Dickerson, 213 Ky 305, 280 S. W 1106 (1926). Complainant must know of the existence of his rights, *Blake v. Merritt*, 101 Wash. 57, 171 Pac. 1013 (1918) *Raymond v. Hattrick*, 104 Wash. 619, 177 Pac. 640 (1919) *Ackerson v. Elliott*, 97 Wash. 31, 165 Pac. 889 (1917) *Burningham v. Burke*, 67 Utah 90, 245 Pac. 977 (1926) and there must be some change of position or relations of the parties adverse to the party sought to be charged which would make it inequitable to enforce the claim, *Brun v. Mann*, 151 Fed. 145, 12 L. R. A. (NS) 154 (1906) *Sullivan v. Portland and Kennebec Railroad Co.*, 94 U. S. 806 (1876) *Stevenson v. Boyd*, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. (NS) 525 (1908) *Mace v. Ship Pond Land & Lbr Co.*, 112 Me. 420, 92 Atl. 486 (1914) *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961 (1916) *Lindblom v. Johnson*, 92 Wash. 171, 158 Pac. 972 (1916) *Conner v. Hodgdon*, 120 Wash. 426, 207 Pac. 675 (1922) Ordinarily the length of time is immaterial if the other factors are present, *Kellner v. Rowe*, 137 Wash. 418, 242 Pac. 353 (1926). Where the obligation is clear, and its essential character has not been changed by lapse of time, equity enforces a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction. If the defendant has not been misled by the delay to his injury or in any way placed in worse position by complainant's tardiness, there is no laches, *Schultz v. O'Hearn*, 319 Ill. 244, 149 N. E. 808 (1925). It has sometimes been held that mere lapse of time may constitute a waiver of complainant's rights, unless otherwise explained, *White v. Bailey*, 65 Va. 573, 64 S. E. 1019, 23 L. R. A. (NS) 232 (1909) *Depue v. Miller* 65 W Va. 120, 64 S. E. 740, 23 L. R. A. (NS) 775 (1909) *Blake v. Merritt, supra.* As to the application of the doctrine of laches to cases where rescission of contracts is sought on the basis of fraud, see 2 WASH. L. R. 132.

An important problem arises as to the relation between the application of the doctrine of laches in courts of equity and the application of statutes of limitation in the law courts, especially in the states where law and equity are administered in the same court. Two distinct lines of decisions appear in the state courts; those enforcing the statute, and those refusing to do so. In the first group the tendency is to hold that the statute of limitations in general applies equally in equity as in law *O'Brien v. O'Brien*, 238 Mass. 403, 131 N. E. 177 (1921) *Bottrell v. Farmers' Bank & Trust Co.*, 172 Ark. 1165, 291 S. W 832 (1927) *Lawrence v. Melvin*, 202 Iowa 866, 211 N. W 410 (1927) *Brown v. Harrison*, 242 Mich. 603, 219 N. W 606 (1928) *Eves v. Roberts*, 96 Wash. 99, 164 Pac. 915 (1917) *Reimer v. Clarke County*, 137 Wash. 194, 241 Pac. 973 (1926) *State v. Plummer supra.* Compare *Hotchkin v. McNaught-Collins Improvement Co.*, 102 Wash. 161, 172 Pac. 864 (1918) while a few have held that in cases where law and equity are administered by the same courts, they are bound by the statute of limitations, rather in obedience to it than on the analogy that equity follows the law *Minon v. Warner* 238 N. Y. 413, 144 N. E. 655, 41 A. L. R. 1412 (1924) *Wentworth v. Wentworth*, 75 N. H. 547, 78 Atl. 646 (1910) see *Hotchkin v. McNaught-Collins Improvement Co., supra.* In the second group the general statement is usually made that the period of delay may be longer or shorter than the statute of limitations. *Rodgers v. Beckel*, 172 Mich. 544, 138 N. W 202 (1912) *Walker v. Jackson*, 48 Idaho 18, 279 Pac. 293 (1929) *Mace v. Ship Pond Land & Lbr Co., supra*, while a few states hold that a statute of limitations does not strictly apply in equity suits. *United States v. Fletcher Savings & Trust Co.*, 197 Ind. 527, 151 N. E. 420 (1926) *Mays v. Morrell*, 65 Or. 558, 132 Pac. 714 (1913) *Duncan v. Dazy*, 318 Ill. 500, 149 N. E. 495 (1925) *Jersey City v. Jersey City Water Supply Co.*, 90 N. J. Eq. 14, 105 Atl. 494 (1918) unless otherwise provided by law *Virginia C. Mining, Milling & Smelting Co. v. Clayton*, 233 S. W 215 (Sup. Ct. Mo. 1921) The federal decisions are in harmony with this view being reluctant to follow state statutes in applying the doctrine of laches, and if they do so, it is by analogy only *Mason v. MacFadden*, 298 Fed. 384 (1924) *Kansas City Southern Railway Co. v. May*, 2 Fed (2d) 680 (1924) *City of Seattle v.*

Puget Sound Power & Light Co., 15 Fed. (2d) 794 (1927) *Bell v. John H. Giles Dyeing Machine Co.*, 37 Fed. (2d) 483 (1930).

It seems well settled, however, that relief may be refused even though the delay or lapse of time is less than the statutory period governing such cases at law. *Kellner v. Rowe, supra, Stevenson v. Boyd, supra, Wooding v. Puget Sound National Bank*, 11 Wash. 527, 40 Pac. 223 (1895) *Nickel v. Janda*, 115 Okl. 207, 242 Pac. 264 (1926) *Warfield v. Anglo & London Paris Nat. Bank*, 202 Cal. 345, 260 Pac. 881 (1927) *Dry v. Rice*, 147 Va. 331, 137 S. E. 473 (1928) *State v. Abernathy*, 159 Tenn. 175, 17 S. W (2d) 17 (1929) *Smith v. Smith*, 291 Pac. 298 (Utah 1930). Although laches resembles statutory limitation, it differs in important particulars. Limitation is concerned with the fact of delay· laches with its effect. Laches is negligence or omission seasonably to assert a right. It exists when the omission to assert the right has continued for an unreasonable and unexplained lapse of time, and under circumstances where the delay has been prejudicial to the adverse party, and when it would be inequitable to enforce the right. *Duryea v. Elkhorn Coal & Coke Corporation*, 123 Me. 482, 124 Atl. 206 (1924).

In the instant case, plaintiff's cause of action was barred by the statute of limitations, and had not the evidence disclosed sufficient facts to support a finding of laches, the same result would in all probability have been reached on the authority of *Eves v. Roberts, State v. Plummer Reiner v. Clarke County and Hotchkin v. McNaught-Collins Improvement Co., supra.* S. D. H.

ASSAULT AND BATTERY—PRIZE FIGHTING—ACTIONS FOR WRONGFUL DEATH DEFENSES—CONSENT OF PARTIES. The administrator of the estate of Cartwright brought suit to recover damages for the death of Cartwright under Rem. Comp. Stat., 183, for the benefit of the dependant surviving spouse. Death resulted from injuries received while Cartwright was engaged in a prize fight with the defendant Geysel. The prize fight was unlawful under Rem. Comp. Stat., 2256. *Held*: That under the facts of the case, consent to the assault and battery constituted a good defense to plaintiff's action. Holcomb and Fullerton, J. J., *dissenting. Hart as Administrator v. Geysel et al.*, 59 Wash. Dec. 461, 294 Pac. 570 (1930)

There are two rules in the United States: the numerical majority rule which is that consent is not a bar to recovery in an action for assault and battery, and the minority rule which is that consent is a bar to recovery. Supporting the majority rule are the following cases: *Wiley v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853 (1892) *Adams v. Waggoner* 33 Ind. 531, 5 A. S. R. 230 (1870) *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 A. S. R. 535 (1887) *McNeil v. Mullins*, 70 Kan. 634, 79 Pac. 168 (1905) *Morris v. Miller*, 83 Neb. 218, 119 N. W 131, A. S. R. 636, 20 L. R. A. (ns) 907 (1909) *Colby v. McLenden*, 85 Okl. 293, 206 Pac. 207, 30 A. L. R. 196 (1922) *Royer v. Belcher* 100 W Va. 694, 131 S. E. 556 (1922) *Shay v. Thompson*, 59 Wis. 540, 18 N. W 473 (1884) *Lund v. Taylor* 115 Iowa 236, 88 N. W 458 (1901) *Jones v. Gale*, 22 Mo. App. 637 (1886) *Teolis v. Moscatelli*, 44 R. I. 494, 119 Atl. 161 (1923). The minority rule is supported by the following authorities: *White v. Whittall*, 113 Mich. 493, 71 N. W 1118 (1897) *Lykins v. Hamrick*, 144 Ky. 80, 137 S. W 852 (1911) *Wright v. Starr* 42 Nev. 441, 179 Pac. 877 (1919).

Recovery may be had if the injury results from excessive or unnecessary force under both the majority and minority rules. *Colby v. McClendon, supra, Gailbraith v. Fleming*, 60 Mich. 403, 27 N. W 581 (1884) This explains the case of *Milam v. Milam*, 46 Wash. 468, 90 Pac. 595 (1907). Consent to be bitten cannot be inferred from engaging in a mutual fist fight. Note that this is not a limitation upon the seriousness of the injury as affecting the rule of liability but applies only when force is used beyond the logical limit of the consent. See *Lykins v. Hamrick, supra*, in which the parties to the suit fought with knives.

Historically, the position of the majority is of doubtful validity. The basis of the majority rule is the case of *Matthew v. Ollerton*, Cumberbach 218 (20 Reprint 438) 1693. At the time this case was decided the state

was interested in the action as a means of enforcing penalties for breaches of the peace. This quasi-criminal feature of the action was abolished by the Statute of 5 and 6 William and Mary c. 12 (1694) The next English case, Boulter v. Clark, Bullers Nisi prius p. 16, 1747, cited *Matthew v. Ollerton, supra.* The first American case is *Stout v. Wren,* 1 (N. Car.) Hawks 420 (1821) which cited as authority the two prior English cases. The cases in support of the majority rule cite as authority for their position the three cases last mentioned. Obviously if the *dicta* in *Matthew v. Ollerton, supra,* applies to criminal actions it states the universal rule. See 16 C. J. 92 Sec. 60 n. 78. *Dicta* in later English cases support the minority rule. *Hegarty v. Shine,* 4 Ir. 288 (1878) *Slattery v. Haley,* 3 Dom. L. R. 156 (1923).

It is a general principle of law that there is no violation of a right protecting an interest is consent is given to the invasion and further that no man shall profit by his own wrong doing. *Wallace v. Cannon,* 38 Ga. 199 (1868) *Gilmore v. Fuller* 198 Ill. 130, 65 N. E. 84 (1902). See also 24 Col. Law Rev. 819. The majority rule is an exception to these two fundamental principles of law

In the principle case the majority opinion limited the decision to the facts of the case before it, but the minority did not do so. The principle case may be distinguished from both the majority and minority cases upon the ground that combat was not entered into in anger. But it is suggested that regardless of the limit so put upon the effect of the decision the case necessarily supports the minority view The distinguishing or qualifying feature of cases of assault and battery is the consent given by each party If the act was not illegal, then clearly the rule would be that there could be no recovery. The illegal act should therefore "either destroy or not destroy" the consent. Whether the combat is a prize fight or a duel with deadly weapons entered into with or without anger, it is in any event illegal. It seems, therefore, that the rule to be laid down is broader than that stated by the majority opinion in the principal case and is that consent is a good defense in a civil action for injuries resulting from an illegal combat. For an analysis of the whole problem with citation of authorities see Am. Institute Treatise No. 1(a), supporting Restatement No. 1 Torts Chapt. V Sec. 7' beginning at page 172 (1925). R. D. C.

Inheritance—Adopted Child—Right to Inherit from Natural and Adoptive Parent. A child adopted by a stranger was allowed to inherit from its natural parent, who died testate without mentioning her in his will, under the pretermission statute, Rem. Comp. Stat., Sec. 1402. The court stated that an adopted child may inherit from both natural and adoptive parents under Rem. Comp. Stat., Sec. 1699.

The result of the principal case seems in accord with that reached in other jurisdictions throughout the country *Roberts v. Roberts.* 160 Minn. 140, 199 N. W 581 (1924) *Wagner v. Varner* 50 Iowa 532 (1879) *Head v. Leak,* 61 Ind. App. 253, 111 N. E. 952 (1916) *Sorenson v. Churchill,* 51 S. D. 113, 212 N. W 488 (1927) *In re Klapp's Estate,* 197 Mich. 615, 164 N. W 381, L. R. A. 1918A 818 (1917) *In re Lander's Estate,* 100 Misc. Rep. 635, 166 N. Y. S. 1036 (1917) *Sledge v. Floyd,* 139 Miss. 398, 104 So. 163 (1925). *Contra, Boosey v. Darling,* 173 Cal. 221, 159 Pac. 606 (1916) Many of the cited cases, although reaching the same result, may be distinguished, either on the basis of statute or facts of the case presented. The Washington statute, Rem. Comp. Stat., Sec. 1699, declares that the natural parents shall be divested of all legal rights and obligations in respect to the child, and the child shall be relieved of all legal obligations to them, and shall be the legal heir of his adopter, owing the same obligations and having the same rights and duties as a child of the adopter born in lawful wedlock. Further it provides "that on the decease of parents who have adopted a child under this chapter, and the subsequent decease of such child without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child." The proviso would imply that the legislature intended to substitute the adoptive parents for the natural parents in

every legal sense. A number of states reaching a result in accord with the principal case have no such provision in their statutes of adoption. Iowa, Laws of 1879, 2308, 2310; South Dakota, Revised Code 1919, 208-10; Mississippi, Laws of 1917, Sec. 290. In others, the statute expressly provides that adopted children do not lose the right of inheritance from their natural parents, which raises the inference that without such a provision the child would be deprived of such a right of inheritance. Massachusetts, Public Statutes, Chapter 213, No. 7, 1876; New York, Laws of 1916, Chapter 453.

Washington, under its adoption statute, reaches the conclusion that the adopted child takes both from and through its adoptive parents. *In re Masterson's Estate*, 108 Wash. 307, 183 Pac. 93 (1919) *In re Hobb's Estate*, 134 Wash. 424, 235 Pac. 974 (1925). A number of states, without such a proviso as in the Washington Statute have decided that an adopted child takes only from, and not through, its adoptive parents, leaving much more room for the conclusion that the adopted child does not lose the right of inheritance from its natural parents. *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956, 138 Am. St. Rep. 247 (1910) *Ryan v. Foreman*, 181 Ill. App. 262 (1913), affirmed 262 Ill. 175, 104 N. E. 189; *Boaz v. Swinney*, 79 Kansas 332, 99 Pac. 621 (1909) *Merritt v. Morton*, 143 Ky. 133, 136 S. W 133, 33 L. R. A. (ns) 117, 118 A. S. R. 672, 9 Ann. Cas. 775 (1911). California, even without a proviso as in the Washington statute, reaches the same conclusion as this jurisdiction, but the court states that the result of such a decision is to substitute the adopting parent for the parent by blood, and "once we reach (this conclusion) we must give to that conclusion its logical result." *In re Jobson*, 164 Cal. 312, 128 Pac. 938 (1912). The logical result mentioned appears when they deny the right of an adopted child to inherit from its natural parents, although they qualify this somewhat by allowing him to inherit from his natural grandparents. *Boosey v. Darling, supra.* The Washington court holds in the principal case that this conclusion has not been reached by them, since the adoption statute is in derogation of common law, and must be strictly construed. It would seem, by strong implication from the proviso in the statute that such a conclusion should be reached, substitution recognized, and therefore no claim by the adopted child upon the natural parents.

If this conclusion be reached, the pretermission statute should not apply, the object of such a statute being to guard against the thoughtlessness of the testator in failing to provide for an heir for whom he is presumed to have desired to provide. *Page on Wills*, (2d. Ed.) Vol. 1, Sec. 490, N. 791, *McLean v. McLean*, 207 N. Y. 365. 101 N. E. 178 (1913) *Porter v. Porter's Ex'r* 120 Ky. 302, 86 S. W 546 (1905) *Thomas v. Black*, 113 Mo. 286, 20 S. W 657 (1892) *Meyers v. Watson*, 234 Mo. 286, 136 S. W 236 (1911) *Boman v. Boman*, 49 Fed. 329 (1892) *Bower v. Bower* 5 Wash. 225, 31 Pac. 598 (1892) In re Barker's *Estate*, 5 Wash. 390, 31 Pac. 976 (1892) *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360 (1893) 28 R. C. L. 82. Where a child or issue of a child is not mentioned in the will, or provided for by will or settlement, it is entitled to take under the statutes relating to the rights of inheritance of pretermitted children, when, and only when, the omission to mention or provide for the child was unintentional or the result of accident, mistake, or inadvertence. 18 C. J. 841, *Lamar v. Crosby*, 162 Ky. 320, Ann. Cas. 1916E 1033 (1915) The presumption is that the omission was the result of accident, mistake, or inadvertence, but Washington will not allow parol evidence to rebut this presumption, the rebutting proof having to come from the face of the will itself. *Bower v. Bower supra.* Any presumption that omission of a child is mistake or inadvertence is gone where the parent omitting the child has no rights or obligations toward it. *Peerless Pacific Co. v. Burckhard*, 90 Wash. 221, 155 Pac. 1037, Ann. Cas. 1918B 247, L. R. A. 1917C 353 (1916).

The cases relied on by the court are not on all fours with the principal case, which seems to be the only one decided under a pretermission statute. The court states that there is no statute which prevents such dual inheritances, quoting *Dreyer v. Schrick*, 105 Kan. 495, 185 Pac. 30

(1919) as authority for this proposition. The statute in effect at that time in Kansas, Gen. Stat. 1915, 6262-6365, has no such provision as appears in the Washington statute, and the question presented in the principal case is not presented in *Dreyer v. Schrick, supra*, the decision on that point being pure dictum. Under statutes similar to Washington, a child adopted by its grandparents is allowed to take only as adopted child, *Moran v. Reel*, 213 Penn. 81, 62 Atl. 253 (1905) or as grandchild only. *Billings v. Head*, 184 Ind. 361, 111 N. E. 176 (1916) amplified in 111 N. E. 952. Under a statute allowing adopted children to take from their natural parents, a child adopted by his grandfather takes as adopted child only *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698 (1889) Contra to these holdings, but under a statute not containing the proviso of either the Washington or Massachusetts statutes, is *In re Bartram's Estate*, 109 Kan. 87, 198 Pac. 192 (1921)

It may be finally argued that the adopted child having no voice in the matter of his adoption should not be deprived of such benefits as he might have elected to retain, but this may be answered by the fact that he is a ward of the equity court, which acts in his best interest. *In re Pillsbury's Estate*, 175 Cal. 454, 166 Pac. 11, 3 L. R. A. 1396 (1917). The result of the principal case seems less desirable under modern conditions than it would have been at an earlier date. The Washington court, and others reaching the same decision, seem to have attained it by following previous cases which are not in point. A. G.