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anon

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after eight years of unavailing inquiries as to the ownership of the donkey, he sold it for junk. In the meantime, through mesne conveyances, the plaintiff had acquired title to the machine. None of the transferees had ever attempted to take possession of the donkey, nor had any of their bills of sale been recorded. On trial of the case, the defendant pleaded the statute of limitations and also defended on the ground that the machine had been abandoned. Judgment was for the defendant and the plaintiff appealed. On appeal, the Supreme Court had some difficulty with the case. In addition to the majority opinion, there were three opinions concurring in the result and one dissent. The majority chose to decide the case on the statute of limitations argument, making no holding on the issue of abandonment. It was held that the statute began to run when plaintiff first became entitled to sue; that he became entitled to sue when the donkey came to rest on defendant's property; that adverse possession in the defendant was not necessary; and that no demand was necessary, since this would give the plaintiff the power to toll the statute by simply refraining from making a demand.

Personal Property—Necessity of Demand Prior to Replevin Action. In *Friendly Finance Corp. v. Koster*, 145 Wash. Dec. 348, 274 P.2d 586 (1954), the assignee of the vendor's interest in an automobile sold on a conditional sales contract brought a replevin action against the assignee of the vendee's interest. The defendant in this replevin action admitted plaintiff's right to the car, but defended on the ground that plaintiff had made no demand before instituting suit. Judgment for the plaintiff was affirmed. The court held that since the plaintiff's right to the car was admitted, that issue in this case was a moot question. The effect of a reversal, said the court, would simply require the plaintiff to make a demand and bring another action, against which the defendant admits he has no defense.

SALES

Avoidance of Disclaimer by Action For Fraudulent Misrepresentation. In *Nyquist v. Foster*, 44 Wn.2d 442, 268 P.2d 442 (1954), the plaintiff brought an action based upon fraudulent misrepresentations of the vendor of a trailer. Allegedly the vendor stated that the sides of the trailer would not warp when exposed to moisture. When the trailer sides did warp, and the vendor refused the return of the trailer, the vendee sued to rescind. The action was for misrepresentation due to the inclusion in the sale contract of a disclaimer clause which prevented any type of warranty action. The case turned upon the question of whether the statements made by the vendor were statements of existing facts, or mere matters of opinion. In holding for the vendee, the court announced the general rule that a statement concerning a quality which existed in the chattel at the time that the statement was made is a statement of an existing fact unless the statement relates to the ability of the chattel to serve a particular use of the vendee, or unless the satisfaction of the thing represented depends upon the performance of a future act or the occurance of a future event. See Comment, *Avoidance of Disclaimer by Action for Fraudulent Misrepresentation*, 30 WASH. L. REV. 54 (1955).

TAXATION

Employment Security Act—Applicability to Home Freezer Salesmen. In *McIntyre v. Bates*, 145 Wash. Dec. 41, 272 P.2d 618 (1954), the Court held that persons engaged in direct selling of home freezers under a so-called "food plan" fall within the scope of the Washington Employment Security Act. The Court found the taxpayer to be an "employer" within the meaning of RCW 50.04.080 and determined that the salesmen

were "in employment" as required by RCW 50.04.100. In concluding that the taxpayer could not claim exception under the provisions of RCW 50.04.140, the Court noted that the only freezers sold by the salesmen were those of the taxpayer and stressed the fact that, although the taxpayer did not in fact exercise extensive control over the actions of the salesmen, he did possess the *right* to control their activities.

TORTS

Malpractice — Limitation of Action in Malpractice Suits. The recent case of *Lindquist v. Mullen*[1] presented the problem of when the cause of action accrues in malpractice actions predicated upon negligence. The defendant left a surgical sponge in a hernia incision in February, 1946, but continued to treat the plaintiff till October, 1949. It was not until March, 1953, that the plaintiff discovered her suffering was caused by the presence of the surgical sponge. The charges were negligence in performance of the operation, and in the diagnosis and treatment subsequent to the injury. The court held that the action was barred by the three-year statute of limitation.[2]

Although seemingly unjust, this decision is in accord with the general rule that the mere fact the plaintiff is not aware of her cause of action for malpractice does not suspend the running of the statute of limitation.[3] The cause of action for malpractice accrues at the time of the physician's wrongful act or omission and not from the time the patient first discovers it.

However, an exception to this general rule has been recognized in most jurisdictions. This exception is based on the theory that where a party is guilty of fraudulent concealment so as to prevent the injured party from obtaining knowledge thereof, the statute of limitation does not start to run until the cause of action is discovered or might have been discovered through reasonable diligence. Among these jurisdictions, however, there is considerable confusion as to what constitutes fraudulent concealment. Some take the view that an affirmative act of concealment on the part of the physician is necessary,[4] while others recognize mere knowledge and failure to disclose to the patient the fact of injury as fraudulent.[5] Still another view employs the rationale

[1] 145 Wash. Dec. 629, 277 P.2d 724 (1954).
[2] RCW 4.16.080(2).
[3] 74 A.L.R. 1318 (1931); 144 A.L.R. 209 (1943).
[4] Carrol v. Peyton, 138 S.W.2d 878 (Civ. App. Tex. 1940); Brown v. Grinstead, 212 Mo. App. 533, 252 S.W. 973 (1923).
[5] Picket v. Arlinsky (C.C.A. 4th), 110 F.2d 628 (1940); Bervath v. LeFever, 325 Pa. 43, 189 A. 542 (1937).