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The Modification of Written Contracts in Montana

Bruce M. Brown

ities, that the legislature could prohibit the sale of all oleomargarine and, in consequence, it could execute this policy by the use of a revenue measure.

Mack J. Hughes.

THE MODIFICATION OF WRITTEN CONTRACTS IN MONTANA

R.C.M. 1935 Section 7569 provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." This statute has been the cause of much litigation in Montana, and because of the hardship which it produces, will probably continue to be.

In *Armington* v. *Steele*,[1] the first case involving the statute, the point was raised as to whether the statute applied to written contracts which were not required by the Statute of Frauds to be in writing. The rule at common law is that a contract in writing, but not required to be so, may be modified by a subsequent oral agreement.[2] In the *Armington* case the written contract involved a lease for eight months which did not need to be in writing. The court held that oral evidence of an extension of the lease to one year was properly excluded, saying:

> "The principle embodied in the provision applies to all kinds of contracts in writing whether they are required to be in writing or not. . . . It is, however, a distinct departure from the common law rule, which permitted parties, at their pleasure, to alter by oral agreement, whether executed or executory, any contract which was not required to be evidenced by a writing. The only exception recognized is the cases in which the subsequent oral agreement has been executed by one or both of the parties."

Since this early case the Montana courts have applied this rule without the point being expressly raised.[3] California, from which Montana borrowed this statute, apparently reaches the same result.[4]

Section 7569 states that a contract in writing may be modified by an executed oral agreement. In the *Armington* case the court said:

"The only exception recognized is the cases in which the

[1](1902) 27 Mont. 13, 69 P. 115.
[2]2 WILLISTON, CONTRACTS (Rev. Ed. 1936) §591, p. 1702.
[3]Hurley v. Great Falls Baseball Assn. (1921) 59 Mont. 21, 195 P. 559; Olsen v. Zappone (1929) 83 Mont. 573, 273 P. 635.
[4]6 CAL. JUR. §226, p. 377.

> subsequent oral agreement has been executed by one or both of the parties."

A later decision, *Kinsman* v. *Stanhope,*[5] which stated that the oral contract must be fully executed is a case in which the oral contract had not been fully executed by either side. Plaintiff paid $1000 in cash and executed his note secured by a chattel mortgage for the balance. The plaintiff brought an action for the conversion of the automobile. The defendant, in his answer, alleged that the note was unpaid which justified the taking. The plaintiff replied that the parties entered into an oral agreement after execution of the note wherein the defendant should keep the automobile repaired and pay the plaintiff's living expenses and the plaintiff was to rent the car out and apply the proceeds toward the purchase price. Plaintiff contended he entered into this agreement and paid defendant $754 pursuant to the agreement. The court rejected any evidence of the agreement, saying:

> "... since such subsequent agreement rested in parol, and was not fully executed, it was impotent for the purpose intended." (The court then cited Section 7569).

The court would apparently require full performance.

A more recent case, *Continental Oil Company* v. *Bell,*[6] followed the rule laid down in *Kinsman* v. *Stanhope,* saying:

> "Section 7569, Revised Codes 1921 provides that: 'A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.' An oral agreement altering a written agreement is not executed unless its terms have been fully performed and performance on the one side is not sufficient."

However, here like the *Kinsman* case, there was not full performance by either party so it would appear that the rule stated was broader than necessary for the decision in the case.

Griffith v. *Thrasher*[7] was the next Montana case which discussed this question. This was an action to foreclose a chattel mortgage. The defense was that the time for payment had been extended by a subsequent oral agreement. The defendant introduced evidence that the plaintiff agreed to extend the time for payment two years in return for $1000 which the defendant paid. The court allowed this evidence in holding the contract was fully executed. The court said:

[5](1914) 50 Mont. 41, 144 P. 1083.
[6](1933) 94 Mont. 123, 21 P. (2d) 65.
[7](1933) 95 Mont. 210, 26 P. (2d) 995.

> "It is true that if the oral contract or agreement was not fully executed, it would of necessity come under the ban of the statute and violate the rule approved by this court. Here the contract was executed, and everything to be done by the parties was done. Defendant was to pay $1000 for an extension of time on the notes. She paid the money. The extension was granted then and there. Nothing was left for future performance."

It seems that the court erred in saying this contract was fully executed. It appears that an agreement extending time for payment cannot be performed until the time has elapsed. The California court[8] holding contra to the *Griffith* case under similar facts (the extension of the time for payment) said:

> "An executed agreement is one the terms of which have been fully performed. It is difficult to conceive how an oral agreement extending the time in which a written contract is to be performed can be executed until the time has elapsed, and then the question could not arise. If the period of time mentioned in the oral agreement has not elapsed, then the agreement has not been executed."

The court in the *Griffith* case tried to distinguish the California case by the fact that there was payment for the extension in the *Griffith* case. It would seem that this fact does not make it an executed contract. It merely amounts to full performance by one party. This decision cannot be said to recognize that performance by one party is sufficient to allow the oral agreement to have effect because the court does not base their decision on part performance, but on full performance.

Ikovich v. *Silver Bow Motor Company*[9] apparently followed the rule laid down in the *Bell* case. In the *Ikovich* case the defendant bought a car from the plaintiff under a conditional sales contract which stated that the car was to be delivered "without warranty except as to title." After the sale was made, the defendant discovered that the car needed expensive repairs. He introduced evidence that the plaintiff company's agent told him to go ahead and get the car fixed up, and they would pay the bill. The defendant had the car fixed and the plaintiff refused to take care of the bill. This evidence was objected to by the defendant who contended that it modified a written agreement and was inadmissible under Section 7569. The court upheld the defendant's contention. Justice Angstman, writing the majority opinion said:

[8]Henehan v. Hart (1900) 127 Cal. 656, 60 P. 426.
[9](1945) 117 Mont. 268, 157 P (2d) 785.

> (after quoting Section 7569) "There must be complete execution of the obligation of both parties in order to bring the modification within the terms of the statute. . . . Here the president of defendant denied emphatically that he had entered into any subsequent agreement regarding the repair of the car. If evidence on the point were admissible under our statute then of course this conflict in the evidence would present a jury question. But under our statutes this evidence was inadmissible. It is to be noted that there is nothing in the record to show any *act* on the part of defendant in recognition of the alleged subsequent agreement and hence the doctrine of estoppel or waiver has no application."

The majority opinion recognized that under certain circumstances a defendant might be held to have lost his right to set up the statute although the contract had not been fully performed and Chief Justice Adair dissented on the ground that the facts warranted that result in this case.

In *Baugh* v. *Monroe*[10] there was performance by one party but the court said admission of the oral agreement was error. Plaintiff agreed to buy a ranch from the defendant, title was not to pass until the purchase price had been fully paid. The defendant died and plaintiff brought an action against his administrator to have the land conveyed to him. He relied on a subsequent oral agreement wherein the defendant told the plaintiff to forget the written contract. The defendant said he would forget the payments and convey the land to plaintiff if he could come and live with the plaintiff and if the plaintiff would continue to make improvements on the land. The defendant did live with the plaintiff and the plaintiff made improvements on the land. The majority of the court believed that this contract was executory and came under Section 7569. Chief Justice Adair, in writing the majority opinion said: "A contract for the sale of land is wholly executory until the conveyance is made. . . . Since they put their contract in writing there could be no subsequent alteration binding on the parties unless the same were in writing or by an executed oral agreement." This case can be distinguished from the previous cases because it is a contract for the sale of land. Contracts in regard to land come under the Statute of Frauds[11] and must be in writing and this is true of any subsequent alteration. While Montana recognizes the

[10](1945) 117 Mont. 306, 158 P(2d) 485.
[11]R.C.M. 1935 §7519 (6).

doctrine of part performance[12] in regard to contracts for the sale of land, the majority here felt there was not sufficient evidence of part performance. The plaintiff's testimony was thought to be inadmissible under R.C.M. 1935 Section 10535.[13] Also, the court felt that the improvements that were made were not unusual and were like those that any lessee would make. There was a dissent in this case by Justice Angstman in which he believed that the doctrine of part performance was applicable here. It appears that both the majority and dissenting judges would recognize the doctrine of estoppel and waiver under the proper set of facts.

Another point brought out in the *Baugh* case was that this statute is one of substantive law and not a rule of evidence. Therefore, a failure to object to the admissibility of the evidence does not preclude a party on appeal to have the evidence disregarded. The dissent in this case thought the statute is a rule of evidence and that failure to object to evidence of an oral modification precludes a party from objecting to it on appeal.

In summarizing the above cases which stated full performance by both parties to be necessary, it is to be noted that there was not full performance by either party except in the *Baugh* case in which he Statute of Frauds was involved; even in the absence of R.C.M. 1935 Section 7569, by the general view, there would need to be a memorandum in writing of an oral modification of a contract such as that in the *Baugh* case. In the *Griffith* case there was full performance by one party and the contract was taken out of the statute. There appears to be little possibility that full performance by one party would take the contract out of the operation of the statute unless the court considers that the contract had been fully performed on both sides.

Attention has already been called to the fact that estoppel or waiver might allow recovery under circumstances where there has been a subsequent oral contract which was not fully performed. *Smith* v. *Gunnis*[14] lays down the rule that a condition

[12]Cobban v. Hecklen (1902) 27 Mont. 245, 70 P. 805; Kettlekamp v. Walkins (1924) 70 Mont. 391, 227 P. 1003.

[13]R.C.M. 1935 §10535(3) provides: The following persons cannot be witnesses: 3. Persons or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that, without the testimony of the witness, injustice will be done.

[14](1943) 115 Mont. 362, 144 P(2d) 186.

in a contract for the benefit of one party may be waived by that party by his conduct. Plaintiff agreed to repair defendant's dwelling house and the work was to be completed by December 20, 1940. Defendant made frequent changes in the plains and plaintiff did not finish the work by December 20. The plaintiff continued work with the consent of defendant until January 24, 1941. The court allowed the plaintiff to recover for his work saying:

> "Where owners thus permit the builder to continue with the work after the expiration of the time fixed in the contract for the completion thereof, such conduct on the part of the owners amounts to an election to go on with the contract. . . . By their conduct did the defendants waive the date for completion of the contract originally specified therein and the situation thereafter was the same as if the extended time had been originally fixed in the contract."

Whether there was an oral contract or simply an oral promise would appear to make no difference. It would seem that this case follows the general rule. Mr. Williston states the rule as follows:

> "On theories of waiver or estoppel it is generally held that to the extent that a failure to perform has been caused by either party, he cannot take advantage of the non-performance."[15]

This rule applies to all contracts including those within the Statute of Frauds.[16]

The reason behind this rule appears to be that a party shall not be permitted to take advantage of his own wrong. It would seem that the rule does prevent hardship and is correct. It appears that the rule applies only when the party has acted in reliance on the waiver or has been injured thereby.[17]

In the *Kinsman* case[18] it would seem that this doctrine could have been applied to prevent the defendant from taking the car. The alleged oral modification would not be given effect but the

[15] 2 WILLISTON, CONTRACTS (Rev. Ed. 1936) §595; p. 1711.
[16] 2 WILLISTON, CONTRACTS §595.
[17] Restatement, Contracts §224 provides: The performance of a condition qualifying a promise in a Contract within the Statute may be excused by an oral agreement or permission of the promisor that the condition need not be performed, if the agreement or permission is given while performance of the condition is possible, and in reliance on the agreement or permission, while it is unrevoked, the promisee materially changes his position.
[18] *Supra* Note 5.

defendant should be estopped from taking the car because the plaintiff's failure to perform was caused by the defendant's conduct. The effect of this would be to give plaintiff an extension of time in which to perform. The point, however, was not raised by counsel or discussed by the court.

R.C.M. 1935 Section 7565 provides that a contract may be rescinded by the consent of the parties. There is no provision that it must be in writing. In *Varnard-Curtis Company* v. *Machl*,[19] a federal case, the defendant objected to testimony by the plaintiff that the defendant and the plaintiff's superintendent mutually agreed (orally) to rescind the written contract. The court held this evidence was properly admitted and, in construing the Montana statute said:

> "It is asserted, therefore, that the evidence referred to was inadmissible because Rev. Codes of Montana 1935, Section 7569 provides that a contract in writing may be altered by a contract in writing, or by an executed oral agreement and not otherwise.
>
> While novel, the argument we think, cannot prevail. The testimony did not indicate an 'alteration' of the written contract, except by rescission. In Montana, rescission of a contract may be had by mutual consent."

The statute has been held to so provide even in the case of a contract in regard to land in which a memorandum in writing is required. In *Ogg* v. *Herman et al*[20] the court stated: "That the mutual rights and obligations of the parties to a written contract for the purchase and sale of real estate may be waived, and the contract annulled and extinguished by parol is well settled." No other case has arisen on this point.

The California court in an early case said: "It has been held many times that a written agreement may be abrogated by an oral contract and that in such a case Section 1698 has no application."[21] Later cases have followed this view.[22]

Bruce M. Brown.

[19](1941) 117 F (2d) 7.
[20](1924) 71 Mont. 10, 227 P. 476.
[21]Dugan v. Phillips (1926) 77 Cal. App. 268, 246 P. 566.
[22]Klein Norton Co. v. Cohen (1930) 107 Cal. 325, 290 P. 613; San Roque Properties, Inc. v. Pierce (1937) 18 Cal. App. (2d) 379, 63 P(2d) 1198.