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executory devise, arises on the giving of an option.''[38] On this theory several decisions holding that an option contract may be enforced against an intervening donee or purchaser with notice can be explained.[39] Also, the explanation of the courts allowing the optionee an injunction or decisions that allow the optionee to come ahead of a declaration of homestead before the exercise of the option are more readily understandable.[40]

In conclusion, since the holder of an option is given protection similar to that given other equitable interests in land, it would be better terminology to call his right an interest in land. This would prevent a court from using the statement that an ''option is in not an interest in land,'' as a reason for a decision as they did in dictum in *Halko* v. *Anderson*.[41] This would also be in accord with the general principle that equitable conversion is a consequence of the right to specific performance in equity.

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[38]*Effect of an Optional Contract to Buy Land*, 26 HARV. L. REV. 747 (1912-1913).
[39]Horgan et al v. Russell, note 14, *supra*.
[40]Pardee v. C. Crane & Co., note 33, *supra;* Manchester Ship Canal Co. v. Manchester Race Course, note 34, *supra*.
[41]Note 8, *supra*.

THE PURPOSE OF THE DECLARATION OF MARRIAGE IN MONTANA[1]

Since the passage of the premarital medical examination

[1]The form of the declaration as provided for in §5725 which is in general use is substantially as follows (it, of course is contended that this is an improper use) :

DECLARATION OF MARRIAGE

H..... and W..... do hereby jointly make and execute a declaration of marriage and make the following statements and representations of facts pursuant to the provisioss of section 5724 RCM 1935.

That H..... is .....years of age, and resides at.....,
That W..... is .....years of age, and resides at.....

We do hereby declare that we are married and do enter into the marriage relationship at this time and place and at the time of the execution of this declaration at..... on the..... day of....., 19..... at.....AM PM.

We hereby certify that this marriage has not been solemnized.

In witness whereof, we hereunto set our hands this.....day of....., 19.....

Signatures of H and W.

Signatures of two witnesses.
Notarization.

requirement in Montana,[2] there is an increasing tendency on the part of domiciliaries of Montana, and others who come into the state for the purpose of avoiding the laws of their domicile, to enter into what is loosely called a marriage by contract.[3] Apparently those relying on the validity of such a marriage rely principally on sections 5724 and 5725, R.C.M. 1935. Section 5724 provides as follows:

> "*Declaration of marriage how made.* Persons married without the solemnization provided for in section 5710 must jointly make a declaration of marriage, substantially showing:
>
> 1. The names, ages, and residences of the parties;
> 2. The fact of marriage;
> 3. The time of marriage;[4]
> 4. That the marriage has not been solemnized."

Section 5725 provides:

> "*Contents of declaration.* If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing:
>
> 1. The names, ages, and residences of the parties:
> 2. The fact of marriage;
> 3. That no record of such marriage is known to exist.
>
> Such declaration must be subscribed by the parties and attested by at least three witnesses."

As edited in our code at present, section 5725 appears to be a detailing of the declaration authorized in 5724. That this is not the real purpose of 5725 is established both by the language of the sections and by that of the California code sections from which we took them.[5] Both sections purport to deal fully with the required contents of the declaration; moreover, the information required is not the same in both sections. A brief examination of the California code makes it clear that the California section 76 (the counterpart of our 5725) is independent

[2]Chapter 208, Laws of Montana, 1947.

[3]The writer has been informed by letter from the clerk of court at Superior, Montana, that there have been a considerable number of such marriages contracted there. Most of them are by non-residents of the state.

[4]It is submitted that the time of marriage as called for in RCM 1935 §5724 is the time when the parties began living together, not the time of the filing of the declaration as provided in the form appearing in note 1, *supra*. Notice also that the statute provided for the declaration to *substantially* show the time.

[5]Cal. Civ. Code, §§75 and 76.

of section 75, (the counterpart of our 5724) and, as edited in California, section 76 is described as involving a declaration where there is no record of the solemnization.

Granted that the two sections relate to entirely different "marriages," it might possibly be argued that section 5725 is the only one referring to an already existing marriage and that section 5724 intends to create a marriage relation for the first time. Again, however, neither the language, nor the history of the statute supports this view.

It is the contention of this comment that neither of these sections authorizes any means of creating a marriage. It is contended that section 5724 provides for a formal record of a marriage already completed but never solemnized, in short, a common law marriage already in existence; and that section 5725 provides a means for the recording of a solemnized marriage of which there is no longer any record. If in fact this is the true purpose of these statutes, then it is submitted that there is no justification for such misconstruction as to permit an easy method for the evasion of Chapter 208, Laws of Montana, 1947, which provides for pre-maritial medical examination. Even though it is the policy of the law to indulge in presumptions in favor of the validity of marriage, such presumptions always give way to statutory language clearly requiring a contrary result. Such a presumption indulged in at this point would violate both the language of the statutes and the policy behind the requirement of the certificate of health.

Notice the language of section 5725: "If no record of the solemnization of a marriage heretofore contracted. . . ." The clear meaning of such language cannot be denied. The statute presupposes two conditions: *one,* that there has been a solemnization of the marriage and, *two,* that there is at present no record of that solemnization. This section of our code was adopted from the California Civil Code Section 76. Since our adoption of the section, California has taken action which supports this contention. In 1895, California abolished the common law marriage, and with it Section 75 of the Civil Code, the section providing for the recording of a common law marriage. Significantly, they did not abolish section 76 which is very similiar to and was the predecessor of our own section 5725. In the light of the amended section 55 of the California Civil Code which requires all marriages in California to be solem-

nized, the only purpose left for section 76 was to provide records of solemnized marriages.[6]

If it be contended that allowing section 76 to remain on the statute books was an oversight on the part of the California legislature, the answer is that in 1897 section 79½ (now section 79a) was enacted. The enactment of section 79½ recoginzed the purpose of section 76 to be as contended for by this comment[7] and extended its use to solemnizations not provided for by the code.

Further in support of the writer's interpretation of section 5725, it is important to note that section 5725 is but a part of the pattern set by sections 5724 thru 5727, and that section 5727 refers to a refusal to enter into a declaration of marriage in the same manner and gives it the same effect as a denial of an existing marriage. If, then, the *denial* of an existing marriage is of the same effect as the *refusal* to enter into a declaration of marriage, it must be true that the *entering* into a declaration of marriage is of the same effect as an *affirmance* of an existing marriage. Furthermore the framers of section 78[8] as well as section 79½ clearly associated the declaration of marriage with an already existing marriage.

It is submitted that section 5727 is a part of the general pattern of the code giving to section 5725 the effect of a recording provision for a previously solemnized marriage.

What is the purpose of section 5724? It may be contended that it provides for another form of solemnizaion, or

[6]This function of supplying records, after the original records have been lost is a matter of extreme importance. Consider the amount of confusion which might be saved after such a disaster as the San Francisco earthquake and fire.

[7]Cal. Civ. Code §79a reads, in part, as follows:

> "*Recording declaration of marriage.* The provisions of this chapter, so far as they relate to the solemnizing of marriages, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation; but such marriages must be declared, as provided in section seventy-six, and be acknowledged and recorded as provided in section seventy-seven."

This section seems to have been intended to validate certain peculiar forms of ceremony and to provide for their formal recording. It conclusively establishes that §76 deals with marriages already in existence, but of which there is no record.

[8]Cal. Civ. Code, §78 provides as follows:

> "*Either party may proceed to test validity of marriage.* If either party to any marriage denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the superior court, to have the validity of the marriage determined and declared."

that it creates a common law marriage simply by contract. Obviously it does not provide for another form of solemnization, for another section of the code[9] provides that previous to the solemnization of any marriage in this state a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to take place. The word "solemnization" as used in the statute clearly should include the meaning of the word "ceremony" and by this interpretation there is no room in which to find authority for any special form of ceremony or solemnization which does not require a license. The history of this section further denies any such interpretation. In 1895 as already noted, California abandoned the common law marriage[10] and, with it, section 75 of the California Civil Code, the section adopted by Montana as section 5724, R.C.M. 1935. This section can only be construed to mean that the legislature of California considered section 75 as a complement of the common law marriage.

As to the contention that 5724 provides for another form of solemnization, the California court in *Toon* v. *Huberty* (1894)[11] said: ". . . the signing, acknowledging and filing of the declaration of marriage provided for by section 75 Cal. Civ. Code, is not a solemnization of marriage under the code." This, then, was the construction placed on section 75 at the time we adopted it and incorporated it into our statutes, and there has been no action by the Montana court to alter such construction.

If however for the sake of argument we should treat this section as authorizing an unlicensed form of solemnization, (and I do not mean to concede this point by any means) then it is submitted that since the enactment of Chapter 208, Laws of Montana 1947, providing for the premarital medical examination, the section is repealed. The repealing clause of

[9]R.C.M. 1935 §5711, adopted simultaneously with §§5724 and 5725.

[10]The amendment of 1895 declares solemnization to be essential to the validity of any marriage in California. See also In re Shipps Estate (1914), Cal. 144 P. 143. In *Toon* v. *Huberty* (1894), 104 Cal. 260, 37 P. 944 the court for that particular case seems willing to agree that the filing of the declaration, plus open and notorious living together, forms a marriage. In Montana now, and in California at that time, it would be a valid common law marriage, *but only because of the subsequent open and notorious living together*, and not on the strength of the filing of the declaration.

[11]The repealing clause of Chapter 208, Laws of Montana, 1947, should not be held applicable to repeal the common law marriage; the social interest protected by the requirement of a premarital medical examination for persons intending to begin living together in the near future is not present where the parties have been cohabiting for some time.

that chapter states that all acts or parts of acts in conflict with it are hereby repealed. Certainly an interpretation of the statute giving it the effect of a solemnization is in direct conflict with the spirit of the act which seeks to narrow the door to marriage. Hence it is reasonable to conclude that the only solemnization authorized by statute requires a license.[13]

Probably most defenders of the marriage by declaration would contend that the filing of the declaration creates a valid common law marriage. It is submitted that such a position is untenable under the laws of Montana. True, Blackstone states[13] that at the early common law, before the statute of 26 Geo. II c.c.33, a marriage without a church ceremony was valid if there was a present agreement of marriage by parties willing and able. The filing of the declaration of marriage is prima facie showing of consent if it is signed by both parties, and this declaration would be sufficient to create a valid marriage under the old common law as interpreted by some courts, as well as by some modern state statutes. Much the same language is used at the present time in the statutes of Oklahoma,[14] and the Supreme Court of that state declared, in 1933,[15] that ". . . all that is necessary to render competent parties man and wife is the agreement in the present tense to be such." However, this view of the common law marriage never has been adopted, either by Montana or California.

The California statute prior to the amendment of 1895,[16] required consent and, in addition, a *mutual assumption* of the marital relation. Much was said about mutual assumption in the famous case of *Sharon* v. *Sharon*.[17] The court in that case looked beyond the marriage agreement and laid down the rule that mutual assumption of the marital relation meant the cohabitation of the parties in the manner of man and wife and not in the manner of man and mistress. In 1895 California repealed the common law marriage entirely; in that same year Montana adopted the California Civil Code and, apparently unwilling to lose the benefits of the common law marriage entirely, but at the same time desiring further to restrict its free and easy aspects, amended our statute defining marriage[18], and

[12]1 Blacksone's Commantaries 439.
[13]Codes of Oklahoma, 1931, §1666. This seesm to be the law in a majority of the states.
[14]Tiuna v. Willmott (1933) .....Okla....., 19 P.(2nd) 145.
[15]Cal. Civ. Code, §55.
[16]Sharon v. Sharon (1889) 79 Cal. 633, 22 P. 26.
[17]R.C.M. 1935, §5695.
[18]See also Codes of Montana, 1887 §1411 providing: "Marriage is a civil

placed the third requirement, *public* assumption, on the common law marriage. Thus today for a valid common law marriage in Montana there must be not only consent, but a mutual and public assumption (i.e., an open and notorious living together as man and wife) of the marital relation.

All the Montana cases to date establish that such is the only sense in which mutual and public assumption of the marital relation is used in our code. In the case of *Shephard & Pierson Co.* v. *Baker*[19] it was pointed out by the court that a relationship whereby the alleged wife was kept in a small building behind the main house was not a mutual assumption of the marital relation. It is to be noticed that in this case there was consent, but even the filing of a statutory declaration would not have helped, for the filing of the declaration could not of itself alter the mutual relationship of the parties concerned.

Just as the California case of *Sharon* v. *Sharon* laid down the controlling rule as to what was mutual assumption of the marital relation, so the case of *O'Malley* v. *O'Malley*[20] states the controlling rule in Montana as to what constitutes a public assumption of the marital relation. In that case the court said that public assumption within the meaning of the statute was a *course of conduct* on the part of both the man and wife toward each other and toward the world, so that people generally take them to be married, and that cohabitation was indispensable thereto. In State v. Newman[21] the court appeared to give strong effect to the fact that the defendant had not made public the agreement and mutual assumption of the marital relation between himself and his alleged wife. Even though there were other grounds upon which the case was decided, the dictum there should be of great weight because the defendant there was charged with a crime and both the presumptions of marriage over adultery and of lawfulness over crime, were overcome by the courts finding that the alleged marriage was invalid. *This because there was no public assumption of the marital relation.*

It may be further argued that the filing of the declaration is so obviously a public assumption in fact that the court should so treat it, although up to the present time it has not

contract to which the consent of the parties capable in law of contracting is essential."

[19](1927), 81 Mont. 185, 262 P. 887.

[20](1913), 46 Mont. 549, 129 P. 501.

[21](1923), 66 Mont. 180, 213 P. 805.

had occasion to give that meaning to the statutes. Admittedly, considered in the abstract, such filing is a form of public assumption; but such an interpretation of the statutes would violate their language which clearly indicates that they refer to an already existing and completed marriage. One advancing this contention must also ignore all the arguments already made in this comment: the language strongly negates such an interpretation, which would facilitate an easy method of evasion of Chapter 208, Laws of Montana 1947, and all the Montana cases to date indicate that the court assumed that they had stated the full scope of what will be deemed public assumption under the marriage code. This argument is not an acceptable basis for supporting the growing practice of marriage by contract.

Even if it be thought that the arguments advanced herein against the marriage by contract are not conclusive, the most that can be said for the validity of such a marriage is that it rests on such doubtful grounds that no responsible lawyer should advise a client to resort to it. It would be well indeed if arrangements could be made for clarification of the question possibly in the form of a declaratory judgment or by definitive legislative action.

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THE PLACE OF TRIAL OF CONTRACT AND TORT ACTIONS UNDER THE MONTANA VENUE STATUTES

The case of *Hardenburg* v. *Hardenburg*[1] decided by the Supreme Court of Montana has created some doubt as to the status of the law in Montana in regard to the "proper"[2] place for the trial of actions upon contracts and actions for torts. Mr. Chief Justice Johnson in his dissenting opinion in the case[3] stated:

> ". . . the majority dispose of the present controversy without expressly reversing the law although they badly unsettle it. While three members concur in the disposal of the case the form of one member's concurrence . . . does not fully indicate in what respects he agrees with the extended treatise signed by the other two members constituting the majority."

[1](1944) 115 Mont. 469, 146 P.(2d) 151.
[2]The word "proper" is used here in the same sense as the word is used in §§9097 and 9098 R.C.M. 1935. See note 12 *infra*.
[3]*Supra* note (1) P. 496.