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Equity—Appeals from Equity Decrees—Scope of Appellate Review

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Montana. The right to suppress illegally obtained evidence could be given effect by objection to introduction of the evidence at trial, as is done in other states.[20] But in Montana, despite omission by the criminal code of mention of any such pre-trial motion, a failure to make it will ordinarily constitute a waiver of the constitutional right to exclusion.[21] Placing such weight on pre-trial procedures which do not appear in the code is, to say the least, inconsistent with any conception that our criminal code is complete and exclusive.

While there may be basis for some distinctions among them, in total the instances described above indicate a clear disregard of the position of the *Bosch* case that the criminal code is exclusive in denominating procedures which may be used. Whether the *Bosch* case should stand to bar the ordering of a bill of particulars may even be open to question, but in any event the broad language of that decision has not controlled the Montana Supreme Court in its rulings with respect to other non-statutory procedures.

MELVYN M. RYAN

EQUITY—APPEALS FROM EQUITY DECREES—SCOPE OF APPELLATE REVIEW—Plaintiff brought an action to enforce a judgment lien against real property standing in the name of the wife of the judgment debtor. Defendants' evidence was not materially contradicted and tended to show that funds of the wife were used to buy the property. The district court, sitting without a jury, found for the defendants. On appeal to the Montana Supreme Court, *held,* affirmed. In an equity case if the record contains substantial evidence supporting the findings of the trial court the Supreme Court will not interfere with those findings. *Beard v. Myers,* 347 P.2d 719 (Mont. 1959) (Justice Adair concurring in the result).

Prior to 1903, appeals from equity decrees were considered on review under the same rules as appeals from judgments at law. Findings of fact made by a judge sitting without a jury were allowed to stand on appeal if there was evidence to support them.[1]

In 1903 the statute providing for appellate review[2] was amended[3] to provide as follows: "In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record . . . and determine the

[20]See Note, *Procedures for Suppressing Illegally Seized Evidence,* 20 MONT. L. REV. 225, 233 (1959).

[21]Weeks v. United States, 232 U.S. 383 (1914) appeared to base the right to suppress in federal courts on a constitutional basis. State v. Gardner, 74 Mont. 377, 240 Pac. 984 (1925) did the same in Montana. While the case of Wolf v. Colorado, 338 U.S. 25 (1949) has cast doubt upon the constitutional basis for the federal rule, the *Gardner* rule has been repeatedly applied in Montana without any questioning of its basis.

[1]McCauley v. Tyler, 11 Mont. 51 (1891).

[2]Then Mont. Code of Civ. Proc. 1895, § 21, now REVISED CODES OF MONTANA, 1947, § 93-216.

[3]Laws of Montana 1903, Second Extraordinary Session, ch. 1.

same, as well as questions of law." This is the so-called "Fair Trial Law" which introduced confusion if not chaos into the Montana law on appeals from equity decrees. Professor Clark, in a law review article,[4] set forth the history behind this amendment and discussed the earlier cases that arose under it. His conclusion was that at least three positions were being taken indiscriminately under the 1903 statute and he strongly advocated its repeal.

It is evident that the state of Montana law on review of equity decrees is as confused today as ever. The Supreme Court has taken what appears to be three different positions almost simultaneously.

In *Schulz v. Fox*,[5] decided in October, 1959, the plaintiff sought to have a note and mortgage declared void as based upon illegal consideration, namely that her husband would not contest her divorce. The trial court found for the plaintiff and declared the instruments invalid. On appeal the Montana Supreme Court found that the evidence *decidedly preponderated* against the trial court's findings and reversed.

Thompson v. Bantz,[6] decided in December, 1959, involved a suit for reformation of a mineral deed. The trial court held that plaintiff had not submitted clear and convincing proof of either intent to include an omitted mineral reservation or of mistake. The Supreme Court reversed, stating: "To our mind, the evidence in this case is clear, convincing and satisfactory as to the mistake and there is no credible evidence to refute it.'"[7] In doing so the court declared that the statute required them to make an independent determination of the evidence in the record, and appeared to follow the statute literally.

The instant case, *Beard v. Myers*, was also decided in December, 1959. As appears above, the court affirmed after finding "substantial evidence" in the record supporting the findings of the trial judge.[8]

At this point it may appear that reversal when the evidence decidedly preponderates against the lower courts findings and affirmance when there is substantial supporting evidence, are really the same test couched in different language, depending upon whether the court is reversing or affirming. This is not so, for although the tests would not lead to different results in all cases, they would in many situations.[9] Furthermore, the language of the *Schulz* case has not been confined to cases of reversal. In *Bell v. Bell*[10] the court refused to reverse unless the evidence decidedly pre-

[4]Clark, *Appeals from Equity Decrees in Montana*, 12 MONT. L. REV. 36 (1951).
[5]345 P.2d 1045 (Mont. 1959).
[6]346 P.2d 982 (Mont. 1959).
[7]*Id.* at 986.
[8]In applying the substantial evidence test the court relied solely upon the case of Sanders v. Sanders, 124 Mont. 595, 229 P.2d 164 (1951). That case is questionable authority, for on appeal it was affirmed by an equally divided court, and two justices were for affirmance under the substantial evidence rule and two dissented. Justice Adair vigorously dissented upon the ground that section 93-216 requires something more than the scope of review under a substantial evidence rule. His concurrence in result only in the instant case is consistent with his position in the *Sanders* case.
[9]For a comparison of results in various situations under the two tests see 20 MONT. L. REV. 123 (1958).
[10]133 Mont. 572, 328 P.2d 115 (1958).

ponderated against the trial court's findings, quoting directly from *Williams v. Williams*,[11] which was also a case of affirmance. It is clear from the language in these two cases that in the court's mind there is a difference between the two phrases, or they would have used the more familiar "substantial evidence" language in affirming them.

Although an independent finding of fact upon the record is apparently called for by the statute, it cannot be seriously advocated. In the first place, the Montana Supreme Court recognized at an early date in the case of *Bordeaux v. Bordeaux*[12] that the finding of fact contemplated by the statute must be made with "a due regard for the findings of the district court."[13] This qualification in the *Bordeaux* case was an important basis for upholding the constitutionality of the statute when it was later attacked on the ground that it gave the Supreme Court original jurisdiction where the Montana Constitution only provides for appellate jurisdiction.[14] Furthermore, though it might be another safeguard that a litigant will get a fair trial, a literal interpretation of the statute leading to an independent finding of fact would encourage an appeal in all close cases, if not in all cases. Finally, as a practical matter, the Supreme Court does not have the machinery to retry the case and as a result it is not in position to pass upon the credibility of the witnesses. Indeed, an attempt to pass upon the facts independently without the opportunity to observe the witnesses and hear their testimony first hand might well lead in the direction of injustice.

To review the facts in such a way as to see whether or not the evidence decidedly preponderates against the trial courts findings is a recognition that the trial judge is in a better position to pass upon the credibility of the testimony. To this extent it is a desirable position. The chief difficulty with this position is its vagueness, complicated by the random interchanging of the terms "preponderates" and "decidedly preponderates."[15] Even if the court were to apply this test in all equity cases, a lack of uniformity would probably result.

From the standpoint of certainty, simplicity, and uniformity, the substantial evidence rule as used in the instant case has much to commend it. Furthermore, it accords with the spirit of code abolishment of the distinction between law and equity and the establishment of one form of civil action as required by the Montana Constitution.[16] However, every time the substantial evidence rule is used, the mandate of the statute is ignored. If the court were to apply this test in every equity appeal it would be a

[11]85 Mont. 446, 278 Pac. 1009 (1929).
[12]32 Mont. 159, 80 Pac. 6 (1905).
[13]*Id.* at 166, 80 Pac. at 8.
[14]MONT. CONST. art.VIII,§ 2 Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918 (1905).
[15]The court stated in National Bank v. Yegen, 83 Mont. 265, 274, 271 Pac. 612, 614 (1928), that an assailant of the trial court's findings must "show that the evidence preponderates against them." In Bell v. Bell, 133 Mont. 572, 581, 328 P.2d 115, 119 (1958), the court stated that "findings of the trial court will not be disturbed on appeal, unless the evidence *decidedly* preponderates against them." (Emphasis supplied.) Each phrase has been used in many cases.
[16]MONT. CONST. art. VIII, § 28.

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clear case of judicial legislation. This step the court would be understandably loath to take.[17]

Under the present state of Montana law a lawyer's decision whether or not to appeal from an equity decree is at best a guess as to which standard the court will apply. In view of the complex mass of cases on the subject and the awkward legislation now in effect it would seem that well planned legislative action would bring the best solution to the problem. A well defined rule on scope of review is badly needed; it is an everyday working tool of an appellate court.

DOUGLAS C. ALLEN

DIVORCE—ADJUDICATION OF PROPERTY RIGHTS IN DIVORCE ACTION. The plaintiff husband filed a complaint for divorce on grounds of desertion. Defendant in her answer denied the alleged desertion, asked for a decree of separate maintenance, and further alleged that she had, during the marriage, contributed to the plaintiff approximately $3,000.00 for the purchase and maintenance of real and personal property, which is now owned solely by the plaintiff. The court found the wife guilty of desertion and granted the divorce to the husband. The court further found that the wife, by reason of the money she had contributed to the purchase and maintenance of plaintiff's property, was equitably entitled to $1,600.00, to be paid out of plaintiff's sole property. The plaintiff appealed from that part of the judgment requiring him to pay this amount to the defendant. On appeal to the Supreme Court of Montana, *held,* affirmed. A divorce court, although without specific statutory authority, has the equitable power to adjudicate the property rights of the parties to a divorce action. *Johnson v. Johnson,* 349 P.2d 310 (Mont. 1960) (Justices Harrison and Castles dissenting).

By the decision in the instant case the Montana Supreme Court has apparently overruled a long line of cases which have consistently held that the divorce court has no power to adjudicate the property rights of the parties to a divorce action.[1]

Revised Codes of Montana, 1947, section 21-139 states in part: "Where a divorce is granted for an offense of the husband, the court may compel him to . . . make such suitable allowance to the wife for her support during her life or for a shorter period as the court may deem just."

This statute provides for the payment of alimony, but is expressly lim-

[17]Subsequent to the instant case, however, the Montana court has again used the substantial evidence test in an equity appeal. Roth v. Palutzke, 350 P.2d 358 (Mont. 1960).

[1]Shaw v. Shaw, 122 Mont. 593, 208 P.2d 514 (1949); Emery v. Emery, 122 Mont. 201, 200 P.2d 251 (1948); Rufenach v. Rufenach, 120 Mont. 351, 185 P.2d 293 (1947); Grush v. Grush, 90 Mont. 381, 3 P.2d 402 (1931); Albrecht v. Albrecht, 83 Mont. 37, 269 Pac. 158 (1928); Damm v. Damm, 82 Mont. 239, 266 Pac. 410 (1928); Bischoff v. Bischoff, 70 Mont. 503, 226 Pac. 508 (1924); Thrift v. Thrift, 54 Mont. 463, 171 Pac. 272 (1918).

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