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Equity—Appeal from Equity Decrees—Scope of Appellate Review

David O. DeGrandpre

and the defendant was a resident of Flathead County. Action was commenced in Lake County. The Montana Supreme Court reversed an order denying a change of venue to Flathead County. In so holding the court said that the word *may* as used in section 93-2904 applies to tort actions as well as to contract actions, and the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for trial of the action.

The instant decision, in light of the *Seifert* case, has settled two issues regarding the proper venue in actions on contract or tort. First, *may* in the contract performance exception in R.C.M. 1947, § 93-2904, means exactly what it says. *Either* the county of defendant's residence or the county where the contract was to be performed is the proper county for trial of the action. Second, in contract actions the place of performance need not appear in the express terms of the contract, but it may be shown by necessary implication therefrom and the performance exception may be invoked. The certainty so long desired in this area has at last been established.

G. RICHARD DZIVI

EQUITY — APPEALS FROM EQUITY DECREES — SCOPE OF APPELLATE REVIEW — Plaintiff wife sought a decree of separate maintenance on grounds of mental and physical cruelty inflicted by her husband. The evidence was in sharp conflict on most points. The plaintiff's case was based almost entirely on her own testimony, practically all of which was uncorroborated. The district court decree allowed separate maintenance. On appeal to the Montana Supreme Court, *held,* affirmed. Where the evidence in an equity case is in conflict the Supreme Court inclines toward sustaining the trial judge's findings because his personal observation of the witnesses allows him to better evaluate their credibility. And where there is substantial credible evidence in favor of the trial court's finding for the plaintiff, that finding will be sustained even though some of plaintiff's evidence be discarded as incredible. *Reynolds v. Reynolds,* 123 Mont. 303, 317 P.2d 856 (1957) (Justices Adair and Bottomly dissenting).[1]

Section 93-216, *Revised Codes of Montana,* 1947, provides that in equity appeals 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 same, as well as questions of law." (Emphasis supplied.)[2] This is not unlike the English equity procedure which had developed by the middle of the nineteenth century. In England such a complete review of facts and law in equity was entirely appropriate since the court of first resort neither saw nor questioned witnesses but made its decision on the basis of written evidence.

[1]Plaintiff's case, since believed, satisfied the requirements for separate maintenance, consequently this question will not be considered here. However, the facts are interesting and highly controversial.
[2]Laws of Montana 1903, Second Extraordinary Session, ch. 1.

Montana Law Review, Vol. 20 [1958], Iss. 1, Art. 2

Before the advent of code procedure the English rule of complete review had been adopted by most of our states. The taking of all testimony in equity cases by deposition was abandoned before the turn of the century. Nevertheless, many states carried this broad scope of review into their codes.[3] Since then the appellate courts in those jurisdictions have recognized the distinct disadvantage in not being able to directly judge the credibility of witnesses and have generally sustained the trial court's findings when supported by substantial evidence.

In the instant case the majority of the court adopted the standard of review operative in appeals from judgments at law; that is, where there exists substantial evidence to support the findings of the lower court they should not be set aside. The dissenting opinion takes the contrary view, without discussion, that the express wording of the statute authorizes broader review in equity that at law.

That each opinion is supported by authority is best illustrated by examination of two recent Montana decisions. The case of *Bond v. Birk*[4] was a suit in equity for the cancellation of a deed. The Montana Supreme Court, after a complete review of the evidence, reversed the trial court's findings that the deed in question had been delivered. The court said that the evidence "clearly preponderates against the contention of the defendant that said deed was delivered" notwithstanding there may be competent evidence in support of the defendant's claim.[5] This position parallels the dissenting opinion in the principal case. The court in the *Bond* case, reviewing the record somewhat more closely than it would have in an action at law, disregarded the findings below when the evidence "clearly preponderated" against them. However, that opinion does not say the court made an independent decision without regard to the trial court's findings.

The decision in *Hart v. Honrud*[6] is authority for the present holding. On appeal from a decree for the defendant in a suit to quiet title, the court said that the trial judge's findings will not be disturbed where conflicting evidence, when fully considered, furnishes reasonable grounds for different conclusions, and when there is substantial evidence to support the lower court's findings.[7] Clearly, the court in the *Hart* case would

[3] POUND, APPELLATE PROCEDURE IN CIVIL CASES, 298 (1941).
[4] 126 Mont. 250, 261, 247 P.2d 199, 204 (1952).
[5] In his argument, counsel for the defendant cited decisions in which the Montana court took a contrary position. On rehearing the court answered that contention as follows: "The provisions of R.C.M. 1947, sec. 93-216 are controlling rather than the various decisions cited by defendant. . . . The reluctance of an occasional judge to abide by and apply the foregoing mandates of the legislature [including § 93-216] neither repeals nor changes the statute." *Id.* at 263, 264, 247 P.2d at 205, 206.
[6] 131 Mont. 284, 309 P.2d 329 (1957).
[7] A dissenting justice in the Hart case, somewhat irked by the result and probably referring to the Bond case, stated: "I have accepted the rule as stated in the majority opinion, and as announced by many decisions of this court that if there be substantial evidence in the record to support the findings of the trial court, we will not interfere with them. However, some members of this court think that in an equity case such as this, this court, even though the evidence be conflicting, must and can weigh the evidence from the cold record and determine wherein lies the preponderance of the evidence, unaffected by the determination of the trial court . . . then certainly this case is one where it might be appropriate to exercise the talents of this court in determining whether the findings . . . are supported by the preponderance of the evidence." *Id.* at 295, 309 P.2d at 336.

treat the findings of an equity judge the same as a jury verdict, upholding either if supported by substantial evidence.

Thus the Montana Supreme Court may apply either of two tests in appeals from equity decrees---the test of affirming whenever the trial court's decision is supported by *substantial evidence*, or the test of reversing only when the evidence *clearly preponderates against* the trial court's finding.

The tests are not necessarily inconsistent in all cases, though it would appear that they are in many situations. The problem may be illustrated by viewing the relative weight of the evidence in terms of percentages. If, for example, 85% of the credible evidence preponderated against the trial court's findings, and assuming that 15% is not substantial evidence, the decision would probably be reversed under either test. But if 70% of the credible evidence opposed the trial court's finding, and 30% (assuming this is substantial evidence) supported it, the appellate court might well reverse upon the ground that the evidence "clearly preponderated against" the trial court's finding. It might equally well affirm on the ground that "substantial evidence" supported the trial court's finding. Such a situation makes it almost impossible to predict whether, in a given equity appeal, an affirmance or reversal is more likely.

If these two rules are merely methods of stating the reason for a predetermined result, then any confusion between the two is immaterial. But some judges may begin with the rule and reason toward a conclusion. In this event it may be important which rule is adopted as the law in Montana since the "substantial evidence" rule favors affirmance while the "clear preponderance" test is more favorable to reversal.

It is possible that section 93-216 demands yet a third approach. The statute seemingly contains a mandate that the court review all the questions of fact arising from the evidence. A complete *de novo* review may be inconsistent with any deference to the trial court's findings. Yet the "substantial evidence" test, which the court adopted in the instant case, is primarily based on deferring to the trial court if there is considerable evidence supporting the court's view, even though that support constitutes less than a majority or preponderance of the evidence.

It is also possible to view both the "substantial evidence" test and the "clear preponderance" test as being consonant with the statute. If the evidence is closely balanced, and sharply in conflict, the Court might properly defer to the trial court's findings, treating the trial court's conclusions as analogous to another item of evidence, even though all the evidence were reviewed on appeal.

Apart from statute, the substantial evidence doctrine, as stated in the *Hart* decision, seems to be the proper standard when reviewing equity cases. With the universal change from depositions to taking direct testimony in equity, appellate courts are not on equal footing with trial courts which have the opportunity of seeing the witnesses and of observing their demeanor and hence are in a better position to judge their credibility. Further, the testimony and evidence in equity suits is often voluminous and of a technical character. A complete *de novo* review would be exceed-

inly difficult and would impose an inordinate amount of work on the appellate courts.

The Court in the instant case apparently applied the "substantial evidence" rule. If the view is taken that this test is more restricted than the broad factual review seemingly contemplated by section 93-216, it would appear that the Court has assumed a legislative function and repealed or severely limited the statute by construction. It may well be that the practical necessities of appellate review demand something less than *de novo* review of all the facts in appeals from equity decrees. However, until such time as the legislature sees fit to modify the 1903 statute, it would seem that the Court should frame its rules on the scope of equity review with reference to that statute.

The instant case does not clarify the confused state of Montana law on equity decrees.[8] It is almost impossible to predict how much weight the Supreme Court will give the trial court's findings in any given equity appeal. A more uniform standard is highly desirable. If the legislature is unwilling to modify section 93-216, the entire burden will remain on the Court to effect a clarification.

DAVID O. DE GRANDPRE

CONSTITUTIONAL LAW — EQUAL PROTECTION — INTEGRATION IN PUBLIC SCHOOLS — Petitioners, members of the Board of Directors of the Little Rock, Arkansas, Independent School District, attempted to secure a delay in the desegregation plan which they approved and adopted on May 24, 1955. This plan was adopted in an attempt to effectuate the mandate of the Supreme Court of the United States in *Brown v. Board of Education*,[1] that racial segregation in public schools be terminated. Pursuant to the plan, nine Negro students were scheduled to enroll in the high school in the fall of 1957. The governor of the state declared the school off-limits to Negro students and ordered units of the Arkansas National Guard to prevent their entrance. These troops were removed only after the governor and officers of the national guard were enjoined from preventing Negro attendance at the high school. Thereafter, the nine Negro students entered school but were removed following public demonstrations. Units of the United States Army were stationed at the school by Presidential order to prevent any further disorder and the Negro students re-entered classes. During the remainder of the year fires, bomb scares, and altercations within the school created unrest and turmoil which inhibited effective education. The Court of Appeals for the Eighth Circuit held that the public violence and opposition could not justify the delay petitioners sought for their desegregation plan. On certiorari to the Supreme Court of the United States, *held*, affirmed. Interference by the governor, state legislature, and general public did not constitute a justifiable excuse for a

[8]The historic foundations of the conflicting Montana approaches to the scope of equity review were analyzed and explained in detail in Clark, *Appeals from Equity Decrees in Montana*, 12 MONT. L. REV. 36 (1951).

[1]347 U.S. 483 (1954). This case is hereafter referred to as the first Brown case.