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Divorce—Modification Proceeding after Final Decree—Counsel Fees

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the proceeds as open accounts in their respective books. Further, the fact that the defendant notified the complaining witnesses of the receipt of the funds would indicate that he did not intend to permanently withhold the funds from the partnership.

The outcome of the instant case would seem correct, but it is submitted that certain emphasis in the case is somewhat misleading. The court states:[9]

> The *only possible circumstance* which would indicate an intent to fraudulently deprive the Grizzly Bear Company of its money permanently is the assertion by Ted Gustafson, one of the complaining witnesses, that the defendant did not inform him of his receipt of the proceeds until some two or three weeks after the car was loaded and shipped. However, there is nothing in the record to indicate even roughly the date this remittance was received by Smith so we are in no way able to infer that he *concealed*, even for a short time, his receipt of the money. (Emphasis added.)

The court in the instant case seems to place great weight on the fact that there was no concealment of the money by the defendant. Concealment is almost terated as an essential element of the crime. Conceding that concealment is nearly always present in cases of larceny, it would seem that its absence would not make a criminal act any less unlawful. Can it be said that a person who performs all the elements necessary for the crime of larceny can escape prosecution simply by taking and holding the stolen property openly and notoriously? Such a position would clearly be untenable and erroneous.

Undue stress was also given to the fact that the owner was lax for a time in enforcing payment. Logically it does not seem that the bailor's subsequent conduct should have anything to do with whether a crime was committed. If a bailee intends to permanently convert the property at the outset, the crime should be completed at that time. If the crime is then complete, the owner's subsequent conduct should not exculpate the offender.

MAURICE R. COLBERG, JR.

DIVORCE—MODIFICATION PROCEEDING AFTER FINAL DECREE—COUNSEL FEES—In 1954, the defendant wife was granted a final decree of divorce from the appellant. She was awarded custody of their minor children subject to visitation rights of the appellant. In 1955, after the statutory time for appeal of a divorce decree had expired, the appellant filed for a modification of the custody order, seeking to restrict the residence of the children. The lower court denied the appellant's motion and allowed the wife counsel fees. On appeal to the Montana Supreme Court, *held,* af-

[9]Instant case at 1102.

firmed. Under section 21-137 of the *Revised Codes of Montana*, 1947,[1] counsel fees may be awarded a wife in an action for modification of a custody order, even though the divorce decree is final and the time for appeal has expired. *Barbour v. Barbour*, 330 P.2d 1093 (Mont. 1958) (Justice Adair dissenting; Justice Angstman dissenting in part).[2]

Two statutory provisions are pertinent to this decision. R.C.M. 1947, section 21-137 is the statutory authority giving power to a court to grant counsel fees to a wife in a divorce action. It provides that such fees may be awarded "*while* an action for divorce is *pending*."[3] R.C.M. 1947, section 93-8706 provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed." There is substantial authority in other jurisdictions having like statutes holding that counsel fees may be allowed a wife on a custody modification proceeding, even after final divorce, on the theory that a custody proceeding is merely a continuation of the divorce action.[4] However, there is contrary authority under similar statutes, holding that a final divorce decree ends the action within the meaning of a statute which provides that such fees may be awarded "during the pendency" of a divorce action.[5] Several Montana decisions, more fully dealt with later, maintain that divorce actions are purely statutory and the power of the court over such actions is solely that conferred by statute. On the other hand, the court in the present case, citing authorities, allowed counsel fees under what it termed "the continuing jurisdiction of the court in aid of the welfare of the children and its inherent equitable power."[6]

From a study of the Montana cases, it appears that prior to the case of *McDonald v. McDonald*,[7] decided in 1950, the Montana Court construed section 21-137 as clearly not permitting the award of counsel fees to a wife after a divorce decree becomes final on appeal or the time for appeal has expired.[8] Even though these cases did not involve custody proceedings

[1]REVISED CODES OF MONTANA, 1947, are hereinafter cited R.C.M. 1947.
[2]Only that portion of the decision which relates to the award of counsel fees will be considered herein.
[3]Emphasis supplied. This section, more fully quoted, provides that "while an action for divorce is pending the court . . . may . . . require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the husband wilfully deserts the wife, she may, without applying for a divorce, maintain . . . an action against him for permanent support and maintenance. During the pendency of such action, the court . . . may . . . require the husband to pay . . . any money necessary for the prosecution of the action." Justice Adair, dissenting in the case of Trudgen v. Trudgen, 329 P.2d 225 (Mont. 1958), pointed out that the second and third sentences of this section have no application whatever to an action for divorce. They refer solely to an action for permanent support and maintenance without applying for a divorce. It follows from that construction of the section that an award of counsel fees in the present case can only be justified under the first sentence of the section.
[4]Clayton v. Clayton, 117 Cal. App. 2d 7, 254 P.2d 669 (1953); Chambers v. Chambers, 75 Neb. 850, 106 N.W. 993 (1906); Crooks v. Crooks, 197 S.W.2d 689 (Mo. App. 1946).
[5]Wallace v. Wallace, 273 Mass. 62, 172 N.E. 914 (1930); Lake v. Lake, 194 N.Y. 179, 87 N.E. 87 (1909); Bishop v. Bishop, 205 N.Y. Supp 542, 210 App. Div. 2 (1924).
[6]Instant case at 1096.
[7]124 Mont. 26, 218 P.2d 929 (1950).
[8]Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359 (1904); Grimstad v. Grimstad, 61 Mont. 18, 201 Pac. 314 (1921); Albrecht v. Albrecht, 83 Mont. 37, 269 Pac. 158 (1924).

following a final divorce decree, the court refused to extend the section beyond its plain and obvious meaning. These cases generally concerned the question whether the wife, in an independent action after a final divorce decree, was entitled to recover counsel fees incurred in the divorce action. The cases agreed that she could not. A research of the decisions prior to 1950 revealed no cases in which, by way of dictum or otherwise, it was said or even implied that there might be special instances when a wife might be awarded counsel fees after a final decree of divorce. Rather, the language of the court in these earlier cases justifies the conclusion that it considered the statute susceptible to but one meaning; viz., counsel fees may be awarded a wife *only* while a divorce action is pending; and such action is deemed to be pending only until the divorce decree is final after appeal or after the time for appeal has expired. In *Grimstad v. Grimstad*,[9] after quoting the pertinent statutes, the court said:

> It requires but a casual reading of section 3677 [now section 21-137] to ascertain that the object of the legislature in enacting it was to give the courts discretionary power, to be exercised during the pendency of the action . . . to compel the husband to provide the means necessary to enable her to prosecute or defend the action. In other words, the power in this behalf conferred by the statute is only ancillary to, or an incident of, an action for divorce. This renders the conclusion necessary that when the main power conferred by this section has ceased to be operative, the ancillary or incidental power also ceases to be operative and cannot be invoked.

The Montana Supreme Court, in these earlier cases, apparently found little difficulty in construing this section, but the case of *McDonald v. McDonald* established at least an exception, if not a contrary rule.[10] In that decision it was held that counsel fees may be allowed after a final divorce decree in an action for modification of a child custody order. The rationale of that case was that even though the divorce decree had become final between the parties, the fact that minor children were involved vested the court with a continuing jurisdiction to adjudicate with regard to their custody; and for this reason the action remained "pending." In 1954, the *McDonald* case was overruled.[11] The court held that the pertinent sections were clearly intended by the legislature to allow the award of counsel fees only "during the pendency" of a divorce suit and not on a modification of a child custody order after the decree became final. In 1958, this case was overruled and the rule of the *McDonald* case was reinstated.[12] The present case, decided shortly thereafter, affirms the *McDonald* case. It is interesting to note that the four cases just referred to, decided since 1950, were decided on virtually the same facts. The fact that each case includes a vigorous dissent indicates the uncertainty existing as to the proper construction of section 21-137.

It is arguable that the legislature impliedly ratified the construction

[9]61 Mont. 18, 22, 201 Pac. 314, 315 (1921).
[10]124 Mont. 26, 218 P.2d 929 (1950).
[11]Wilson v. Wilson, 128 Mont. 511, 278 P.2d 219 (1954).
[12]Trudgen v. Trudgen, 329 P.2d 225 (Mont. 1958).

placed on section 21-137 by the court in the *Wilson* case.[13] In two successive legislative assemblies which met after the *Wilson* decision in 1954 and before that case was overruled in 1958, a bill was proposed which would have clearly allowed counsel fees in an action for modification of a custody order, even though the decree was final. House Bill number 329, introduced in the Thirty-Fourth Legislative Assembly (1955), sought to amend the first sentence of section 21-137 by inserting after the words, "while an action for divorce is pending," the words, "or upon any action or proceeding for modification of any order or decree therein." A similar bill was proposed in the Thirty-Fifth Legislative Assembly (1957). Both bills were killed in the Senate.[14] There is substantial authority to the effect that such action is tantamount to legislative ratification of the construction placed upon a statute by the courts.[15] The Montana court, in *Bottomly v. Ford*, said:

> The fact that the legislature has not seen fit by amendment to express disapproval of a . . . judicial interpretation of a particular statute, has been referred to as bolstering such construction . . . or as persuasive evidence of the adoption of the . . . construction. . . . The failure to . . . [amend] amounts to legislative approval and ratification . . . and . . . such construction should generally be adhered to, leaving it to the legislature to amend the law should a change be deemed necessary. These rules are particularly applicable where an amendment is presented to the legislature and fails of enactment.[16]

There is also substantial authority to the effect that a long standing construction of a statute by the courts becomes a part of the statute itself and any changes thereafter should come from the legislature and not the courts.[17] Since the court consistently construed section 21-137 in cases decided before 1950, it should, under the above rule, be presumed that the legislature acquiesced in that construction. Assuming that the *McDonald* case[18] was not in accord with cases decided prior to 1950, it is arguable that a change, if desired, should have been accomplished through legislative action. This position is taken by Justice Adair, dissenting in the principal case and in the *Trudgen* case.[19] In both cases, the dissenter's basic proposition is that a court cannot lawfully do by construction what the legislature refused to do by enactment. In other words, the court, by reversing its prior construction, was unlawfully exercising a legislative function.

[13]Note 10 *supra*.

[14]R.C.M. 1947, § 21-137 has remained unchanged since its enactment in 1895.

[15]Bottomly v. Ford, 117 Mont. 160, 157 P.2d 108 (1945); State v. State Board of Equalization, 324 P.2d 1057 (Mont. 1958); Bodinson Mfg. Co. v. Cal. Employment Commission, 17 Cal. 2d 321, 109 P.2d 935 (1941); Bosley v. Dorsey, 191 Md. 229, 60 A.2d 691 (1948).

[16]117 Mont. 160, 168, 157 P.2d 108, 112 (1945).

[17]Pouch v. Prudential Life Ins. Co., 204 N.Y. 281, 97 N.E. 731 (1912); Manley v. Mayer, 68 Kan. 377, 75 Pac. 550 (1904); Lowman and Hanford Co. v. Ervin, 157 Wash. 649, 290 Pac. 221 (1930); Industrial Loan Corp. v. Swanson, 223 Minn. 346, 26 N.W.2d 625 (1947); Coleman v. Coleman, 94 N.H. 456, 55 A.2d 471 (1947).

[18]Note 9 *supra*.

[19]Note 11 *supra*.

It is apparent that the court has indulged in a vacillating construction of section 21-137. This construction has rendered the meaning of the section uncertain. Litigants and attorneys, who must necessarily look to statutory law for guidance in divorce proceedings, may justifiably hesitate to place any reliance on the court's latest construction. That such a situation is undesirable is plainly evident. Since parents often become dissatisfied with custody orders and frequently institute modification proceedings with regard thereto, the number of litigants affected is substantial. It appears that this situation might have been avoided if changes in the construction of the statute had been left to the legislature.

THEODORE CORONTZOS

MUNICIPAL CORPORATIONS—LIABILITY FOR POLICE NEGLIGENCE—DUTY TO PROTECT INFORMERS—Plaintiff's intestate son, in response to an FBI flyer, furnished information to the New York police concerning the whereabouts of the notorious criminal, Willie Sutton. His part in the capture of Sutton was widely publicized. Thereafter he received threats against the safety of himself and his family, and was afforded police protection for a short while. The threats continued but police protection was discontinued in spite of request. He was shot to death three weeks later, walking home from work. An action for damages was filed against the City of New York by decedent Schuster's father as administrator of his estate, alleging that his death was due to the negligent failure of the city to use ordinary or reasonable care for Schuster's security and protection. The complaint was dismissed on the ground that it lacked facts sufficient to constitute a cause of action. On appeal the New York Court of Appeals divided three and three. After appointment of an additional justice to sit on the case, on reargument before the Court of Appeals, *held,* reversed. A municipality has a duty, the breach of which will support a cause of action, to exercise reasonable care for the protection against retaliation of a person who has aided in the enforcement of the criminal law. *Schuster v. City of New York,* 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

The breach of a duty is the foundation of any liability in negligence. Hence the problem with the instant case is to find, or create, a duty of reasonable protection running from the New York City Police to an informer who has aided them in a capture, and who reasonably appears to be in danger. Generally a duty arises from a relationship between the parties which brings them sufficiently close together that the conduct of each can have a substantial effect on the other. This relation may be one of activity and space, such as is involved in the operation of an automobile, or it can be a status relation such as "invitee" or "employee." A duty arising from an act can be inferred from the act itself without much difficulty. On the other hand, a duty breached by an omission, since there has been no act, must be established on independent grounds.[1] Since the instant case involved only inaction, any duty must be independently established.

[1]On duty generally, see Winfield, *Duty in Tortious Negligence,* 34 COLUM. L. REV. 41 (1934).