

Comment on Recent Decisions

AFFIDAVITS—ACKNOWLEDGEMENTS—TELEGRAPHS AND TELEPHONES.—The defendants executed a mortgage and subsequently mortgaged the same premises to a bank. In a foreclosure suit the defendant contended that the first deed was void because the acknowledgement by his wife was made over the telephone. Held, that such acknowledgements by the wife over the telephone were good. *Abernathy v. Harris* (Ark. 1931) 34 S. W. (2d) 765.

The prevailing rule is that where statutes require a personal appearance and privy examination before a proper officer for an acknowledgement, one taken over the telephone is void. *Roach v. Francisco* (1917) 138 Tenn. 357, 197 S. W. 1097; *Southern State Bank v. Sumner* (1924) 187 N. C. 762, 122 S. E. 848; *Hutchinson v. Stone* (1920) 79 Fla. 157, 84 So. 151; *Meyers v. Eby* (1920) 33 Idaho 266, 193 Pac. 77, 12 A. L. R. 535. The deed under such circumstances is void. *Robinson v. Bruner* (1927) 94 Fla. 797, 114 So. 556.

However there is some authority to the effect that in the absence of fraud, duress or mistake, a deed acknowledged over the telephone is valid. *Banning v. Banning* (1889) 80 Cal. 271, 22 Pac. 210. This may be so even where the statute requires an appearance before the proper officer. *Wooten v. Farmers' and Merchants' Bank* (1923) 158 Ark. 179, 249 S. W. 569. Where there is an appearance and an acknowledgement of the deed in some manner, it is conclusive, and evidence is inadmissible to impeach the certificate as against an innocent holder. *Meger v. Gossett* (1882) 38 Ark. 377.

Ordinarily, affidavits taken over the telephone are void. *Sullivan v. First National Bank* (1904) 37 Tex. Civ. A. 288, 835 S. W. 421; *Carnes v. Carnes* (1912) 138 Ga. 1, 74 S. E. 785. Notaries taking such acknowledgements will be guilty of professional misconduct and of violation of public duty. *In re Napolis* (1915) 169 App. Div. 469, 155 N. Y. S. 416. But where a lessor executed a lease and received the rent for four years, an attempt to repudiate the agreement upon the ground that it was acknowledged over the telephone was unsuccessful. *Logan Gas. Co. v. Keith* (1927) 117 Ohio 206, 158 N. E. 184, 58 A. L. R. 600. And where notice of injuries was required to be given to the city as a condition precedent to instituting an action against it, it was held that the action could be maintained even though the affidavit in the notice was taken over the telephone. *Kuhn v. City of St. Joseph* (Mo. App. 1921) 234 S. W. 353, 7 St. LOUIS L. REV. 187.

The instant case seems to be contrary to the purpose and intent of an acknowledgement, namely, that by it the grantor states the act evidenced by the instrument to be his act or deed. It hardly seems possible that one can state an act or deed to be his, when he is talking over the telephone without having the deed before him.

T. L., '32.

ATTORNEY AND CLIENT—CONTINGENT FEE LIEN—SECRET SETTLEMENT BY CLIENT.—A personal injury suit was compromised by the plaintiff without

his attorney's knowledge or consent. *Held*, under the Oklahoma statutes, R. S. Okla. (1921) sec. 4103, the attorney may sue in equity the former defendant for the amount due under his contingent fee lien and that the extent of his lien is to be measured by the amount of the probable recovery in the principal action. *Sterling Milk Products Co. v. Brown* (Okla. 1930) 294 Pac. 117.

The result in the present case is based entirely upon the terms of the Oklahoma statute, because at common law the attorney's lien did not attach until there was a judgment. *Beecher v. Peter A. Vogt Manufacturing Co.* (1920) 227 N. Y. 669, 125 N. E. 831; *Levy v. Public Service Railway Co.* (1918) 91 N. J. L. 183, 193 Atl. 171. However, statutes giving the attorney a lien of some sort in case of a secret settlement between the parties exist in every state. The Alabama courts, under the statute in that state, have reached a similar result to that in the principal case. *Alabama Fuel & Iron Co. v. Denson* (1922) 208 Ala. 337, 94 So. 311. In Texas a similar result is reached when the contract between a client and his attorney involves a partial assignment of the cause of action rather than a mere contingent fee agreement. *Gibson v. Texas Pacific Coal Co.* (Tex. Civ. App. 1924) 266 S. W. 137.

The above cases represent the correct rule in but a small minority of the states. In Missouri the amount of the lien is specifically limited in the statute which creates it to the agreed percent of the settlement. R. S. Mo. (1929) secs. 11716 and 11717. This is the general doctrine. *Conklin v. Conklin* (1922) 201 App. Div. 170, 190 N. Y. S. 685; *Downey v. Northern Pacific Railroad Co.* (1924) 72 Mont. 166, 232 Pac. 531. The attorney can recover more than the consideration recited in the release if he can show that the real consideration was greater, unless the release contains an express stipulation that the recited consideration is the sole one. *Whitehall v. Aurora* (1909) 139 Mo. 597, 123 S. W. 1045; *Hurr v. Metropolitan Street Railroad Co.* (1910) 141 Mo. App. 217, 124 S. W. 1057. If the defendant in the secret settlement agrees to pay plaintiff's lawyers, some states allow the attorney to recover the stipulated percent of the total amount the defendant is obligated to pay (the "settlement" plus the fee to the plaintiff's lawyers). *Whitecotton v. St. Louis & Hannibal Railroad Co.* (1913) 250 Mo. 624, 157 S. W. 770; *Case v. Emmerson-Brantingham Co.* (1915) 269 Ill. 94, 109 N. E. 671. Other states hold that the attorney gets only a fee on the amount paid to his client. *Proctor v. Louisville & Nashville Railroad Co.* (1913) 156 Ky. 465, 161 S. W. 519; *Ward v. Donovan* (1923) 235 N. Y. 240, 189 N. E. 254.

The client may settle at any time provided he acts in good faith, any clause in the contract of employment prohibiting such a settlement being void as against public policy. *Beagles v. Robertson* (1909) 135 Mo. App. 306, 115 S. W. 1042; *Boyd v. Johnson* (1924) 145 Md. 385, 125 Atl. 697. If the settlement was made with an intent to defraud the attorney, the courts will exercise their common-law powers and allow the attorney to intervene and continue the suit so that the amount of his fee can be determined.

Barthels v. Garrels (1921) 206 Mo. App. 199, 227 S. W. 910; *Frear v. Lewis* (1922) 201 App. Div. 660, 195 N. Y. S. 3.

Where the settlement was made in good faith, there is great conflict as to what is the attorney's proper remedy. In Missouri his only action is a suit at law, as the settlement extinguishes the principal cause of action. *Mills v. Metropolitan Street Railway Co.* (1920) 282 Mo. 118, 221 S. W. 1. In New York the proper relief is by a summary proceeding in equity to foreclose the lien. *In re Reisfeld* (1919) 187 App. Div. 223, 175 N. Y. S. 365. Several jurisdictions allow intervention in the original suit. *Schutt v. Bush* (1920) 210 Mich. 495, 178 N. W. 48; *Johnson v. Mo. Pac. R. R. Co.* (1921) 149 Ark. 670; 234 S. W. 979. In Oklahoma the attorney can get the original suit reinstated but must do so before the expiration of the term of court in which it was dismissed; otherwise his only remedy against the former defendant is a proceeding in equity. *Wood v. Hines* (1927) 117 Okla. 86, 245 Pac. 846.

The situation in Oklahoma is somewhat anomalous. The statute obviously tends to prevent secret settlements by making the amount of fees for which the defendant is liable uncertain. By the holding that the new suit against the former defendant should be in equity, a judge is put in the position of having to fix the amount of damages that would probably have been assessed by a jury. G. W. S., '33.

CONSTITUTIONAL LAW—JURY TRIAL—PETTY OFFENSES IN THE FEDERAL COURTS.—The defendant was charged with having operated a motor vehicle over a public highway recklessly at a greater speed than twenty-two miles an hour, contrary to statute, in such manner and condition as to endanger property and individuals. Having been denied a jury trial by the police court of the District of Columbia, the defendant appealed. The decision was reversed by the Court of Appeals, which was sustained by the Supreme Court. *Held*, driving an automobile recklessly so as to endanger life and property is a "crime" within the constitutional provision guaranteeing jury trial. *District of Columbia v. Colts* (1930) 51 S. Ct. 52.

Constitutional provisions guaranteeing the right of trial by jury insure the right as it existed at common law. *Ex parte Mana* (1918) 178 Cal. 213, 172 Pac. 986; *Jernigan v. Garrett* (1923) 115 Ga. 390, 117 S. E. 327; *Laska v. Chicago Rys. Co.* (1925) 318 Ill. 570, 149 N. E. 469.

Some 170 minor offenses in colonial Massachusetts were punished in the first instance by the unaided magistrate. HILKEY, LEGAL DEVELOPMENT IN COLONIAL MASSACHUSETTS (1910) 37 COLUMBIA UNIV. STUDIES, cited in Frankfurter and Corcoran, *Petty Federal Offenses and Trial by Jury* (1926) 39 HARV. L. REV. 917, 940. Such was also the case in most of the other colonies where, because of the general inability to pay heavy fines and lack of manpower to guard jails, it was necessary to inflict light penalties in all except very serious offenses. Frankfurter and Corcoran, above. It is known that at the time of the drafting the Constitution the Committee on Detail deliberated be-