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Recent Decisions

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answer the demands of cleanliness, which alone can insure the health of the barber's patrons; (2) That barber shops may become lounging places for the idle and dissipated, and therefore a menace to minors; and (3) That the barber shop in front may be a blind for a den of thieves, professional gamblers, gangsters and racketeers behind. Two strong dissenting opinions are published along with the majority opinion in this case. It is submitted that they are of greater merit. In his dissenting opinion, speaking of the prohibitory ordinance passed by the city of Zanesville, Judge Jones says: "This ordinance may be such that would receive the approval of a Soviet or Fascist regime; but its Alpha and Omega amounts to a regimentation of both labor and industry . . . Neither the N. R. A. in the heyday of its activities nor the American Federation of Labor has asked for such drastic regulation of American labor and industry . . . Why are the closing hours at 6 o'clock, P. M., or on Thursday afternoon so sacrosanct? The public welfare is the welfare of the people. They best know when they desire such service, and the trade can be depended upon to render that service at the hours the public demands it. Thousands of neighborhood shops exist in Ohio communities having many more thousands of customers employed in daytime work in offices, shops and factories, customers who have little or no opportunity of seeking a barber's service before 6:00 o'clock, P. M.; nor have they such opportunity before 8:00 o'clock, A. M., when they must be at their work or on their way thereto. Shall that portion of the public be deprived of their liberty of action by the *ipse dixit* of some municipal council? I hold that the ordinance in question is arbitrary, unreasonable, and places an undue restraint upon the personal liberties of the public and upon those engaged in the pursuit of a lawful business." The majority opinion carried to its logical conclusion; opens the door to like prohibitory regulation against many soft-drink parlors, small restaurants, cigar stores and other places of like nature where people are wont to congregate at night—a situation hardly justifiable under our present system of government.

John J. Locher, Jr.

RECENT DECISIONS

MORTGAGES—ABSOLUTE DEED AS A MORTGAGE.—A recent case presents an unusual aspect of the general principle that an absolute deed may be shown to be a mortgage. The plaintiffs brought an action to recover the sum of \$5,000, an alleged *loan* made to the defendant by their testator and secured by an absolute deed. Simultaneously with the execution of the deed, the defendant and the testator executed an instrument under seal providing that the defendant was to pay: (1) For all necessary repairs on the property conveyed by the deed; (2) All taxes and assessments on this property; (3) The testator the sum of \$300 per

year in semi-annual installments (which would be at the rate of 6 per centum mortgage interest on the sum of \$5,000); and (4) All premiums on insurance policies. The defendant was permitted to retain possession. The property conveyed was subject to a mortgage executed in favor of a third person. Several witnesses testified that the transaction was a loan rather than an outright sale. The \$5,000 was *in excess of the value of the equity of redemption* in the property conveyed by the deed. The defendant contended that the transaction constituted a sale, rather than a mortgage. The court held that the plaintiffs were entitled to recover. *Chase Nat. Bank of City of New York v. Tower*, 183 N. Y. S. 832 (1935).

The general rule seems to be, especially in jurisdictions where the distinctions between legal and equitable actions are and have been largely observed, that parol evidence is not admissible in an action at law to show a conveyance absolute upon its face was intended to operate as a mortgage. MORTGAGES, 19 R. C. L. 253; *Flint v. Sheldon*, 13 Mass. 443 (1816); *Hogel v. Lindell*, 10 Mo. 483 (1847). The reasons that have been given for this rule are: (1) The admission of parol evidence in such a case by a court of law is prohibited by the statute of frauds of the particular jurisdiction; (2) A written instrument cannot be varied or contradicted by parol evidence; and (3) The admission of parol evidence in such a case would go to establish a trust, that is, an agreement on the part of the grantee to reconvey the premises to the grantor upon the payment of a certain sum of money with interest, and this is prohibited by statute, in some states. *Rogan v. Walker*, 1 Wis. 527 (1853); *Flint v. Sheldon, supra*; MORTGAGES, 19 R. C. L. 253.

The equity of redemption is an inseparable incident to a mortgage. It arises out of the nature of the transaction, and it is not created by the deed or other instrument of the parties. So the admission of parol evidence in such cases does not establish an interest or trust in land, contrary to provisions of statutes of fraud or statutes prohibiting the establishment of trusts in land by parol evidence. See *Rogan v. Walker, supra*. Neither is the parol evidence rule violated in such cases. This rule prohibits the variance in their signification or explanation of deeds and specialties by parol evidence, if the terms of such instruments are capable of a sensible explanation of themselves. But to admit parol evidence to show that an absolute deed was intended to operate as a mortgage does not violate this rule. Such evidence does not vary the deed, but it maintains the equity which attaches to the transaction inherently, and which the deed does not create and cannot destroy. See *Rogan v. Walker, supra*.

In some jurisdictions it has been held that parol evidence is admissible in an action at law for the purpose of showing that an absolute deed was intended to operate as a mortgage. *Despard v. Walbridge*, 15 N. Y. 374 (1857); *Jackson v. Lodge*, 36 Cal. 28 (1868); *Walls v. Endel*, 20 Fla. 86 (1883); *McAnulty v. Seick*, 59 Iowa 586, 13 N. W. 743 (1882) (bill of sale). These decisions are from code states; and in two of them (*Despard v. Walbridge* and *Walls v. Endel*) the courts emphasized the code provisions allowing equitable defenses in actions at law.

From a very early date parol evidence was admitted in equity to show that a deed absolute in form was executed as security for a debt. Professor Walsh says that the earliest case of this kind was Y. B. 9 Edw. IV, 25, 34 (1470), "in which the law court stated that the Chancellor would give relief in such cases." WALSH, A TREATISE ON MORTGAGES 34, p. 1.

While the decisions in the United States are uniform that in a court of equity an absolute deed may be shown to be a mortgage, there is a diversity of opinion as to the grounds on which jurisdiction in such cases rests. In some of the cases, especially some of the early decisions, the doctrine does not apply except in cases where there is some ordinary ground of equity jurisdiction, such as fraud,

accident or mistake. 1 BEACH, COMMENTARIES ON MODERN EQUITY JURISPRUDENCE (1892) § 407; Annotation, L. R. A. 1916B, 18. But in most jurisdictions, and especially in the recent decisions, fraud, accident or mistake is not essential in an action for relief and to give effect to the intention of the parties. 1 BEACH, COMMENTARIES ON MODERN EQUITY JURISPRUDENCE (1892) § 407; Annotation, L. R. A. 1916B, 18. In some cases the doctrine is asserted that fraud in the use of such an instrument is as much a ground for the interposition of equity as fraud in the execution. *Pierce v. Robinson*, 13 Cal. 116 (1859).

In North Carolina the rule is said to be that "a deed absolute upon its face cannot be converted into a mortgage unless it shall be established that the clause of defeasance was omitted by ignorance, mistake, fraud, or undue influence." *Perry v. Southern Surety Co.*, 129 N. E. 721, 723 (N. C. 1925).

There are various circumstances which will show that a deed absolute upon its face was intended to operate as a mortgage. "The existence and continuance of a debt is said to be a well nigh infallible evidence that the instrument was intended as a mortgage; and the payment of interest upon the debt, or the extension of time of payment, is generally conclusive evidence of this fact. But, on the contrary, the absence of any written acknowledgment of the debt, or express promise to pay, is far from being conclusive. Whether the transaction is a mortgage is to be determined by the answer to the inquiry whether it was the intention of the parties to secure the payment of the debt or extinguish it. Inadequacy or price is also an important element in establishing the character of the transaction; and another circumstance that will have much weight is the continuance of the grantor in the use and occupation of the land as owner after the apparent sale and conveyance." 1 BEACH, COMMENTARIES ON MODERN EQUITY JURISPRUDENCE (1892) § 412.

The contention that a deed absolute upon its face was intended to operate as a mortgage is one that is usually made by the debtor-grantor in the particular transaction. But, as in the principal case, the contention has not infrequently been made by the creditor-grantee in the deed. See: *Bryan v. Cowart*, 21 Ala. 92 (1852); *Stone v. Nix*, 101 Ga. 290, 28 S. E. 840 (1897); *Reid v. McMillan*, 189 Ill. 411, 59 N. E. 948 (1901); *Herron v. Herron*, 91 Ind. 278 (1883); *McMillan v. Bissell*, 63 Mich. 66, 29 N. W. 737 (1886); *Forest Lake State Bank v. Ekstrand*, 112 Minn. 412, 128 N. W. 455 (1910); *Shields v. Simonton*, 65 W. Va. 179, 63 S. E. 972 (1909); *White v. Daniell*, 141 Wis. 273, 124 N. W. 405 (1910). It is not uncommon for persons to lend money on securities, of which they do not wish to become permanent owners, even though the securities may be ample to indemnify the creditor and exceed in value the amount of the loan. See *Bryan v. Cowart*, *supra*. Regardless of whether the securities exceed the amount of the loan, the creditor is entitled to deal with the security in accordance with the actual intention of the parties at the time the transaction was entered into. As the principal case shows, the security may not have been ample indemnity, or it may depreciate in value, and the resulting loss would be thrown on the lender, when he had really protected himself against it by the terms of the agreement with the borrower.

Francis Dunn, Jr.

PARENT AND CHILD—ACTIONS BETWEEN PARENT AND CHILD.—In *Duffy v. Duffy*, 178 Atl. 165 (Pa. 1935), the plaintiff sued her minor son for injuries due to his negligent operation of the car in which they were riding. The court denied relief mainly on the converse of the proposition, that an unemancipated minor may not maintain an action against the parent for personal injuries.

The usual reason for such a rule is that to give a minor child a right of action against the parent would tend to bring discord into the family and to disrupt the

peace and harmony of the household. However, there is no rule at the common law barring actions between parent and child for personal injuries to latter. EVERSOLEY, DOMESTIC RELATIONS (1885) 601. Most of the early common-law writers intimate that a minor child may have a cause of action for unreasonable chastisement by the parent. A few early cases in England have allowed children to maintain actions against their parents. *Roberts v. Roberts*, Hard. 96, 145 Eng. Rep. 399 (1657) (action by infant against her father to enjoin the commission of waste); *Morgan v. Morgan*, 1 Atk. 4, 89, 26 Eng. Rep. 310 (1737) (account decreed in favor of infant against parent).

Before 1891 several cases allowed recovery against persons *in loco parentis*. *Fitzgerald v. Northcote*, 4 F. & F. 656 (1865) (child recovered a verdict against his school master for assault and false imprisonment); *Gould v. Christianson*, Fed. Cas. No. 5,636 (D. C. S. D. N. Y. 1836) (shipmaster was held liable for assault and battery of a minor child); *Nelson v. Johansen* 18 Neb. 180, 24 N. W. 730 (1885) (held that an action for negligence in not properly clothing a minor child would lie in its favor against a guardian).

Since 1891 the first case involving the right to sue a parent arose in the United States. In *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891), it was held that a minor daughter had no action for false imprisonment against her mother. This decision was followed by many more and remains today the law in the United States. An extreme case is *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905). A father had been convicted of rape upon his minor daughter and had been sentenced to imprisonment. The daughter sued for damages and a verdict in her favor was reversed. The court approved the doctrine of domestic tranquility and as a further reason continued: "Outside of these reasons which affect public policy, another reason, which seems almost to be *reductio ad absurdum*, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him." But see *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905, 71 A. L. R. 1055 (1930), wherein the court said family life ought not to be used as a cloak for intended wrong.

Many cases have arisen due to negligent operation of automobiles and in all of them the courts have denied recovery by the child. In most of the cases the father carried liability insurance. In *Matarese v. Matarese*, 47 R. I. 131, 131 Atl. 198 (1925), a five-year-old child was riding on the running board of her father's car with his permission when she was thrown under the wheels and seriously injured. No recovery was allowed. While the opposite rule seems to be more reasonable, but as yet it is only supported by the dissenting opinions in *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923), and *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927), and a *dictum* in *Dunlap v. Dunlap*, *supra* (where the minor child was in fact emancipated). The only case squarely recognizing a cause of action at law for negligent injuries is a recent Canadian case, *Fidelity and Casualty Co. v. Marchand*, 9 D. L. R. 157 (1924), adopting the theory of accountability under a statute declaring that there is liability for damage caused by fault, and denying the existence of any public policy forbidding actions between parent and child. The court, in the course of its opinion, said: "However repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damages he has suffered."

The reasons usually given for denying liability are: (1) That to give a child a right to sue would tend to disrupt family life; (2) That children would become unruly; (3) The possibility of succession through heirship by the parent; (4) Depletion of the family exchequer, which should be held for the benefit of all. *Dunlap v. Dunlap*, *supra*. Judge Crownhart, dissenting, in *Wick v. Wick*,

supra, answers the first reason by these questions: "But is there any more danger of disrupting family life by permitting an infant to sue for injury to his person than for injury to his property rights? Why not the same rule as to injuries to his person as to his property? The Constitution classifies the rights together and on an equality."

The second reason that children would tend to become unruly if they have a right to legal redress for malicious assaults seems a far-fetched deduction to Chief Justice Peaslee, in *Dunlap v. Dunlap, supra*: "It smacks of the abandoned notion that ignorance and blind obedience of the servient class is necessary to their proper control."

The third contention, that the possibility of succession through heirship by the parent, is a remote contingency, equally applicable to actions concerning property. The depletion of the family exchequer theory ignores the parent's power to distribute his favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength through injury.

As representative of the many cases involving automobile accidents in all of which the courts have denied recovery against an insurance company is *Small v. Morrison, supra*. Chief Justice Clark, in his elaborate and convincing dissenting opinion, states the facts as follows: "This is an action by a child injured in an automobile accident, seeking to recover damages for negligence against the insurance company upon its contract to indemnify her father for any damages caused by his negligence in the operation of his machine. The indemnity company in setting up the plea that the child cannot sue the father is not seeking to carry out the Fifth Commandment or to enforce relations between parents and children, but to exempt itself from its obligation to the father, made in consideration of his money paid for that purpose, of reimbursing him for any damages which might be caused to anyone by his operation of the machine. There is no statute and no common law forbidding the child to make this recovery to which besides it is entitled under the very terms of the contract as well as under the general law as being a beneficiary therein."

It seems that the sole debatable excuse for the denial of a child's right to sue is the affect a suit would have upon discipline and family life. "If, therefore, the situation is such that the suit will not affect those matters at all, the reason for the theory fails and should not be applied." *Dunlap v. Dunlap, supra*.

As the law now stands, parents are not liable to respond in damages for personal injuries to their children. There is, however, criminal liability for excesses. *Fletcher v. Illinois*, 52 Ill. 395 (1869); *Hinkle v. State*, 127 Ind. 490 (1890). The minority decisions and *dicta* would permit recovery for excessive injuries done in breach of parental duties. Professor McCurdy has suggested several solutions to the problem one of which is as follows: "Privilege, either absolute or qualified, in respect to parental discipline and control, and in respect to the conduct of the domestic establishment. If the privilege is absolute, there would be no civil liability, regardless of when the suit is brought, for those matters within parental discipline and control, and for the conduct of the domestic establishment; but there would be ordinary liability in respect to other matters. If the privilege, so confined, is qualified, then the question is one as to the merits in all cases, with a rather wide scope of discretion in some conduct. Since parental discipline and control and the conduct of the domestic establishment are at the root of the denial of a cause of action, it would seem that the denial should, at least, be so confined, even if it be felt undesirable to make the privilege only a qualified one. It is submitted that a privilege, either absolute or qualified, thus confined, is the rational solution, against which can be urged only reasons of nebulous policy." McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.

Charles M. Pieroni.