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Mortgages -- Absolute Deeds -- Binding as Against the Grantor (Mortgagor); Void as Against Creditors

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It is submitted that in the instant case the court would have adopted the better view and followed the modern trend had it upheld the covenant as far as it was shown to be reasonable, namely, eastern North Carolina, and thus given the employer the protection needed.

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Mortgages—Absolute Deeds—Binding as Against the Grantor (Mortgagor); Void as Against Creditors

Courts throughout the United States recognize that a deed, although absolute in form, upon proper proof will be considered a mortgage.[1] Courts differ, however, in determining what constitutes proper proof. Apparently North Carolina is the only state requiring proof of some general ground of equitable relief before parol evidence will be admitted to show that the deed, although absolute in form, was in fact intended as a mortgage.[2] All other states seem to have abandoned this strict view and will permit reformation if there is sufficient parol proof of the intent to establish a security.[3] The standard statement of the North Carolina court is that two things must be proved, "1. It must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue advantage. 2. The intention [to create a security] must be established, not by simple declarations of the parties, but by proof of facts and circumstances *dehors* the deed, inconsistent with the idea of an absolute purchase. . . ."[4] It is also a general requirement that the proof be clear, cogent, strong, and convincing.

The most recent statement of this proposition is in *Posten v. Bowen*[5] where the relation of employer-employee was not considered sufficient in itself to constitute undue advantage[6] in the ommission of the clause of redemption. As a result the grantor was non-suited.

This conservative view would seem to be based upon our court's almost unswerving adherence to the parol evidence rule and the land contract section of the Statute of Frauds.[7] The court feels that to allow parol proof of the security intent without first finding general

[1] See Note, L.R.A. 1916B 18 for an extensive analysis of the broad proposition and applicable cases from all jurisdictions; Note, 16 N. C. L REV. 416 (1938) discusses the North Carolina view.

[2] Note, L.R.A. 1916B 18, 47; 1 JONES, MORTGAGES §375 (8th ed. 1928).

[3] Notes, 155 A.L.R. 1104 (1945); 79 A.L.R. 937 (1932).

[4] *E.g.*, Davenport v. Phelps, 215 N. C. 326, 1 S.E. 2d 824 (1939); Newbern v. Newbern, 178 N. C. 3, 100 S.E. 77 (1919); Frazier v. Frazier, 129 N. C. 30, 39 S.E. 634 (1901); Watkins v. Williams, 123 N. C. 170, 31 S. E. 388 (1898); Sprague v. Bond, 115 N. C. 530, 20 S.E. 709 (1894); Kelly v. Bryan, 41 N. C. 283 (1849); Streator v. Jones, 10 N. C. 433 (1824) (dissent). For a more exhaustive list see Note, 16 N. C. L. REV. 416 (1938).

[5] 228 N. C. 202, 44 S.E. 2d 881 (1947).

[6] Variously referred to as undue influence, oppression, or advantage taken of grantor's necessities.

[7] N. C. GEN. STAT. §22-2 (1943).

grounds for equity jurisdiction would ". . . in effect . . . make titles to property, which ought to be evidenced by solemn instruments in writing—to depend . . . on the 'slippery memories' of witnesses. . . ."[8]

The cases declaring this proposition seem to be completely analogous to those in which it is attempted to engraft a parol trust in favor of the grantor upon an absolute deed.[9] Such parol trusts are systematically refused[10] unless there is clear, cogent, strong, and convincing proof of fraud, ignorance, mistake, undue influence, or a breach of a confidential relationship. The reasons generally used in this situation also are the parol evidence rule and the land contract section of the Statute of Frauds.[11] This trust law has been criticized as inconsistent in view of the fact that parol trusts are freely engrafted upon absolute deeds when made in favor of a third person contemporaneously with the deed, without considering that either the parol evidence rule or Statute of Frauds constitutes an obstacle.[12]

Both the absolute deed as security and the parol trust conveyance are obviously dangerous and are resorted to only by ill-advised persons who have found themselves in a financial corner. Not the least danger is that if the deed is recorded and the land sold, the grantor will be confronted with a perfect record title and he will be unable to redeem. At most he will have an action against his crafty grantee. Furthermore, even if the grantee has retained the title the grantor will be confronted with what is usually an insurmountable burden of proof,[13] since in most instances the defeasance clause was omitted purposely and not through fraud, mistake, ignorance, or undue advantage. The grantor simply chose to rely upon his grantee's agreement. Thus the reports abound with instances where the alleged borrower fails to obtain the desired reformation of the deed. The court must be cautious, of course, in order to prevent reformation of deeds actually intended to be absolute.

Although our court has placed what amounts to an insurmountable requirement of proof upon the grantor when he brings such an action, an indirect approach exists which might bring the desired relief. A

[8] Clement v. Clement, 54 N. C. 184, 185 (1854).

[9] *Ibid.*

[10] *E.g.*, Wadsell v. Aycock, 195 N. C. 268, 142 S.E. 10 (1928); Chilton v. Smith, 180 N. C. 472, 105 S.E. 1 (1920); Walters v. Walters, 172 N. C. 328, 90 S.E. 304 (1916); Campbell v. Sigmon, 170 N. C. 348, 87 S.E. 116 (1915); Gaylord v. Gaylord, 150 N. C. 222, 63 S.E. 1028 (1909); Ferguson v. Haas, 64 N. C. 772 (1870).

[11] Gaylord v. Gaylord, 150 N. C. 222, 227, 63 S.E. 1028, 1031 (1909).

[12] For an analysis of the parol trust cases, mild criticism of results, and suggested improvement see: Lord and Van Hecke, *Parol Trusts in North Carolina*, 8 N. C. L. Rev. 152 (1929).

[13] Only the security intent need be proved when the defeasance clause is a separate writing. Proof of fraud, ignorance, mistake, or undue advantage is added only when the defeasance is oral. See Note, 16 N. C. L. Rev. 416 (1938).

line of cases[14] which is equally well established in our law sets forth the general proposition that a deed which is intended as security is *void* as to creditors of the grantor upon a showing of the security intent.[15] No proof of fraud, ignorance, mistake, or undue advantage is required. The deed is said to be void "without regard to any intent on their part to defraud creditors."[16] This result is due to a presumption of fraud in the conveyance in that it tends to defraud, delay, and hinder creditors in the pursuit of their just claims.[17] In short, the grantor's interest is not properly disclosed, and is thus hidden from creditors who would otherwise resort to it for the satisfaction of their claims.

That an anomalous situation is created can be illustrated as follows: assume that a distressed debtor did borrow money, did give an absolute deed to secure the debt, cannot prove that the defeasance clause was omitted due to any of the factors heretofore mentioned, but can prove facts showing that a security was in fact intended. Then the deed will stand as an absolute conveyance as against the grantor, but as against a creditor of the grantor, *upon the same proof,* the deed is void. The anomaly is made even more obvious by cases declaring that the deed is void even as against *subsequent*[18] creditors of the grantor.[19]

To complete the anomaly pointed out above, even the second proposition that the deed is void as to creditors because it does not disclose the grantor's interest would appear to rest upon a false premise in

[14] *E.g.,* Foster v. Moore, 204 N. C. 9, 167 S.E. 383 (1932); Clement v. Cozart, 109 N. C. 173, 13 S.E. 862 (1891); Gulley v. Macey, 84 N. C. 434 (1881); Johnson v. Murchison, 60 N. C. 286 (1864); King v. Cantrel, 26 N. C. 251 (1844); Holcombe v. Ray, 23 N. C. 340 (1840); Gregory v. Perkins, 15 N. C. 50 (1833); Gaither v. Mumford, 4 N. C. 600 (1816) *semble.*

[15] Note, 16 N. C. L. REV. 416 (1938) (circumstances considered as factors bearing on the security intent are distress of the maker, prior negotiation of the parties, continued existence of the debt, possession by grantor without payment of rent, and gross inadequacy of the price).

[16] Foster v. Moore, 204 N. C. 9, 11, 167 S.E. 383, 384 (1932); Gulley v. Macey, 84 N. C. 434, 440 (1881).

[17] N. C. GEN. STAT. §39-15 (1943); cases cited in Note, 16 N. C. L. REV. 416 (1938). In some cases the rule is said to be extracted from the general provisions of the registration statutes in that the deed cannot be registered as an absolute deed because the parties did not so intend, nor as a mortgage because it does not purport to be one. *E.g.,* Foster v. Moore, 204 N. C. 9, 11, 167 S.E. 383, 384 (1932); Bernhardt v. Brown, 122 N. C. 587, 591, 29 S.E. 884, 885 (1898); Gulley v. Macey, 84 N. C. 434, 439 (1881).

[18] Holcombe v. Ray, 23 N. C. 340, 344 (1840); Foster v. Moore, 204 N. C. 9, 167 S.E. 383 (1932) (this point not discussed, but relief was granted in favor of a subsequent creditor).

[19] The general rules concerning fraudulent conveyances stem from 13 ELIZABETH, c. 5. The North Carolina version is embodied in N. C. GEN. STAT. §39-15 (1943) to the effect that conveyances for the purpose of delaying, hindering, and defrauding creditors shall be "utterly void and of no effect," but the statute is not always cited by the court. It is interesting to note that North Carolina usually considers such a conveyance fraudulent and void as against creditors as a matter of law. Most courts hold that it is but a badge of fraud and not conclusive evidence thereof. See Notes, L.R.A. 1916B 18, 576, 68 A.L.R. 306, 317 (1930).

view of the first proposition that the deed stands absolute as to the grantor in the absence of fraud, ignorance, mistake, or undue advantage. In effect, on the one hand the court is saying, "The deed is absolute and the grantor has no interest," while, on the other hand, with equal vigor, it says, "The deed appears absolute, but the grantor has retained an interest which is not properly disclosed thus the deed is void." This contradiction of ideas would be eliminated by abolishing the obsolete North Carolina requirement that fraud, ignorance, mistake, or undue advantage must first be shown. Then, even in the absence of such a showing, the debtor would indeed have an interest concealed by the absolute character of the deed.

With the law of North Carolina in its present condition, the second proposition that "the deed is void as to creditors of the grantor" would seem to be of great value to debtors who have been forced to resort to such a transaction. Such a debtor undoubtedly has creditors among whom there should be one who is willing to pursue the property in order to collect his debt. If none exists, then in view of the cases extending the rule to subsequent creditors, there appears to be no obstacle to the debtor's approaching a friend or relative for the purpose of making a *bona fide* borrowing. By incurring an actual debt and immediately defaulting, the debtor will enable the new creditor to be in a position to proceed against the grantee to have the deed declared void. Thus the burdensome requirement that the grantor must prove fraud, ignorance, mistake, or undue advantage would seem to be so easily circumvented as to be of questionable value at best. Furthermore, the very fact that North Carolina is alone in imposing this requirement suggests doubt as to its value.[20]

Doing by indirection what cannot be done directly cannot be condemned in this instance since ultimate justice is attained. True, the grantee has taken an absolute deed, but it was offered and accepted as security for a debt. By a quirk in our law, unless fraud, ignorance, mistake, or undue advantage can be shown, the deed has a legal effect different from what the parties intended. The grantee has taken advantage of a rule of law which is favorable to him. But since the deed was intended only as security for a debt, why should not the second proposition be asserted to have the deed declared void? It was intended as a mortgage and as nothing else, thus the intent of the parties has been violated no more by the second proposition than by the first. The grantee-lender has played the ancient game of "heads I win; tails you lose," for when the suit is at the instance of the grantor the grantee is in a superior position whether the deed is declared a mortgage or not. If construed as a mortgage the grantee can collect the debt, in-

[20] See notes 2 and 3, *supra*.

terest, and, if the bargain called for it, rent for the time the grantor remained in possession.[21] If construed as an absolute deed, as usually happens, the grantee has complete title, probably for an inadequate consideration. By using the *creditor* approach, the deed may be declared a nullity and the grantee is defeated in his scheme. And no miscarriage of justice against the grantee can result, for the creditor does have to present clear, cogent, strong, and convincing evidence of the intent to create a security.

JOSEPH C. MOORE, JR.

Parties—Divorce—Right of Guardian or Committee of Incompetent to Maintain Action

In *Phillips* v. *Phillips*[1] a guardian brought an action for divorce on behalf of his ward, an insane person, on the ground of adultery committed by the wife of the ward prior to his insanity. The complaint alleged that prior to insanity the ward expressed his intention and desire of getting a divorce from defendant and that at the time of filing the suit and during a lucid interval when the ward was capable of understanding the nature of the action, he again expressed the same intention and desire. It was further alleged that the suit was instituted pursuant to the ward's direction, desire and will at the time of filing same. On demurrer, *held:* the guardian of an insane person cannot prosecute an action for divorce on behalf of his ward.

The court here enunciated what seems to be, in the absense of a governing statutory provision giving a guardian the right to institute a divorce action on behalf of an insane ward, the universal rule in the United States.[2] The theory behind the rule is that the action of divorce is one strictly personal and volitional, and the will of the guardian cannot be substituted for that of the ward who is incapable of excercising any will. The basis of the theory is that there are no offenses, which by law, work of themselves a dissolution of a marriage, and there are no offenses which may not be condoned by the injured spouse.

[21] Note, 16 N. C. L. REV. 416, 418 (1938).

[1] 45 S. E. 2d 621 (Ga. 1947).

[2] Cohen v. Cohen, 73 Cal. App. 2d 330, 166 P. 2d 622 (1946); Worthy v. Worthy, 36 Ga. 45 (1867); Bradford v. Abend, 89 Ill. 78 (1878); Mohler v. Shank, 93 Iowa 273, 61 N. W. 981 (1895); Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 651 (1885); Johnson v. Johnson, 294 Ky. 77, 170 S. W. 2d 889 (1943); Stevens v. Stevens, 266 Mich. 446, 254 N. W. 162 (1934); Higginbotham v. Higginbotham, ———Mo. App.———, 146 S. W. 2d 856 (1940), *Cert. denied,* 348 Mo. 1073, 156 S. W. 2d 650 (1941); Mohrmann v. Kobb, 291 N. Y. 181, 51 N. E. 2d 921 (1943); Kemmelick v. Kemmelick, 114 Misc. 198, 186 N. Y. Supp. 3 (1921); Mainzer v. Mainzer, 108 Misc. 230, 177 N. Y. Supp. 596 (1919); Dillion v. Dillion, ———Tex. Civ. App.———, 274 S. W. 217 (1925). See Notes, 70 A. L. R. 964 (1931) and 149 A. L. R. 1284 (1944). Since the commencement of this note the Georgia court has reiterated the rule in Sternberg v. Sternberg, 46 S. E. 2d 349 (Ga. 1948); see note 20 *infra* for interesting history of this case.