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## Adoption -- Invalidation for Want of Consent

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and be sued would seem to indicate that it intended the Corporation to be subject to the same rules of law as private insurance companies. The Supreme Court could have avoided the effect of the Corporation's Wheat Crop Insurance Regulations in the same manner as did the Idaho Supreme Court.<sup>31</sup> That court said that Congress did not intend such regulations to be binding law but merely rules for the Corporation's own guidance and for the guidance of its agents. However, the Court did not find that Congress intended the law of private insurance companies to be applicable to the Corporation.

In the future, if government corporations which are engaging in commercial activities are to be held amenable to the same rules of law as private corporations Congress must clearly manifest that intention in the statutes creating them.

WILLIAM T. JOYNER, JR.

### Adoption—Invalidation for Want of Consent

In *Allen v. Morgan*,<sup>1</sup> the Court of Appeals of Georgia upheld the action of the trial court in denying plaintiff's petition for adoption of defendants' child, and vacating the interlocutory order of adoption granted eight months prior to entry of the judgment.

The defendants were married after conception but before birth of the child. On learning of this the husband's step-mother began to apply pressure to have the child adopted. The defendants testified that the step-mother "suggested" that the mother go to a waiting home and put the child out for adoption, in order that the step-mother could hold up both "her head" and "her social standing." One month after its birth they took the child to Saluda, North Carolina and left it in the care of a doctor, until the defendants "could get situated." Three days later the defendants signed the consent, "because of the constant pressure being put on us day and night." The plaintiffs were residents of Georgia and were qualified in every way to become adoptive parents. Neither they nor their attorney had knowledge of any coercion that might have been practiced on the defendants.

The court, in construing the statute<sup>2</sup> requiring consent of the natural parents, held that both the letter and spirit of the statute gives the court, "full and unrestricted power to examine into the nature and kind of consent by parents to an adoption, not only because it is absolutely

(1940), 38 U. S. C. §§801, 805 (1940). The War Risk Insurance of the First World War was administered by the Bureau of War Risk Insurance in the Treasury Department. 40 STAT. 398 (1917).

<sup>31</sup> *Merrill v. Federal Crop Ins. Corporation*, 174 P. 2d 834 (Idaho 1946).

<sup>1</sup> 44 S. E. 2d 500 (Ga. 1947).

<sup>2</sup> GA. CODE ANN. (Harrison, 1937) §74-403 (Supp. 1945) ". . . no adoption shall be permitted except with the written consent of the living parents of the child. . . ."

prerequisite to the validity of an order granting a prayer for adoption, but because the wisdom of the grant, the welfare of the child and of the other parties, as well as the public policy of the State is involved."

With the exception of Maryland,<sup>3</sup> the states uniformly require the consent of the natural parent or parents to give validity to an adoption, absent special circumstances such as abandonment. Prior to 1941, North Carolina required that the consent be given to the specific adoption,<sup>4</sup> but in 1941 an amendment was added to the statute, overruling these decisions.<sup>5</sup>

There is a wide divergence of opinion as to whether or not consent, voluntarily given, may be arbitrarily withdrawn at any time before entry of the final decree.<sup>6</sup> Some courts refuse to grant the final order of adoption over the objection of the natural parents, even though they had previously consented to it.<sup>7</sup> It may be stated generally that this view emanates from the now outmoded doctrine of strictly construing adoption statutes in favor of the rights of the natural parents.

Conversely, many tribunals have denied the right to revoke and have based such denials on: (1) principles of contract;<sup>8</sup> (2) estoppel or other equitable grounds;<sup>9</sup> (3) public policy favoring the adoption of children, particularly illegitimates;<sup>10</sup> (4) welfare of the child.<sup>11</sup>

Analysis of these cases discloses that though the courts speak in terms of contract, estoppel, public policy and welfare of the child, much depends on the facts and circumstances of the particular case. Indeed, at least one court<sup>12</sup> has announced this to be the rule. Accordingly, parents were allowed to revoke<sup>13</sup> shortly after execution of their consent and before entry of the final decree, and before adoptive parents had

<sup>3</sup> *Adoption of Lagumis*, 46 A. 2d 189 (Md. 1946) ("The Maryland statute differs from that of most of the states in not requiring the consent of the parents in any case. . .").

<sup>4</sup> Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127, 143 (1941).

<sup>5</sup> N. C. GEN. STAT. (1943) §48-5: ". . . and no further consent of the parent, parents, or guardian to a subsequent specific adoption shall be necessary. . . ."

<sup>6</sup> N. C. GEN. STAT. (1943) §48-5 provides among other things that where the child has been surrendered to a licensed child-placing agency or to the Superintendent of Public Welfare of the County, the attending consent is irrevocable. Where surrendered to others for adoption, the attending consent becomes irrevocable after six months.

<sup>7</sup> *In re McDonnell's Adoption*, 176 P. 2d 153 (Cal. 1947); *In re White's Adoption*, 300 Mich. 378, 1 N. W. 2d 579 (1942); *Platzer v. Beardsley*, 149 Minn. 435, 183 N. W. 956 (1921); *Wright v. Fitzgibbons*, 198 Miss. 471, 21 So. 2d 709 (1945); *Application of Graham*, 199 S. W. 2d 68 (Mo. 1947); *Adoption of Caparelli*, 175 P. 2d 153 (Ore. 1946); *In re Nelms*, 153 Wash. 242, 279 Pac. 748 (1929); see *Allen v. Morgan*, 44 S. E. 2d 500, 506 (Ga. 1947).

<sup>8</sup> *Durden v. Johnson*, 194 Ga. 689, 22 S. E. 2d 514 (1942); *Stanford v. Gray*, 42 Utah 228, 129 Pac. 423 (1913).

<sup>9</sup> *Wyness v. Crowley*, 292 Mass. 459, 198 N. E. 758 (1935).

<sup>10</sup> *In re Adoption of a Minor*, 144 F. 2d 644 (App. D. C. 1944); *Ex parte Schultz*, 181 P. 2d 585 (Nev. 1947).

<sup>11</sup> *Lee v. Thomas*, 297 Ky. 858, 181, S. W. 2d 457 (1944).

<sup>12</sup> *Hammond v. Chadwick*, 199 S. W. 2d 547 (Tex. 1947).

<sup>13</sup> *Id.*

custody of the child for a considerable time and had spent much money on it.<sup>14</sup> On the other hand, the right to revoke was denied where the fully qualified adoptive parents took custody of the child and devoted time and money toward carrying out their duty as foster parents for fifteen months without objection from the consenting mother.<sup>15</sup>

The extreme on this point was reached by the Court of Appeals of the District of Columbia in the case of *In re Adoption of a Minor*.<sup>16</sup> Basing its decision on the public policy of Congress in maintaining the new relationship, the court held that consent of the mother given two months before birth of the child was valid and irrevocable. Though on its face the decision was based on congressional policy, with a hint at estoppel,<sup>17</sup> the facts of the particular case seemed to control the outcome. These facts were that the adoptive parents had taken custody, that the court had acted on the consent that the attempt to revoke came two months after birth, the illegitimacy of the child, and the qualifications of the adoptive parents to rear the child.<sup>18</sup>

There is a definite trend toward denial of the right arbitrarily to revoke consent that is voluntarily given. These decisions are parallel to, and grow out of, the trend toward a more liberal construction of adoption statutes with a view toward maintaining the new status of the child.<sup>19</sup>

The decided cases establish the proposition that the decree of adoption may be set aside for: (1) fraud practiced on the court;<sup>20</sup> (2) undue influence practiced on the adopting parent by the natural parent;<sup>21</sup> (3) undue influence practiced by the adoptee;<sup>22</sup> (4) gaining of the consent

<sup>14</sup> *Accord*, *Skaggs v. Gannon*, 293 Ky. 795, 170 S. W. 2d 12 (1943) (where sufficient reason is shown, mother may revoke consent within sixty days allowed for appeal from the adoption order).

<sup>15</sup> *Lee v. Thomas*, 297 Ky. 858, 181 S. W. 2d 457 (1944).

<sup>16</sup> 144 F. 2d 644 (App. D. C. 1944).

<sup>17</sup> *Id.* at 651. Consent was irrevocable, ". . . especially after having been presented to the court and acted upon by the appellants who were . . . innocent strangers who acted in good faith."

<sup>18</sup> A different construction of the case—i.e. consent given before birth is irrevocable regardless of the peculiar facts of the case—would lead to an extremely harsh result. There can be no reason to cause a mother to face the ordeal of giving birth to a child which she knows she cannot keep, just because she erred in giving her consent, possibly in one of the trying moments that often accompany pregnancy, which she now wishes to withdraw. It is difficult to believe that Congress intended its policy to be so far reaching.

It also seems that a good argument against such a rule could be made on the basis of public policy.

<sup>19</sup> Compare *Ex parte Schultz*, 181 P. 2d 585 (Nev. 1947), with *Platzer v. Beardsley*, 149 Minn. 435, 183 N. W. 956 (1921); *Application of Graham*, 199 S. W. 2d 68 (Mo. 1947).

<sup>20</sup> *Platt v. Magagnini*, 110 Cal. 699, 251 Pac. 205 (1920) (defendants adopted the child while knowing it could not live, in order to inherit from it); *Stevens v. Halstead*, 168 N. Y. S. 142, 181 App. Div. 198 (1917) (adult woman lived in adultery with an aged man in order to induce him to adopt her).

<sup>21</sup> *Phillips v. Chase*, 203 Mass. 556, 89 N. E. 1049 (1909).

<sup>22</sup> *Greene v. Fitzpatrick*, 220 Ky. 590, 295 S. W. 896 (1927).

of the natural parents by the use of fraud or undue influence;<sup>23</sup> and (5) such grounds as would entitle the court to vacate any other order or decree.<sup>24</sup>

No cases are found which distinguish between fraud and undue influence which is practiced by the adoptive parents and that practiced by third persons. In *Lambert v. Taylor*<sup>25</sup> there was fraud in the *factum* of the written consent. Fraud was induced by persons in the natural father's family, but there was no showing of participation by the adoptive parents. The court set aside the decree, reciting the usual rule as to fraud.<sup>26</sup>

To set aside an adoption decree on the ground that the natural parents' consent thereto was due to mistake or fraud, such mistake or fraud must have been with respect to an existing fact, rather than a mere matter of opinion or belief as to something to happen in the future, regardless of how greatly such matter influenced the giving of the consent.<sup>27</sup> Likewise, "undue influence," such as will warrant setting the adoption aside means that the person exercising the influence so far dominated the will of the other as to substitute his will for such other, so that his act is in reality the act of the person exercising the influence.<sup>28</sup> Accordingly, it was held that advice of doctors, made in good faith, that the plaintiff would not survive her case of tuberculosis was not fraud.<sup>29</sup> Duress was not established by showing that the consent was given due to the "irresistible pressure of the circumstances" and plaintiff's "mental condition" caused by her husband's refusal to support her and threats of leaving her after learning that she was the mother of an illegitimate child.<sup>30</sup> The same result was reached where the plaintiff was "put to shame" and "great emotional tension" as a result of pleas of her brother that she put her illegitimate child out for adoption.<sup>31</sup>

It appears, therefore, that the instant case is not only against the weight of authority on this point, but is patently wrong.<sup>32</sup> This fact situation, from which the court found duress, is the rule rather than the ex-

<sup>23</sup> *Lambert v. Taylor*, 150 Fla. 680, 8 So. 2d 159 (1942).

<sup>24</sup> *State ex rel Bradshaw v. Probate Court of Marion County*, 73 N. E. 2d 769 (Ind. 1947).

<sup>25</sup> 150 Fla. 680, 8 So. 2d 159 (1942). (The result of this case is indefensible because there was a delay of five years in bringing the suit. The court noted the laches but cast it aside because no such issue was properly presented. These adoptive parents, who spent their money, love, and affection on the child for five years, cannot regard very highly the "justice" of such a harsh penalty for their unfortunate choice of attorneys.)

<sup>26</sup> Decree may be set aside for fraud.

<sup>27</sup> *Nealon v. Farris*, 131 S. W. 2d 858 (Mo. 1939).

<sup>28</sup> *Phillips v. Chase*, 203 Mass. 556, 89 N. E. 1049 (1909).

<sup>29</sup> *Nealon v. Farris*, 131 S. W. 2d 858 (Mo. 1939).

<sup>30</sup> *Stanford v. Gray*, 42 Utah 228, 129 Pac. 423 (1913).

<sup>31</sup> *Adoption of Caparelli*, 175 P. 2d 153 (Ore. 1946).

<sup>32</sup> *But* see *Westendorf v. Westendorf*, 187 Iowa 659, 174 N. W. 359 (1919).

ception. In the case of illegitimacy there is likely to be someone in the mother's family applying pressure on her to have the child adopted so that the family can "hold up their heads." Let such "duress" be valid grounds for setting aside the adoption—add to this the fact that the majority of adoptees are illegitimate<sup>33</sup>—and the result is that a substantial percentage of adoptions have been undermined. Knowing of this decision, all the mother who has changed her mind has to do, to have a perfectly valid adoption set aside, is to have a relative come into court and tell how he or she put the mother to great shame by showing her what a disgrace the illegitimate child was going to be and "suggesting" that she put it out for adoption.

The decision completely ignores the fact that the plaintiffs are perfectly innocent third persons who had nothing to do with the "duress," and who, in good faith, put forth their money, love and affection only to be forced to stand by and watch their efforts go up in the "smoke" of a family squabble with which they were not concerned.

The case seems to be another product of the outworn theory that adoption statutes, being in derogation of the common law and the parents' natural rights, should be strictly construed.<sup>34</sup> This theory was announced by the court.<sup>35</sup> The more modern view recognizes the fact that such legislation is not intended to supplement the common law, but completely to supplant it. Accordingly, it is held that the statutes should be construed liberally, to the end that the adoption may be upheld and the assumed relation sustained.<sup>36</sup>

The North Carolina decisions, prior to 1943, are based on the strict view,<sup>37</sup> and resulted in the wholesale thwarting of adoptions.<sup>38</sup> Then came the case of *Locke v. Merrick*<sup>39</sup> wherein Mr. Justice Schenck, quoted from<sup>40</sup> and cited with approval the case of *McConnell v. McConnell*,<sup>41</sup> which is a leading case for the liberal view. Due to the high degree of success and the social desirability of adoption as compared to

<sup>33</sup> Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127, 131 (1941).

<sup>34</sup> *Smith v. Smith*, 180 P. 2d 853 (Idaho 1947); *Application of Graham et al.*, 199 S. W. 2d 68 (Mo. 1947); *Adoption of Caparelli*, 175 P. 2d 153 (Ore. 1946).

<sup>35</sup> 44 S. E. 2d 500, 506 (Ga. 1947).

<sup>36</sup> *In re Adoption of a Minor*, 144 F. 2d 644 (App. D. C. 1944); *McConnell v. McConnell*, 345 Ill. 70, 177 N. E. 692 (1931); *Seibert v. Seibert*, 170 Iowa 561, 153 N. W. 160 (1915); *Ex parte Schultz*, 181 P. 2d 585 (Nev. 1947); *Locke v. Merrick*, 223 N. C. 799, 22 S. E. 2d 523 (1943).

<sup>37</sup> *Ward v. Howard*, 217 N. C. 799, 7 S. E. 2d 625 (1940).

<sup>38</sup> Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127 (1941).

<sup>39</sup> 223 N. C. 799, 22 S. E. 2d 523 (1943).

<sup>40</sup> *Id.* at 803 "... it is well to remember that since the right of adoption is not only beneficial to those immediately concerned but, likewise, to the public, construction of the statute should not be narrow or technical nor compliance therewith examined with a judicial microscope in order that every slight defect may be magnified . . ." The value of the case as a precedent is questionable because no mention was made of the previous North Carolina cases, and the decision would likely have been the same under the strict view.

<sup>41</sup> 345 Ill. 70, 177 N. E. 692 (1931).

institutions or leaving children with unfit parents,<sup>42</sup> the liberal view is the more desirable one, and it is to be hoped that our court will follow the attitude expressed in the *Locke* case.<sup>43</sup>

Because the law of North Carolina thwarted adoptions instead of furthering them, necessary changes were made in the statute in 1941.<sup>44</sup> The statute was made cumbersome by this patchwork, therefore in 1947 a complete revision of the old statute was passed for the purpose of organization and clarification.<sup>45</sup> Because the enacting clause was omitted, however, the North Carolina Supreme court held that the attempted enactment is entirely null and void.<sup>46</sup> This statute expressly embodied the liberal policy here advocated.<sup>47</sup> It would be highly beneficial if the next legislature would see fit to re-enact the statute, with additional improvements<sup>48</sup> and the necessary enacting clause.

The better view as provided, by statute in North Carolina,<sup>49</sup> is that entry of the final decree is final and cannot be set aside for failure fully to protect the rights of the natural parents where they are made parties. By the logic of the instant case it would make no difference whether the final decree had been entered or not, because according to the rule laid down, a decree without consent is no decree at all, and consent given under duress is no consent at all. Even conceding the contention that there was duress the case still has potentialities of thwarting adoptions. The person on whom the duress has been practiced can wait for years and assert his rights at leisure, the adoptive parents in the meantime having expended all the effort that accompanies parenthood in bringing the child through the most difficult years. Greater consideration than this should be given to the attachment between the adoptive parents and the child that has grown out of the new relationship. Since it is highly desirable that the break between the infant and the mother be abrupt and final,<sup>50</sup> the natural parents should not be heard to assert any such objection after the probationary period is over and the final decree entered. Public policy demands that the adoption statutes should not

<sup>42</sup> Hanft, *Thwarting Adoptions*, 19 N. C. L. Rev. 127 (1941).

<sup>43</sup> For an excellent discussion of modern policy toward adoptions see: *In re Adoption of a Minor*, 144 F. 2d 644 (App. D. C. 1944).

<sup>44</sup> *Statutory Changes in N. C. in 1941*, 19 N. C. L. Rev. 435, 449-453 (1941).

<sup>45</sup> *A Survey of Statutory Changes*, 25 N. C. L. Rev. 376, 408-412 (1947).

<sup>46</sup> *In re Advisory Opinion*, 227 N. C. Appendix, 43 S. E. 2d 73 (1947).

<sup>47</sup> N. C. Pub. Laws, 1947, c. 885.

The statute included in its express declaration of primary purposes ". . . and to protect them (children) from interference, long after they have become properly adjusted in their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure."

It included in its express declaration of secondary purposes ". . . and to protect foster parents . . . and prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected."

<sup>48</sup> *A Survey of Statutory Changes*, 25 N. C. L. Rev. 376, 408-412 (1947).

<sup>49</sup> N. C. GEN. STAT. (1943) §48-5.

<sup>50</sup> *In re Adoption of a Minor*, 144 F. 2d 644 (App. D. C. 1944).

be nullified by a decision that causes the public to fear the consequences of adopting a child when their efforts are at the whim and caprice of the natural parent.<sup>51</sup>

J. W. ALEXANDER, JR.

### Bills and Notes—Reacquisition—Liability of Intermediate Indorser to Purchaser from Reacquiring Payee

The payee of a negotiable promissory note indorsed the note to the defendant. The defendant shortly thereafter indorsed it back to the payee, who indorsed to the plaintiff. Plaintiff was admittedly a holder in due course. All indorsements were special. *Held*: Reacquisition by the payee gave the note a "fresh start," terminating the contractual liability of the intermediate indorser, so that he could not be regarded as in the line through which the holder traced his title.<sup>1</sup>

It is important that the problem of the instant case be distinguished at the outset from that arising under §58<sup>2</sup> of the Negotiable Instruments Law.

We are here concerned with a holder who is a holder in due course in his own right. The specific question is: Does an indorser remain liable to a subsequent holder in due course, in spite of reacquisition by a prior party, when the holder took with notice of the reacquisition?

Section 58,<sup>3</sup> on the other hand, deals with defenses available to prior parties when the instrument is in the hands of a holder *not* in due course. This section reads as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Thus the specific question arising under this section is: Under what circumstances can a holder *not* in due course avoid the defenses of prior parties?

This distinction is necessary, for, as will be noted below, the courts have confused the issue somewhat in discussing the instant problem, by drawing §58 into the picture, though it is obviously inapplicable.<sup>4</sup>

<sup>51</sup> *Ex parte Schultz*, 181 P. 2d 585 (Nev. 1947).

<sup>1</sup> *Denniston's Adm'r v. Jackson*, 304 Ky. 261, 200 S. W. 2d 477 (1947), briefly noted in 46 MICH. L. REV. 97.

<sup>2</sup> N. C. GEN. STAT. (1943) §25-64 (quoted in text below).

<sup>3</sup> N. C. GEN. STAT. (1943) §25-64.

For an extensive discussion of the problem arising under this section, see Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party*, 21 COL. L. REV. 538 (1921). Also see Note, 1 N. C. L. REV. 187 (1923).

<sup>4</sup> See 46 MICH. L. REV. 97, 98 (1947) (brief discussion of the difference between these two problems).