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res gestae doctrine. However, the *res gestae* doctrine is not adequate in cases like the principal case where the application of the *Hillmon* rule might have given some potentially valuable information to the jury.

It is submitted that the North Carolina court should accept the *Hillmon* doctrine completely by extending it beyond its present limited scope in this state to cover such cases as the principal case.

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Mortgages—Absolute Deeds Construed As Security Transactions

In *Isley v. Brown*[1] the plaintiffs sought to have an absolute deed of conveyance construed as a security for a debt. The plaintiffs contended that they had signed the deed with the understanding that the defendant, the grantee under the deed, would pay off an indebtedness and allow them to repay him in monthly installments. On appeal to the supreme court a judgment for the plaintiffs was reversed (1) because of plaintiffs' failure to allege and prove that the clause of redemption was omitted by mistake and (2) because of plaintiffs' negligence in failing to read the instrument of conveyance before signing it.

Generally, a deed of conveyance, although absolute on its face, will be construed as a mortgage if it is given as security for a debt and if the property was intended by the parties to stand as security.[2] In the majority of jurisdictions this rule follows upon proof that the parties intended a security transaction.[3] However, North Carolina has long required, in addition to proof of an intent to create a security, that it be shown that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. Moreover, the former had to be shown by facts and circumstances *dehors* the deed.[4]

In the principal case the Court, in giving its first reason for reversal, stated that in order for the grantor of the absolute deed to

[1] 253 N.C. 791, 117 S.E.2d 821 (1961).

[2] See, *e.g.*, Hill v. Day, 231 Ark. 550, 331 S.W.2d 38 (1960). See generally Annot., 79 A.L.R. 937 (1932); Note 26 N.C.L. REV. 405 (1948).

[3] See, *e.g.*, Newell v. Pate, 264 Ala. 644, 89 So. 2d 170 (1956).

[4] See, *e.g.*, Perkins v. Perkins, 249 N.C. 152, 105 S.E.2d 663 (1958); for cases prior to 1939, see Notes, 26 N.C.L. REV. 405 (1948); 16 N.C.L. REV. 416 (1938). See also Jones v. Brinson, 231 N.C. 63, 55 S.E.2d 808 (1949) (parel trust); Williams v. Joines, 228 N.C. 141, 44 S.E.2d 738 (1947) (action for specific performance).

have it converted into a security for a debt "it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. This must be established by proof of declarations and proof of facts and circumstances, *dehors* the deed, inconsistent with the idea of an absolute purchase."[5]

This statement of the required proof departs materially from the former requirement in three respects. First, it apparently eliminates the necessity of proving intent.[6] Secondly, it requires the omission of the redemption clause to be established by proof of declarations and proof of facts and circumstances *dehors* the deed. Heretofore, this was the requirement for proving intent.[7] Thirdly, it requires proof of a declaration and of facts and circumstances outside the deed. The Court had previously only required proof of facts and circumstances outside the deed.[8] Nevertheless, as the Court cites and appears to rely upon prior decisions stating the double requirement of proving intent to create a security and that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage, apparently it merely mistated the rule in the principal case.[9]

The trial court submitted the following issue to the jury: "Did the defendant obtain the deed to the property . . . by reason of the ignorance or mistake of the plaintiffs, the fraud of the defendant, or undue advantage of the plaintiffs, taken by the defendant?"[10] The jury answered the question in the affirmative. Although this jury finding would seem to support the issue of mistake, the form of the issue submitted renders it impossible to determine whether they found all, several, or just one of the elements encompassed within the alternatively framed issue. From the contradictory testimony they could have found mistake on the part of the plaintiff, mistake on the part of the defendant in giving the plaintiffs the wrong instru-

[5] 253 N.C. at 792, 117 S.E.2d at 823.

[6] It would seem to follow that upon proper proof of omitting the redemption clause the intent to make a security transaction could be implied, but the old rule expressly required proof of two things. See Perkins v. Perkins, 249 N.C. 152, 105 S.E.2d 663 (1958).

[7] Davenport v. Phelps, 215 N.C. 326, 1 S.E.2d 824 (1939); Note, 16 N.C.L. REV. 416 (1938).

[8] In previous cases using the phraseology *declarations, facts,* and *circumstances,* the Court held that *intent* could not be proved by simple declarations of the parties, but had to be established by facts and circumstances. Perkins v. Perkins, 249 N.C. 152, 105 S.E.2d 663 (1958).

[9] Perkins v. Perkins, *supra* note 8.

[10] 253 N.C. at 792, 117 S.E.2d at 822.

ment to sign, mistake on the part of both parties, or even fraud in the factum[11] on the part of the defendant. On the basis of the court's treatment of the issues raised, a trial court would be well advised to submit and have the jury pass specifically and individually on the elements of mistake, fraud or undue advantage. The separation of the different elements of the submitted issue and individual determination on each by the jury would have greatly aided the plaintiffs and also the court by pointing to what was specifically proved to the jury.

The second reason the court gives for reversing appears to invoke a form of estoppel against the plaintiffs for their failure to read the instrument they signed. The Court stated, "The duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud, or oppression, is a circumstance against which no relief may be had, either at law or in equity."[12] The soundness of this rule could not be seriously questioned, but it would seem to have no application to the principal case for two reasons. First, it is to be noted that the plaintiffs specifically relied upon fraud and mistake as grounds for relief and the jury found fraud and mistake in the alternative issues it affirmatively answered in favor of the plaintiffs.[13] Secondly, the plaintiffs admitted the ability to read but specifically alleged and sought to show that they were not of sufficient intelligence to understand the difference between an absolute deed and a mortgage. No mention of this allegation was made except that the plaintiffs had the duty to read, apparently even if it would be futile from the point of understanding.[14]

The facts of the principal case would seem to demand the intervention of equity regardless of the taut rules of law involved. Here a man of little education, of less than moderate means, is faced with a variety of expenses and pending foreclosure of his home. After ten years of buying and building, he is supposed to have sold all his rights therein for $100 to the defendant, a successful businessman,

[11] The Court dealt exclusively with the point of mistake and ignored the issue of fraud which the plaintiffs relied upon as heavily at trial and on appeal as they did mistake.

[12] 253 N.C. at 793, 117 S.E.2d 823.

[13] *Id.* at 792, 117 S.E.2d at 822.

[14] In Streator v. Jones, 10 N.C. 423 (1824), the grantor was unable to read or write; the court found gross inadequacy of price, oppression and financial distress and granted relief.

when the value of the land is almost $1700 and the amount owing is less than $600. It would be difficult to imagine the parties meeting on more unequal terms. Although at law a " 'pepercorn' of consideration is sufficient to support a promise," equity may inquire further.[15]

The harshness of the North Carolina rule is further illustrated by what must be termed an exception to or an inconsistency with the old double requirement. Under the old rule the grantor in order to have the deed reformed had to allege and prove that the clause of redemption was omitted by mistake, fraud, undue advantage or undue influence. On the other hand, a creator of such grantor can have the same absolute deed declared void upon the mere showing of an intent to create a security. The deed, as to such creditor, is upset on the ground that it is improperly recorded and would therefore tend to defraud, delay and hinder him.[16] If the security of titles is of such paramount importance it should demand the application of the double requirement here.[17] Yet the distinction in the two situations would tend to indicate that implied fraud on the grantor's creditors is more serious than any proven fraud upon the grantor. It is submitted that this inconsistency in standards is unjustifiable.

The majority of jurisdictions require either by legislative[18] or

[15] Dalzell, *Duress by Economic Pressure, II*, 20 N.C.L. REV. 341, 357 (1942). "With respect to value, mere inadequacy of price is of no more weight in equity than at law. If a man who meets his purchaser on equal terms, negligently sells his estate at an undervalue, he has no title to relief in equity. But a court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the vender was in distressed circumstances, and that advantages was taken of that distress, it will avoid the contract." Wood v. Abrey, 3 Madd. 417, 56 Eng. Rep. 558 (1818).

[16] Under the registration statutes the deed cannot be registered as an absolute deed for it was not so intended; nor can it be registered as a mortgage for it does not purport on it face to be one. Foster v. Moore, 204 N.C. 9, 167 S.E. 383 (1932). This difference in standards has led to the suggestion of an indirect method of securing the desired relief. See Note, 26 N.C.L. REV. 405, 406 (1948).

[17] Certainly "titles to property, which ought to be evidenced by solemn instruments in writing," should not depend on the slippery memory of witnesses. Clement v. Clement, 54 N.C. 184, 186 (1854). However, there seems to be more justice in allowing a man the opportunity to recover his home and property than securing property titles, especially when he contends he never intended to convey, the circumstances seem to negate the idea of an absolute sale, and there is no third party involved.

[18] See *e.g.*, ALA. CODE ANN. tit. 47, § 136 (1958); IDAHO CODE §§ 45-904, -905 (Supp. 1961); MICH. STAT. ANN. § 26.549 (1953). Two jurisdictions require the grantor to retain possession. GA. CODE § 67-104 (1957); MISS. CODE § 272 (1942). Several jurisdictions seek to protect third parties in this situation. *E.g.*, N.Y. REAL PROPERTY LAW § 320. *Contra*, MD. CODE ANN. art. 66 § 1 (1957); PA. STAT. ANN. § 21-951 (1955).

judicial[19] action, that the plaintiff show by clear, cogent and convincing evidence that there was the intent to create a security transaction. These statutes allow the reformation of conveyances to conform to the intent of the parties while, at the same time protecting the interest of any third parties.

It is submitted that the North Carolina legislature should adopt a statute similar to the California statute which provides that a conveyance will be deemed a mortgage if intended as security regardless of the omission of a clause of redemption or defeasance.[20]

T. LA FONTINE ODOM

[19] Zivotosky v. Max. 75 N.Y.S.2d 553 (1947) (Sup. Ct. 1947), *aff'd*, 92 N.Y.S.2d 631 (Sup. Ct. 1949). No statute or decision has been found similar to North Carolina's double requirement.

[20] CAL. CIV. CODE § 2929. A man's ignorance or financial oppression should not be allowed to fatten the purse of those who seek a "bargain" by such circumstances. The defendant stated on cross examination that "if he wanted to sell me a piece of property, I see no reason—if you can buy at a bargain, I'll buy a bargain anywhere." Record, p. 83, Isley v. Brown, 253 N.C. 791, 117 S.E.2d 821 (1960).