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danger will commit other similar acts. Accordingly, since the extent of confinement should be greater where the actor knows of the danger and lesser where he has no such knowledge, we must conclude that Stephen's theory has a better foundation in logic and practicality.

In conclusion, it is submitted that although Holmes' and Stephen's theories do not differ extensively, the fact remains that some distinction does exist where the actor has knowledge of the circumstances plainly indicating great danger and yet has no actual knowledge of the great danger. And, finally, it is submitted that Stephen's theory, resting upon subjectivity, has the better foundation in logic and practicality.

J. WIRT TURNER, JR.

MAY THE DEED OF AN INSANE GRANTOR BE AVOIDED AT LAW AS WELL AS IN EQUITY?

The majority view is that the deed of an insane grantor, not yet officially declared to be insane, can be avoided in an action at law as well as in equity, though the question has not been passed upon by many states.[1] In many other decisions it is taken for granted that the matter can be decided in a law action.[2] Though early federal cases said that in ejectment the strict legal title prevails,[3] a power of attorney to convey the property of an insane owner was held void in an action at law.[4] Therefore, the deed executed in accordance with it was held void. There was a dictum in the case to the effect that if the insane owner had been the grantor of the land, the action that would result in the avoidance of his deed could be brought at law as well as in equity.[5]

Ordinarily the law actions in which the deed of an insane grantor is avoided are ejectment[6] and writ of entry.[7] The question usually arises where the person intending, eventually, to impeach the title of the grantee from the insane grantor, brings a law action, claiming title in himself. To combat this, the defendant must give evidence of a deed which the plaintiff will then claim is void, because of the grantor's

[1] Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434 (1907); Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175 (1893); Webster v. Woodford, 3 Day 90 (Conn. 1808); Guest v. Beeson, 2 Houst. 246 (Del. 1859); Brown v. Freed, 43 Ind. 253 (1873); Wall v. Hill's Heirs, 40 Ky. (1 B. Mon.) 290, 36 Am. Dec. 578 (1841); Valpey v. Rea, 130 Mass. 384 (1881); Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716 (1874); Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908); Fitzgerald v. Shelton, 95 N. C. 412 (1886); Farley v. Parker, 6 Ore. 105, 25 Am. Rep. 504 (1876); Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766 (1880).

[2] Daugherty v. Powe, 127 Ala. 577, 30 So. 524 (1900); Burnham v. Kidwell, 113, Ill. 425 (1885); Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716 (1874).

[3] Foster v. Mora, 98 U. S. 425 (1878).

[4] Dexter v. Hall, 82 U. S. 9, 21 L. ed. 73 (1872).

[5] *Id.* at 21, 21 L. ed. 73, 77.

[6] Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766 (1880).

[7] Valpey v. Rea, 130 Mass. 384 (1881).

insanity at the time it was executed. Also the insanity of the grantor can be used at law to impeach his deed by setting it up as a defense when his grantee brings the action to get possession of the land.[8]

A smaller number of jurisdictions require an action in equity to avoid the deed of an insane grantor.[9] They hold that the rights of a grantee who acted in good faith can be better protected in equity than at law;[10] that the right of possession alone is determined in the law action and that is settled by record title or title based upon possession.[11] Since the plaintiff would have title neither by record nor by possession, he could not maintain ejectment until the deed by the insane grantor was set aside in equity. The Michigan Court held in *Moran* v. *Moran*[12] that the plaintiff must resort to equity since the defendant has a voidable rather than a void title, and this is sufficient to enable him to defeat the law action until his deed is set aside in equity.

One reason that the court gave in the *Moran* case for following the minority rule, which reason it admitted did not apply to many other states, was that Michigan followed the common law rule forbidding equitable defenses in legal actions.[13] The court said that the states which had abrogated this common law rule were thereby permitted to avoid the deed executed by the insane grantor, not under guardianship, at law as well as in equity. It is hard to see the logic in this reason, and few if any of the states following the majority rule give as a reason for so doing the fact that they have abrogated this common law rule.

The reason given why the deed of an insane grantor can be avoided is that the grantor has not assented to the conveyance. Since his mind is lacking, he is incapable of assenting.[14] This fact, it is contended, may as well be shown at law as in equity.[15] Another case compares the situation to a forgery, since in neither case would the grantor assent to the conveyance.[16] Still another court held that the grantee of an insane grantor was estopped to deny his grantor's title, since he

[8] Doherty v. Courtney, 150 Cal. 606, 89 Pac. 434 (1907).

[9] Evans v. Horan, 52 Md. 602 (1879); Moran v. Moran, 106 Mich. 8, 63 N. W. 989 (1895); McAnaw v. Clark, 167 Mo. 443, 67 S. W. 249 (1902).

[10] Evans v. Horan, 52 Md. 602 (1879).

[11] McAnaw v. Clark, 167 Mo. 443, 67 S. W. 249 (1902).

[12] 106 Mich. 8, 63 N. W. 989 (1895).

[13] *Ibid.*

[14] See Dexter v. Hall, 82 U. S. 9, 21 L. Ed. 73, 77 (1872).

[15] Douglass v. Hartzell, 15 Ill. App. 251, 254 (1884), where it was said: "If the grantor in the deed to appellee was insane or an imbecile at the time of the execution of the deed, and was incapable of understanding the transaction, then it was not her deed. The fact may as well be shown in a court of law as equity."

[16] Brown v. Freed, 43 Ind. 253, 257 (1873). The court said: "If it would have been competent to have proved that the supposed deed had been forged and was therefore void, why was it not competent to prove that it was inoperative and void by reason of the want of mental capacity in the grantor to make any valid deed? We can see no difference in principle between the case supposed and the one involved in the case under consideration."

entered under a voidable conveyance from the insane grantor.[17] The latter explanation does not seem to have gained wide credence.

The argument of the Michigan court in *Moran* v. *Moran*[18] that the minority view should be followed on the grounds that the insane grantor's deed transfers a voidable title is met in more than one way by the majority states. One group says that the deed transfers no title, rather than a voidable one.[19] This would permit the grantor, or those holding under him, to maintain ejectment. The reason given for holding the deed to be void rather than voidable is that there is no meeting of minds and the necessary mutual consent to the conveyance is absent. Therefore, the deed should be of no effect whatsoever.[20]

However, the weight of authority in the United States is that the deed of an insane grantor is voidable rather than void.[21] This means that the deed of the insane grantor transfers a defeasible but legal title to the grantee. It is good until it is disaffirmed. It may seem absurd to give any effect at all to a deed where one of the parties is unable to assent, but analogy may be drawn to an infant's contract.[22] Most states hold the deed of an insane grantor to be voidable rather than void for the reason that the equity doctrine holding such a deed voidable has largely overthrown the old view of the law courts that such a deed was void. Though the deed of the insane grantor is voidable, this does not mean that it must be avoided in equity rather than law, as some equity courts say.

Where a person has a right to rescind or avoid a contract involving personal property, it is clear that he may show that he has done so whether the action is in law or equity.[23] It is also suggested that though the insane grantor's deed is voidable, it does not transfer title from the grantor, but may give rise to certain equitable rights in the grantee. The law courts do their best to protect these rights in the grantee, though possibly not as effectively as equity, by requiring a tender of return of the consideration.[24]

Also, contracts obtained by fraud are merely voidable. Yet they can be shown to be unenforceable either at law or equity.[25] Similarly, it may well be contended that it does not necessarily follow that a deed, voidable because of the grantor's insanity, must be remedied in equity alone.

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[17] Wall v. Hill's Heirs, 40 Ky. (1 B. Monroe) 290, 36 Am. Dec. 578 (1841).

[18] 106 Mich. 8, 63 N. W. 989 (1895), cited *supra* note 13.

[19] Daugherty v. Powe, 127 Ala. 577, 30 So. 524 (1900); Farley v. Parker, 6 Ore. 105, 25 Am. Rep. 504 (1876).

[20] Daugherty v. Powe, 127 Ala. 577, 30 So. 524 (1900).

[21] Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716 (1874); Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908); Note (1893) 19 L. R. A. 489.

[22] An infant's contract is voidable. Wright v. Buchanan, 287 Ill. 468, 123 N. E. 53 (1919); Cain v. Garner, 169 Ky. 633, 185 S. W. 122 (1916); Allis v. Billings, 6 Metc. 415, 39 Am. Dec. 744 (Mass. 1843).

[23] Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908).

[24] Note (1908) 19 L. R. A. (N. S.) 461.

[25] Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908).

A factor that has detracted from the argument for the majority rule, namely that the deed of an insane grantor can be avoided at law as well as in equity, is that not all the states had equity jurisdiction from the first.[26] Necessarily in this type of case, resort was to the law courts. Massachusetts and Pennsylvania, which follow the majority view, are examples of the states which did not have equity jurisdiction for some time.[27] Despite this, however, there is nothing to indicate that they would not have held with the majority on this question if there had been equity jurisdiction from the first in their courts.

Though fraud is usually thought of as cognizable mainly in equity and certain kinds are cognizable only in equity, such as constructive fraud or fraud in the inducement, this is not true of every kind of fraud. Fraud in the execution of the instrument may be dealt with either at law or equity.[28] An example of this occurs when one induces another to sign an instrument by reading to the signer, who cannot read, what he falsely claims to be the contents of the instrument. The fact that the signer can raise the question either in law or equity is due to his failure to assent to the instruments as they were when he signed them. If there was fraud only in the inducement, the signer consented to the instrument and must go into equity for his remedy. The deed of an insane grantor is in the class with instruments that are voidable because of fraud in the execution. In neither case did the signer assent to the instrument, for he did not know what he was signing. Due to the lack of assent in both cases, the one claiming to have been wronged should be premitted to raise the question either in law or equity.[29]

The deed of an insane grantor is similar to the deed of an infant. According to the majority view, both are voidable and either can be avoided in an action at law or equity.[30] Either can be ratified at the proper time. The infant can ratify upon coming of age. The insane grantor can ratify on regaining his sanity.

It would seem that Kentucky follows the majority view, namely that the deed of an insane grantor can be avoided either at law or equity. The Kentucky Court of Appeals has said that certain cases indicate that Kentucky holds to the minority view.[31] These are all equity cases and are not, therefore, controlling. In the one case in

[26] Note (1908) 19 L. R. A. (N. S.) 461.

[27] Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908).

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid;* Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705 (1866); See Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766, 767 (1880).

[31] Transylvania University v. McDonald's Ex'r., 277 Ky. 608, 611, 126 S. W. (2d) 1117, 1118; citing Quinn v. Hendren, 187 Ky. 283, 287, 218 S. W. 1022, 1024 (1920); James v. Cullins, 214 Ky. 179, 282 S. W. 1106 (1926).

Kentucky squarely involving the question, the grantor's deed was avoided in an action at law.[32] While that is a very old case and stands by itself, the Court of Appeals has indicated in a late case that it would possibly follow the majority view on the question.[33]

EUGENE R. WEBB.

REMITTITUR IN KENTUCKY

Ordinarily the term remittitur is applied to a voluntary remission of part of the damages found by the jury. But in the Kentucky decisions, as well as those of some other states,[1] the setting aside of part of a separable verdict by the court when it has committed error by admission of certain evidence or by giving particular instructions resulting in an excessive verdict, has been called a remittitur.

I.

May the trial court give the recovering party the option of accepting a reduction of the verdict or submission to a new trial? In *Brown* v. *Morris*,[2] a malicious prosecution case, the plaintiff received a verdict. The defendant, alleging excessive damages, moved for a new trial. The court said a new trial would be granted unless the plaintiff would take one-fourth the verdict. Plaintiff objected but took judgment for the latter amount. Defendant appealed. The Court of Appeals reversed the holding of the trial court saying that in this instance the lower court had virtually assessed the damages, thereby depriving each party of his right to an assessment by a jury. The court in *Chattaroi Railroad Company* v. *Leftwitch*,[3] an action for wrongful death caused by the alleged wilful negligence of defendant's employees, cited *Brown* v. *Morris* and granted a new trial—the lower court had remitted, notwithstanding plaintiff's objection, $5,000 of a $9,000 verdict. *Louisville & Nashville Railroad Company* v. *Earl's Administratrix*,[4] another wrongful death case, is in accord. These cases indicate that where the recovering party objects to a remittitur when the verdict is for unliquidated damages and is inseparable, the trial court may not enter judgment for an amount less than that found by the jury.

The court in *Johnson's Administrator* v. *Johnson*[5] sustained a release of part of the verdict. Even though the plaintiff objected, the remittitur was held valid because the court assumed (the evidence

[32] Wall v. Hill's Heirs, 40 Ky. (1 B. Mon.) 290, 36 Am. Dec. 578 (1841).

[33] Transylvania University v. McDonald's Ex'r., 277 Ky. 608, 126 S. W. (2d) 1117, 1119 (1939).

[1] McCormick on Damages (1935) Section 19.

[2] 66 Ky. (3 Bush) 81 (1867).

[3] 7 Ky. Law Rep. 165, 13 Ky. Op. 480 (1885).

[4] 94 Ky. 368, 22 S. W. 607 (1893).

[5] 104 Ky. 714, 47 S. W. 883 (1898).