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Equity--Showing a Deed Absolute on its Face to be a Mortgage--Effect of Illegality in Transaction

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quired land if the additional burden on the servient tenement was slight.

Suppose the timber on the above-mentioned 31-acre tract had first been piled on the 95-acre tract for the purpose of drying. Could it then be hauled over the right of way? In the case of *Williams v. James*,[5] hay from land adjoining was stacked on the dominant land, and later was carted across the servient tenement. The English court said that the defendant could make an ordinary and reasonable use of the dominant field, but could not use it as a pretext to increase the scope of the easement. The jury found that the defendant was making a *bona fide* use of his land in stacking hay on it. It followed that his use of the way was proper. A similar situation would arise here if the timber was piled on the dominant land to dry and then hauled across the way. If this were done *bona fide*, and not as a pretext to secure the use of the way, it would seem to be a reasonable use of the dominant land. If so, the defendant could then transport the timber over the way, although it would indirectly benefit land adjoining the dominant tenement. The West Virginia Court has held that a way of necessity is granted for any and all purposes for which land is reasonably adapted.[6] It would seem to follow that timber or other products from adjoining land might be brought on the dominant tenement for any reasonable purpose and later hauled therefrom across the way.

—A. William Petroplus.

Equity—Showing a Deed Absolute on its Face to be a Mortgage—Effect of Illegality in Transaction.—Miller applied to McNabb for a loan of $100,000, who instead of taking a lien on his property as security had him to convey the same to him in fee, giving Miller a lease on same for five years with the option to repurchase for the amount of the loan. This was done to avoid usury and taxation. After McNabb died, Ben Lomond Company, assignee of Miller, sought to repurchase the property. Trial court decreed that the $100,000 be paid to Florence McNabb, the widow. The heirs appealed and the Supreme Court reversed the decree and refused to give effect to the parol

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[5] 2 C. P. 577 (1867).

[6] Crotty v. New River Coal Co., 72 W. Va. 68, 78 S. E. 233 (1913); Uhl v. Railroad Co., 47 W. Va. 59, 34 S. E. 934 (1899).

evidence proving that the deed was in fact a mortgage. *Ben Lomond Co. v. McNabb et al.*[1]

It is well settled that a deed absolute on its face may be shown by parol evidence to be in fact a mortgage.[2] The basis of this rule is, however, that the party seeking so to do must have an independent equity, and the normal case in which it is done, is one between the lender and the borrower. Granting that the above rule and theory of same is well founded, the question remains, should it conclude this case?

The unique feature of this situation is that the interested parties both claim under the party who had the advantage of the so-called improper device, this is, the lender. But the court fails to notice its peculiar facts and deals with it just as it would treat a case involving a controversy between the lender and borrower. The heirs cannot be said to stand in a better position than the widow because they are both claiming under the same person. If McNabb had lived the $100,000 would have been paid to him and would have been his personal property to do with it as he wished. To the present plaintiff it makes no difference what the court decrees the instrument to be because it is ready to pay the specified amount.

Why should the court by its action discriminate between those claiming under the lender? There was no question of unclean hands *inter sese.* The court says that it will not give aid to a party seeking to enforce an illegal or fraudulent contract, but here the widow is not trying to enforce one, rather she is trying to show the true nature of the transaction for a collateral purpose unopposed to the policy of the rule. It is well settled that equity will give relief to those who have become the victims of usurious contracts and will set the same aside and restore the property.[3] From this it would seem that the court would be furthering public policy to give effect to the parol evidence rather than enforce the contract as that which it appears to be on its face. Clearly the purpose of the usury laws was circumvented in this instance.

The effect of the decision is to defeat the collection of taxes on

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[1] Ben Lemond Co. v. McNabb, et al., 153 S. E. 905 (W. Va. 1930).

[2] Note (1906) 11 L. R. A. (N. S.) 209; Vangilder v. Hoffman, 22 W. Va. 1 (1883); Harvey v. Shipe, 78 W. Va. 246, 88 S. E. 830 (1916); Hudkins v. Crim, 72 W. Va. 418, 78 S. E. 1043 (1913).

[3] Johnson v. Chicot Bank & Trust Co., 128 Ark. 640, 194 S. W. 29 (1917); Chase & Baker Co. v. Nat'l Trust & Credit Co., 215 Fed. 633 (1914); Davisson v. Smith, 60 W. Va. 413, 55 S. E. 466 (1906); Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555 (1914).

the loan. By giving effect to the parol evidence the court could declare the deed a mortgage and thus leave it open to the state to assert its claim to unpaid taxes. In a word, it would have been a decision which effectuated justice both to the state and the one to whom the money, if the truth of the thing is allowed to be shown, rightfully belongs.

—JAMES A. MCWHORTER.

SPECIAL ASSESSMENTS—NECESSITY OF NOTICE TO MORTGAGEES.—A mortgage company, holding deeds of trust to real estate in the municipality of Dunbar, sought to enforce the priority of their lien against a subsequent paving assessment levied on the same property by the city. In affirming the superiority of the assessment lien, the Supreme Court of Appeals decided that no notice to the mortgagee was necessary. *Mortgage Company of Maryland v. Lory.*[1]

As a general rule notice is necessary to bind the property owner by special assessments.[2] However, cases have sustained the validity of special assessments wherein no notice has been given.[3] In *Davis v. Lynchburg,*[4] the Virginia court bound the property owner without notice of assessment, reasoning that proceedings of the work itself was sufficient notice to the owner. In the absence of statute requiring the same, other cases have held no notice of special assessment is necessary.[5] A mortgagee, who has a contingent interest, at the most a defeasible security interest, would seem to present a weaker case for notice.

The rule seems to be well settled that notice by publication is sufficient, if properly and reasonably given for the benefit of property owners.[6] Also, if the property owner can contest the

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[1] 154 S. E. 136 (W. Va. 1930).

[2] Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401 (1906); 4 DILLON, MUN. CORP. (5th ed. 1911) § 1365; 5 MCQUILLIN, MUN. CORP. (2nd ed. 1928) § 2226.

[3] Stevenson v. N. Y., 1 Hun 51 (N. Y. 1874).

[4] 84 Va. 861, 6 S. E. 230 (1888).

[5] Collins v. Holyoke, 146 Mass. 29, 15 N. E. 908 (1888); Paulson v. Portland, 16 Ore. 450, 19 Pac. 450 (1888).

[6] Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825 (1890); Glidden v. Harrington, 189 U. S. 255, 23 Sup. Ct. 574 (1902); Citizens' Savings Bank v. Greenbaugh, 173 N. Y. 215, 65 N. E. 978 (1903).