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Domestic Relations - Torts Between Parent and Child - Right of an Unemancipated Child to Recover from its Parent for Personal Injuries

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CASE NOTES

DOMESTIC RELATIONS — TORTS BETWEEN PARENT AND CHILD — RIGHT OF AN UNEMANCIPATED CHILD TO RECOVER FROM ITS PARENT FOR PERSONAL INJURIES. The plaintiff, a thirteen year old boy, was injured when the automobile in which he was riding, operated by his mother, collided with another car. Acting by his next friend, the boy sued his mother for damages alleging his injury was caused by the negligence of his mother. It was stipulated that his mother had liability insurance in a sum equal to recovery sought. The lower court denied a motion by the defendant to dismiss the complaint. On appeal it was *held* that the motion to dismiss should have been granted. *Villaret v. Villaret*, 169 F. 2d 677 (1948).

It has been generally held that an emancipated child may sue its parent for a tort. *Cafaro v. Cafaro*, 116 N.J.L. 487, 184 A. 779 (1936); *Detwiler v. Detwiler*, 162 Pa. Super 383, 57 A. 2d 426 (1948); *Taubert v. Taubert*, 103 Minn. 247, 114 N.W. 763 (1908). The question of whether an infant is emancipated is usually a question of fact. *Goldstein v. Goldstein*, 4 N. J. Misc. 711, 134 A. 184 (1926); *Martin v. Martin*, 11 N.J. Misc. 705, 167 A. 227 (1933); *Stiliga v. Metropolitan Cas. Ins. Co. of N. J.*, 113 N.J.L. 101, 172 A. 793 (1934); *Detwiler v. Detwiler, supra.* Where there was no emancipation of the child, however, a different result has been reached. *Hewlitte v. George*, 68 Miss. 703, 9 So. 885 (1891). In the *Hewlitte Case* a minor child brought an action against her mother for false imprisonment for maliciously confining the child to an insane asylum. In reversing a judgment for the child the court held that ". . . the peace of society, and of the families composing the society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. . . ." There does not appear to be any actual precedent at common law in support of this case. Eversley, *Domestic Relations* (4th Ed. 1926) 571.

At common law a child could maintain an action against his father, not only in respect to dealing with the child's property, but in an action for libel and slander and for wrongs inflicted by him. *Torts Between Persons in Domestic Relation*, 43 Harward Law Review 1030, 1056; Eversley, *Domestic Relations* (4th Ed. 1926). Since the *Hewlitte Case, supra*, the rule forbidding recovery has become a well settled principle of law. *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932); *Kloppenburg v. Kloppenburg*, 66 S. D. 167, 280 N.W. 206 (1938); *Lund v. Olson*, 183 Minn. 515, 237 N.W. 188 (1931). Only a few courts hold to the contrary. *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930). See also *The Suit by the Unemancipated Child Against His Parent*, 26 Georgetown Law Journal 139. The earlier cases were decided on the theory of public policy, that to allow such suits would be harmful to the family relationship and tranquility. Later, in cases where liability insurance was involved an attempt was made to overthrow this public policy. In the case of *Detwiler v. Detwiler, supra*, the defendant had liability

insurance. There the court held that the argument that ". . . the rule of public policy does not fit the present day in case of negligent operation of an automobile by a minor protected by casualty insurance, is of no validity." To support its argument the court cites a quotation from an earlier case in Pennsylvania, *Silverstein v. Kastner, et al.*, 342 Pa. 207, 20 A. 2d 205 (1941), in which the court said, "Without a legislative mandate, we see no justification for making such discrimination, thus segregating automobile cases from other actions by a parent growing out of a negligent conduct of an unemancipated minor because in many automobile cases insurance might be carried that would give protection. The fact, therefore, that there was insurance in the instant case, was of no moment." In the *Villeret Case, supra*, the court says the existence of liability insurance ought not to create a cause of action where none exists otherwise. Liability policy protects against claims legally asserted, but does not itself produce liability. This is the theory upon which many courts base their decisions that a child cannot sue the parent even where insurance is involved. *Luster v. Luster*, 299 Mass. 480, 13 N.E. 2d 438 (1938); *Lund v. Olson, supra; Norfold S. R. Co. v. Grelakis*, 162 Va. 597, 174 S.E. 841 (1934); *Laserki v. Kabara, et al.*, 235 Wis. 645, 294 N.W. 33 (1940).

There are no reported cases in North Dakota on this question. By adopting a rule that such actions between a child and a parent would lie where there was insurance, one of the elements to be proved by the plaintiff would be that the defendant has insurance. There would then exist a situation where the fact of the defendant having insurance would be an element to be proved, yet the rule in trial practice in North Dakota seems to be that insurance shall not be mentioned in a trial of negligence cases where such mention would be prejudicial. *Ramage v. Trepanier*, 69 N. D. 19, 283 N.W. 471 (1939). Since the rule of trial practice appears to be well established in North Dakota, it would seem to follow, therefore, that North Dakota will go along with the cases that have held that the mere fact that the defendant-parent has insurance does not give the child the right to recover from the parent.

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ATTORNEY AND CLIENT — UNAUTHORIZED PRACTICE OF LAW — APPLICATION IN THE TAX FIELD. The P seeks to punish for contempt and to enjoin the unlawful practice of the law by Bercu, an accountant. C company's liability to the city of New York for retail sales taxes and compensating use taxes accrued in 1936, 1937, and 1938, during which time C had no taxable profits and the claims were not paid. In 1943 C made large profits and deemed it desirable to settle these tax claims with the city of New York if a deduction could be taken for the payment on the federal income tax return for 1943. C employed its own accountant-lawyer and his opinion was that the deductions could not be made for the current year, but could be taken only in the years in which they accrued—1936, 1937, and 1938. Upon being consulted by C concerning the matter, the D stated that as an accountant he would say the deduction could not be taken for 1943, but he was sure there was a case holding otherwise

and that he would make his own research on the subject. The D found a treasury decision supporting the position which C wished to take. D submitted his findings to C and received compensation for his services. He did not file the income tax return for C. The Special Term held that D's activities lay within the proper scope of the accounting profession and therefore did not constitute the unlawful practice of law. On appeal it was *held* that the decision be reversed. The injunction was issued, and D fined for contempt. *New York County Lawyer Association v. Bercu*, 273 App. Div. 524, 78 N.Y.S. 2nd 209 (1948).

With many lawyers today, problems of taxation make up a substantial part of their practice. The above stated case makes an attempt to determine what phases of taxation must be left to the exclusive jurisdiction of members of the bar. In determining the matter of accountants unauthorized encroachment upon the legal profession in the tax field the general rules laid down by the courts as to what constitutes the practice of law are applied.

The practice of law is not limited to the preparation of cases and their conduct in court. It includes legal advice and counsel and the drawing of instruments, when such instruments set forth, limit, terminate, claim, or grant legal rights. *Cain v. Merchants National Bank and Trust Co. of Fargo*, 66 N.D. 746, 268 N.W. 719 (1936). The drafting of documents, when merely incidental to the work of a distinct occupation, is not the practice of law, although the documents have legal consequences. *People v. Title Guarantee and Trust Co.*, 227 N.Y. 366, 125 N.E. 666 (1919). A layman may prepare simple elementary documents of a routine character and may also advise persons as to matters involved, without engaging in the prohibited practice of law where the legal training, knowledge, and skill required are not beyond the range of an average man. *State v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941). A person who is not a member of the bar may draw simple legal instruments when they are incidental to transactions in which such person is interested provided no charge is made therefor. If compensation is exacted, either directly or indirectly, all advice to clients and all action taken for them in matters connected with the law constitutes practicing law. *Cain v. Merchants National Bank and Trust Co. of Fargo, supra.* However, in *People v. Jersin*, 74 Pac. 2d 668 (Colo. 1937), the court said that special consideration should be given in cases of emergency when lawyers were unavailable and that the matter of compensation is not determinative of the issue. A sharp line cannot be drawn between the field of the lawyer and that of the accountant, but any service that lies wholly within the practice of law cannot lawfully be performed by an accountant or any other person not a member of the bar. *Meniick v. American Security and Trust Company*, 107 F. 2d 271 (1940). Taxation which invades almost every phase of modern life is so interwoven with nearly every branch of law that one could hardly pick any tax problem and say this is a question of pure taxation or pure tax law wholly unconnected with other legal principles. "How any accountant doing income tax work could do his business at all without a knowledge of the statutes, decisions, and treasury rulings in income tax matters is hard to see and we should hesitate to hold the necessity of such knowledge would

require every member of a firm of accountants to be a member of the bar." *Humphreys v. Commissioner of Internal Revenue*, 88 F. 2d 430 (1937). Tax accounting problems are questions of fact not of law. *Dobson v. Commissioner of Internal Revenue*, 320 U.S. 489 (1943). The making out of a simple tax return is not practicing law. *Lowell Bar Association, et al., v. Loeb et al.*, 52 N.E. 2d 27 (Mass. 1943). In the main case the court said that as a matter of practical administration, while allowing the accountant jurisdiction of incidental questions of law which may arise in connection with auditing books or preparing tax returns, they should be denied the right as a consultant to give legal advice. Though the same legal question may arise in preparing a tax return and at another time serve as the subject of a request for advice by a client, the difference is that in the former the accountant is dealing with a question of law which is only incidental to preparing a tax return and in the latter he is addressing himself to the question of law alone. An accountant must be restrained when he undertakes to pass upon a legal question apart from the regular pursuit of his calling though he may understand the legal question involved. *Auerbacker et al. v. Wood*, 142 N.J.Eq. 484, 59 A. 2d 863 (1948). The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the Judicial Department could exercise little control. *Lowell Bar Association et al. v. Loeb et al., supra.* In dealing with the controversy in the future there are two alternative methods which could be pursued. With the general basis now laid down by the courts as to what constitutes the practice of law in the field of taxation, each individual case could be settled through a lawsuit as it arises. It would seem, however, that such jurisdictional fights are beneath the dignity of both the legal and accounting professions and should be avoided as much as possible. The other possible solution is for members of both professions to reach an agreement outside of the courts as to the work to be done by each. Some progress has been made along this line as in 1944, the National Conference of Lawyers and CPA's was created. As is stated by Louis S. Golderg, CPA and member of the Iowa bar, "The line between the two professions is often imperceptible . . . and frequently rules of law and rules of accounting are indistinguishable. In the area where distinction is possible, the boundary can be marked by conference better than by court." *Journal of Accounting*, p. 188 (Sept. 1947). A better relationship between both accountants and lawyers should be sought as to the contribution which each of the professions is equipped to make in the public interest.

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JOINT TENANCY — BANK ACCOUNTS — RIGHT OF SURVIVOR WHO HAS MADE NO CONTRIBUTION TO THE DEPOSIT. A opened a joint bank account in two banks in his own name and that of D. After A's death, D claimed the balances remaining in both accounts by the right of survivorship. A's executor brought suit to recover said monies and prevailed in the trial

court. On appeal it was *held* that the judgment be affirmed. The court held that the trial court did not err in permitting the introduction of testimony of uninterested witnesses as to conversations with A previous to his making the accounts, as such testimony was admissible to indicate A's intention in creating such accounts and the evidence sustained a finding by the trial court that the accounts were created by A as a matter of convenience only. No attempt was made to sustain D's right to the balance of the accounts on the basis of a gift inter vivos. *Pence v. Wessels*, 320 Mich. 195, 30 N.W. 2d 834 (1945). The court pointed out in this case, that a statute creating a presumption of joint tenancy where accounts are in the names of two or more persons, payable to either, does not create a conclusive presumption.

Where the parties indicate an intention to create a gift inter vivos by means of a written instrument, the instrument being conclusive of the deceased's intention to create a joint ownership, the right of survivorship follows as a legal incident. *Kennedy v. Kennedy*, 169 Cal. 287, 146 P. 647 (1915). Where there is no written instrument upon which to base such a conclusion, a different problem arises. As pointed out by Justice Nuessle in *First National Bank and Trust Co. v. Green*, 66 N.D. 160, 262 N.W. 596 (1935), "There is a great diversity of holding in the cases respecting the rights of parties in whose names joint deposits in savings and other banks are made. This is particularly so as respects the rights of parties who contribute none of the money constituting the deposit where the other party who does contribute dies. Some of the cases have held such deposits effective or ineffective as the case may be to constitute gifts causa mortis, gifts inter vivos, or as creating trusts, some have held them to constitute voluntary bestowments in joint tenancy, some to be merely abortive attempts at testamentary disposition, and some to be contractual arrangements for the convenience of the depositor without benefit to the other party." In many instances the right of the survivor, who has made no contribution to the deposit, turns on the question of whether or not a gift inter vivos was in fact created. In *Battles v. Milbury Savings Bank*, 250 Mass. 180, 145 N.E. 55 (1924), the court stated that where the right of the survivor to the deposit, created in the names of two or more, is based on a gift inter vivos, the elements of a gift must be present. If they do exist, a joint account would be held to operate as a present and complete gift in joint ownership, if such was the intention of the depositor. The following cases point out instances where the intention to create a gift inter vivos to the survivor was not clearly indicated and therefore no interest passed to the survivor upon the death of the depositor. In the case of *Bradford v. Eastman*, 299 Mass. 499, 118 N.E. 879 (1918), it was held that where the owner of bank deposits caused the same to be put in the names of herself and her niece, and gave possession of the deposit books to the niece on the latter's promise to return them, there being no intention to make a gift, as between the owner and her niece the money belonged always and wholly to the former. The case of *McGillivray v. First National Bank of Dickinson*, 56 N.D. 152, 217 N.W. 150 (1927) points out that an estate in joint tenancy, in a credit resulting from a bank deposit, is not created by inserting donee's

name in a certificate of deposit as a joint payee where full control of the certificate and of the deposit are retained by the depositor. *Accord: Denigan v. San Francisco Saving Union, et al.*, 127 Cal. 142, 59 P. 390 (1899). The question arises as to what will be sufficient to create a bank account in joint tenancy with the right of survivorship in North Dakota. The N. D. Rev. Code (1943), Sec. 47-0206 provides that, "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Sec. 47-0208 provides that, "Every interest created in favor of several persons in their own right is an interest in common unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint tenancy." By Sec. 6-0366, a bank which holds money by deposit in two names may pay to either of the named persons without liability. In *Denigan v. San Francisco Saving Union, et al., supra,* the California Supreme Court, construing Sec. 683 Civ. Code, which is in substance identical with Sec. 47-0206 of the N. D. Rev. Code (1943), said in part that, "The proposition of respondent that this section applies only to real estate is without support. There is no limitation of this character in this section, and, as it is found in the title headed 'Ownership' and the chapter thereof which treats 'Interests in Property' irrespective of its character, it must be held applicable to all kinds of property." In *Armstrong v. Hellwig*, 70 S.D. 406, 18 N.W. 2d 284 (1945), the court held that SDC Sec. 51-0214, similar to Sec. 47-0208 of the N. D. Rev. Code (1943), which requires that every interest in favor of several persons in their own right in property is an interest in common unless declared in its creation to be a joint interest, is satisfied by any form of words which clearly express intention to create a joint tenancy, and it is not necessary in order to create a joint tenancy to expressly call it that. The court further held that a single conveyance of realty, expressly declaring that the conveyance was to the grantees and survivor of them in his or her own right, created a joint tenancy. A conveyance to "husband and wife" as "joint tenants" was held to be sufficient to create an estate in joint tenancy with the right of survivorship, in *Englebrecht v. Englebrecht, et al.*, 323 Ill. 208, 153 N.E. 827 (1926).

Because the North Dakota statutes are similar to those in California and South Dakota, it would seem to follow that our statutes would apply to personalty as well as realty, and also that the statute is satisfied by any form of words which clearly express intention to create a joint tenancy. If that is so, then it would also seem to follow that a joint tenancy in a bank account, in North Dakota, could be created by a sole contributor, by using the words "in joint tenancy" or similar words, with or without a statement that such deposit was not to be considered as an interest in common. However, a deposit set up in such a way would probably not raise a conclusive presumption that a joint tenancy exists, but could probably be upset by the heirs of the contributor, if they could show that the contributor did not intend to create a joint tenancy in the bank account. In such a situation, no doubt the fact that the contributor in setting up the deposit used the correct words, would be strong evidence

of his intent to create a joint tenancy. It is believed, however, that no conclusive presumption of joint tenancy is created by complying with N. D. Rev. Code (1943) Sec. 47-0208.

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SALES — FLOOR PLAN CHATTEL MORTGAGES — PROTECTION OF BONA FIDE PURCHASERS. Plaintiffs purchased two automobiles from defendant-dealer, which, unknown to them, were subject to prior, properly filed, "floor plan" chattel mortgages held by defendant Contract Purchase Corporation. The mortgagor-dealer was left in possession of the automobiles, being allowed to place them in stock and sell to customers in the regular course of business. The mortgagor was also permitted to give such purchasers certificates of title to the automobiles without disclosing the liens, thus leaving it to the mortgagor-dealer to thereafter pay the mortgages and obtain releases therefrom. Upon the dealer defaulting in payments to the mortgagee, the cars were seized by the finance company while in the possession of the plaintiffs. Plaintiffs brought an action for their return and from an adverse decision the finance company appealed. On appeal it was *held* that the judgment be affirmed. The court pointed out that the question involved goes beyond the mere issue of whether plaintiffs are bona fide purchasers or not and, that through its course of dealings the finance company had put it in the power of the dealer to mislead purchasers and perpetuate a fraud, which under the circumstances, estopped them from enforcing their lien. *Daas v. Contract Purchase Corporation, et al.*, 318 Mich. 348, 28 N.W. 2d 226 (1947).

Under common law, a chattel mortgage on personal property was void unless possession of said property was retained by the mortgagee, it being decided early that one of the badges of fraud was the retention of possession by the transferor. *Twynes Case*, 76 Eng. Reprint 809 (1602). For a substantial incorporation of this common law doctrine see N. D. Rev. Code (1943) Sec. 13-0106. The applicable Michigan statute relied on in the instant case is similar to our own N. D. Rev. Code (1943) Sec. 35-0406, which provides that a mortgage of personal property is void as against creditors and subsequent purchasers and encumbrancers of the property in good faith for value, unless the mortgage is filed in the office of the register of deeds. In America, generally, and as interpreted in *Richert v. Simons*, 6 N.D. 239, 42 N.W. 657 (1889), the filing of a chattel mortgage properly executed and regular on its face, is equivalent to actual delivery and change of possession. For other statutory constructions see *Pace v. Threewit*, 31 Cal. App. 2d 509, 88 Pac. 2d 247 (1939) (Double purpose of giving notice to interested parties and enabling them to identify and locate their property); *Stamler v. Universal Ins. Co.*, 305 Mich. 131, 9 N.W. 2d 33 (1943) (Notice for purposes declared by statute only); *Nome State Bank v. Brendmoen*, 70 N.D. 391, 295 N.W. 82 (1940). In some jurisdictions, such as Texas and California, Certificates of Title Acts have repealed prior statutes relating to chattel mortgages insofar as they relate to the recording of motor vehicles thereunder. *Motor Inv. Co. v. City of Hamlin*, 142 Tex. 486, 179 S.W. 2d 278 (1944); *In re Wiegand*,

27 F. Supp. 725 (Cal. 1939). Thus while the generally accepted rule that one cannot convey more than he has, 1 *Williston Sales* (2d Ed.) sec. 314 p. 719, sec. 315 p. 721; *Kastner v. Andrews*, 49 N.D. 1059, 194 N.W. 824 (1923) does not present too many conflicting ramifications, the problem becomes more complex where recordation and subsequent rights of innocent third parties may become involved. Where it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee has given the mortgagor powers of control, retention and disposition as he sees fit, the problem becomes further accentuated by the diversity of authorities in the United States as to whether the mortgage is void, voidable, or merely presents a factual situation which may or may not estop enforcement of the mortgagee's lien. Michigan, as evidenced by the instant case in which the court rendered a unanimous decision, has unwaveringly held that the validity of the mortgage is a question of fact to be determined on the intent of the parties in the light of all the circumstances surrounding and attendant upon the transaction. In a bankruptcy proceeding, *In re Kramer Mercantile Co.*, 21 F. 2d 615 (Okla. 1927) it was held that retention of possession by the mortgagor does not of itself raise a presumption of fraud but is only a factor to be considered along with the other attendant facts and circumstances in determining whether there has been fraud in fact. In *Farmers National Bank v. Missouri Livestock Commission*, 53 F. 2d 991 (Mo. 1931) where a lien was claimed by virtue of a chattel mortgage on cattle, the court held that a waiver had been spelled out by the mortgagee giving the mortgagor consent to sell the livestock. It was further held that this would be so regardless of the purchaser's knowledge or lack of knowledge of the previous lien and that the waiver may be shown by express words or by implication from a course of conduct. The court in *Howell v. Board*, 185 Okla. 513, 94 P. 2d 830 (1939) held that the mortgagee's knowledge that the mortgagor would sell in the usual course of business rendered the lien ineffective notwithstanding recording. *Accord: Rogers County Bank v. Cullison*, 186 Okla. 373, 98 P. 2d 612 (1940). South Dakota has held that such a transaction (where mortgagee allows the mortgagor to remain in possession and dispose of the goods as if they were his own and unencumbered) raises a prima facie case of fraud which will stand only if unrebutted, placing the burden on the mortgagee to show that the transaction was made in good faith, upon proper consideration, and without intent to hinder or delay creditors. *Hellenbeck v. Louden*, 35 S.D. 320, 152 N.W. 116 (1915). In *Bergman v. Jones*, 10 N.D. 520, 88 N.W. 284 (1901) an insolvent partnership executed a chattel mortgage to secure a preexisting debt with the mortgagee allowing the mortgagor to remain in possession and sell the encumbered merchandise in the regular course of business. When the mortgagee subsequently brought an action for conversion of the goods against the sheriff who had levied on them for other creditors, the court held the mortgagee's lien void, imputing fraud as a matter of law in obedience to the principle that the parties must have contemplated the natural consequences of their acts.

Where the mortgagee consented to the mortgagor's sale of the still encumbered property this was recognized as a waiver or estoppel of

further claim for a lien substituting in its stead the personal promise of the mortgagor (debtor) to repay the mortgagee (creditor). *New England Security Co. v. Great Western Elevator Co.*, 6 N.D. 407, 71 N.W. 130 (1897). But note that this result does not follow where the mortgagor remains the agent of the mortgagee. *Red River National Bank v. North Star Boot & Shoe Co.*, 8 N.D. 432, 79 N.W. 130 (1897). *Accord: Regional Agr. Cr. Corp. v. Griggs County*, 73 N.D. 1, 10 N.W. 2d 861 (1943) where consent to sale was on condition that proceeds were to be received by third party and applied on mortgage debt after payment of costs of sale.

If confronted with a factual situation such as the *Daas Case, supra*, North Dakota would undoubtedly hold the mortgage fraudulent and void as regards the bona fide purchaser without regard to the bona fides of the debt or intentions of the parties, with the presumption of fraud attaching when the circumstances are proved. While this may seem startling, in view of sec. 9-0310 of the N. D. Rev. Code (1943) which provides that actual fraud is always a matter of fact, it must be borne in mind that as early as the *Bergman Case, supra*, the court considered and felt disinclined to follow the dictates of the legislature in this regard where the court felt that the entire transaction smacked of fraud. The justification of such a supposition could probably be based on the fact that in most cases it is but mere speculation to attempt to gather the parties' true motives which often elude the most searching inquiries. Certainly where a mortgagee nullifies the effect of the protection accorded him by a recording act by his inconsistent conduct in the form of his tacit acquiescence in the mortgagor's indicia of ownership it is not manifestly inequitable to hold the parties to the natural consequences of their acts. Thus, while it is not a court's proper office to legislate, it may feel bound to mould its decisions according to the exigencies of the factual situation presented. Such will be the necessary action of the courts until there is legislation which not only admits of but actually contemplates bona fide purchasers and provides for their adequate protection in cases where opportunity for fraud is present.

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