RECENT CASES


Aside from the mutuality problem, the question of policy in enforcing such a contract arises on examination of the position of the infant plaintiff. Contracts of parents with third persons, dealing with the custody and control of children, may be enforced where they actually promote the children’s welfare; but control is rarely left in the hands of unwilling persons, and parents may not irrevocably divest themselves of their duties by ordinary contract. See Hohenadel v. Steele, 237 Ill. 229, 86 N.E. 717 (1908); Enders v. Enders, 164 Pa. 266, 30 Atl. 129, 27 L.R.A. 56, 44 Am. St. Rep. 598 (1894); Note, 42 L.R.A. (N.S.) 1013; 7 Minn. L. Rev. 417 (1923). A contract to adopt will not be specifically enforced. Erlanger v. Erlanger, 102 Misc. 236, 168 N.Y.S. 928 (1917), aff’d 185 App. Div. 888, 171 N.Y.S. 1084 (1917). And even arrangements for visiting children are carefully examined. Illinois, Smith-Hurd Rev. Stat. 1931, c. 64, § 4; Stickles v. Reichardt, 203 Wis. 579, 234 N.W. 728 (1931), and Comments, 16 Iowa L. Rev. 538 (1931), 15 Minn. L. Rev. 719 (1931).

In the present case, in order to obtain the money for his support, the child would have to submit to such directions with respect to his education as the now unwilling defendant might feel morally obligated to give, which might not be the best arrangement for the child. But only by so binding the plaintiff could the court secure to him the needed support; and perhaps the better solution was reached, in placing the power to terminate the relation, if it should become intolerable, in the plaintiff, who probably stood to lose the most by the termination.

FRED M. MERRIFIELD

Equity Practice—Necessary and Indispensable Parties—Objection of Nonjoinder Raised for First Time by Appellate Court—[Illinois].—Only rarely has an appellate court, on its own motion, raised the objection of the absence of a necessary party to an equity suit. However, this was done recently by the Illinois Supreme Court. A testator devised land to one of his sons, James, for life and at his (James’) death to the heirs of his body. If no heirs of James’ body survived him, then the land was to go to the testator’s heirs. After the birth of James’ only son, James and the testator’s heirs conveyed the land to R for the purpose of destroying the son’s interest. A grantee of R mortgaged the land to X. The son died, and James’ divorced wife brought this bill to construe the will, joining as defendants the grantors and grantee in the deed to R and subsequent grantees, but failing to join X, the mortgagee. A demurrer to the bill was sustained on its merits. No party litigant ever raised the question of the nonjoinder of the mortgagee. Held, the mortgagee was a necessary party and the decree for defendants (favorable to the absentee) should be reversed solely because of his absence. Hauser v. Power, 183 N.E. 586 (Ill. 1933).

Courts have been very loath to reverse a decree on this ground when no objection was made in the lower court, often stating that an objection made for the first time on appeal is not favored and will not be sustained when the decree is in favor of the absentee’s interests, even when the decree is for the complainant, unless the absent par-
ties are clearly indispensable. Some courts have even said the complainant is estopped to raise the question on appeal to reverse a decision unfavorable to him. *Wright v. Scotton*, 13 Del. Ch. 40, 121 Atl. 69 (1923); *Englehard v. Schroeder*, 92 N.J. Eq. 663, 116 Atl. 717 (1921); and see Winter v. Dibble, 251 Ill. 200, 95 N.E. 1093 (1911). In Abernathie v. Rich, 229 Ill. 412, 82 N.E. 308 (1907), a suit to set aside a deed, complainants failed to join intermediate grantees who had conveyed the land by warranty deed, and the Court said flatly that it would not have reversed the decree for defendants because of complainants' own mistake had not one of complainants been insane. See *Webster v. Jackson*, 304 Ill. 569, 136 N.E. 770 (1922). No case is found where this Court applied the estoppel doctrine to an adult complainant of sound mind.

The serious criticism of *Hauser v. Power* is its assumption that the mortgagee is a person whose presence is so indispensable that no decree can be entered without affecting his interests. No case cited by the Court so holds. In equitable suits attacking defendant's title to property, a grantee, mortgagee, or assignee of defendant is usually held to be a necessary party. *Swanson Auto Co. v. Stone*, 187 Iowa 309, 174 N.W. 247 (1919); *Theriot v. Daigle*, 125 La. 563, 51 So. 292 (1910); *Markwell v. Markwell*, 157 Mo. 326, 57 S.W. 1078 (1900); possibly contra *Billings v. Aspen Co.*, 51 Fed. 338, 350 (C.C.A. 8th 1892); *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429 (1889); *Workman v. Henrie*, 71 Utah 400, 266 Pac. 1033 (1928). But there are degrees of necessity. Federal courts employ the old chancery definition of a necessary party, but if his citizenship is such that to require his joinder will defeat federal jurisdiction, they will dispense with his presence unless he is what they call an "indispensable party," one whose relation to the suit is so direct and vital that without him no adequate decree could be entered determining the rights of the parties; that any decree would affect his interests. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158 (U.S. 1854). See Dobie, Federal Procedure (1928), 213-220.

The cases cited above holding that the grantee or mortgagee from defendant is not a necessary party in suits of this sort seem out of line with the weight of authority, but they cast some light on the relative necessity of the mortgagee's presence. And Edward v. Mercantile Trust Co., 124 Fed. 381 (S.D. N.Y. 1903), holds that a pledgee from defendant of corporate stock is not an "indispensable party"—as the federal courts use the term—to a suit to determine the title of the stock. The court suggests a decree declaring the stock subject to the same lien, if any, that it held at the beginning of the suit. It would seem in the principal case that a similar decree could have been entered in spite of the absence of the mortgagee. If the decree were for defendants, the absentee could not possibly be prejudiced. If it were for complainants he should not be bound. A precedent against the validity of the mortgagor's title has been established, but the mortgagee may have defenses not available to the mortgagor, and even if he has no additional defense there are many cases where one has an unfavorable precedent established against him in his absence. We need not consider the positions of the parties joined, for they have not raised the question. The argument of convenience does not apply either way, for a second trial is necessary in any event. It is submitted that the possibility of prejudice to the mortgagee does not justify this decision, the case having proceeded so far without him.

*Kenneth Davidson*