

BAKER *v.* GOWERS.

Opinion delivered February 10, 1930.

1. **FRAUDULENT CONVEYANCES—EVIDENCE.**—In a suit to cancel a deed and mortgage, as made and executed with fraudulent intent to cheat and defraud creditors, evidence *held* to establish that the conveyances were valid, regardless of the fact that they may have effected a preference in the payment of claims of certain creditors over others.
2. **FRAUDULENT CONVEYANCES—PRESUMPTION.**—Fraud may be established by circumstantial as well as by direct evidence, but it is not to be presumed, and will not be established by circumstances of mere suspicion.
3. **FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.**—If the form and design of a transaction alleged to be in fraud of creditors may be traced to an honest source under a preponderance of the evidence, the transaction sought to be annulled as a fraudulent conveyance must be allowed to stand.
4. **FRAUDULENT CONVEYANCES—SUFFICIENCY OF PROOF.**—A creditor seeking to set aside a conveyance of a debtor must prove tangible and substantial facts from which a legitimate inference of fraudulent intent can be drawn, and the evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law.
5. **FRAUDULENT CONVEYANCES.**—A voluntary conveyance by one who is not indebted is not fraudulent.

Appeal from Logan Chancery Court, Northern District; *John E. Chambers*, Chancellor; reversed.

## STATEMENT BY THE COURT.

This appeal is prosecuted from a decree canceling a conveyance by F. B. Baker and Nellie Baker of 160 acres of land to Mrs. Ada G. Van Hoozer, and a mortgage of 37 acres of land by the same grantors to John Luther Baker, as conveyances made in fraud of creditors.

Ned Gowers and 23 other miners brought suit on the 7th day of December, 1926, in the chancery court, against the Baker Coal & Mining Company, and F. B. Baker and Nellie Baker, to recover judgment for wages due.

On the 19th day of January, 1927, the American Bank & Trust Company brought suit against the mining corporation, and F. B. Baker and Nellie Baker, to foreclose

a mortgage against the corporation for about \$22,000. These suits were consolidated for trial together.

On the 22d day of March, 1927, Nellie and F. B. Baker deeded to Ada G. Van Hoozer the 160 acres of land described therein, and, on the 8th day of July thereafter, Mrs. Van Hoozer deeded to Fenner Brown Baker, her grandson, the same 160 acres of land.

On the 8th day of September, 1927, Nellie and F. B. Baker, her husband, executed a mortgage to John Luther Baker, to secure an indebtedness of \$1,400.

On the 12th day of September, 1927 the consolidated cases were tried, and a decree rendered in favor of Ned Gowers and others for \$1,836.94 against the corporation, Baker Coal & Mining Company, Nellie Baker and F. B. Baker, and a judgment in favor of the American Bank & Trust Company against the mining corporation and F. B. and Nellie Baker for \$20,888.57, and decreed the foreclosure of its mortgage against the Baker Coal & Mining Company. On the foreclosure sale, the American Bank & Trust Company bid in the coal-mining property for \$16,500, and the sale was confirmed on the 16th of October, 1927, leaving a balance due on the mortgage of \$4,979.89. On the 16th day of November, 1927, the bank and trust company paid off other judgments, which were prior liens to its judgment, and took assignments of same, which, with the receiver's fee and court costs, amounted to \$..... On the 18th day of February, 1928, the bank assigned and transferred to the Dixie Coal Company the balance of its judgment against the Baker Coal & Mining Company, F. B. and Nellie Baker.

On the 23rd day of January, 1928, Ned Gowers and others brought the suit to cancel the deed executed by Nellie and F. B. Baker to Mrs. Ada G. Van Hoozer for the 160 acres of land, and her deed to Fenner Brown Baker for the same land, and the mortgage executed by Nellie and F. B. Baker to John Luther Baker on the lands described therein, alleging that the transactions and mortgage were made and executed with the fraudulent

intention to cheat and defraud their creditors, especially the plaintiffs, in the collection of their debts.

On the 20th day of February, 1928, the Dixie Coal Company filed an intervention, alleging that the conveyances were made and executed with the fraudulent intention to cheat and defraud the creditors, etc.

On the 17th day of February, 1928, the defendants, including John Luther Baker, answered, denying all the material allegations of the complaint, and alleging that the deed executed from Nellie and F. B. Baker to Mrs. Van Hoozer was for a valuable consideration, as also her deed to Fenner Brown Baker; denied any fraudulent intent in the making of the deeds, and alleged that the mortgage to John Luther Baker was for valuable consideration and made without any fraudulent intent to cheat, hinder and delay their creditor or creditors; and denied that Mrs. Van Hoozer participated in any fraudulent intent. The American Bank & Trust Company, on its own motion, was made a party plaintiff, and on April 29, 1929, Geo. A. Hall was appointed guardian *ad litem* for the minor defendant, Fenner Brown Baker, and filed an answer denying all the allegations of the complaint. The case was heard on the 25th of June, 1929, and on the 25th day of July, 1929, the court rendered judgment against the defendants, setting aside and canceling the conveyances as fraudulent, and subjecting the lands to the payment of the claims of appellees.

Fenner B. Baker is the only child of Nellie and F. B. Baker, and Mrs. Nellie Baker is the only child and heir of Mrs. Ada G. Van Hoozer, and John L. Baker is the brother of F. B. Baker.

It appears from the testimony that Mrs. Van Hoozer, in the first instance, had conveyed the 160 acres of land to her daughter, Nellie Baker, wife of F. B. Baker; that the Baker Coal & Mining Company was a corporation, with F. B. Baker and Nellie Baker its officers; that the debts due the miners were for wages in the operation of the mine, and that the judgments and decrees in all the

suits were rendered against the corporation and F. B. and Nellie Baker, its officers, because of failure to file the annual report for the corporation required by law. Before these judgments were rendered, however, the conveyances of the lands belonging to Nellie Baker, the 160 acres to her mother for a recited consideration of over \$9,000, and the mortgage of the 37 acres to John Luther Baker, brother of appellant, F. B. Baker, to secure the \$1,400 indebtedness to him, and the conveyance of the 160-acre tract by Mrs. Van Hoozer for the consideration of love and affection to her grandson, Fenner Brown Baker, were all executed.

There are no allegations in the pleadings to the effect that the debts alleged to be due from the Bakers to Mrs. Van Hoozer, and in consideration of which the 160-acre tract was conveyed to her, were not *bona fide* claims, or were simulated or fictitious; nor is there any such allegation that the debt due to John Luther Baker, secured by the mortgage, was other than a valid and *bona fide* debt. The decrees in the suit against the corporation were rendered against F. B. Baker and his wife, Nellie Baker, on account of their failure to make the annual report required by law; and there is no contention that the corporation ever had any interest in, or right to, the tracts of land conveyed and mortgaged by F. B. Baker and his wife.

*James B. McDonough*, for appellants.

*Cochran & Arnett, Hays, Priddy & Smallwood* and *W. B. Rhyne*, for appellees.

KIRBY, J., (after stating the facts). Appellants insist that the chancellor's finding, that the conveyances were made with a fraudulent intent to cheat, hinder and delay the creditors of appellants in the collection of their debts, is contrary to the preponderance of the testimony, and that these conveyances were valid, regardless of the fact that they may have effected a preference in payment of the claims of these creditors over others. The court has concluded, after a careful examination of the testimony, that the contention of appellants must be sustained.

The preponderance of the testimony shows, in our opinion, that the advances or loans of money claimed to have been made by Mrs. Van Hoozer to her son-in-law and daughter, and borrowed by them for payment of the wages of the miners and other expenses incident to the operation of the mine, as well as for interest due upon the mortgage and loans by other persons to Mrs. Baker, were actually made. The notes given by Nellie and F. B. Baker, evidenced different amounts borrowed from and furnished by Mrs. Van Hoozer, and attached to each of the notes was a short memorandum showing the different sums constituting the amount of the note given, and a great many canceled checks from Mrs. Van Hoozer were also introduced, showing the amount of money advanced as indicated by the memorandum attached to the notes executed theretofore. Both Mrs. Baker and F. B. Baker, her husband, who had the matter specially in charge, kept the memorandum of indebtedness for money borrowed from Mrs. Van Hoozer, produced a great number of paid checks, showing the amounts of money obtained, testified that they owed her for money borrowed the amount of the different notes given in the whole sum of the consideration recited in the conveyances of the 160 acres to her in payment thereof. That the debts were *bona fide* and the money had been actually supplied by Mrs. Van Hoozer. She testified that she had advanced the money in the amount shown to be due by the recited consideration in the deed, and even attempted to borrow some more money and lend to them to keep the mine in operation when they were unable to proceed. It was established also by other witnesses, that Mrs. Van Hoozer had a good deal of property, with an annual income of something over \$5,000, and was able to loan the money claimed to have been advanced.

The brother, John L. Baker; Nellie Baker and F. B. Baker all testified that the debt due John L. Baker, secured by the mortgage, was a *bona fide* debt due for money obtained from him; and there was no evidence

contradicting their statement, further than the mortgage was not given at the time the note was made and the money borrowed.

It is true Mrs. Van Hoozer conveyed these lands, after they were conveyed to her by the appellants, to her grandson, the son of Nellie and F. B. Baker, for a recited consideration of love and affection; but she could do as she pleased with her own property, without regard to the source of its acquisition; if the conveyance to her was valid. The conveyances complained of are not voluntary conveyances, although made to near relatives, as disclosed by a close scrutiny of the entire transaction, and no presumption as to their being fraudulent therefore arises. "Fraud may be established by circumstantial as well as by direct evidence, but it is not to be presumed. If the form and design of the transaction may be traced to an honest source, under a preponderance of the evidence, the transaction must be allowed to stand." *Frauenthal & Schwartz v. Bank of El Paso*, 170 Ark. 326, 280 S. W. 1001, 44 A. L. R. 871. In *Wait on Fraudulent Conveyances*, § 5, it is said:

"Fraud, it is also argued, will not be lightly imputed and cannot be established by circumstances of mere suspicion. \* \* \* The creditor must prove tangible and substantial facts from which a legitimate inference of a fraudulent intent can be drawn. The evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law."

While it is true that the conveyance from Mrs. Van Hoozer to her grandson, Fenner Brown Baker, may be regarded a voluntary conveyance, it must be remembered that Mrs. Van Hoozer was not indebted to any of the creditors of the corporation, nor to F. B. Baker or his wife, Nellie Baker, and was not insolvent; and it can make no difference to any such creditors how she disposed of her property legally acquired. Having concluded, as already said, that the chancellor's finding and holding the conveyance of the 160 acres of land to Mrs.

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Van Hoozer fraudulent as to creditors, and also the mortgage of the other tract to John Luther Brown, is erroneous and contrary to the preponderance of the testimony, it follows that the decree must be reversed, and the cause remanded with directions to dismiss the complaint for want of equity. It is so ordered.

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