OWEN *v.* OWEN.

4—2555

Opinion delivered June 13, 1932.

1. DEEDS—AGREEMENT TO SUPPORT—FRAUD.—Where a deed is executed in consideration of the agreement by the grantee to support the grantor, and this agreement is made by the grantee for the fraudulent purpose of securing the deed and without intending to carry it out, and it has this effect, it constitutes a fraud vitiating the conveyance, and equity will set it aside.
2. DEEDS—CONSIDERATION.—In a suit to cancel a deed for the grantees failure to support the grantor, *held* under the evidence that the substantial consideration of the deed was the agreement to support the grantor.
3. DEEDS—CANCELLATION—EVIDENCE.—In a suit to cancel a deed for failure of the grantees to support the grantor, a finding that the grantees had failed to support the grantor was not sustained.
4. DEED—RETENTION OF POSSESSION IN GRANTOR.—A deed from a father to his sons conveying his home and containing a covenant that the father should remain in possession, and that the deed should not become operative until his death, *held* a valid covenant.
5. CANCELLATION OF INSTRUMENT—FAILURE TO SUPPORT GRANTOR.—Where a deed from father to sons covenants that the sons shall support their father, the duty of support is a continuing one, and if at any time the sons neglect or refuse to support their father, the latter may bring a suit to cancel the deed.

Appeal from Columbia Chancery Court; *J. E. Hawkins,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

U. C. Owen brought this suit in equity against E. R. Owen and W. W. Owen to cancel two deeds whereby he

granted his real estate to them in consideration of support.

According to the testimony of U. C. Owen, he is the father of E. R. Owen and W. W. Owen. On the 30th day of November, 1920, he executed a deed to them to a tract of land comprising 200 acres, 160 acres of which were situated in Lafayette County and forty acres in Columbia County. The deed contained a covenant that he warranted the title to the land against all claims except a deed of trust in favor of the Federal Land Bank of St. Louis, Missouri. The consideration recited in the deed was $4,000. On the same day, he conveyed to his said sons 120 acres of land, 80 acres of which was situated in Lafayette County and the remaining 40 acres in Columbia County. The consideration recited in the deed was $500. The deed contained a covenant that the grantor would warrant the title against all lawful claims except against a deed of trust in favor of the Federal Land Bank of St. Louis, Missouri. The deed contained a covenant that the grantor should retain the use and enjoyment and profits of the land during his life, and that the grant should not be operative and take effect until his death. Both deeds were duly acknowledged, and were filed for record on the 3d day of December, 1920. The deeds were delivered to the grantees, but the grantor continued to reside upon the land and has enjoyed the rents and profits therefrom ever since the date of the execution of the deeds. The 120-acre tract has 75 acres in cultivation, and this is considered the most valuable part of the land. The grantor lives on the 80 acres situated in Columbia County. The son, E. R. Owen, also lives on the land. The indebtedness to the Federal Land Bank amounted to $2,500. The grantor was 81 years of age on the 10th day of December, 1930. He is still hearty, but not so stout and able to work as he was when he executed the deeds. At that time he was 71 years of age, and considered himself a spry and able-bodied man. At the time the lands were purchased by him, his sons lived with him, and they all worked together. The grantor,

however, paid for the lands; and, after the execution of the deeds to his sons, he paid part of the taxes, and they paid a part. He and his sons also made payments to the Federal Land Bank. The father managed the lands and allowed the sons to live on them until they married, which was something over two years ago. One of them still lives on the land.

On cross-examination, the grantor was asked if he had not conveyed the lands to his sons in order to prevent a creditor from obtaining a judgment against him and levying upon them. He answered that that might have had something to do with it. He had been surety on a bond to the Raleigh Medicine Company for a $1,000 and had compromised or settled with it some years after the execution of the deeds. The lands were considered to be worth about $8,000.

E. R. Owen and W. W. Owen were witnesses for themselves. Each one testified that the consideration recited in the deeds was not expected to be paid, and that the father had conveyed the land to them because he was indebted to the Raleigh Medicine Company in the sum of $1,000, and wished to put the land beyond the reach of his creditors. Each testified that there was no understanding that the sons were to support the father during his lifetime in consideration of the execution of the deeds. They testified also that it was not understood that they were to pay the Federal Land Bank the indebtedness to it. They testified that they were on good terms with their father and were willing to support him in case it became necessary. They stated that he had managed the lands since the execution of the deeds, and that the rents and profits had been sufficient to support him. Tax receipts showing that the taxes were paid on the land by the sons for several years after the execution of the deeds were introduced in evidence. The sons also testified that they had helped make the payments to the Federal Land Bank and had placed improvements upon the land.

The special chancellor found that the consideration for which the grantor made the deeds to his sons had failed, and was of the opinion that said deeds should be canceled. A decree was entered in accordance with the finding of the chancellor, and, to reverse that decree, this appeal has been prosecuted.

Wade Kitchens and *W. H. Kitchens, Jr.,* for appellant.

Henry Stevens, for appellee.

HART, C. J., (after stating the facts). This court is committed to the doctrine that, where a deed is executed in consideration of the agreement by the grantee to support the grantor, and this agreement is made by the grantee for the fraudulent purpose of securing the deed, and without intending to carry it out, and it has this effect, it constitutes a fraud vitiating the conveyance, and equity will set it aside. *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936; *Boyd* v. *Lloyd,* 86 Ark. 169, 110 S. W. 596; *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286; *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. (2d) 738; and *Federal Land Bank of St. Louis* v. *Miller,* 184 Ark. 415, 42 S. W. (2d) 564.

We are of the opinion that, when all the attendant circumstances are considered, the chancellor should have found that the substantial consideration which was the inducement for the execution of the deeds was that the sons should take care of and support their father during his natural life. It is true that they deny that this was the consideration, but their testimony is contradicted by the attendant circumstances. They admit that their father resided on the land at the time he executed the deeds to them, and that he has continued to reside there ever since, a period of something over ten years. During all of this time he has had exclusive management of the land, and has collected the rents and otherwise used the land as still belonging to him. The sons testified that the rents and profits derived from the land were sufficient to support their father, and this was equivalent to them supporting him. It is not a case where

the grantees have neglected or refused to carry out their part of the agreement by refusing or neglecting to support their father.

In a transaction of this kind there is always an element of love and confidence reposed by the parents in their children, and they part with their property with the expectation and belief that they will be supported and cared for by the children. If the children refuse to carry out their part of the agreement, equity will grant relief to the parent by canceling the deed. In the present case, the evidence does not justify cancellation of the deeds on account of the sons' failure to support. In this connection it may be stated that if at any time in the future the sons should fail to carry out their part of the agreement and fail to support their father, equity will afford him relief by canceling the deeds.

We cannot agree with the contention of the sons that the consideration of the deeds was that the father conveyed the land to them in an effort to defraud his creditors. It is true that he stated that this had something to do with it, but it is evident that the substantial agreement was that his sons should support him. The deeds themselves recite that they are made subject to an indebtedness owed by the father to the Federal Land Bank. The deed to the home place also contains a covenant that the father is to remain in possession of that during his life, and that the deed should not become operative until his death. This was a valid covenant. *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. (2d) 402.

The lands were of the value of $8,000, and the debt owed by the father was only $1,000. The debt was afterwards paid by the father. These circumstances strongly tend to show that the lands were not conveyed to the sons by the father in an effort to defeat his creditor in the collection of its debt, but that the consideration of support by the sons was the substantial inducement which caused him to execute the deeds.

The result of our view is that, as the case now stands, the chancellor erred in canceling the deeds. As above

stated, the duty of support is a continuing one; and, if at any time in the future the sons neglect or refuse to support their father, he will have the right to bring another suit to cancel the deeds on that account. Therefore the decree will be reversed, and the cause will be remanded with directions to dismiss the complaint for want of equity.