WASSON v. LIGHTLE.

4-3239

Opinion delivered December 18, 1933.

1. FRAUD—BURDEN OF PROOF.—Fraud is never presumed, and the burden is upon the party alleging fraud to prove it.
2. FRAUDULENT CONVEYANCES—RETENTION OF POSSESSION BY VENDOR.—Retention of possession of land by a vendor is a badge of fraud.
3. FRAUDULENT CONVEYANCES—DEEDS TO RELATIVES.—While conveyances from an insolvent debtor to near relatives are not sufficient

of themselves to establish fraud, yet, when added to other suspicious circumstances, they may be sufficient evidence of fraud to justify the court in setting them aside.

4. FRAUDULENT CONVEYANCES—FINDING OF COURT.—In a suit to set aside conveyances as fraudulent, the chancellor's finding that the deeds were executed to secure debts and intended for security, and not to pass an absolute title, was an affirmative finding that the deeds were not what they purported to be.
5. EVIDENCE—WEIGHT.—In weighing testimony the courts must consider the interest of a witness.
6. FRAUDULENT CONVEYANCES.—Testimony *held* insufficient to overcome a *prima facie* case of fraud in conveyances by an insolvent debtor.

Appeal from White Chancery Court; *Frank H. Dodge*, Chancellor; reversed in part.

STATEMENT BY THE COURT.

This is a creditors' suit instituted by appellants in the White County Chancery Court against appellees, seeking to set aside a number of conveyances executed by J. E. Lightle and wife, Margaret Lightle, to J. W. McKinney, Lois H. McKinney and H. S. McKinney; and also conveyances from J. W. McKinney to W. L. Holt, and others, it being alleged: "That all said conveyances were made for the purpose of placing the property of said J. E. Lightle beyond the reach of his creditors, and have so placed it until the said conveyances be set aside and held for naught."

The grantees in the respective deeds answered the complaint, and admitted the execution of the deeds, but affirmatively alleged that they were executed for a valuable consideration; therefore not fraudulent. No denial was interposed by the appellees to the alleged indebtedness to appellants. Other mortgages, deeds of trust, notes, bank accounts and other evidences of indebtedness were in controversy, but, from the view we take of the controversy, we do not here set them out in detail.

On trial of the cause, testimony was produced by the parties establishing the following facts as we find them: That on June 10, 1930, and at all time subsequent thereto, J. E. Lightle was greatly involved in debt, aggregating more than $60,000. Much of this indebtedness was to these appellants. This indebtedness or a great portion

thereof has continued to this date. Prior to June 10, 1930, one of the appellants here was pressing appellee J. E. Lightle for security on its indebtedness. On June 10, 1930, J. E. Lightle and wife executed a deed to J. W. McKinney for a recited consideration of $10,000, conveying a large quantity of lands in White County. This deed was not filed for record until October 18, 1930.

On October 25, 1930, J. E. Lightle and wife executed a conveyance to Lois H. McKinney, conveying additional lands situated in White County. This deed recited a consideration of $3,000, and was filed for record October 30, 1930. On December 13, 1930, Lois H. McKinney and her husband, J. W. McKinney, executed a deed to R. W. McKinney, conveying the same lands which had been theretofore conveyed to Lois H. McKinney by J. E. Lightle and wife. This deed recited a consideration of $3,500, and was filed for record December 18, 1930. On December 19, 1930, J. W. McKinney and wife, Lois H. McKinney, conveyed to W. L. Holt all the lands embraced in the deed from J. E. Lightle and wife to J. W. McKinney. This deed recited a consideration of $11,000, and was filed for record December 18, 1930. On September 5, 1931, W. L. Holt and wife conveyed to J. W. McKinney and Lois H. McKinney, his wife, all the lands which had theretofore been conveyed to him by J. W. McKinney and wife. This deed recited a consideration of $1.00, and was filed for record September 5, 1931.

On August 31, 1931, R. W. McKinney and wife conveyed to Lois H. McKinney all the lands which had theretofore been conveyed to them by her. This deed recited a consideration of $1.00, and was filed August 31, 1931.

On October 30, 1930, J. E. Lightle and wife conveyed to H. S. McKinney certain lands for a recited consideration of $3,500. On December 13, 1930, Lois H. McKinney and her husband, J. W. McKinney, conveyed to R. W. McKinney certain lands which had theretofore been conveyed to her by J. E. Lightle and wife. The conveyances aforesaid practically denuded J. E. Lightle and wife of all their Arkansas real estate, and a number of them were admittedly without consideration.

Margaret Lightle, the wife of J. W. Lightle, is the daughter of J. W. McKinney and Lois H. McKinney. H. S. McKinney and R. W. McKinney are brothers of Margaret Lightle. W. L. Holt is the son-in-law of J. W. McKinney and Lois H. McKinney.

Neither H. S. McKinney, R. W. McKinney, W. L. Holt nor Lois H. McKinney were called as witnesses in this controversy, or gave any testimony therein. J. W. McKinney appeared as a witness in said cause, and testified in his own behalf. He testified generally that J. E. Lightle was indebted to him in a sum in excess of $10,000, and was so indebted on and prior to the execution of the deeds in controversy. He stated that this indebtedness began about 1912; he could not furnish or produce any note, check, bank account or voucher proof of said indebtedness, or any part thereof. This witness further testified that he did not know that the deeds had been executed to him until sometime after they were placed of record in White County.

J. E. Lightle testified in behalf of appellees, and to the effect that all the conveyances and transactions were *bona fide.* He further testified that the deeds executed on June 10, 1930, were purposely withheld from the records of White County by himself, and that he did not notify the grantees therein that they had been executed until sometime after they were filed for record.

Brundidge & Neelly, W. H. Gregory and *Frauenthal & Johnson,* for appellant.

John E. Miller, C. E. Yingling and *Roland H. Lindsey,* for appellees.

JOHNSON, C. J., (after stating the facts). The foregoing statement of facts demonstrates that all the conveyances here in controversy were made solely for the purpose of putting the property of J. E. Lightle and wife, Margaret Lightle, beyond the reach of Arkansas creditors. It is granted, of course, that J. E. Lightle and wife had the right, under the law, to prefer their kinfolks as creditors, but, before such conveyances are finally sustained, it must be shown that they were supported by valuable considerations. We are not unmindful of the

established rule that fraud is never presumed—neither are we unmindful that the burden is upon the party who alleges fraud to prove it. These rules are so permanently and definitely planted in our jurisprudence it is not necessary to refer to cases in support thereof.

Sections 4874 and 4878, Crawford & Moses' Digest, provide:

"Section 4874. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void.

"Section 4878. No conveyance required by the provisions of this act to be recorded shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record; nor even then if shown to be made with intent to defraud prior creditors or purchasers, but shall be void against such prior creditors or purchasers."

With these cardinal rules in mind, we have here the following outstanding facts: That prior to June 10, 1930, J. E. Lightle held himself out, and was considered a very rich man in the vicinity of Searcy; he owned and possessed very valuable properties, both real estate and personal property. On June 10, 1930, he executed a deed to his father-in-law, J. W. McKinney, conveying valuable real properties in White County; this conveyance was purposely held off the record for several months. J. W. McKinney was not advised of its execution for several months thereafter. After the execution of this deed others were executed that practically denuded J. E. Lightle and wife of all real property situated in the State of Arkansas. After these properties passed to the kinsfolk of the

Lightles, they were tossed about by the grantee similar to a cat playing with a mouse. During all this period of time, J. E. Lightle and wife remained in possession and control of this property as if their own. This court has repeatedly held that, where a deed is executed but the vendor remains in possession, it is within itself a badge of fraud. *Godfrey* v. *Herring,* 74 Ark. 186, 85 S. W. 232; *Dennie* v. *Ball-Warren Commission Co.,* 72 Ark. 58, 77 S. W. 903; *Little Rock & F. S. R. Co.* v. *Page,* 35 Ark. 304; *Puckett* v. *Reed,* 31 Ark. 136.

It has long been the settled doctrine of this court that a conveyance from an insolvent debtor to his near relatives, while not sufficient of itself to establish fraud, yet, when added to other suspicious circumstances, may be sufficient evidence of fraud to justify the court in setting aside such conveyance. *Melton* v. *State, etc.,* 177 Ark. 1194, 10 S. W. (2d) 500.

In addition to what we have just said, the learned chancellor found from the testimony in this case that all the deeds passed and exchanged between the appellees were executed to secure debts and were intended for security, and not to irrevocably pass the fee simple title to these lands. This was an affirmative finding that the deeds were not what they purported to be.

The manipulations of the appellees in the transferring and retransferring of the title to the lands contained in the conveyances here in controversy, a number of which were without consideration, were potent circumstances indicating that appellees were endeavoring to place their property beyond the reach of creditors. We are convinced from all the facts and circumstances appearing in this record that appellants made out a *prima facie* case of fraud against appellees, and that the onus of proof then shifted to appellees, to establish the *bona fides* of the recited considerations appearing in these conveyances.

In the discharge of this burden, none of the grantees, other than J. W. McKinney, endeavored to defend these conveyances. J. W. McKinney did appear as a witness, but his testimony is such that we cannot attach any

weight thereto. He testified that he could, and would, furnish voucher proof in support of his claimed indebtedness against J. E. Lightle, but has never done so. From this we necessarily conclude that he had no such vouchers. Therefore, notwithstanding J. W. McKinney appeared as a witness, his debts stand upon the same footing as all others with no testimony to support the consideration therein stated other than as hereinafter recited.

It will thus be seen that the *bona fides* of all these transactions stand wholly and squarely upon the testimony of J. E. Lightle. It must be remembered that J. E. Lightle is the party who has manipulated all these conveyances. Likewise, he is the person who has denuded himself of all available property in this State, leaving an indebtedness of more than $60,000. It is true he testified to the *bona fides* of all the considerations in the conveyances here in controversy, but we cannot, and should not, attach any great weight to his testimony. It is the imperative duty of courts in weighing testimony to take in consideration the interest of the witness in the matter in controversy. When this is done, in reference to the testimony of J. E. Lightle, we conclude that his testimony was entirely insufficient to overturn the *prima facie* case made in behalf of appellants.

For the reasons aforesaid, the decree of the White County Chancery Court is reversed, in so far as the real estate conveyances are concerned, which are set out in the statement of facts, with directions to enter a decree canceling same; otherwise, the decree is affirmed.