MOORE *v.* BRASEL.

4-3281

Opinion delivered January 15, 1934.

1. FRAUDULENT CONVEYANCES—PRESUMPTION FROM VOLUNTARY CONVEYANCE.—No presumption will be indulged that a husband's gift to his wife was fraudulent as against a subsequent creditor.
2. FRAUDULENT CONVEYANCES—INTENT TO DEFRAUD.—An intent to defraud subsequent creditors by a gift to a debtor's wife is not made to appear by proof of outstanding liabilities against the debtor, but such liabilities must be shown to have exceeded all property retained by him.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of fact not clearly against the preponderance of the evidence will not be disturbed on appeal.
4. HUSBAND AND WIFE—ESTOPPEL AS TO WIFE'S OWNERSHIP.—A wife is not estopped, as against her husband's creditors, to claim her property by the fact that she permitted her husband to improve the property, collect rents therefrom, and pay taxes thereon.

Appeal from Newton Chancery Court; *Sam Williams*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Because of the voluminous record here presented, it is impractical to detail the testimony. It will suffice to give a summary of the issues presented and the testimony introduced in support thereof. The suit was instituted by appellant against appellees, in the Newton Chancery Court, seeking to set aside as fraudulent a certain conveyance of J. S. Brasel and wife, a brother of James Brasel, to Lulu Brasel, the wife of James Brasel, in the early part of 1922 conveying 93 acres of land situated in Newton County. Appellant also sought to recover judgment against appellee, James Brasel, for $1,500, together with accrued interest thereon. The case was de-

fended by appellees on the theory that the tract of land in controversy was the separate property of Lulu Brasel. The testimony on behalf of appellant tended to show that in July, 1925, he loaned to appellee, James Brasel, $1,900, and, as evidence thereof, accepted James Brasel's note therefor. Due payment of this note was secured by the pledge of $2,000 par value of stock of a certain bank in Newton County. Some years after the execution of the note, certain payments having been made thereon, its value was reduced to $1,500. The testimony on behalf of appellant tended further to show that, at the time he made this loan to James Brasel, he believed that James Brasel was the owner of the tract of land here in controversy; that at that time James Brasel was paying the taxes on the lands; he was procuring the same to be improved out of his own means; he was selling timbers therefrom and collecting the proceeds; he was renting the same and collecting the rents therefor, and was doing many other acts which were calculated to, and did, lead appellant and every one else to believe that he was the true owner.

The testimony on behalf of appellees tended to show that in 1918 James Brasel owned the old Brasel farm, containing 193 acres in Newton County, but that his wife, Lulu Brasel, had furnished the money with which to purchase an undivided one-half interest therein; that during said year James Brasel gave to his wife, Lulu Brasel, his half interest in said farm, no deed, however, being then executed; that at that time James Brasel was worth approximately $25,000, and was owing only a few thousand dollars; that Mrs. Brasel, at the time of the marriage of James Brasel to her in 1888, owned, in her own right, valuable properties; that thereafter, for a number of years, she assisted her husband as clerk in the postoffice at a salary of $20 per month, and that she assisted her husband in all his endeavors accumulating property; that in 1919 the old Brasel farm was sold by Lulu Brasel to J. S. Brasel for $8,000; that in the early part of 1922 J. S. Brasel, then being unable to pay the purchase price of the old Brasel farm, conveyed to Lulu Brasel the Hudson farm, or the tract of land here in controversy, in payment and satisfaction of the purchase price of the old

Brasel farm; that the deed from J. S. Brasel and wife to Lulu Brasel was so made because the old Brasel farm belonged to her and not to her husband. This deed was not placed of record in Newton County until after this suit was filed.

On behalf of appellant, the testimony further tended to show that in 1918, when the Brasel farm was given to Lulu Brasel by her husband, James Brasel, he was indebted to various and sundry parties in a sum in excess of all the properties then owned and retained by him.

Much other testimony was introduced by the respective parties, but it is believed that the above concise statement will reflect the respective contentions of the parties.

The chancellor found that Lulu Brasel was the owner, in her own right, of the old Brasel farm, and exchanged same to J. S. Brasel for the Hudson farm; that appellees had no intention of delaying or defrauding subsequent creditors by reason of such exchange, and that appellant was not misled or defrauded by reason thereof. A judgment was rendered against James Brasel for the indebtedness due, but in all other respects the complaint was dismissed for want of equity, and this appeal is prosecuted to reverse the decree.

J. Loyd Shouse, A. B. Arbaugh, W. S. Moore and *Jack Holt,* for appellant.

S. W. Woods, for appellee.

JOHNSON, C. J., (after stating the facts). It will be seen from the foregoing statement of facts that appellant is a subsequent creditor seeking to set aside a conveyance made some years prior to the creation of his debt.

This court held in *Jenkins* v. *Smith,* 170 Ark. 806, 281 S. W. 377: "In order for a subsequent creditor to secure the avoidance of a voluntary conveyance, the intention to defraud existing or subsequent creditors must be proved by the facts and circumstances surrounding the transaction, and the presumption of such intention will not be indulged from the execution of a voluntary conveyance."

It will thus be seen that no presumption can be indulged that the gift of the old Brasel farm by James Brasel to his wife was fraudulent in aid of appellant's rights. The intent to defraud subsequent creditors is not

made to appear merely because of outstanding liabilities against the grantor; these liabilities must be shown to have been in excess of all property retained by him. The chancellor found, from the testimony, that James Brasel was solvent at the time the gift was made to his wife, and we think this finding is supported by the testimony. At any rate, we are unwilling to hold that the chancellor's finding to this effect was clearly against the preponderance of the testimony. In this view the chancellor's findings should not be disturbed. *Arnold* v. *McBride,* 78 Ark. 275, 93 S. W. 989; *Eureka Stone Co.* v. *First Christian Church,* 86 Ark. 212, 110 S. W. 1042; *Craig* v. *Craig,* 90 Ark. 40, 117 S. W. 765; *Waite* v. *Stanton,* 104 Ark. 9, 147 S. W. 446; *Nevada County Bank* v. *Sullivan,* 122 Ark. 235, 183 S. W. 169.

Neither is any question of estoppel presented here. Appellant is not only a subsequent creditor, but is a secured one as well. As late as 1931, the security held by him was reasonably worth twice the amount of his debt. Under these circumstances, appellant was not injuriously misled by the outstanding title to this piece of property. Moreover, the title was never in the name of James Brasel; therefore it cannot be said that James Brasel did any affirmative act, in reference to this title, which has misled appellant. The contention that James Brasel told appellant at the time that he borrowed this money that he was the owner of the Hudson farm is flatly contradicted by James Brasel.

The contention that Lulu Brasel permitted her husband to improve the property, collect rents therefrom and to pay taxes thereon are likewise without merit. It was the natural thing for a wife to do to permit her husband to perform these duties. Neither fraud nor estoppel can, or should be, based upon these acts.

It is true, of course, that, where a wife permits her husband to handle her property as his own, holding out to creditors this indicium of ownership, the wife thereby estops herself to assert ownership as against creditors who contract on the faith of this *prima facie* ownership, but such are not the facts of this case.

Neither is the contention that appellant's money was used by James Brasel in extinguishing prior indebtedness, thereby subrogating appellant to all rights of existing creditors, established by the testimony. The chancellor found, and we concur, that appellant's money was not in fact used for such purpose.

Since the chancellor's findings of law and facts conform to the views here expressed, the decree must be affirmed.