

SMITH *v.* WHEAT.

Opinion delivered February 16, 1931.

1. FRAUDULENT CONVEYANCES—CONVEYANCES TO RELATIVES.—Conveyances to members of the household and to near relatives by an embarrassed debtor are looked upon with suspicion and scrutinized with care; when voluntary, they are *prima facie* fraudulent; and when the embarrassment of the debtor proceeds to financial wreck, they are conclusively presumed to be fraudulent as to existing creditors.
2. EVIDENCE—EXPLANATION OF SUSPICIOUS CIRCUMSTANCES.—Where the parties can explain suspicions connected with a transaction, their failure to produce evidence within their power is regarded as a circumstance against them.
3. FRAUDULENT CONVEYANCES—EVIDENCE.—Evidence *held* to show that a conveyance by an insolvent debtor to his brother-in-law was voluntary and in fraud of existing creditors.

Appeal from Jefferson Chancery Court; *H. R. Lucas*, Chancellor; reversed.

STATEMENT OF FACTS.

This is a suit by appellant against appellees to set aside certain conveyances of real estate to them as being made in fraud of creditors of the grantor of the deed.

The record shows that during the year 1928 L. L. Fuller was doing business as the Linwood Lumber Company at Shreveport, Louisiana, and was being harassed by his creditors for his debts to them in September and October of that year. On the 16th day of October, 1928, L. L. Fuller conveyed to G. B. Wheat, his brother-in-law, four lots in Pine Bluff, Arkansas, and forty acres of land in Grant County, Arkansas. The deed was duly acknowledged on that day and filed for record on October 17, 1928. The consideration in the deed for the lots in Pine Bluff was recited to be the sum of one dollar and other valuable considerations. On October 27, 1928, L. L. Fuller filed a voluntary petition in bankruptcy, and claims aggregating several thousand dollars were filed against the estate of said Fuller, and it is agreed that there are not sufficient assets in the hands of the trustee to pay the claims in full.

According to the evidence for the plaintiff, the Linwood Lumber & Supply Company was engaged in the retail lumber supply and grocery business at Shreveport, Louisiana in 1928. It was shown by several creditors of the firm that on October 16, 1928, the firm was indebted to them, and that they had been for some time pressing payment of their claims and had been unable to collect same.

According to the testimony of W. A. Mabry, he was a notary public at Shreveport, Louisiana, and acknowledged the deed in question from L. L. Fuller to G. B. Wheat on October 16, 1928, whereby Fuller conveyed four lots in Pine Bluff, Arkansas, and forty acres in Grant County, Arkansas, to Wheat. Prior to that time, Fuller had come to his office and discussed his financial affairs. Witness understood that Fuller was discussing his affairs with him as an attorney and hesitated to testify about the transaction. In view of the fact that no objection was made to his testimony, Mabry did testify. He stated that Fuller told him that he was in financial distress and desired to save as much property for himself as he could. A day or two later he came to the office with G. B. Wheat and requested that Mabry act as notary in making the deed to the property in controversy. Mabry saw no money paid for the property, and there was no discussion of any debt between Fuller and Wheat.

A certified public accountant was a witness for appellant. According to his testimony, he examined the books of the Linwood Lumber & Supply Company and that company was on and prior to November 1, 1928, insolvent. The books of the company showed insolvency.

According to the testimony of L. L. Fuller, G. B. Wheat married his sister. About the first of September, 1928, Wheat came to Shreveport for the purpose of becoming manager of the store department. He had nothing to do with the finances, and the records of the business were not kept at the store but at the lumber office about three blocks away. Fuller had charge of the

finances, and Wheat had no occasion to know anything about them. Fuller bought the four lots in Pine Bluff which he conveyed to Wheat for \$225 each. He sold them to Wheat for \$800 cash. Wheat wanted them sometime before, but Fuller refused to sell them until about the middle of September, 1928, when he needed some money to use in his business. Wheat paid him \$500 in cash about the middle of September, and later on paid him \$300. Fuller bought the forty acres of land in Grant County for \$480 because there was a prospect of oil being discovered there. At the time he sold them to Wheat, they were not worth more than two dollars an acre because the prospect of oil did not materialize. Witness knew that he was somewhat embarrassed in his business, but did not know that he was insolvent until about the first of November, 1928. On cross-examination, Fuller admitted that he had testified in the bankruptcy proceedings that he had transferred the property to Wheat in payment of an old debt. Fuller could not remember in what kind of currency Wheat paid him. He used the money to make purchases of lumber stock. He also testified that Wheat had wanted to purchase the lots in Pine Bluff for quite a while, but that he had refused to sell them to him. In another place he testified that he had been trying to sell the lots through an agent at Pine Bluff but had been unable to do so.

According to the testimony of Wheat, he had run a barber shop at Pine Bluff for the past twenty-five years. He paid \$800 in cash for the lots in Pine Bluff and the forty acres in Grant County. Wheat paid Fuller \$500 in cash in the middle of September and the remaining \$300 when the deed was executed in the middle part of October. Eight hundred dollars was a fair value for the property. Wheat testified in a general way that he had kept the money in his pocket and had made it in running a barber shop. He did not tell why he had not put the money in a bank and did not give any detailed information as to his profits in running the barber shop.

The chancellor found that Wheat paid to Fuller the sum of \$800 for said real estate, which was an adequate consideration, and that Wheat knew nothing of Fuller's insolvency. It was decreed that the complaint should be dismissed for want of equity, and the case is here on appeal.

Bridges, McGaughey & Bridges, for appellant.

HART, C. J., (after stating the facts). It is the settled rule in equity in this State that conveyances to members of the household and to near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and, when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors. *Wilks v. Vaughan*, 73 Ark. 174, 83 S. W. 913; *Davis v. Cramer*, 133 Ark. 244, 202 S. W. 239; *Barham v. Federal Reserve Bank*, 176 Ark. 1082, 5 S. W. (2d) 318; and *American Company of Arkansas v. Wheeler*, 181 Ark. 444, 26 S. W. (2d) 115.

In this connection, it may be stated that these cases call for the application of that rule of evidence that where parties have it in their power to explain suspicious circumstances connected with a transaction, the court trying the case may regard their failure to do so as a proper subject for comment and regard their failure to produce evidence within their power as a circumstance against them. *Miller v. Jones*, 32 Ark. 337; *Burke v. Napoleon Hill Cotton Co.*, 134 Ark. 580, 202 S. W. 827; *Gallup v. St. Louis I. M. & So. Ry. Co.*, 140 Ark. 347, 215 S. W. 586; and *Ramey v. Fletcher*, 176 Ark. 196, 2 S. W. (2d) 84.

This is in application of Lord Mansfield's maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." *Kirby v. Tallmadge*, 160 U. S. 379, 16 S. Ct. 349.

When the circumstances under which a transfer of property by a debtor are suspicious, the failure of the parties to testify or to produce available explanatory or rebutting evidence is a badge of fraud. 27 C. J. 494.

The rule also applies where the circumstances attending the transaction are suspicious, and the parties fail to produce any explanation of the suspicions attending the transfer by testifying or giving some explanatory evidence. *Griggs v. Crane's Trustee*, 179 Ky. 48, 200 S. W. 317.

In the present case the evidence shows that Fuller was financially embarrassed when the deed in question was made on the 16th day of October, 1928, to his brother-in-law, G. B. Wheat, and that Fuller filed a voluntary petition in bankruptcy on the first of November, 1928. Fuller testified that he did not know that he was insolvent on the 16th day of October, 1928, and that Wheat did not know anything about his financial condition. In this respect, he is corroborated by Wheat, but they are contradicted by the attendant circumstances. According to their own testimony, Wheat came down there about the first of September, 1928, and went to work for Fuller, closing out his barber shop business in Pine Bluff. He advanced \$500 in cash to Fuller without making any inquiry whatever about his solvency. He does not give any satisfactory account about where he got the money. According to his testimony, he went from his own home in Pine Bluff to Shreveport and carried the money in his pocket. He had never kept it in the bank, although he carried a small account in the bank from his barber shop business in Pine Bluff. Neither Fuller nor Wheat had any recollections whatever as to the kind of money which the \$500 consisted of. Fuller testified in a general way that he used it in purchasing lumber stock for his firm, but he does not give any detailed or satisfactory account of the transaction. It will be remembered that Fuller testified in the bankruptcy proceeding that the consideration for the deed was an old debt which he owed Wheat. In his testimony in the present case, the old

debt passes out and a new consideration in cash is given. In this connection it may be stated that according to his own testimony, Wheat advanced the \$500 a month before the deed was executed without any request for the payment of his old debt. Fuller testified that Wheat had been trying for some time, while he lived at Pine Bluff to purchase the four lots in question, but that he had refused to sell them to him. Later on in his testimony he stated that for some time he had had the lots in question in the hands of an agent, and that his agent had been unable to sell them. This he gave as the reason for selling them at a low price to his brother-in-law. When all the attendant circumstances are considered, we are of the opinion that a preponderance of the evidence shows that there was no consideration passed between Wheat and Fuller when the property in question was conveyed by Fuller to Wheat and that the transaction should be treated as a voluntary conveyance. The evidence in the record shows that Fuller was insolvent at the time, and the case calls for the application of the rule of law in this respect above set out.

Therefore, the decree will be reversed, and the cause remanded with directions to the chancery court to set aside the conveyance of the property in question from Fuller to Wheat as fraudulent, and for such further relief as appellant may be entitled to in equity which is not inconsistent with this opinion. It is so ordered.
