Equity: Specific Performance of a Contract to Reconvey Land Transferred by Fraudulent Conveyance

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the fact that the acts involved relate to distinct subject matters as lending support to the conclusion that there is no repeal by implication.

It is believed that the instant case is consistent with prior decisions of the Court of Appeals of Kentucky and with the attitude to which that court seems to be committed with reference to repeals by implication.

JOE R. JOHNSON, JR.

EQUITY: SPECIFIC PERFORMANCE OF A CONTRACT TO RECONVEY LAND TRANSFERRED BY FRAUDULENT CONVEYANCE

Appellee deeded land to appellant, his son, to prevent the execution of a judgment lien held against his land. Appellant agreed to reconvey and upon his failure to do so appellee filed this bill for specific performance. Appellant contends there is no aid in equity for one who transfers land in fraud of creditors. Appellee asserts that his judgment creditor chose not to enforce his claim against the land and therefore was not in fact defrauded. He claims further that appellant failed to affirmatively plead the fraudulent conveyance. The order of the Circuit Court granting specific performance was overruled. Asher v. Asher, 278 Ky. 802, 129 S. W. (2d) 552 (1939).

It is clear in Kentucky and elsewhere that one who transfers land in fraud of creditors subjects himself to certain limitations on future action, one of which is his inability to have specific performance of a contract to reconvey the land. This inability results from a failure to conform to equitable standards of conduct. These standards as most often expressed by courts of equity in denying relief are two: (1) the parties are in pari delicto or (2) one must come into equity with "clean hands". The court in the principal case reaffirms this principle that equitable relief is predicated on a

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28 Section 1059 relates to the county judge and section 1833 deals with the fiscal court.
1 Carson v. Beliles, 121 Ky. 294, 89 S. W. 208(1905); Coleman v. Coleman, 147 Ky. 383, 144 S. W. 1(1912); Shamo v. Benjamin's Adm'r., 155 Ky. 373, 159 S. W. 798(1913); Ballance v. Ballance, 213 Ky. 73, 200 S. W. 473(1917); Dunne v. Cunningham, 234 Mass. 332, 125 N. E. 560(1920); Palmer v. Palmer, 100 Neb. 741, 161 N. W. 277(1917).
2 Jones v. Jefferson, 334 Mo. 606, 66 S. W. (2d) 555(1933) (The materiality of the maxim "in pari delicto" is fully discussed in this case that is strikingly like the instant case. The grantor conveyed property to his daughter in anticipation of a suit for breach of promise and was precluded by the doctrine of "unclean hands" from having equitable relief from the daughter's repudiation of the agreement to reconvey). Accord: McRae v. McRae, 37 Ariz. 307, 394 Pac. 280(1930); New York, New Hampshire, etc., Railroad v. Pierce, 281 Mass. 479, 183 N. E. 836(1933).
transaction free from fraud or illegal or inequitable conduct in this manner:

"... by his own iniquitous acts the plaintiff has pitched himself into the mire and he cannot now call upon the clean hand of equity of extricate him."

In spite of the expressive language used the instant case does not present such a precise and obvious situation. Here, although the transfer was made for the purpose of preventing execution of a judgment against the land, the transferor's judgment creditor chose not to subject the property to a lien, and hence was not defrauded by the conveyance. Granting that an ineffectual purpose is no purpose, there was no fraud in this case in fact, only an intent to defraud. The following assertion of the court places the transferor in the unenviable position of having to prove that he intended to convey bona fide before he may have specific performance of the agreement to reconvey:

"... It is of no help to plaintiff that his contemplated fraud did not have actual effect. He intended to defraud his creditor and this besmeared the transaction with moral turpitude. ..."

Whether the mere intent of the grantor to defraud is sufficient to render the conveyance fraudulent is not well settled in the cases. The question usually arises in interpreting the purpose of statutes against fraudulent conveyances. One line of decisions takes the position that the policy against fraudulent conveyances, whether it be expressed by statute or the maxim of "unclean hands", does not operate as a moral code on the conscience of the party making the conveyance, but its purpose is to protect the legal or equitable rights of others. The conflicting authority is equally certain that no one is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention and for a fraudulent purpose. There can be little doubt as to the position of Kentucky after the present decision.

The right of the transferor to recover his property is not always confined to a suit for specific performance. Quite often a transfer in fraud of creditors is made in the form of a trust for the benefit of the transferor. Upon the failure of the trust because of illegality it is necessary to determine whether there is a resulting trust to the transferor, or in case of his death to his heirs at law. Similarly, where there is no trust but the transferee is unjustly enriched, if such unjust

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1 Asher v. Asher, 278 Ky. 802, 805, 129 S. W. (2d) 552(1939).
2 Id. at 804.
3 Day v. Lown, 51 Iowa 361, 1 N. W. 786(1879); Rivera v. White, 94 Tex. 538, 63 S. W. 125(1901) Dothan Oil Mid. Co. v. Espy, 220 Ala. 685, 127 So. 178(1930).
4 Pride v. Andrew, 51 Ohio St. 405, 38 N. E. 84(1894); Tantum v. Miller, 11 N. J. Eq. 551 (1858); Comment, (1931) 11 Boston U. L. Rev. 282.
5 3 Scott, Trusts (1939) sec. 422
6 Id. at sec. 422.2.
enrichment is accompanied by fraud on the part of the transferee, the transferee may be declared a constructive trustee for the transferor.\textsuperscript{10} In each instance a question of policy is again involved.\textsuperscript{11} In each case it is necessary to decide if the policy against permitting unjust enrichment of the transferee is outweighed by the policy against giving relief to a person who has voluntarily entered into an illegal transaction.

The court in the principal case did not raise either possibility. It is difficult to see how a constructive trust could be construed for the transferee's unjust enrichment is not accompanied by fraud on his part. It is submitted however that the transfer here, coupled with an agreement to reconvey, indicated an intention for the transferee to hold the property in trust for the transferor. Upon failure of this trust because of illegality there was a resulting trust, and the trustee is bound to return the property. The position of the transferee here indicates that the policy, in this instance at least, should be against permitting unjust enrichment rather than against relieving a fraudulent conveyor. If the suit were for cancellation of the fraudulent conveyance it would be necessary to prove the creditor actually defrauded,\textsuperscript{12} but in this suit for specific performance he needs only to assert "unclean" hands on the part of the plaintiff.

The position of the court in regard to the incidental problem of pleading the fraudulent conveyance is more tenable, for the doctrine of "unclean hands" goes to the discretionary powers of the court.\textsuperscript{13} The transferee is protected, not because of an equitable defense available to him, but because a transferor who has transferred in fraud of creditors cannot invoke the conscience of the chancellor.

W. L. MATTHEWS, JR.

\textsuperscript{10} 1 Scott, Trusts (1939) sec. 42.1. \\
\textsuperscript{11} Restatement, Trusts (1935) sec. 422. \\
\textsuperscript{12} Glenn, Fraudulent Conveyances (1931) 83. \\
\textsuperscript{13} That fraud is an affirmative defense and must be pleaded in Kentucky see: Transylvania Casualty Ins. Co. v. Paritz, 184 Ky. 807, 213 S. W. 185(1919); Tandy et al. v. Wolfe, 270 Ky. 556, 110 S. W. (2d) 277(1937). The court in the principal case recognized this fact but expressly said: "But it does not take an affirmative defense to defeat plaintiff", 278 Ky. 802, 805, 129 S. W. (2d) 552(1939); See also Clark, Principles of Equity (1919) sec. 30.