ANNA SCHEUERMAN (DEFENDANT) . APPELLANT;

AND

JOHN SCHEUERMAN (PLAINTIFF) . . RESPONDENT.

1915
*Oct. 28, 29.
1916
*Feb. 1.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Title to land—Conveyance in fraud of creditor—Husband and wife—Advancement—Trustee—Equitable relief—Restitution—Evidence—Statute of Frauds.

Lands which, at the time of the transaction, would be exempted from seizure and sale under execution by the Alberta "Exemptions Ordinance" were purchased by S. and, with the intention of protecting them from pursuit by his judgment creditor, he caused them to be conveyed to his wife, on a parol agreement with her that the title should remain in her name until the judgment debt was satisfied. The debt was subsequently paid by S. and he brought suit against his wife for a declaration that she held the lands in trust for him and for reconveyance.

Held per curiam.—That the court should not grant relief to the husband against the consequence of his unlawful attempt to delay and hinder his creditor, although the illegal purpose had not been carried out. *Mucklestone* v. *Brown* (6 Ves. 68); *Taylor* v. *Chester* (L.R. 4 Q.B. 309); followed. *Rochefoucauld* v. *Bousted* ((1897), 1 Ch. 196) referred to. Judgment appealed from (8 Alta. L.R. 417), reversed, Anglin J. dissenting on the ground that the conveyance of exempted lands could not prejudice the rights of creditors and, although it had been made with fraudulent intent, it was not fraudulent as against them. *Mundell* v. *Tinkis* (6 O.R. 625); *Mathews* v. *Feaver* (1 Cox 278); *Rider* v. *Kidder* (10 Ves. 360); *Day* v. *Day* (17 Ont. App. R. 157); *Symes* v. *Hughes* (L.R. 9 Eq. 475), and *Taylor* v. *Bowers* (1 Q.B.D. 291), referred to.

Per Duff J.—In the absence of proof that his creditor had not been prejudiced in consequence of the conveyance being taken in the name of his wife the plaintiff was not entitled to relief.

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*PRESENT:—Sir Charles Fitzpatrick C.J., and Idington, Duff, Anglin, and Brodeur JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), whereby, on equal division of opinion among the judges, the judgment of Scott J., at the trial (2) stood affirmed.

The circumstances of the case are stated in the head-note and the questions raised on this appeal are stated in the judgments now reported.

F. Ford K.C. for the appellant.

O. M. Biggar K.C. for the respondent.

THE CHIEF JUSTICE—I think the appeal should be allowed.

The trial judge has found that the evidence does not establish a valid agreement between the parties for the reconveyance of the property to the respondent. The respondent in such a case as this can, of course, ask nothing from the court but his strict rights. There seems to me nothing necessarily inconsistent between the idea of his making an absolute gift to his wife and the fact of his having given her the property to keep it from his creditors. The appellant says that the reason for the gift was "because he lose it anyhow." I think that, as between themselves, the presumption of law that the gift to the wife was an absolute one is not rebutted.

But if it were necessary to hold that there was a resulting trust, in favour of the respondent, I do not think he is in a position to ask the court to enforce it. He can only make out his case by alleging his own unlawful intentions in making the conveyance to his wife.

(1) 8 Alta. L.R. 417. (2) 7 Alta. L.R. 380.

In the case of *Muckleston* v. *Brown*(1) at page 68, the Lord Chancellor said:—

Cottington v. *Fletcher*(2) does not affect this case. That case was upon the grant of an advowson contrary to the policy of the law, by a roman catholic in trust for himself. Afterwards he turns protestant; and desires a discovery as to his own act. The defendant put in a plea of the Statute of Frauds; but by answer admitted the trust. Lord Hardwicke is made to say, that upon the admission he would act. I do not know whether he did act upon it; but it is questionable whether he should; for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor, in fraud of the law, and of a man coming upon his own act under such circumstances.

It is there said it might be different if it had come on upon demurrer. The reason given is that, as this assignment was done in fraud of the law, and merely in order to evade the statutes, it was doubtful whether at the hearing the plaintiff could be relieved. Lord Hardwicke means to say that, if the defendant admits the trust, though against the policy of the law, he would relieve, but if he does not admit the trust, but demurs, he would do what does not apply in the least to this case. The plaintiff stating he had been guilty of a fraud upon the law to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, "Let the estate lie, where it falls." That is not this case.

It will be observed that the Lord Chancellor considered it questionable whether the plaintiff ought to have relief even in a case where the defendant admits the trust. In the present case the appellant has denied the trust.

I am prepared to hold that a plaintiff is not entitled to come into court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose.

I think the maxim quoted by Lord Eldon applies

(1) 6 Ves. 52. (2) 2 Atk. 155.

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in this case and that the court should say "Let the estate lie, where it falls."

IDINGTON J.—The respondent, as plaintiff, alleges in his statement of claim that the defendant, now appellant, who is his wife, was the registered owner of lands described therein but held the same as trustee for him, the plaintiff.

He proceeds in said statement of claim to allege that she, in breach of her said trust, sold the lands and he seeks a declaration of the trust and judgment for the part of the purchase-money she got and other relief.

The lands I will assume, as the learned trial judge has found as a fact, were bought with respondent's money, but the conveyance taken to the appellant when his wife.

Under such a naked state of facts the presumption of law would be that she received same by way of advancement. In short she, in law, thereby became the owner unless proven by other facts she was a trustee.

There was no writing or other evidence of a legal trust upon which he could rely. Therefore, he was of necessity, in order to establish his claim that she was his trustee, driven to prove that he had procured the conveyance to be made to his wife lest a creditor or creditors should reach the land if in his name and that the like reason had obtained for the vesting in her of other property out of the proceeds of the sale of which the land in question was paid for or improved.

Many authorities have been cited which I have, in deference to the argument and divided opinions be-

low, fully considered. But from none of them can I extract authority for the proposition of law that when a man has, out of the sheer necessity to prove anything upon which he can hope to rest the alleged claim of trust, to tell of an illegal purpose as the very basis of his claim, that he may yet be entitled to succeed. I find cases where the man has, accidentally as it were, or incidentally, to the relation of his story told that which he might if skilfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established, by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.

This is not respondent's case, but the other kind of case I have just referred to is.

Out of the many cases on the subject *Taylor* v. *Chester*(1) furnishes the law applicable to this case, and the case of *Taylor* v. *Bowers*(2) furnishes an apt illustration of the other kind of case.

In this latter all Taylor need have done was to prove that the goods in question were his and they were found in the possession of the defendant who had never bought them or acquired any honest title thereto.

The plaintiff there had never executed the intended assignment in fraud of creditors or any other and if the defendant had set up the facts he relied upon his defence would have been held illegal. That

(1) L.R. 4 Q.B. 309. (2) 1 Q.B.D. 291.

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much is got from an examination of the facts noted and judgments in the case and especially from those in appeal.

The more recent case of *Kearley* v. *Thomson*(1) shews some things said by even eminent authority in the case I have just referred to may not be law.

Had the conveyance been made to a stranger, under such facts and circumstances as might have enabled the respondent to present and rely upon the naked fact of his purchase and payment of the price as producing a resulting trust which the law would imply, the respondent might thereby have escaped telling of his own illegal purpose and succeeded. Here he has to tell the facts disclosing the illegal purpose as his chief, and indeed only, motive for constituting the trust he claims to have existed, and rely thereon, and cannot, as I view the law, successfully do so.

The cases of *Sims* v. *Thomas*(2), and *Symes* v. *Hughes*(3), certainly fall far short of covering this. The real question of law involved and decided in the former was the non-exigibility of the asset in question and the right to sue in such case upon the bond in question despite the provision of an insolvency Act not framed to reach it.

The latter case certainly is not to be extended and it needs extension to cover this case even if binding us, as it does not.

All that was argued and well presented as to the operation of the "Exemptions Ordinance" seems, from my view of the law, as applicable to the facts herein

(1) 24 Q.B.D. 742. (2) 12 A. & E. 536.
(3) L.R. 9 Eq. 475.

irrelevant. On the law and facts the property was hers and the exemption relative thereto hers also.

The appeal should be allowed with costs throughout, and the action dismissed with costs.

DUFF J.—In 1908, the respondent, who was the husband of the appellant, purchased land in Edmonton for which he agreed to pay $700. Shortly afterwards he built a house at a cost of $600 and, from that time until 1912, the appellant and the respondent occupied the property as their home with their children. On the completion of the purchase, in 1907, the transfer was taken in the name of the appellant and, in 1912, during the respondent's absence in the United States the appellant sold the property at the price of $3,500; $2,000 having been paid in cash and the respondent, on discovering the sale, brought the action out of which this appeal arises claiming the property was his and consequently the residue of the purchase price, $1,500 still in the vendee's hands.

The respondent puts his case in this way. He says that the purchase money was paid by him under the agreement of 1907; that the house was built partly by his own labour and partly by labour and materials provided by him; that the transfer was taken to his wife by arrangement between them, the effect of which was that she should hold the property as trustee for him.

On behalf of the appellant it is not disputed that she was to hold the property as trustee for the respondent; but it is said that the explicit arrangement was that the property was to be held by her until a certain debt for the payment of which the respondent was then being pressed had been discharged

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and that the intention of both parties in making the transfer to the wife instead of to the husband was to conceal the fact that the husband was the owner and in that way to protect the property from proceedings by a creditor who, at the time the transfer was taken, had recovered judgment.

The appellant denies that the property was paid for with the respondent's money, but on that point the finding is against the appellant and this appeal must, I think, be decided on the footing that the finding is right.

It is not, I think, seriously open to question that the respondent could only succeed by producing evidence shewing that in directing the transfer to be made to his wife an advancement to her was not intended and the evidence which establishes this is precisely the evidence which shews that the title vested in the wife was intended as a cloak to protect the property from the creditor mentioned. The respondent's case, therefore, rests upon a transaction which if it had in fact the effect contemplated, namely, of delaying or hindering the creditor, would undoubtedly be a transfer void under the Statute of Elizabeth at the instance of the creditor; and in that case the respondent must obviously fail on the principle that a plaintiff cannot recover who is obliged to make out his case through the medium and by the aid of an illegal transaction to which he was himself a party. *Taylor* v. *Chester*(1).

The respondent, however, has succeeded, the Appellate Division of Alberta being equally divided on the ground that the rule has no application where

(1) L.R. 4 Q.B. 309, at p. 314.

nothing has been done in execution of the unlawful purpose beyond payment or delivery of the property itself and that in point of fact the creditor whose debt has since been paid was not defeated, hindered or delayed. By the law of Alberta a house and building occupied by an execution debtor and the lot or lots on which they are situate are exempt from execution to the extent of $1,500. The view which has prevailed is that the evidence appearing to shew the property to have been of no greater value than $1,500, at the time the transfer was taken, the transaction could not be a fraudulent one and impeachable as such under the Statute of Elizabeth because of the well settled rule that the statute only aplies to dealings with property which creditors are entitled by law to have applied in the payment of their claims.

The judgment of Lord Justice Mellish concurred in by Lord Justice Baggallay in *Taylor* v. *Bowers* (1) is relied upon as establishing the proposition that the general principle gives to persons making a payment or delivering goods for an illegal purpose a *locus pœnitentiæ* so long as no part of the illegal purpose has been carried out, and that so long as that has not happened the restitution of the property transferred under such an agreement as that disclosed by the evidence in this case can be enforced. *Taylor* v. *Bowers* (1) was in point of fact not decided upon the principle invoked, Lord Justice James proceeding upon the ground that it was the defendant in that case who was obliged to set up the illegal transaction in order to justify his possession of the goods. Two very eminent judges, however, Lord Jus-

(1) 1 Q.B.D. 291.

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tice Mellish and Lord Justice Baggallay do seem to have put their judgment upon the ground that where goods are delivered under a fictitious assignment, the object of which is to defraud creditors, the delivery and assignment of the goods are not to be regarded as execution in part of the illegal purpose so long as no creditor is in fact prejudiced. It has been seriously doubted whether the general principle stated by Lord Justice Mellish in his judgment was correctly applied to the facts of that case; and the subsequent decisions of *Kearley* v. *Thomson*(1) and *Herman* v. *Jeuchner* (2) afford considerable justification for such doubts.

I do not find it necessary for the purpose of deciding this appeal to pass upon the question whether a proper application of the principle stated above to the facts of this case would be to hold that no part of the illegal purpose had been carried out notwithstanding the fact that the conveyance had been taken in the name of the wife. This case must, I think, be approached from a slightly different point of view. The object, as I have said, of taking the transfer in the name of the wife was that her *ex facie* title should protect the property from pursuit by the husband's creditor, the design being that so long as the debt remained unpaid she should hold the title. Whether or not they had in mind a possible advance in value the scheme necessarily involved the hindering of the creditor in the exercise of his rights in the event of the value of the property reaching a point at which the surplus would become properly exigible. We know that, in 1912, the property had acquired a value of $3,500. It is conceded apparently that some time

(1) 24 Q.B.D. 742. (2) 15 Q.B.D. 561.

before the trial the debt was paid; when, does not appear. If any part of the debt was still unpaid after the value of the property rose beyond $1,500 the presumption would be that the creditor was prejudiced. In these circumstances it is impossible to say that the creditor was not prejudiced. Indeed, having regard to the fact that the respondent must have known the precise date when the debt was paid and offered no information about it there is some presumption of fact the other way. The conclusion I have come to, however, is this: Accepting the rule in the form in which it is stated in *Symes* v. *Hughes*(1), and *Taylor* v. *Bowers*(2) I think the onus in the circumstances of this case was on the respondent to shew that the creditor had not been delayed.

It is true that as the respondent in this case does not ask to recover back the property on the ground only that it was property transferred for an illegal purpose which has not been carried out his position is not entirely the same as the position of the plaintiffs referred to in the judgment of Mr. Justice Scott. His case may be put in the alternative. First, the transfer was taken in the name of the appellant, the consideration having been paid, the presumption of advancement is rebutted by the evidence of the agreement between the husband and wife that the property was to be held for the husband for the purpose of protecting him against a creditor. In point of law he rests upon the position that the wife is trustee for him by reason of the fact that the purchase money was paid by him. But while that is his legal position he is obliged, in order to make out that case, to prove

(1) L.R. 9 Eq. 475. (2) 1 Q.B.D. 291.

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an agreement fraudulent in the purpose under which the transfer was taken, which agreement he does not shew that he repudiated before part of its purpose took effect in the delaying of his creditor.

Secondly. He may allege an express trust arising out of the oral agreement that the property was to be held for him with the object stated. The breach of this express trust, the failure on the part of the wife to carry out the agreement under which she acquired the property being treated in equity as a fraud, constitutes the wife trustee *ex maleficio,* a trustee, that is to say, who is not entitled to invoke the Statute of Frauds as a protection against her own fraud. *Rochefoucauld* v. *Boustead*(1). The respondent does not (be it observed with reference to an argument of Mr. Ford) in this way of putting his case seek to enforce the express oral trust, although the result in this particular case might be the same in the event of success as if he had succeeded in enforcing the express trust. The respondent's right and remedy would have been precisely the same if the arrangement had been that the wife instead of holding the property in trust for him had bound herself to hold it in trust for a third person, orally; to any proceeding by such third person as *cestui que trust* for the enforcement of the express oral trust the 7th section of the Statute of Frauds would have been an effectual answer, but there is no answer to an action on the part of the respondent for *restitutio in integrum* on the ground that the wife's fraudulent refusal to effectuate the express trust under which she acquired the property constitutes her a trustee for the person from whom she

(1) [1897] 1 Ch. 196.

received it. Put in this way, nevertheless, the respondent's case still necessarily rests upon an arrangement which when it is fully disclosed appears to be a fraudulent arrangement, and that arrangement the respondent has not shewn to have failed in effectuating its purpose.

In the result the appeal should be allowed and the action dismissed.

ANGLIN J. (dissenting).—The plaintiff sues to recover from his wife the proceeds of property admittedly placed in her name with the intent that it should be held by her in order to defeat the claim of one of his creditors. When placed in the name of the defendant the property was occupied by the husband and family and was not worth more than $1,500. It was, therefore, exempt from execution under sub-section 10 of section 2 of chapter 27 of the "North-West Territories Consolidated Ordinances, 1898."

In answer to the plaintiff's claim the defendant sets up:—

(*a*) That the purchase money of the property in question was wholly or in great part hers;

(*b*) That the property subsequently ceased to be occupied by the plaintiff and became worth more than $1,500 and the surplus would then have been exigible.

(*c*) That the plaintiff's admitted fraudulent intent debars his recovery;

(*d*) That the plaintiff, in order to succeed, is obliged to establish an express trust which section 7 of the Statute of Frauds renders incapable of proof by parol evidence.

The learned trial judge found explicitly that the

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purchase money all belonged to the plaintiff. He saw the plaintiff in the witness box and believed his story as against that of the defendant whose evidence was taken on commission. This finding was not disturbed on appeal and we are not in a position to say that it is wrong and that the defendant should have been believed rather than the plaintiff.

It is the value and condition of the property at the date of the transfer which must determine its exigibility. To hold that a subsequent change in occupation or increase in value should be taken into account would introduce an element quite too speculative, would unsettle titles and would defeat the purpose of the statute. *Sims* v. *Thomas*(1); *Willoughby* v. *Pope*(2).

The law condemns and penalizes the fraudulent act, not the fraudulent intent. The act must be one which at least may be injurious to persons whom the law protects against it. In *Mundell* v. *Tinkis et al*(3) the transfer dealt with was of this character. However wrongful the intent with which it is done, an act *in se* lawful subjects the person who commits it neither to criminal nor to civil responsibility. The transfer by a debtor of property exempt from seizure is lawful and cannot harm his creditor and, therefore, cannot be fraudulent against him. *Mathews* v. *Feaver* (4); Story's Equity, sec. 367; *Rider* v. *Kidder*(5); *Nichols* v. *Eaton et al*(6) at p. 726. However evil the mind and intent of such a debtor may be, he is amenable only *in foro conscientiæ*. The plaintiff's intent

(1) 12 A. & E. 536.
(2) 58 So. Rep 705.
(3) 6 O.R. 625.
(4) 1 Cox 278.
(5) 10 Ves. 360.
(6) 91 U.S.R. 716.

was fraudulent; his act was not. *Day* v. *Day*(1), at pp. 167, 166, 172; *Symes* v. *Hughes*(2); *Taylor* v. *Bowers*(3); *Cloud* v. *Meyers et al*(4); *Palmer* v. *Bray et al*(5); 20 Cyc., pages 381-4.

Were it not for the presumption of an intention to make a gift by way of an advancement, which ordinarily arises where property belonging to a husband is without consideration transferred to or placed in the name of a wife, proof of the absence of consideration would establish a resulting trust in favour of the plaintiff. The presumption of advancement is, however, readily rebuttable, the sole question being the intent with which the transaction took place (*Marshal* v. *Crutwell*(6); *In re Young*(7), and but for the objection to its admissibility, based on section 7 of the Statute of Frauds, the evidence of the understanding of both husband and wife that the latter should hold as trustee for the former would clearly establish such a trust. That objection cannot prevail, for equity deems it a fraud on the part of a trustee to attempt to withhold trust property from his *cestui qui trust* for his own benefit, and will not permit the statute to be made the instrument for committing such a fraud. *McCormick* v. *Grogan*(8), at p. 97 *per* Lord Westbury; *Rochefoucauld* v. *Boustead* (9); *In re Duke of Marlborough; Davis* v. *Whitehead* (10); *Haigh* v. *Kaye*(11); *Davies* v. *Otty*(12).

I am for these reasons of the opinion that the appeal fails and should be dismissed with costs.

(1) 17 Ont. App. R. 157.
(2) L.R. 9 Eq. 475.
(3) 1 Q.B.D. 291.
(4) 136 Ill. App. 45.
(5) 98 N.W. Rep. 849.
(6) L.R. 20 Eq. 328.
(7) 28 Ch. D. 705.
(8) L.R. 4 H.L. 82.
(9) [1897] 1 Ch. 196.
(10) [1894] 2 Ch. 133.
(11) 7 Ch. App. 469.
(12) 35 Beav. 208.

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BRODEUR J.—The main point to be decided in this case is whether the property in question having been transferred to the appellant for a fraudulent purpose, the respondent could recover that property.

The plaintiff and the defendant are husband and wife.

The husband was very heavily indebted. He owned a homestead for which he had agreed to pay a little over $1,000, and which according to the laws of Alberta was exempt from seizure to the extent of $1,500.

In order to prevent his creditors from seizing that homestead and in order to defeat them the husband (the plaintiff respondent) had that property conveyed to his wife, the appellant.

The husband seeks to recover the property and claims that the wife was holding it as trustee for him.

In order to enable him to recover he had to give evidence of the fraudulent scheme; otherwise the wife would have been presumed to have received an advancement. They both admit that the transfer was made for the purpose of defeating creditors. So the presumption of advancement was successfully rebutted provided it involves no other illegality.

But the Statute of Frauds is pleaded by the wife who claims that the husband will have to adduce written evidence of the alleged trust.

The Statute of Frauds was not made to cover fraud; it does not prevent the proof of a fraud.

It is a fraud on the part of a person to whom land is conveyed as trustee to deny the trust and claim the land herself. It is competent to prove by parol evidence that the property was conveyed upon trust for the plaintiff and that the wife is denying the

trust and relying upon the form of conveyance in order to keep the land herself. *Rochefoucauld* v. *Boustead*(1).

The question then is whether the plaintiff can invoke his own fraudulent intent to recover the property from his wife.

In general principle fraud vitiates all contracts. The courts never assist a person who has placed his property in the name of another to defraud his creditors, and some decisions go so far as to state that it is of no consequence whether any creditor has been actually defeated or delayed.

Mundell v. *Tinkis*(2); *Rosenburgher* v. *Thomas,* in 1852,(3); *Kearley* v. *Thompson,* in 1890(4).

In the case of a trust the same principle applies and the settlor is prevented from recovering the estate if the trust has been created for a fraudulent purpose. Lewin on Trusts(12 ed.), p. 120.

But the trial judge relying on the case of *Symes* v. *Hughes*(5), says that, where the purpose is not carried into execution, the mere intention to effect an illegal object does not deprive the assignor from recovering the property from the assignee and he says also that it was not necessary, in the present case, for the husband to have the property conveyed to his wife at the time in order to protect the lands in question against his creditors because they were exempt from seizure.

By the exemption ordinance, which I have already mentioned, the homestead was exempt from seizure if

(1) [1897] 1 Ch. 206.
(2) 6 O.R. 625.
(3) 3 Gr. 635.
(4) 24 Q.B.D. 742.
(5) L.R. 9 Eq. 475.

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it did not exceed in value $1,500. We have no positive evidence as to the value of the property at the time it was conveyed to the wife; but we have the evidence that, a short time after, the property was sold for a much larger price. The intent of the husband, then, was to defeat the creditors when the property would become of a value sufficient to become liable to seizure.

Cases of the same kind with regard to homesteads have been decided in the United States. I find a case of *Kettleschlager* v. *Ferrick*(1), where it was held that a transfer of the homestead from husband to wife without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims *in case the debtor should remove therefrom is fraudulent as to creditors.*

Similar decisions have been rendered in Texas: *Taylor* v. *Ferguson*(2); *Baines* v. *Baker*(3).

We have also *Barker* v. *Dayton et al*(4), which was decided in the Wisconsin courts.

The plaintiff in having the homestead conveyed to his wife never ceased to be the real owner of the property. If the property had remained in his hands it could have been seized by his creditors for the payment of his debts. During all the time his wife was in possession of that property, the creditors, if it was a homestead exceeding in value $1,500, could claim the payment of their debt upon the property.

The courts should never help any person who has acted with a fraudulent intent, and the same rule should apply whether a transfer is made for the purpose of defeating subsequent creditors or when it is

(1) 12 S.Dak. 455.
(2) 87 Tex. 1.
(3) 60 Tex. 139.
(4) 28 Wis. 367.

made with the purpose of defeating existing creditors who may exercise their right upon the increased value of the property.

For these reasons I am of opinion that the plaintiff cannot recover the property from his wife and that his action should have been dismissed.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Emery, Newell, Ford, Bolton & Mount.*

Solicitors for the respondent: *Short, Cross, Biggar, Sherry & Field.*