

HARRY H. ELFORD (DEFENDANT) . . APPELLANT;

1922

*May 15, 16.
*June 17.

AND

MERCIE A. ELFORD (PLAINTIFF) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Husband and wife—Fraudulent conveyance—Property in wife's name to defeat creditors—Principal and agent—Power of attorney to husband—Transfer by attorney to himself—Right of wife to relief.

A husband (the appellant) had certain property put in his wife's (the respondent's) name, with her knowledge, for the purpose of defeating his creditors. He held a general power of attorney from her. A quarrel having occurred between them the husband registered this power and, as his wife's attorney, he had the property transferred into his own name. The wife sued to have the property re-transferred to her.

Held, Idington and Brodeur JJ. dissenting, that the wife was entitled to have the transfer to her husband set aside. In order to succeed, she had only to invoke the illegal act of her husband in executing as her attorney the transfer of the property to himself and she was not obliged to disclose the alleged fraud connected with her own title; on the contrary, the husband, in order to succeed in his defence, had to invoke such fraudulent arrangement made to defeat his creditors.

Judgment of the Court of Appeal ([1921] 2 W.W.R. 963) affirmed, Idington and Brodeur JJ. dissented.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Taylor J., at the trial (2) and maintaining the respondent's action.

*PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1921] 2 N.W.R. 963. (2) [1921] 1 W.W.R. 341.

1922
ELFORD
v.
ELFORD.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgment now reported.

John Feinstein for the appellant.

R. Hartney for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J. (dissenting)—This is an action between husband and wife who during twelve or thirteen years had resorted to various devices to defeat the creditors of the husband who pretended to act for the wife and acting under powers of attorney from her to preserve for him or her the fruits of his labour and enterprise in fraud of his creditors.

But for his course of so dealing having been properly held by the learned trial judge a legal barrier in his way he was entitled to claim that his wife was his trustee of the properties in question herein.

The correct inference to be drawn from the history of the dealings between them is that in her giving the power of attorney in question it was given for the sole purposes of continuing to protect his property from and in fraud of his creditors.

She herein complains of his unexpected abuse of such power of attorney in conveying the property to himself.

I cannot think that a suitor depending upon an instrument so designed to perpetuate a fraudulent course of dealing, and thus tainted with illegality, can properly ask the court to protect her from any abuse of such power. She has already had the benefit

of the application of such a principle of law by being freed from any liability to account to her husband by reason of the trusteeship by which she would have had to account to him but for the whole being tainted with illegality.

1922
ELFORD
v.
ELFORD.
Edington J.

I do not see that she can properly complain after invoking the principle to defeat his claim of it being in turn applied to the residue of their illegal undertakings.

The principle upon which the decision of the Court proceeded in the case of *Scheuerman v. Scheuerman* (1), works both ways.

Notwithstanding her illegal acquisition of the properties, I recognize that if she had given a power of attorney to a stranger to sell and dispose of same and he had dealt with them as the husband has done, she might have been entitled to relief by way of having him so empowered declared her trustee, quite independently of the abstruse questions arising under the "Land Titles Act".

In my view of the case I need not either try to resolve that question or deal with many others discussed here and below.

But let us suppose that power of attorney to her husband had expressly provided that he might convey thereby to himself, and she had applied to the court to have such an instrument rectified because it had been inserted by mistake, would she have been entitled to any such rectification of an instrument so tainted with fraudulent purpose as I think this was?

With some confidence I submit not, and that all that which is involved herein is essentially of that character.

(1) [1915] 52 Can. S.C.R. 625.

1922
ELFORD
v.
ELFORD.
Idington J.

It was mentioned during the course of the argument that the creditors, or some of them, had issued executions and registered judgments against the lands in question.

Nothing I have said herein is to be taken (even if concurred in by others of my brother judges) as in anyway deciding the effect thereof in light of the legal puzzle arising out of the registration of the conveyance by the appellant to himself having been recognized by the registrar.

The creditors, of course, may, until that is solved, have a mesasure of protection meanwhile.

I would allow the appeal herein with costs here and below and restore the judgment of the learned trial judge.

DUFF J.—This appeal appears to present little difficulty once the facts are understood. The respondent was the registered owner of the lands under dispute. She had given her husband a power of attorney conferring upon him a wide general authority to deal with them, but this general authority did not embrace the power to execute a conveyance in favour of the agent himself. Any attempt to acquire a title by such a use of the authority vested in him would be a fraud upon the power. *Prima facie*, therefore, the wife is entitled to have the husband declared trustee for her.

The question therefore arises whether the husband can displace this *prima facie* right of the wife's by alleging that she held her title to the property for his benefit, but for the purpose of protecting it from his creditors. In other words, whether her title was acquired in pursuance of an unlawful design and plan to defeat the creditors of the husband.

It is quite clear, I think, that such a defence is not competent to the husband. As Lord Hardwick said in *Cottington v. Fletcher* (1), as long ago as 1740 such "fraudulent conveyances" are "absolute against the grantor." It is quite clear that the husband would not be heard in an action to impeach the wife's title brought by himself to set up a claim based upon an arrangement of the character he now seeks to rely upon. If authority were needed for such a proposition it would be found in the judgment of Lord Selborne in *Ayerst v. Jenkins* (2), and it is equally clear that the wife is entitled to assert her rights as owner, that is to say the rights incidental to her ownership against the husband as well as against a stranger, so long as it is not necessary for the purposes of her case to rely upon the fraudulent arrangement with her husband. The principle is illustrated admirably in the judgment of Mr. Justice Maclellan in *Hager v. O'Neil* (3), and in the decision of the Court of Appeal in *Gordon v. Chief Commissioner of Metropolitan Police* (4). The appeal should be dismissed with costs.

1922
ELFORD
v.
ELFORD.
Duff J.

ANGLIN J.—I would dismiss this appeal.

The transfer to himself executed by the defendant as his wife's attorney transgresses one of the most elementary principles of the law of agency. It was *ex facie* void and should not have been registered.

In order to succeed the plaintiff merely requires to establish that in executing the transfer to himself of the property in question, which stood registered in her name, her husband committed a fraud on the power of attorney from her under which he professed

(1) [1740] 2 Atk. 155.

(3) [1891] 20 Ont. App. R. 198 at p. 218.

(2) [1872] L. R. 16 Eq. 275.

(4) [1910] 2 K.B. 1080.

1922
 ELFORD
 v.
 ELFORD.
 Anglin J.

to act. She does not have to disclose the alleged intent to defraud her husband's creditors in which her own title to the land is said to have originated, or to invoke any of the transactions tainted by that fraud. *Simpson v Bloss* (1); *Taylor v. Chester* (2); *Clark v. Hagar* (3). It is the defendant who brings that aspect of the matter before the court in his effort to retain the fruits of his abuse of his position as his wife's attorney; and to him the maxim applies *memo allegans turpitudinem suam est audiendus*. *Montefiori v. Montefiori* (4).

Neither does the plaintiff seek any equitable relief. The equitable maxim invoked by the defendant—"he who comes into equity must come with clean hands"—is therefore inapplicable.

Nor did the defendant by making an unauthorized and illegal use of his wife's power of attorney put himself in a position to assert rights to property which the court would not have allowed him to prefer had that property remained registered in the plaintiff's name, as it was prior to his wrongful attempt to vest the legal title to it in himself.

The rights of the husband's creditors are not affected by this litigation, to which they are not parties. The confessedly guilty defendant cannot now shelter himself under the rights of his creditors whom he sought to defraud—if indeed the creditors would be entitled to claim under the void transfer here in question.

BRODEUR J. (dissenting)—This is a very sad case. This is an action between husband and wife. The husband used his wife's name to shield himself

(1) [1816] 7 Taunt, 246.

(3) [1893] 22 Can. S.C.R. 510, at p. 525;

(2) [1869] L.R. 4 Q.B. 309, at p. 314. 20 Ont. App. R. 198, at pp. 221-2.

(4) [1762] 1 W. Bl. 363.

against the actions of his creditors. The properties acquired were put in his wife's name. All this was done by the husband himself under a power of attorney which he had from his wife. They both conspired together to defraud his creditors.

1922
ELFORD
v.
ELFORD.
Brodour J.

It has been found by the trial judge that the husband most brazenly lied in a suit instituted by one of his creditors to gain an advantage for his wife and himself; and that in this case the husband and wife evaded telling the truth or would not hesitate to tell falsehoods.

The wife in that atmosphere of purity developed, what is not surprising, an intimacy with a man named Iceton, whom she had as a boarder in her house. The husband realizing how far this intimacy would lead to, ordered this man to leave his house, but with not much success. He even found his wife and that man searching in his papers the title deeds of the properties which had been acquired. He then, using the power of attorney which he had from his wife, had the properties transferred to his own name and registered under the "Land Titles Act."

The wife now sues him to have the properties retransferred and registered in her name.

Her action was dismissed by the trial judge on the ground that these properties had originally been put in her name for the purpose of defrauding the creditors of her husband and that the courts of justice could not assist her in carrying out that fraud. Besides some creditors in the meantime have registered claims to have the properties made available for payment of their claims; and the claims constitute a charge and lien upon the land.

1922

ELFORD
v.
ELFORD.

Brodeur J.

The trial judge decided also that the power of attorney was not wide enough to authorize the agent to transfer the lands in his name.

The Court of Appeal agreed with the trial judge that the power of attorney was insufficient to authorize the husband to transfer the properties in his name; but they reversed his judgment and decided that the transfers and their registration should be set aside.

If the husband had taken proceedings to claim that the properties in question belonged to him he could certainly not have succeeded; a man who is obliged to set up his own fraud as the basis for the granting of an equitable relief should not succeed. The wife would have been entitled to retain the property for her own use, notwithstanding that she was a party to the fraud.

The husband, in such a case, could not be relieved from the consequence of his actions done with intent to violate the law. In other words, the courts are always refusing to assist in any way, shape or form those who violate the law or who act fraudulently. *Ex dolo malo non oritur actio. Gascoigne v. Gascoigne* (1), *Scheuerman v. Scheuerman* (2).

It is disclosed in this case that the wife had conspired with her husband to deprive the creditors of the payment of their legitimate claims and that the power of attorney she gave her husband was given for the purpose of continuing the fraud intended against her husband's creditors. She seeks however to have the courts transfer to her the properties in question. It seems to me that, applying the principle mentioned in the cases above quoted, we should refuse to assist her. The properties should remain in the hands of the husband, to be sold for the payment of the legitimate claims of the husband's creditors.

(1) [1918] 1 K.B. 223.

(2) 52 Can. S.C.R. 625.

The appeal should be allowed with costs of this court and of the courts below and the judgment of the trial judge restored.

1922
ELFORD
v.
ELFORD.
Mignault J.

MIGNAULT J.—In my opinion the appeal fails.

It seems hopeless to contend that the husband (appellant) under the power of attorney which he held from his wife (respondent), could transfer to himself the properties standing in the land registration office in the name of his wife. His counsel could cite no authority permitting such a transfer, and it certainly cannot stand.

The wife's action to set aside this transfer was therefore well founded. The husband, however, resisted her action by alleging that the properties in question really belonged to him and that they had been placed in his wife's hands merely as a trustee to hold them for him. In the evidence it was disclosed that the husband, who formerly lived in Halifax, had left unsatisfied judgments there when he moved to the West, and for that reason, although these properties were purchased with his moneys or from moneys coming from a partnership in which his wife was nominally a partner, they were placed in her own name to hinder or defeat the action of the husband's creditors.

If the wife was a trustee for her husband to further any such purpose, the husband cannot be listened to to claim from his wife the properties thus held by her. *Montefiore v. Menday Motor Components Co.* (1). To demand their return he would have to rely on an illegal contract, and this he cannot do. The wife's position is different in this sense that the proper-

(1) [1918] 2 K.B. 241.

1922
ELFORD
v.
ELFORD.
Mignault J.

ties already stand in her name and all she does or has to do is to attack the transfer which the husband made to himself under the power of attorney granted by his wife. To succeed she does not have to rely on an illegal contract, while the husband cannot get back the properties without claiming them under a contract made in furtherance of an unlawful purpose.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Irvine & Feinstein.*

Solicitors for the respondent: *Hartney & Boyce.*
