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# Creditors' Rights and Security Transactions— 1961 Tennessee Survey (II)

Forrest W. Lacey\*

During the period under survey there were few cases dealing with creditors' rights or security transactions. One of these, *Cannon Mills, Inc. v. Spivey*,<sup>1</sup> presented the question of whether the mere filing of a bill to subject the property of an insolvent debtor for the benefit of creditors created a lien *lis pendens*, or whether registration of the lien was necessary before it became effective. The facts were as follows. A judgment creditor with a *nulla bona* return filed a general creditors' bill on October 18, to subject the property of an insolvent debtor for the benefit of all his creditors. The lot which was involved in the controversy was specifically described in the bill. Five days later a judgment creditor had an execution issued and levied on the lot on October 29. The papers were sent to the circuit court and the court condemned the lot and ordered it sold, and the sheriff advertised it for sale. Meanwhile, on November 1, complainant filed for record a certified abstract of the bill. At the sale of the lot complainant's counsel appeared and announced that the sale was subject to the general creditors' bill, but the sale proceeded and the lot was bid in by the levying creditor. The sheriff gave a deed to the purchaser. Later two other creditors undertook to redeem the lot under Tennessee Code Annotated section 64-808, and received a deed from the purchaser. The redeeming creditors later were made defendants to the general creditors' suit, and filed answers claiming priority to the lot. A consent order was entered agreeing that the lot be sold and the proceeds held subject to the same priorities the parties would have had to the lot.

The supreme court, affirming a decree denying the redeeming creditors a priority, held that the filing of the general creditors' bill without an attachment created a lien and that thereafter no creditor could acquire a priority. In reaching this decision the court relied upon and quoted from an earlier case, *Roberts v. Frogge*.<sup>2</sup>

The language quoted from the *Roberts* case does support the decision in the instant case, but the *Roberts* case involved a question of jurisdiction rather than one of priority between creditors. However, other early Tennessee decisions<sup>3</sup> more clearly analogous also support the instant holding.

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1. 346 S.W.2d 266 (Tenn. 1961).

2. 149 Tenn. 181, 258 S.W. 782 (1923).

3. Principally *Cowan, McClung & Co. v. Dunn*, 69 Tenn. 68 (1878) and *Jordan v. Everett*, 93 Tenn. 390, 24 S.W. 1128 (1894).

The principal difficulty confronting the court in resolving the question arose from the language of two code sections dealing with *lis pendens*. Section 26-604 provides:

The creditor has a lien *lis pendens* upon the property of defendant situated in the county of suit, if properly described in the bill of complaint, on the filing of the bill, so far as concerns the pursued defendant; and he may have a lien *lis pendens* upon all property, so described, as against bona fide purchasers and encumbrancers, for value, upon registration of an abstract of the claimed lien as provided by this Code.

Similarly, section 20-301, which also prescribes registration of an abstract of the claimed lien, provides that "until the same is so filed, so far as concerns the rights of bona fide purchasers and encumbrancers, for value, of the realty, or any interest therein, they shall not be affected."

The court interpreted both of these sections as requiring registration of an abstract only against bona fide purchasers and encumbrancers, and not against existing creditors. This seems consistent with the statutes, except perhaps the language of section 26-604 which provides: "The creditor has a lien . . . on the filing of the bill, so far as concerns the pursued defendant . . ." (Emphasis added.) The reading given this section by the court is that "the filing of the bill in this case, fastened on this lot a lien *lis pendens* against the debtor, his creditors and all other persons except bona fide purchasers for value and bona fide encumbrancers for value."<sup>4</sup>

The court also held that the purchaser at an execution sale cannot be regarded as a bona fide purchaser for value, and that redeeming creditors under section 64-808 acquire no greater rights than the purchaser from whom they redeem.

An interesting fraudulent conveyance question is considered in *Womack v. Caldwell*.<sup>5</sup> The facts as found by the chancellor were that in late 1957 defendant Caldwell entered into an oral agreement with his married daughter to convey his home to her, on condition that she give up her own home, move in with him and make a home for him. Early in 1958 the daughter and her family did move into her father's home. In March 1959 defendant was involved in an auto accident, and shortly thereafter he had prepared and executed a deed conveying the property to his daughter. The deed recited as consideration the assumption of a mortgage on the home and the agreement of the daughter to furnish grantor a home for the remainder of his life. Thereafter complainant sued and obtained a judgment against the father for damages resulting from the collision. Only a part of the judgment was paid, and action was brought to set aside as fraudulent the conveyance to the daughter. The chancellor held the conveyance was not

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4. 346 S.W.2d at 271. (Emphasis added.)

5. 349 S.W.2d 795 (Tenn. App. E.S. 1961) (the western section sat in the eastern section).

fraudulent, and the court of appeals affirmed.

The decision is based primarily upon the concept that an oral agreement which is validated by execution of the deed "is good from its inception."<sup>6</sup> Applying this reasoning, the court held that the question of whether the conveyance was fraudulent should be determined as of the time of the oral agreement. At that time defendant had no creditors and the conveyance did not render him insolvent.

When the deed was executed, complainant was a creditor within the meaning of the Uniform Fraudulent Conveyance Act,<sup>7</sup> although he held only an unliquidated tort claim. If determined as of this time, therefore the conveyance probably was fraudulent. The act makes fraudulent any conveyance for which no fair consideration is received, if the effect of the conveyance is to render the grantor insolvent, even though there is no actual intent to defraud.<sup>8</sup>

An agreement to support is generally held not to be a fair consideration<sup>9</sup> because it does not constitute an asset readily available to creditors of the grantor. Therefore, if the grantor is insolvent or is rendered insolvent by the conveyance, a conveyance in consideration of an agreement to support is stated to be fraudulent as a matter of law.<sup>10</sup> Nor is an additional promise to assume a mortgage fair consideration unless the liability assumed exceeds the value of the asset conveyed.<sup>11</sup>

The court suggests, without deciding, that possibly defendant was not rendered insolvent by the conveyance since he apparently had a \$6,000 insurance policy to apply to his potential liability.<sup>12</sup> A decision to this effect seems unlikely in view of the majority rule that a prima facie case is made by showing a conveyance without a fair consideration at a time when grantor is indebted, which stands until rebutted by evidence tending to show the grantor's remaining property was sufficient to pay his debts.<sup>13</sup>

As the conveyance in question was probably fraudulent if tested as of the time of execution of the deed, the correctness of the decision depends upon the validity of the court's dual premises that a valid oral agreement once validated is good from its inception, and that the test of fraudulence should be applied as of the date of the oral agreement.

Several Tennessee decisions are cited in support of the first premise, and

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6. *Id.* at 800.

7. TENN. CODE ANN. §§ 64-308 to -321 (1956).

8. TENN. CODE ANN. § 64-312 (1956).

9. GLENN, FRAUDULENT CONVEYANCES § 277 (rev. ed. 1940). *Accord*, Scarborough v. Pickens, 26 Tenn. App. 213, 170 S.W.2d 585 (E.S. 1942); Cooper v. Cooper, 22 Tenn. App. 473, 124 S.W.2d 264 (M.S. 1938).

10. GLENN, *op. cit. supra* note 9.

11. *Id.* § 286(a); 37 C.J.S. *Fraudulent Conveyances* § 153 (1943). See also Cooper v. Cooper, 22 Tenn. App. 473, 124 S.W.2d 264 (M.S. 1938).

12. 349 S.W.2d at 800, 801.

13. GLENN, *op. cit. supra* note 9, § 271.

it seems clear that the rule is appropriate for some purposes. But the Tennessee decisions do not always apply the rule denying third parties the right to raise the defense of unenforceability. The most recent decision in support of the rule cited in the instant case in fact held that a purchaser under an unenforceable oral contract to buy realty did not have an insurable interest in the realty.<sup>14</sup> As the rule is not rigidly applied, the question becomes one of the desirability of its application.

Assuming the facts to be as found by the chancellor, there was no fraudulent intent on the part of the defendant at the time of the oral agreement. But should a defaulting creditor be allowed to introduce evidence of a claimed prior oral agreement, where the writing necessary to enforceability was not executed until after an obligation, although a contingent one, accrued? Where the conveyance is to a member of the grantor's family, the possibility of actual fraud is evident. The court in the present case relied on the fact that the daughter moved into her father's house as evidence of the oral agreement. But such moving can also be consistent with a sense of devotion, moral obligation, or even anticipation of inheritance.

On petition to rehear, it was claimed that the instant case is in conflict with the opinion of the middle section of the court of appeals in the case of *Cooper v. Cooper*.<sup>15</sup> The only answer given was that a question of conflict in opinions is a matter for consideration of the court en banc.

The *Cooper* case and the instant case have some facts in common, but seem distinguishable. In the *Cooper* case the conveyance was made to a son in consideration of a promise to support plus a promise to pay a contingent liability of the grantor. The conveyance was held to be fraudulent because made without a fair consideration. But there was no claim of an oral agreement to convey which preceded the execution of the deed. If the reasoning of the court in the present case is correct, the prior oral agreement to which relation back may be made is clearly a basis for distinguishing this case from the *Cooper* case.

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14. *Cherokee Foundries, Inc. v. Imperial Assur. Co.*, 188 Tenn. 349, 219 S.W.2d 203 (1949). See also *Evans v. Mayberry*, 198 Tenn. 187, 278 S.W.2d 691 (1955) (denying recovery for inducing breach of an oral contract to sell land).

15. 22 Tenn. App. 473, 124 S.W.2d 264 (M.S. 1938).