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Fraudulent Conveyances - Remedies of Creditors and Purchasers - Attachment

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NOTES

FRAUDULENT CONVEYANCES — REMEDIES OF CREDITORS AND PURCHASERS — ATTACHMENT. — The law of fraudulent conveyances has always been complex and difficult, bristling with unresolved problems. Not least among these has been the question of when an attachment is authorized in tort cases against the property of one who makes a fraudulent conveyance. The issue presented is well illustrated by the case of *Republic of Italy v. De Angelis*,[1] in which a partnership composed of De Angelis and his wife owned a packing plant and leased it to the De Angelis Packing Company, Inc., a closed corporation of which De Angelis was also the chief stockholder. De Angelis then acquired a controlling interest in another meat-packing concern, Adolf Gobel, Inc., a clause of the sale contract providing that the partnership of which De Angelis was a member would cancel the lease to the plant to De Angelis Packing Company, Inc., thus automatically putting it out of business. The plaintiff, whom the De Angelis Packing Company, Inc., had agreed to supply with a large amount of tallow, was left upon the cancellation of the lease and subsequent dissolution of the corporation holding contracts executed by a non-existing firm.[2] It sued De Angelis, his wife, and their partnership in tort for inducing a breach of contract, obtained an attachment of individual and partnership property on the ground that defendants had tortiously induced the breach of contract by cancelling the lease and had assigned, disposed of, or secreted its property with intent to defraud its creditors.[3]

The defendants moved to vacate the attachment, arguing that actual intent to defraud had not been shown and was necessary to a valid attachment under New York's Civil Procedure Act.[4] It was held, however, that the plaintiff's attachment was valid under the provisions of the Uniform Fraudulent Conveyance Act, adopted in New York,[5] which requires only a showing of constructive intent to defraud to authorize an attachment.

Previous New York cases had held that under the Act a fraudulent conveyance could be set aside by a bill in equity.[6] This case would

1. 206 F.2d 121 (2d Cir. 1953).
2. The effect of these rather complicated transactions, so far as the plaintiff was concerned, was a net loss of approximately $800,000.
3. N.Y. Debtor and Creditor Law §§273, 275, 277, 278 (1) (b).
4. §903, subd. 3.
5. N.Y. Debtor and Creditor Law, §§270-281.
6. Sabatino v. Cannizzaro, 243 App. Div. 20, 275 N.Y.S. 677 (1934); Brody v. Pecoraro, 250 N.Y. 56, 164 N.E. 741 (1928).

appear to be the first adjudication construing the direct attachment provision of the Uniform Fraudulent Conveyance Act as permitting an attachment independent of the general statute regulating the remedy.[7]

But the general problem has a long and troublesome history. The practice of a debtor placing property beyond the reach of creditors is an old one. The most famous early law dealing with the problem was the *Statute of 13 Elizabeth,*[8] which provided that every conveyance made to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions would be void. At common law, in jurisdictions that did not have statutes such as this, only those creditors whose claims were in existence at the time a conveyance was made could attack it.[9] Not until the advent of statutes like the English Statute, which included the words "and others," did the courts bring subsequent creditors within the rule.[10]

Fraudulent transfers have always defied exact description or definition because of three characteristics: (1) the absence of any well recognized, definite conception of insolvency, (2) failure to make clear the persons legally injured by a given fraudulent conveyance, (3) the attempt to make the Statute of Elizabeth cover all conveyances which wrong creditors, even though the actual intent to defraud does not exist."[11] The essence of a fraudulent conveyance is the diminution of the debtor's assets, so that the creditor has less property against which he can proceed for the satisfaction of his claim.[12] In general, a conveyance made by a debtor who is insolvent, or who thereby is rendered insolvent, is prima facie fraudulent.[13]

The classic decision which set the first standards of what constitutes fraudulent intent was *Twyne's Case,*[14] decided in 1601. It held a secret transfer of sheep with retention of title in the vendor was fraudulent. The court said for such a transfer to be valid it must be based on good consideration and bona fide. Bona fides

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7. N.Y. Debtor and Creditor Law §278, gives a creditor with a mature claim the following options: (a) Have the conveyance set aside or the obligation annulled to the extent necessary to satisfy his claim, or (b) Disregard the conveyance and attach or levy execution upon the property conveyed.
8. 13 Elizabeth c. 5(1570).
9. Burgett v. Burgett, 1 Ohio 469 (1842).
10. 1 Glenn, Fraudulent Conveyances and Preferences, §317 (rev. ed. 1940).
11. 9A U.L.A. 43 (1951).
12. Lynch v. La Fonte, 371 F. Supp. 499, 503 (S.D. Calif. 1941).
13. Nicholson v. Scott, 50 F. Supp. 209, 212 (E.D. Mich. 1934).
14. 30 Coke 806, 76 Eng. Rep. 809 (1601).

require openness of dealing rather than secrecy, transfer in specific satisfaction of a particular debt, and immediate delivery of possession.[15]

A person is insolvent for the purposes of the Uniform Act, when the present fair salable value of his assets is less than the amount of his liability on his existing debts as they fall due.[16] Fair consideration or payment for a transfer of property requires reasonable proportion between what is given and what is received, and may include the satisfaction of an antecedent debt.[17] In general, if the conveyance renders the debtor insolvent and there was inadequate consideration, the conveyance is fraudulent.[18] Persons about to engage in a new business[19] or incur new debts[20] for which their remaining assets are insufficient, can be shown to have made a fraudulent transfer.

Actual intent to place property beyond the reach of justified claims where it can be proved, is clearly fraudulent, both as to present and future creditors.[21] Many courts say that certain types of transactions amount to "badges of fraud" and give rise to a presumption of lack

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15. *Id.* at 814, 76 Eng. Rep. at 817.

16. Uniform Fraudulent Conveyance Act, §2(1), 9A U.L.A. 53 (1951); N.D. Rev. Code §13-0203 (1943) "1. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured"; See Carter v. Carter, 130 P.2d 186 (Cal. App. 1942).

17. Uniform Fraudulent Conveyance Act, §3, 9A U.L.A. 57 (1951); N.D. Rev. Code §13-0203 (1943) "Fair consideration is given for property, or obligation: 1. When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or 2. When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained." See Nicholson v. Scott, 50 F. Supp. 209 (E.D. Mich. 1943).

18. Uniform Fraudulent Conveyance Act, §4, 9A U.L.A. 73 (1951); N.D. Rev. Code §13-0204 (1943) "Every conveyance made and every obligation incurred by a person who is or thereby will be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." See Bowery v. Vines, 178 Tenn. 98, 156 S.W.2d 395 (1941).

19. Uniform Fraudulent Conveyance Act, §5, 9A U.L.A. 90 (1951); N.D. Rev. Code §13-0205 (1943) "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent." See Kearny Plumbing Supply, 151 Atl. 873 (N.J. Ch. 1930).

20. Uniform Fraudulent Conveyance Act, §6, 9A U.L.A. 92 (1951); N.D. Rev. Code §13-0206 (1943) "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." See McBride v. Bertsch 58 F.2d 797 (W.D. Mich. 1930).

21. Uniform Fraudulent Conveyance Act, §7, 9A U.L.A. 93 (1951); N.D. Rev. Code §13-0207 (1943) "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." See Henderson v. Kendrick, 72 Minn. 253, 75 N.W. 127 (1898); see also 3 Pomeroy, Equity Jurisprudence, 879 (5th ed. 1943).

of good faith.[22] Two of these "badges" have resulted in statutory enactments in many jurisdictions: The retention of possession of goods by insolvent debtors who have secretly conveyed them away so often defrauded creditors that they brought on the enactment of recording acts, and bulk sales acts were passed to regulate the entire sale of goods in stock to one buyer.[23]

Conveyances of partnership property which result in partnership insolvency are fraudulent if made to a partner or to an outsider if made without fair consideration.[24] The Uniform Act definitely provides against the necessity that a claim be liquidated. Proceedings can be brought prior to judgment.[25] Creditors with mature claims, except as against bona fide purchasers for value without notice and their assignees, have an option. They may either (a) have the fraudulent conveyance set aside in equity,[26] or (b) disregard it and attach or levy execution.[27]

The Uniform Fraudulent Conveyance Act was approved by the National Conference of Commissioners of Uniform State Laws, in

22. Burkhalter v. Glennville Bank, 184 Ga. 147, 190 S.E. 644 (1937); Schreiber Milling and Grain Co. v. Nutrena Mills, 149 Kan. 276, 87 P.2d 577 (1939); Farrell v. Paulus, 309 Mich. 441, 15 N.W.2d 700 (1944); Bentley v. Caille, 289 Mich. 174, 286 N.W. 163 (1939); Hendrix v. Goldman, 92 S.W.2d 733, 736 (Mo. 1936) ". . . fictitious consideration, false statements as to consideration, transactions different from usual course of doing business, transfer of all of a debtor's property, insolvency, confidential relationship of the parties, and transfers in anticipation of suit or execution, and though none of these things alone proves fraud, they warrant inference of fraud, especially where there is a concurrence of a number of them."

23. 1 Glenn, Fraudulent Conveyances and Preferences, §305 (rev. ed. 1940).

24. Uniform Fraudulent Conveyance Act, §8, 9A U.L.A. 121 (1951); N.D. Rev. Code §13-0208 (1943) "Every conveyance of partnership property and every partnership obligation incurred when the partnership is or thereby will be rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred: 1. To a partner, whether with or without a promise by him to pay partnership debts; or 2. To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners." See Liebowitz v. Arrow Roofing Co., 259 N.Y. 391, 182 N.E. 58 (1932). The plaintiff in the De Angelis case claimed that this section was violated, in that partnership assets were used to reduce De Angelis' personal obligation to a bank. The court agreed and the attachment on the partnership property was allowed to remain in force, pending outcome of the suit.

25. Uniform Fraudulent Conveyance Act, §10, 9A U.L.A. 141 (1951); N.D. Rev. Code §13-0210 (1943) "Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in the district court against any person against whom he could have proceeded had his claim matured, and the court may: 1. Restrain the defendant from disposing of his property; 2. Appoint a receiver to take charge of the property; 3. Set aside the conveyance or annul the obligation; or 4. Make any order which the circumstances of the case may require."

26. Zakheim v. Dry Harbor Homes, 245 App. Div. 769, 281 N.Y.S. 153 (1935); Anderson v. Stribling, 160 Tenn. 453, 26 S.W.2d 131 (1930).

27. Uniform Fraudulent Conveyance Act, §9, 9A U.L.A. 122 (1951); N.D. Rev. Code §13-0209 (1943) "Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser, may: 1. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or 2. Disregard the conveyance and attach or levy execution upon the property conveyed. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment."

1918.[28] It represented an attempt to codify and modernize the *Statute of Elizabeth.*[29] To date twenty states have adopted the Uniform Act. [30] When North Dakota revised their Code in 1943, the Uniform Fraudulent Conveyance Act was included.[31] The Statute spelled out what was already part of our existing law.[32] The Code Revision Committee said in a prefatory note to Chapter 13-02: "S.S. 1939, c.110, the Recodification Act, requires the Code Revision Commission to make the statutory law conform to the declaratory law, and the Commission feels that because of this provision of the 1939 Act, it should recommend the Uniform Fraudulent Conveyance Act for adoption to include in the Code various rules which have been established by judicial decisions."[33]

In addition to Chapter 13-02, which enacted all but the last three sections of the Uniform Act, Chapter 13-01[34] also deals with fraudulent conveyances. It was allowed to remain in the Code, although 13-02 in effect repealed this former section. To avoid confusion, Chapter 13-01 should probably be formally repealed.

Before the Uniform Act, the general rule was that tort claimants were denied any remedies,[35] without first obtaining a judgment.[36] Some authority[37] can be cited to show that the Act can be used to set aside a fraudulent conveyance, before judgment, in tort cases. The theory here advanced is that a tort claimant is a creditor whose claim has not matured.[38] The court in the *De Angelis* decision has now allowed a remedy to a tort claimant, as a matured creditor.[39] A tort claimant in New York can thus disregard a fraudulent conveyance and attach the property conveyed, previous to judgment. It could be argued that this will result in property being unjustifiably attached on frivolous tort claims. But in such cases the courts should move quickly to dissolve the attachment where the plaintiff cannot establish a prima facie case.

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28. 9A U.L.A. 42 (1951).
29. Kline v. Inland Rubber Corp., 194 Md. 122, 69 A.2d 774 (1949).
30. 9A U.L.A. 42 (1951).
31. N.D. Rev. Code c. 13-02 (1943).
32. Walker v. Connell, 63 N.D. 622, 249 N.W. 726 (1933).
33. See notes of Code Revision Commissioners, to c. 13-02 of the North Dakota Revised Code (1943).
34. §§13-0101 to 13-0113, N.D. Rev. Code (1943).
35. Sonnesyn v. Akin, 12 N.D. 227, 97 N.W. 557 (1903). But many jurisdictions allowed attachment in cases where the defendant was a non-resident. See Moen v. Melvin, 57 N.D. 630, 223 N.W. 702 (1929). See also 2 So. Calif. L. Rev. 480 (1929).
36. 1 Glenn, Fraudulent Conveyances and Preferences, 81 (rev. ed. 1940).
37. *See* Underwood et al. v. Krotman et al., 193 Misc. 309, 84 N.Y.S. 2d 431 (1948); Babcock v. Tam, 156 F. 2d 116 (9th Cir. 1946).
38. See note 25 *supra.*
39. See note 27 *supra.*

The *De Angelis* case is of special interest because of the dissent.[40] Judge Chase agreed that a prima facie case had been made, showing that the partnership had tortiously induced the breach of contract by the corporation. But he did not believe attachment should be permitted under the facts of the case. The view of the dissent was that, assuming a fraudulent conveyance could be attacked by attachment under the Act, such proceedings would still have to be brought under the provisions of the New York Civil Procedure Act, Section 903, on attachment remedies.[41] This would in effect give the *right* under the Act, but compel the litigant to get his *remedy* from without the Uniform Act. This view seems to possess the disadvantages that the creditor would then be forced to pursue his remedy without the benefit of the well defined presumptions as to intent outlined in the Act. He would thus be required to prove "actual" intent to defraud his creditors, before he could avail himself of the remedy of attachment. The general rule is that mere constructive fraud does not ordinarily warrant an attachment,[42] and proving actual fraudulent intent to justify an attachment can at times be very difficult.[43]

The *De Angelis* case interprets New York Statutes which are very similar to those of North Dakota.[44] If New York had followed the dissent in the case, the Uniform Act would have found a fraudulent conveyance, but then, the claimant would have had to resort to the attachment statute in order to bring the property under the jurisdiction of the court. This would have brought the law back to the dilemma of whether or not the intent of the conveyor justified attachment. In view of the unfortunate consequences which would

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40. *See* 206 F. 2d 121, 132 (2d Cir. 1953) (dissenting opinion).

41. N.Y.C.P.A. §903 requires in order to warrant attachment, in §3 that "If a natural person or domestic corporation, has removed or is about to remove property from the state *with intent* to defraud his or its creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of . . ." The intent required is that of actual intent. See Casola v. Vasquez, 147 N.Y. 258, 41 N.E. 517 (1895).

42. Page v. Steinke, 60 N.D. 685, 236 N.W. 261 (1931); Millang v. Lambros, 90 Misc. 638, 153 N.Y.S. 944 (1915); Harris v. Spencer, 130 Minn. 141, 153 N.W. 125 (1915).

43. 38 Yale L. J. 822 (1929).

44. Both states have the Uniform Fraudulent Conveyance Act. The Court held there was a fraudulent conveyance and that an attachment could be sustained by using the following statutes in this order: N.Y. Debtor and Creditor Laws, §§273, 275, 277, and 278. North Dakota has identical statutes: §§13-0204, 13-0206, 13-0208 and 13-0209, N.D. Rev. Code (1943). The New York Attachment statute, N.Y.C.P.A. 903 (note 41 *supra*), is basically the same as North Dakota §32-0801, N.D. Rev. Code (1943). North Dakota also requires "actual" intent under this law, as shown in Gamble-Robinson Minot Co. v. Mauratis, 55 N.D. 616, 214 N.W. 913 (1927).

follow adoption of the dissent, it is to be hoped that North Dakota will follow the rule of this case.[45] GORDON THOMPSON.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — THE DOCTRINE OF COMPARATIVE NEGLIGENCE. — There is a pronounced trend in this country today toward the adoption of damage apportionment or "comparative negligence" acts. In 1951, for instance, legislation to that effect was introduced in sixteen states.[1] The reason for the present trend probably lies in the great post-war increase in automobile accidents, the litigation arising therefrom, and the corresponding need for aiding the uncompensated victims. In view of the growing prominence of the doctrine of comparative negligence, it seems desirable that any discussion of it should include at least some background, by way of a brief treatment of the doctrine of contributory negligence, its modifications and the beginnings of comparative negligence—followed by a judicial and legislative history of the doctrine of comparative negligence, as well as a discussion of some of the problems it entails.

Contributory Negligence

The doctrine of contributory negligence was born with the English case of *Butterfield v. Forester.*[2] Plaintiff, riding away from the public tavern at a furious pace, failed to observe a pole the defendant had left lying across the road and rode into it. He was subsequently disallowed recovery for his injuries on the theory that he had contributed to his own harm by failing to use common and ordinary caution.

In 1824 the doctrine was accepted in America.[3] It has operated, essentially, to preclude a plaintiff from recovery where his act contributed as an efficient or "proximate" cause to his own injury.[4]

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45. Care must be used in the preparation of the pleadings, in order to bring the action within the provisions of the Uniform Fraudulent Conveyance Act. In the case of Irwin v. Meese, 325 Mich. 344, 38 N.W.2d 867 (1949), an equitable action was brought to enjoin the transfer of assets, previous to the adjudication of a tort claim. Plaintiff's counsel evidently overlooked the Uniform Act in the theory of the case, for the Act, in effect in Michigan at the time, was not pleaded. The Supreme Court of Michigan refused to enjoin the transfer, although it was perfectly obvious that if the Uniform Act had been pleaded, the transfer would have been ruled a fraudulent conveyance.

1. Prosser, *Comparative Negligence*, 41 Calif. L. Rev. 1 n.1, citing Lipscomb, *Comparatice Negligence*, 344 Ins. L.J. 667. The sixteen states are: Arizona, Arkansas, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah and Washington.

2. 11 East 60, 103 Eng. Rep. 926 (1809).

3. Smith v. Smith, 19 Mass. 621 (1824).

4. Cleveland Ry. Co. v. Halterman, 22 Ohio App. 234, 153 N.E. 922 (1926); McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74 (1901).