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Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*

DEFAULTING debtors are apparently as old as the institution of property and that may be almost, if not quite, as old as human society itself. And the fraudulent debtor, the one who strips himself of his property so that his creditor may not get his debt paid, is also an ancient phenomenon. Not only was he well-known to the Roman law, but the terminology used to describe his offense is taken bodily from the Roman law, where *fraus creditorum* was an elaborately developed nominate tort.¹

The Roman law was quite precise as to the theory on which it proceeded. It based the right of the creditor to recover the property conveyed, not on any interest the particular creditor had, but on the general public advantage of facilitating payment of debts. Besides the power which the creditor had to enforce his claim against the property actually owned or possessed by the debtor, he was given the additional power to enforce his claim against the property which the debtor had deliberately got out of his possession, *quod dolo malo fecit quo minus possideret*.² It is regrettable that when the Roman phrase "fraud on creditors" was imported into the common law, it was not imported *cum pertinentiis suis*. A great deal of confusion might have been spared.

The fraudulent debtor, the malicious, covinous, collusive and guileful debtor, to paraphrase the words of the Statute of Elizabeth, whose "end, purpose and intent, [is] to delay, hinder or defraud creditors and others of their just and lawful . . . debts," was also well known to medieval and feudal society. The earliest examples in the common law of an attempt to avoid the fulfillment of obligations were those many devices whereby, in feudal times, efforts were made to evade the due and legitimate claims of feudal estates. In a sense,

* The Uniform Act appears in full, *infra* pp. 13, 14.

¹ Cf. BUCKLAND, TEXTBOOK OF ROMAN LAW (2d ed. 1932) 591 *et seq.*, and my HANDBOOK OF ROMAN LAW (1927) 153-154. See also my article, *Fraudulent Conveyances at Roman Law* (1931) 18 VA. L. REV. 109.

² The phrase is found in the Edictum Perpetuum; cf. LENEL, DAS EDICTUM PERPETUUM (3d ed. 1927) 424 *et seq.*; DIG. 10, 4, 9, pr.; 14, 4, 7, 2.

Quia Emptores is itself directed at this kind of evasion and if we are to believe the preamble of the Statute of Uses, that great institution, the use or trust, was as much a means of keeping feudal landlords from what belonged to them, as a means of effecting equitable and charitable ends.

When in the sixteenth and seventeenth centuries the mercantile classes became more fully a part of English society than they had ever been before, the group of moneyed men who were getting into the habit of taking their controversies to Westminster, to the great enhancement of fees and profits of the cursitors, attendants and counsel attached to the King's Courts,—entered these precincts in what might be called the upper reaches of legal discussion. They found their interests affected by the same difficulties as those which had formerly hampered those of the great landlords of the early common law.

The famous Statute of 13 Elizabeth, passed in 1571,³ reenacted many of the provisions and repeated many of the words of statutes of Henry VIII and Edward III, but it laid emphasis on the facts that the men primarily hampered by these practices were the moneyed men of the community, the creditors, who precede "others", in the recital of those for whose benefit the Statute was passed.⁴ These creditors were all the more in need of protection, because they were in general men whose acquaintance with the thousand pitfalls of the system of tenures perfected by the English feudal lawyers, was relatively slight.

The Statute of Elizabeth not only declared all transactions in fraud of creditors to be void, but likewise established criminal penalties, which, however, were rarely enforced. Its many successors abandoned criminal sanctions for the most part—not completely, of course—and attempted to secure the desired result in the Roman fashion, by facilitating the creditor's efforts to satisfy his claim out of property apparently removed from his immediate reach.

The complete displacement of a feudal economy in modern times by one based almost exclusively on a vastly expanded and intricate system of money-credits, has made protection of the creditors even more necessary than before. The Statute of Elizabeth was couched

³ 13 Eliz. (1571) c. 5. It was formally repealed by the Law of Property Act, 15 Geo. V (1925) c. 20, § 172, p. 761. 15 HALSBURY'S STATUTES OF ENGLAND (1930) 355-357. For its effect, cf. 15 HALSBURY'S LAWS OF ENGLAND (Hailsham, 2d ed. 1934) 273.

⁴ The statute is examined by Holdsworth, in 4 *History of English Law* (1924) 480, as a special application of land law. That fraudulent debtors attempted to evade their debts by seeking sanctuary was an ancient and well-known abuse. 3 *ibid.* (3d ed. 1923) 305-306.

in fairly general terms, and the types of fraud it had in mind were limited and easily recognized. But the complications arising out of a financial and industrial system, as interwoven and labyrinthine as ours, have demonstrated the inadequacy of general prohibitions.

During the nineteenth century the debtor groups in the United States were openly favored by legislative changes. Execution against the person in ordinary cases was abolished. An increasing number of exemptions was provided. Discharge in bankruptcy was much facilitated. This met the needs of newer communities in which enterprise and speculation—even rash speculation—could not be dispensed with and in which severity of enforcement against debtors would act as a marked impediment to growth.

But the twentieth century discovered a decided shift in the incidence of the credit burden. The facilities of total or partial discharge of debts involved in the bankruptcy system, supplemented by a great many methods of private adjustment, were complicated by mobility of population and by the fact that various forms of production were separated by large distances and that often three or four middlemen were needed to effect the interchange of commodities. All this tended to further complications of credit and to become an increasing burden on solvent debtors, who had to bear the losses caused by insolvents, since these losses entered into the price of commodities.

A movement in the direction of safeguarding creditors led to many changes in the law, some by statute and some by judicial decision. The two most striking examples of this tendency were the "bulk-sale" laws which have been passed in every state and some territories, and the Uniform Fraudulent Conveyance Act, which has now been passed by sixteen states, including New York, New Jersey, Pennsylvania and Massachusetts.

California in 1903 passed a bulk-sales act which in the main followed that of other states. It has been three times amended, in 1917, 1923 and 1925. The protection afforded by such measures was at first somewhat problematical. In most instances, they were enacted at the instance of credit men's associations. But they have been shown to be effective and of real value, and have not, as was once feared, unduly favored one group in the community at the expense of another.

But California has not passed the Uniform Fraudulent Conveyance Act and it may well be said that there is almost no branch of the law in the state that is more confused and uncertain.

The law of fraudulent conveyances in California⁵ is, so far as it has been statutorily expressed, to be found in sections 3439, 3440, 3441, 3442 of the California Civil Code. To this may be added, so far as transfers of realty are concerned, sections 1227, 1228, which, however, are kept within the strictly feudal range of purchasers and encumbrancers. There are also sections 154, 155, and 531 of the Penal Code. The entire statutory provision does not go beyond the Statute of Elizabeth—even the words “creditor or other persons” are repeated.

That this is quite inadequate for the purposes of modern commerce is apparent. Section 3439 requires an intent to delay or defraud, and section 3441 insists that fraud is a question of fact,⁶ and that the mere circumstance that the transaction was gratuitous is not enough. This statement, however,—and clumsily enough—is at once qualified by a proviso in section 3442: “that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.”

That is to say, in California, three groups of persons are protected. One consists of creditors existing at the time of the transfer.⁷ The second consists of prior or subsequent encumbrancers of land for value without notice. Both of these are protected, first when the transfer is intentionally “fraudulent” and secondly, when it is made by a person who is insolvent or who contemplates insolvency to one who takes it without valuable consideration. The third consists of

⁵ The first fraudulent conveyance act was passed in 1850. Cal. Stats. 1850, p. 266. It contains in chapter II, many of the provisions usually found in the Statute of Frauds.

⁶ The confusion of the law cannot be better illustrated than by the frequently quoted case of *Bull v. Bray* (1891) 89 Cal. 286, 26 Pac. 873. In that case it is solemnly asserted that intent is a question of fact and that the fact may be conclusively presumed.

⁷ The distinction between existing and subsequent creditors is sharply drawn in many California cases. The two most frequently cited in this connection are *Schell v. Gamble* (1908) 153 Cal. 448, 95 Pac. 870, and *Bush & Mallett Co. v. Helbing* (1901) 134 Cal. 676, 66 Pac. 967. In the former case, which will be mentioned again in another connection, the creditor was declared to have been specifically in the mind of the debtor. Relief was denied. In the latter, relief was granted on an allegation that future creditors were in the mind of the debtor, although the proof falls short of pointing to the plaintiff. Both these cases are cited and followed in a clear statement of the California law in *Barr v. Roderick* (N. D. Cal. 1925) 11 F. (2d) 984. The opinion was written by Justice Kerrigan who had long been on the California bench. In this case the creditors complaining were assignees of creditors existing at the time of the transfer. The complaint, however, specifically alleged a fraud against the assignees.

subsequent creditors whom it was the debtor's deliberate intention to deprive of the means of enforcing their claims.⁸

It will be seen that while only "existing" creditors are protected in the case of debtors who are insolvent,⁹ it is different with purchasers and encumbrancers of land. In this group, the words "prior and subsequent" are used or implied, a fact which is quite in accordance with feudal tradition. There is, of course, nothing but the tradition itself that can justify putting this latter group in a preferred position, but the fact that in this preferred group, subsequent encumbrancers and purchasers are specially mentioned ought to make clear that the discussion of fraudulent conveyances has been based on a misconception.

This misconception itself derived from the word "fraud". The Statute of Elizabeth had in mind malicious and deliberate overreaching, but that the general idea of "fraud on creditors" necessarily implied malice or fraud, is demonstrably wrong. The Statute of Elizabeth is merely one in a series of statutes which meant to protect rightful interests from being destroyed or frustrated, and the basic notion is not that of keeping men from being tricked into an imprudent bargain, but of giving creditors all that in equity and good conscience they ought to have.

It cannot be borne in mind too frequently that we are not dealing with estoppel: Most of the "badges of fraud" in *Twyne's* case have, to be sure, a coloring of estoppel, but it will be noticed that the essential element of estoppel, the reliance on the false appearance, is in these "badges" not found as a fact, but is merely presumed. It is true that whoever has notice of the conveyance is not protected. But it does not work the other way. The fact of reliance is no part of the claim for relief. A creditor who gives credit with specific knowledge that the debtor had previously conveyed some of his property, may be taken to have waived all recourse to that particular property. Or, better, we may say he takes for granted that he will

⁸ The Code Commissioners in their note to section 3439 state that a transfer with fraudulent intent is void as to subsequent creditors, "even though intended to defraud prior creditors only." 2 CAL. CIV. CODE (Ann. ed. by Haymond & Burch, 1872) 451. It is hard to see why this should be the case unless the rule in *Freeman v. Pope* (1870) L. R. 5 Ch. App. 538, is adopted.

⁹ Whether the rule of *Freeman v. Pope*, *ibid.*, that subsequent creditors may avoid the conveyance, if there is an existing creditor who could have done so, prevails in California, is not quite clear. The rule is generally repudiated in the United States. Cf. *Brun-
dage v. Cheneworth* (1897) 101 Iowa 256, 70 N. W. 211; GLENN, FRAUDULENT CON-
VEYANCES (1931) 432-434.

not be able to satisfy his claim out of such property. A creditor who does not know whether the debtor had any specific property or not, has not relied on it or foregone recourse to it. The essential thing is that the debtor has acted improperly, not that the creditor has been misled.

If we deal with the realities of modern society, it becomes plain at once that no actual reliance can be predicated of the creditor in the case of most business transactions. Business is done too feverishly and rapidly today to make it possible to assume as a fact that every obligor takes the pains to examine the existing holdings of the other party to the transaction and to enter into relations with him or decline to do so, in the understanding that these holdings are not to be impaired until the debt is paid. Whenever there is such a state of mind, the obligor asks unmistakably for security. We might properly assert that in fact and reality credit is today extended chiefly on general reputation and that most unsecured creditors do not know much about the actual property of their debtor, and rarely attempt to find out. Certainly they have no reason to demand, unless they insist on being secured, that the debtor will deal prudently and circumspectly with his property, for the express purpose of being able to pay his obligations when they mature. The creditor cannot reasonably expect this, even when he assumes good faith, since he knows that urgencies and pressures exist or may come into existence which will completely change the attitude and conduct of the men with whom he deals.

There is no reason either in history or in fact for resting the doctrine of fraudulent conveyance on estoppel or anything approaching it. It is purely a matter of equitable interposition. When an obligation becomes due, the creditor is allowed firstly to enforce it against all the nonexempt property of his debtor and secondly against all the property the debtor would have had, if he had acted equitably, provided, of course, that this property can be recovered.

Estoppel is an important and fruitful equitable idea, but it should be treated as a reality and not as a pretense or a ghost. In transactions involving transfers of title with retention of possession, whether under the Bulk Sales Act or not, as in transfers of property with a secret agreement to reconvey, the doctrine of estoppel should not be invoked unless it is actually present. A holding out, or what in reasonable contemplation seems to be a holding out, added to reliance on the apparent availability of the property for the satisfaction of debts—when we have these two factors, present in fact and

not implied or presumed or imagined—we may speak of something like an estoppel and we may deny to those who have permitted the appearance to exist, the right to assert claims which contradict this appearance.

But there is no reason for making the appearance or the reliance the rationale of the protection of creditors against fraudulent conveyances or transfers. The Roman law, the medieval and the modern law have recognized the existence of two funds from which creditors may satisfy obligations. One fund was already in existence. This is the actual property of the debtor at the time the judgment becomes effective. The other consists of the property which the debtor would have had at that moment, if he had not in one way or another disposed of it against equity and ordinary fairness, *quodque dolo malo fecit quo minus possideret*, to use the words of the Roman Edict which first formally established this additional fund. It is a free gift of the law to creditors. It is based on a general purpose of increasing the occasions on which they can get their debts paid.¹⁰

The question therefore is not whether the creditor has been induced to give the credit by the misleading artifices of the debtor, but whether the debtor has acted unfairly in disposing of his property. Unfairness is present (a) when there is a deliberate intention that a particular creditor or a group of creditors shall not be paid;¹¹ and (b) when the debtor has, with or without such a deliberate intention, gratuitously disposed of so much of his property that he has not enough left to pay his debts. There is no unfairness merely in an arbitrary selection of creditors to be paid, although both the debtor

¹⁰ That the purpose of the law is the creation of an additional fund out of which the creditor may satisfy himself, and not the mere desire to help an over-reached creditor is abundantly shown by such cases as *Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 173, 213, 152 Pac. 542, 559, and the case of *First National Bank v. Maxwell* (1899) 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64, there cited. This has been recently affirmed in *Fross v. Wotton* (1935) 3 Cal. (2d) 384, 44 P. (2d) 350. In both these cases if fraud is made out, the property conveyed may be reached by creditors, even though other property still held by the debtor may be available.

¹¹ The U. F. C. A. is silent on the specific question of a conveyance with any sort of trust on behalf of the grantor. This has been held to be absolutely void as to creditors without reference to intent or insolvency. The silence of the Act may well be taken to imply a repudiation of the rule. In California the statute of 1850, page 266, section 11 expressly declared such a conveyance void both as against existing and subsequent creditors. It was under this statute that *Chenery v. Palmer* (1856) 6 Cal. 119, and *Hodgkins v. Hook* (1863) 23 Cal. 581 were decided. The statement in *HANNA, CASES ON CREDITORS' RIGHTS* (2d ed. 1935) 188, must therefore be corrected. Evidently if the purpose of the trust is to hinder creditors, it comes within the third rule of the Uniform Act.

The U. F. C. A. has been in substance incorporated in the New Bankruptcy Act (Chandler Act) § 67.

and the satisfied creditors know that there is not enough to pay the other creditors.¹²

This may be said to govern the law of California, as it seems to have governed the predecessors and successors of the Statutes of 13 and 27 Elizabeth. The Uniform Fraudulent Conveyance Act goes further in a number of ways. It includes in its protection a new group of creditors under (b) whom in equity and fair dealing the debtor ought to have had in mind, and it increases the means by which these creditors may secure the present or future satisfaction of their debts. It also increases the occasions on which debts may be paid and thus maintains the essential purpose of this type of legislation.

If we keep this in mind, to-wit, that "fraud" in these transactions means merely an act which results in detriment to the creditor and which the debtor ought in equity not to have done, we shall be able to see what it is that the Uniform Fraudulent Conveyance Act attempts to accomplish.

We may summarize the purposes of the Act by saying that it attempts to eliminate completely the notion of estoppel or reliance from consideration in determining whether a transfer or conveyance is fraudulent. It defines "debt" broadly and modernizes the idea of insolvency. It includes among protected creditors,¹³ even when no actual fraud is present, the subsequent creditors, if the debtor ought reasonably and equitably to have presumed that there would be subsequent creditors although he may well have had no definite persons in mind. And finally, the Uniform Act makes remedies concurrent and, when they are alternative, allows the creditor to pursue both in turn.¹⁴

The great advance this presents over the existing law of California can be best illustrated in certain type-situations. A large num-

¹² Preferences that result in total or partial insolvency are obviously legal in general. It is so provided in set terms by the Civil Code, section 3432. *Heath v. Wilson* (1903) 139 Cal. 362, 73 Pac. 182. An interesting example of a preference held void because of a specific intent to defraud is *Menton v. Adams* (1875) 49 Cal. 620.

¹³ The English Property Act, which repealed the Statute of Elizabeth, makes a brief and perhaps sufficient class of protected creditors by saying that the conveyance shall be "voidable, at the instance of any person thereby prejudiced." 15 Geo. V (1925) c. 20 at 695.

¹⁴ The debtor's fraudulent alienation does not create a claim for damages in California nor in most jurisdictions. *Cf. Menner v. Slater* (1905) 148 Cal. 284, 83 Pac. 35. It seems otherwise when the alienation takes place after judgment. *Findlay v. McAllister* (1885) 113 U. S. 104. The U. F. C. A. does not mention this type of relief, but the enumeration in sections 9 and 10 may well be taken to be exclusive, supplemented as it is by section 11.

ber of important obligations are contingent. Among these are guarantors and indorsers, whether for accommodation or in the course of negotiation. Perhaps as important as most of these is the group of equitable claims arising out of suretyship or guaranty or analogous transactions. All these claims are created by definite transactions, but they are not the main purpose of these transactions. Does the owner of such a claim come within the class of "existing creditors" which alone is accorded protection by the California Code? This has been denied in jurisdictions the law of which is more or less like that of California. Dicta and inferences from decided cases in California might lead to the same conclusion.

A similar question is presented by the relationship of husband and wife. Is a wife a creditor in the sense of the Statute of Elizabeth? At the older common law, she could of course bring no action against her husband except a matrimonial one. Even here, however, alimony might be awarded. But in the modern versions of the common law she has both legal and equitable rights and she may seek separate maintenance without divorce or alimony after divorce. May a husband deliberately disregard these possibilities by intentionally detrimental transfers under Civil Code section 3439, or by voluntary conveyances under section 3441?

It is quite true that since 1927, the interest of the wife in the community property is formally declared to be an existing one. But does that make her a creditor? Again, gifts of personalty or realty which are part of the community need her signature. But the enforcement of this condition is not always easy and the chance of doing so is readily lost. And in those cases where there is no land, there are many situations in which the husband's control of the community renders the wife's right nugatory in practice.

Under the U. F. C. A. the wife might readily be classed within the definition of "creditor". It is very doubtful whether this result would be reached under the California code.

Then there is the large group of liabilities in tort. Is the victim of a tort a creditor from the moment of the injury or from the date of the judgment? It bears discussion.¹⁵ It ought to be beyond doubt

¹⁵ The fact that in California a claim must be reduced to judgment in order to enable the creditor to treat a conveyance as fraudulent, seems to rule out claims not reduced to judgment. This was the particular situation in *Schell v. Gamble*, *supra* note 7. This would be otherwise under the U. F. C. A., at any rate if an action has been commenced. *Dutcher v. Van Duine* (1928) 242 Mich. 477, 219 N. W. 651; *Babirecki v. Virgil* (1925) 97 N. J. Eq. 315, 127 Atl. 594, 39 A. L. R. 171.

under the definition of the U. F. C. A. Or we may take the situation a step further. A person who does not desire to curb his reckless habits in driving motor vehicles, makes himself judgment-proof by gratuitous conveyances. May these conveyances be attacked by subsequent victims of his recklessness? Section 6 of the U. F. C. A. would lead one to affirm the right. It is highly dubious whether the law of California would do so.

It is quite true that the law of California on these subjects has been somewhat expanded by decision. In Civil Code section 3441, taken almost verbatim from Field's draft, it is stated: "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."

This provision certainly meant—and the title of section 3441, "Creditor's Right Must be Judicially Ascertained," confirms it—that it is only a judgment creditor who may treat the Act as "void."¹⁶ That was the law in New York when Field made his draft. But must he have the conveyance first set aside in equity or may he disregard it and levy on the property conveyed as though the title were still in the judgment debtor? New York had reached the latter conclusion, and was followed by other states, including California.¹⁷

Whether section 3441 really meant that, or whether this intervention of equity was to be treated as other such forms of relief were, and demanded an exhaustion of legal remedies, we need no longer examine.¹⁸ Since modern attachment is merely an anticipated execution, subject to defeasance if the claim is not reduced to judgment, whenever an attachment is available—and in California that is true for all money claims—it is unnecessary to enjoin a threatened transfer, if the creditor is ready to begin his action. If, however, he is not

¹⁶ *Cushing v. Building Ass'n* (1913) 165 Cal. 731, 134 Pac. 324, illustrates an exception to this rule.

¹⁷ The doctrine that the conveyance may be disregarded and execution levied on the property as though it had not been conveyed is frequently stated and usually quoted from 1 FREEMAN, *EXECUTIONS* (3d ed. 1900) § 136, and 2 FREEMAN, *JUDGMENTS* (5th ed. 1925) § 954. It often appears as a dictum in California cases, but the case in which it is directly involved is *Bull v. Ford* (1884) 66 Cal. 176, 4 Pac. 1175, where the precise situation was presented.

¹⁸ The exhaustion of the legal remedy is necessary when an effort is made to set aside a conveyance: *Aigeltinger v. Einstein* (1904) 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; *Roberts v. Buckingham* (1916) 172 Cal. 458, 156 Pac. 1018; *Bettendorff v. Chronister* (1935) 2 Cal. (2d) 425, 41 P. (2d) 337. It is possible to regard a suit to set aside a conveyance which could in fact be disregarded on execution as the equivalent of a bill to remove a cloud on a title.

ready to begin it because the claim has not matured, as in the case of a holder of a note not yet due, he is quite helpless, for it may well be impossible to recover the property later on. Section 10 of the U. F. C. A. which permits action in equity that preserves the future rights of the creditor, even when the claim has not matured, affords protection that is often denied under statutes like those of California.

It has long been noted that the term "void", used in the Statute of Elizabeth¹⁹ and repeated in the modern form of the Statute, such as the relevant sections of the California Civil Code, cannot be taken literally. But the statement in the leading case of *Brasie v. Minneapolis Brewing Co.*²⁰ does not quite describe the situation correctly: "It is true that a fraudulent conveyance is voidable, not void, in that it is good as between the parties to it . . ."

It may be said as between the parties, it is neither void nor voidable but wholly and completely valid, and as between the grantee and creditors it is more than voidable. It is sufficiently void to be disregarded.²¹ The grantee, however, even against the injured creditor is not wholly devoid of rights. If he has made valuable encumbrances, he will be allowed reimbursement on the terms of equity. Section 11 of the U. F. C. A. saves all equitable rights and remedies already established in any jurisdiction. In California, in the case of *Ackerman v. Merle*²² this rule was reaffirmed. In this case, a piece of land encumbered with a mortgage was conveyed in fraud of creditors. The grantee paid off the mortgage and was allowed reimbursement before the creditors' claim could be enforced against the land. Ordinarily, to be sure, a fraudulent possessor is given scant consideration at the common law, although the rule is not quite as absolute as it is sometimes stated.

There is ordinarily no special reason why in these cases a grantee who is party to the fraud, should be deprived of anything that he has added to the land. If we recall that we have largely foregone the criminal sanctions of these transactions and that, when they exist, they are to be pursued independently, there seems little reason to impose a severe fine on an act that is called fraudulent only by a

¹⁹ The English Real Property Act, which repealed the Statute of Elizabeth, changes "void" to "voidable".

²⁰ (1902) 87 Minn. 456, 468, 92 N. W. 340, 344. (Dissenting opinion of Start, C. J.)

²¹ That these are void in California and not merely voidable as to creditors is established by many cases, of which only one need be cited: *Butler v. San Francisco Gas & Electric Co.* (1914) 168 Cal. 32, 141 P. 818.

²² (1902) 137 Cal. 169, 69 Pac. 983, (1902) 1 MICH. L. REV. 238. Cf. also *Frank v. Von Bayer* (1923) 236 N. Y. 473, 141 N. E. 920 (Cardozo, J.)

figure of speech. All that the law means to do is to permit the creditor to reach a second fund, in addition to the property which the debtor had at the effective moment of the judgment; and since this additional fund is merely all that the debtor would have had, if the conveyance had not taken place, there seems to be little equity in giving him more. If the grantee is to be punished for participating in the fraud, it ought to be done directly by punitive provisions, not indirectly and casually.²³

There are situations for which the U.F.C.A. makes no provision. A case which has several times engaged the attention of American courts is one that concerns the earnings of members of the family. Normally such savings, as soon as acquired, become the property of the husband or father. Suppose he releases them in advance, as he usually may do. Is that a "conveyance in fraud of creditors?" The decision is usually in the negative, but there may well be doubt when the whole situation is merely colorable and is a mere cover under which a debtor, without changing his business or means of livelihood, succeeds in completely evading his debts. Again, the creation by the debtor of a joint estate with rights of survivorship, subjects the creditor to the possibility of loss, if his debtor should predecease the co-tenant. Is that a conveyance in fraud of creditors?

The problems created by the insufficiency of our law of fraudulent conveyances have been serious enough, even if they cannot be called pressing. If clarity and breadth of view are desirable in legislation, these qualities can be introduced into this topic by the mere acceptance of the Uniform Act which has operated effectively elsewhere. It is hard to imagine what group or class in the community would be adversely affected by making our law in this matter uniform with that of the commercially most important states of the Union.

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²³ These are cases in which the grantee is allowed reimbursement even when privy to the fraud: *Hamilton Nat. Bank v. Halstead* (1892) 134 N. Y. 520, 31 N. E. 900; and there is also *contra* authority: *Burt v. Gotzian* (C. C. A. 8th, 1900) 102 F. 937, *cert. den.*, (1900) 179 U. S. 684; *Leinbach v. Dyatt* (1924) 117 Kansas 265, 230 Pac. 1074.

UNIFORM FRAUDULENT CONVEYANCE ACT

Section 1. (Definition of Terms.) In this act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

"Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

Section 2. (Insolvency.) (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.

(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

Section 3. (Fair Consideration.) Fair consideration is given for property, or obligation,

(a) 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

(b) 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.

Section 4. (Conveyances by Insolvent.) Every conveyance made and every obligation incurred by a person who is or will be thereby 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.

Section 5. (Conveyances by Persons in Business.) 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.

Section 6. (Conveyances by a Person about to Incur Debts.) 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.

Section 7. (Conveyances Made with Intent to Defraud.) 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.

Section 8. (Conveyance of Partnership Property.) Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

Section 9. (Rights to Creditors Whose Claims have Matured.) (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, 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,

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) 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.

Section 10. (Rights of Creditors whose Claims Have Not Matured.) Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside a conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

Section 11. (Cases not Provided for in Act.) In any case not provided for in this Act the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

Section 12. (Construction of Act.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 13. (Name of Act.) This act may be cited as the Uniform Fraudulent Conveyance Act.

Section 14. (Inconsistent Legislation Repealed.) Sections,, are hereby repealed, and all acts or parts of acts inconsistent with this Act are hereby repealed.