

1990

Lynda C. Baldwin v. Willard D. Wood, Tonya
Glazier Wood, Max D. Burton Sr., Emily A. Burton,
Max D. Burton Jr., N.D. "Pete" Hayward, and Keith
L. Buckner : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

LYNDA C. BALDWIN, :

Plaintiff/Appellee, :

vs. :

Case No. 900339

WILLARD D. WOOD; TONYA GLAZIER :

WOOD; MAX D. BURTON SR.; EMILY :

Priority No. 16

A. BURTON; MAX D. BURTON, JR.; :

N.D. "PETE" HAYWARD, Sheriff :

of Salt Lake County, Utah; and :

KEITH L. BUCKNER, Deputy Sher- :

iff of Salt Lake County, Utah :

Defendants/Appellants. :

* * * * *

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District
Court of Salt Lake County, the Honorable Leonard H. Russon

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LYNDA C. BALDWIN,	:	
Plaintiff/Appellee,	:	BRIEF OF APPELLANTS
vs.	:	
WILLARD D. WOOD; TONYA GLAZIER	:	
WOOD; MAX D. BURTON SR.; EMILY	:	
A. BURTON; MAX D. BURTON, JR.;	:	
N.D. "PETE" HAYWARD, Sheriff	:	Docket No. 900339
of Salt Lake County, Utah; and	:	
KEITH L. BUCKNER, Deputy Sher-	:	
iff of Salt Lake County, Utah	:	
Defendants/Appellants.	:	

* * * * *

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction of this Appeal pursuant to Utah Code Annotated Section 78-2-2(j).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in determining as a matter of law that a creditor must bring a separate action in order to set aside a fraudulent conveyance, rather than executing directly upon the property? The District Court's determination of this issue constitutes a legal conclusion. It is reviewed for

correctness and is afforded no deference by the Supreme Court. Territorial Sav, & Loan Ass'n v. Baird, 781 P.2d 452, 456 (Utah App. 1989).

2. Did the District Court err in ruling that the statute of limitations barred any action by Burtons to set aside the alleged fraudulent conveyances by Mr. Wood? The District Court's determination of this issue constitutes a legal conclusion and is reviewed for correctness. Id.

3. Did the District Court err in ruling that the Baldwins were bona fide purchasers of the Lauri Kay property? This issue appears to be factual in nature. However, the District Court disposed of the issue upon a Motion for Summary Judgment. Therefore, it is reviewed for correctness, and is afforded no deference by the Supreme Court. Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d at 456, note 4.

4. Did the District Court err in ruling that Baldwins were entitled to an award of their attorney's fees as damages against Burtons? The District Court's determination of this issue constitutes a legal conclusion and is reviewed for correctness. Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d at 456.

5. Did the District Court err in awarding "paralegal costs" to Baldwins? The District Court's determination of this issue constitutes a legal conclusion and is reviewed for correctness. Id.

6. Did the filing of bankruptcy by Mr. Wood on April 21, 1983, or his subsequent discharge in bankruptcy on August 15, 1983, affect Burtons' execution upon the Lauri Kay property? Although the District Court briefly mentioned this issue in its May 25, 1987 Memorandum Decision, the District Court made no expressed determination of the issue. Nevertheless, because this issue may be dispositive of some aspects of the present appeal, Appellants have addressed this issue herein. The issue is legal in nature, and is reviewed on a de novo basis by the Supreme Court. Allphin Realty, Inc. v. Sine, 595 P.2d 860, 862 (Ut. 1979).

DETERMINATIVE AUTHORITIES

The following authorities may be dispositive of certain aspects of this Appeal:

UCA 25-1-15 Rights of creditors with matured claims.

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:

(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.

UCA 78-22-1. Lien of judgment.

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. A transcript of judgment rendered in a district court or circuit court of this state, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any other county, and when so filed and docketed it shall have, for purposes of lien and enforcement, the same force and effect as a judgment entered in the district court in such county. The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as provided by law, in which case the lien of the judgment ceases.

STATEMENT OF THE CASE

This case involves an execution upon real property by the Burtons, which culminated in the issuance of a Sheriff's Deed to Burton Jr. and Emily Burton on May 7, 1987. Baldwins, who were the owners of the property on the date of execution, subsequently filed this action to set aside the Sheriff's Deed based upon the fact that Burtons' judgment debtor, Willard Wood, had no interest in the property at the time that Burton's Judgment was docketed. Burtons deny that Mr. Wood had no interest in the property.

Following the filing of cross motions for summary judgments by Burtons and Baldwins, the District Court issued its Memorandum Decision, dated May 25, 1989, which held that Wood had no interest in the property at the time that Burtons' judgment was docketed, so that Burtons' subsequent execution upon the property was wrongful. The District Court awarded damages to Baldwin

consisting of attorney's fees and "related damages" in the amount of Seven Thousand Eight Hundred Seventy-two and 66/100 Dollars (\$7,872.66). Such judgment included an unspecified amount for "paralegal costs." Burtons deny that Baldwins were entitled to an award of their attorney's fees or paralegal costs.

STATEMENT OF FACTS

1. During 1979 and 1980, Max D. Burton, Sr. ("Burton, Sr."), Willard D. Wood ("Mr. Wood") and Clealon B. Mann ("Mr. Mann") were partners in a land development and subdivision enterprise known as Woodcove Subdivision. (R. 046.)

2. On May 15, 1979 Mr. Wood and his wife, Tonya G. Wood ("Mrs. Wood"), as buyers, and Ralph L. Kofoed and Elaine L. Kofoed ("Kofoeds"), as sellers, entered into a Uniform Real Estate Contract, whereby the Woods purchased the Kofoeds' interest in certain real property ("the Lauri Kay property"), which is the subject matter of this action. (R. 226-228.)

3. On December 19, 1979 the Kofoeds, as grantors, executed a Warranty Deed in favor of Mr. and Mrs. Wood, as joint tenants, thereby conveying Kofoeds' interest in the Lauri Kay property to the Woods. Said Warranty Deed was recorded December 19, 1979. (R. 229.)

4. During 1980 an Agreement was reached between the aforementioned partners of the Woodcove Subdivision whereby Mr. Wood and Mr. Mann purchased Burton, Sr.'s interest in the project. Pursuant to said Agreement, Mr. Wood and Mr. Mann executed a

Promissory Note, dated February 6, 1980, in favor of Burton, Sr. and his wife, Emily A. Burton ("Mrs. Burton") in the amount of Thirty-five Thousand Dollars (\$35,000.00). (R. 046, 233.)

5. On May 1, 1980 Mr. Wood purported to convey his interest in the Lauri Kay property to Mrs. Wood by way of a Special Warranty Deed. Said Special Warranty Deed cites as consideration: "The sum of TEN DOLLARS and other good and valuable consideration" (Emphasis in original.) (R. 007.)

6. On May 26, 1980, Mr. and Mrs. Wood executed a Trust Deed in favor of Valley Bank and Trust ("Valley Bank"), through which the Lauri Kay property was transferred as security for a loan from Valley Bank to Woods in the amount of Twenty Thousand Dollars (\$20,000.00). (R. 560.)

7. On February 25, 1981 Burton, Sr. and Mrs. Burton commenced a legal action against Mr. Wood and Mr. Mann in the Third Judicial District Court of Salt Lake County, State of Utah, Case No. C-81-1568, seeking recovery of amounts due under the February 6, 1980 Promissory Note which were in default, plus interest. (R. 046, 231-232.)

8. On June 9, 1981, Summary Judgment was entered in said legal action in favor of Burton, Sr. and Mrs. Burton and against Mr. Wood and Mr. Mann, jointly and severally, in the amount of Thirty-eight Thousand Five Hundred Dollars (\$38,500.00) plus interest, attorney's fees and costs. (R. 047, 234.)

9. Prior to August 1981, Woods listed the Lauri Kay property for sale with Jean Lampe, a local realtor. The listing agreement was signed by Mr. Wood as the owner of the home. (R. 501.)

10. In August of 1981, Gregory Baldwin ("Mr. Baldwin") and Lynda C. Baldwin ("Mrs. Baldwin") entered into negotiations for the purchase of Woods' interest within the Lauri Kay property. During such negotiations, Mr. Wood stated that he was "under some financial duress," and was willing to take a lower price on the home." Deposition of Gregory Baldwin, dated November 11, 1987 (hereinafter cited as "Baldwin Depo."), page 5.¹

11. On August 24, 1981 Baldwins received a Commitment for Title Insurance ("Title Report") prepared by Western States Title Company ("Western States"). Said Title Report stated in part that: "Judgments have been searched in the names of . . . Willard D. Wood . . . and none were found of record." (R. 089-091.)

12. Notwithstanding the above-quoted statement within the August 24, 1981 Title Report regarding judgments in the name of Willard Wood, at the time that Western States issued said Title Report, its agents had actual knowledge of the June 9, 1981 judgment of Burton Sr. against Mr. Wood. Western States' agents

¹The depositions of Gregory Baldwin and Willard Wood were published in the District Court (R. 135-136).

have stated that they "do not recall" the reason that Burton Sr.'s judgment was omitted from the Title Report. (R. 110, 138).

13. On August 23, 1981 the Baldwins and the Woods entered into an Earnest Money Agreement for the purchase and sale of the Lauri Kay property. (R. 153-154.) Page 2 of said Earnest Money Agreement states in part: "Acceptance of offer contingent upon the successful transfer of lien from 2257 E. Laurie Kay Drive to building property by Valley Mortgage already agreed upon and scheduled to close on or before September 20, 1981." [sic] According to the Deposition of Willard Wood, dated November 11, 1987 (hereinafter cited as "Wood Depo."), page 17, this provision was placed in the Earnest Money Agreement at the behest of Baldwins. However, Gregory Baldwin testified that he was not familiar with the provision. (Baldwin Depo., page 9.) The Earnest Money Agreement was signed by both Mr. and Mrs. Wood as "Seller."

14. At the time that Woods and Baldwins commenced negotiations related to Baldwins' purchase of the property, the property was listed by Woods for sale at Two Hundred Sixty-five Thousand Dollars (\$265,000.00). As consideration for their purchase of the home, Baldwins paid Woods Fifty-seven Thousand Twenty-four and 33/100 Dollars (\$57,024.33), assumed a first mortgage to Equitable Life Insurance Company in the amount of Twenty-five Thousand Seven Hundred Eighty Dollars (\$25,780.00),

and assumed the Woods' obligation to Kofoeds under the May 15, 1979 Uniform Real Estate Contract, in the amount of One Hundred Twenty-one Thousand Six Hundred Ninety-five and 67/100 Dollars (\$121,695.67). (R. 153; Wood Depo., page 21.)

15. On September 30, 1981 Woods executed a Trust Deed upon the Lauri Kay property in favor of Kofoeds in consideration of Kofoeds' remaining equity within the property. Said Trust Deed was recorded on October 2, 1981. Mr. Wood signed said Trust Deed because, notwithstanding his execution of the May 1, 1980 Special Trust Deed to Mrs. Wood, he "still regarded [himself] as having an interest in said property." (R. 071; R. 235.) Mr. Wood also appears as a "Seller" upon the Sellers' Settlement Statement and the Buyers' Settlement Statement, each dated September 30, 1981. (R. 236-237.)

16. Also on September 30, 1981 Mr. and Mrs. Wood executed a Warranty Deed upon the Lauri Kay property in favor of Baldwins, subject only to the September 30, 1981 Trust Deed from Woods to Kofoeds and the underlying mortgage to Equitable Life Assurance Company, dated October 16, 1967. Said Warranty Deed was prepared by Western States and notarized by their closing agent and was recorded on October 2, 1981. (R. 238.) According to Baldwins, Mr. Wood executed said Warranty Deed because he appeared "to have some naked interest of record" in the property by virtue of his execution of the September 30, 1981 Trust Deed to Kofoeds. (R. 410; R. 413.)

17. On February 24, 1982 a Partial Satisfaction of Judgment was entered in the Burtons v. Wood/Mann lawsuit, pursuant to which Mann was released from the Judgment, and Burtons reserved their cause of action against Wood for the balance of the Judgment, consisting of Four Thousand Three Hundred Twenty-three and 73/100 Dollars (\$4,323.73) plus interest. (R. 240.)

18. On April 21, 1983 Mr. and Mrs. Wood filed a petition for voluntary bankruptcy under Chapter 7 of the United States Code in the United States Bankruptcy Court for the District of Utah, Central Division. Burtons were listed as creditors within said bankruptcy proceeding. Kofoeds were not listed as creditors. The Lauri Kay property was not listed as an asset of the Woods. (R. 242-243.) Woods were discharged in bankruptcy on August 15, 1983 and their bankruptcy case was closed on December 15, 1985. (R. 470.)

19. During the summer of 1986 Burton, Sr. received a Notice of Default which indicated that the Lauri Kay property was about to be foreclosed under the September 30, 1981 Kofoed Trust Deed. Upon investigation, Burton, Sr. obtained a copy of a foreclosure report prepared by Surety Title Company, dated May 8, 1986. Said foreclosure report indicated that Burtons' judgment lien had attached to the Lauri Kay property behind the first mortgage of the Equitable Life Assurance Company and ahead of the September 30, 1981 Trust Deed from Woods to Kofoeds. (R. 047, 050-055.)

20. Prior to Burton Sr.'s receipt of the Notice of Default during the summer of 1986, Burtons had no knowledge of the May 1, 1980 conveyance from Mr. Wood to Mrs. Wood. (R. 047.)

21. On August 6, 1986 Burtons, through their prior attorney, obtained a Writ of Execution from the Third Judicial District Court of Salt Lake County, State of Utah, upon their Judgment against Mr. Wood. Said Writ commanded the sheriff or constable of Salt Lake County to levy upon and sell enough of the unexempt personal property or real property of Willard D. Wood to satisfy the Burtons' Judgment. (R. 037.)

22. On or about August 6, 1986 Burtons, through their prior attorney, issued a Praecipe directing the sheriff of Salt Lake County to levy upon the interest of Baldwins as "successors-in-interest of Willard D. Wood," in the Lauri Kay property. (R. 245-246.)

23. On August 11, 1986 the Salt Lake County Sheriff's Office issued a Notice of Real Estate Levy upon the interest of "Gregory Blake Baldwin and Linda Baldwin as successors-in-interest of Willard D. Wood . . ." in the Lauri Kay property. Said Notice of Real Estate Levy was recorded with the Salt Lake County Recorder on August 12, 1986. (R. 247.)

24. On August 12, 1986 the Salt Lake County Sheriff's Office issued a Notice of Real Estate Sale upon the interest of "Gregory Blake Baldwin and Linda Baldwin, successors-in-interest of Willard D. Wood . . ." in the Lauri Kay property. (R. 008.)

25. During approximately September of 1986 Max D. Burton, Jr. ("Burton, Jr.") purchased an assignment of Burton, Sr.'s interest in the Burton Judgment against Mr. Wood. (R. 266.)

26. On September 9, 1986 the Salt Lake County Sheriff's Office conducted an Execution Sale wherein Burton, Jr. and Mrs. Burton purchased the interest of the Baldwin's "as successors-in-interest of Willard D. Wood" in the Lauri Kay property. (R. 075-076.) Although Baldwins had notice of said execution sale, they did not attend or object to the sale, nor did Baldwins subsequently redeem the property. (R. 262.)

27. On January 16, 1987 the beneficial interest of Kofoeds under the September 30, 1981 Trust Deed was assigned to Robert L. Rice ("Mr. Rice"). (R. 260.) Mr. Rice is a personal friend and former Bishop of the Baldwins. (R. 505.)

28. During approximately January of 1987, Burton Sr. engaged in a conversation with Mr. Wood, wherein Mr. Wood stated that the reason for his execution of the May 1, 1980 Special Warranty Deed to Mrs. Wood was to protect the property from his creditors, and that he had received no consideration from Mrs. Wood for the transfer. (R. 047-048). Mr. Wood subsequently testified that the purpose for the transfer was to protect the property from his creditors, and that he received no consideration for the transfer. (Wood Depo., page 12.)

29. During May of 1987, Mr. Rice commenced a private foreclosure action under the September 30, 1981 Trust Deed. (R. 270.)

30. On May 7, 1987 the Salt Lake County Sheriff's Office issued a Sheriff's Deed conveying to Burton, Jr. and Mrs. Burton the interest of "Gregory Blake Baldwin and Linda Baldwin, successors-in-interest of Willard D. Wood . . ." in the Lauri Kay property. Said Sheriff's Deed was recorded on May 8, 1987. (R. 075-076.)

31. On June 10, 1987 Mr. Rice bid at the Trustee's Sale on the September 30, 1981 Trust Deed and received a "Trustee's Deed" on the property. Said Trustee's Deed was recorded June 18, 1987. (R. 269-271.)

32. On June 18, 1987 Robert L. Rice, as grantor, executed a Warranty Deed in favor of Derald A. Tilley, as grantee, upon the Lauri Kay Property. Said Warranty Deed was recorded June 18, 1987. (R. 272.)

33. On October 7, 1987, Derald A. Tilley, as grantor, executed a Quit Claim Deed in favor of Lynda C. Baldwin, upon the Lauri Kay property. Said Quit Claim Deed was recorded on October 8, 1987. (R. 280.)

34. On June 22, 1988, Lynda C. Baldwin, as grantor, executed a Quit Claim Deed in favor of the Lynda C. Baldwin Trust, upon the Lauri Kay property. Said Quit Claim Deed was recorded on June 23, 1988. (R. 281.)

35. The present action was filed on May 12, 1987. The Plaintiffs were initially designated as "Lynda Baldwin and Gregory Blake Baldwin." (R. 002.) On January 3, 1989 an Amended Complaint was filed in which Lynda C. Baldwin, in her own name and on behalf of the Lynda Baldwin Trust, was named as the sole plaintiff. (R. 189; R. 281.) (Lynda C. Baldwin and the Lynda C. Baldwin Trust are hereinafter collectively referred to as "Baldwin.")

36. On March 3, 1989 Baldwin filed a Motion for Summary Judgment upon her claims against the Burtons in the present action. (R. 423-424.) Following the submission of affidavits and legal memoranda by both parties, the District Court, per the Honorable Leonard H. Russon, issued its Memorandum Decision dated May 25, 1987 (R. 572-579), a true and correct copy of which is attached hereto as Exhibit "A," in which the Court held in summary:

(a) that at the time the Burton Judgment was entered against Mr. Wood, Mr. Wood had no interest within the Lauri Kay property to which said Judgment could attach;

(b) that if Burtons believed that the conveyance from Mr. Wood to Mrs. Wood was fraudulent Burtons were required to file a separate action to set aside such fraudulent conveyance;

(c) that the statute of limitations upon an action by Burtons to set aside the conveyance from Mr. Wood to Mrs. Wood as fraudulent had passed;

(d) that the Baldwins were bona fide purchasers of the Lauri Kay property;

(e) that the September 9, 1986 execution sale and the May 7, 1987 Sheriff's Deed to Burton Jr. and Mrs. Burton are null and void;

(f) that Burtons had wrongfully executed upon Baldwin's interest within the Lauri Kay property;

(g) that Mr. Wood filed for bankruptcy on April 21, 1983 and listed Burton Sr. as a judgment creditor. Mr. Wood was subsequently discharged in bankruptcy; and

(h) that the only remaining issue of fact was the amount of Mrs. Baldwin's damages, including attorney's fees.

37. On April 5, 1991 Baldwin, through her attorney, Dwight Epperson, filed an Affidavit of Attorney's Fees, which set forth, inter alia, the sum of Three Thousand One Hundred Ninety-two Dollars (\$3,192.00) in attorney's fees, Two Hundred Forty-five Dollars (\$245.00) in "secretarial fees," and Nine Thousand One Hundred Ninety-five and 19/100 Dollars (\$9,195.19) in "paralegal costs." (R. 641-658.)

38. On April 17, 1990, Burtons, through their present attorney, filed a Defendants' Objection to Proposed Order and

Judgment Approving Plaintiff's Attorney's Fees and Costs, wherein Burtons argued that Baldwin was not entitled to an award of her attorney's fees, secretarial fees or paralegal costs on the grounds that there was no legal basis for such an award. (R. 659-663.)

39. After conducting a hearing upon the matter of Baldwin's attorney's fees and related damages on May 14, 1990, the District Court entered a Judgment, dated June 4, 1990, which ordered that Burtons pay to Baldwin the amount of Seven Thousand Eight Hundred Seventy-two and 66/100 Dollars (\$7,872.66), "representing payment for attorney's fees and related damages incurred by Plaintiff in this matter, together with interest thereon at the legal rate of ten percent (10%) per annum from the date of this Judgment." (R. 667-668.) Said Judgment constitutes the final Judgment from which this Appeal is taken.

SUMMARY OF ARGUMENT

POINT I

Willard Wood did have an interest in the subject property at the time that Burtons' judgment lien was docketed. In addition, any conveyance by Mr. Wood of his interest in the property was fraudulent and, therefore, Burtons were entitled to disregard such conveyance and execute upon the property pursuant to Utah Code Annotated Section 25-1-15(2).

POINT II

Burtons' execution upon the property did not involve, nor did it require, any action to set aside the prior conveyance by

Mr. Wood as a fraudulent conveyance. Therefore, the applicable statute of limitations in this case is the eight-year period for executing upon judgments established by Utah Code Annotated Section 78-22-1. In the alternative, an issue of fact exists as to the date that Burtons should have discovered the fraudulent nature of Mr. Wood's conveyance.

POINT III

Baldwins were not bona fide purchasers of the property because they had both constructive and actual notice of the Burtons' lien.

POINT IV

Baldwins were not entitled to an award of their attorney's fees, inasmuch as there is no statutory or contractual bases for such an award, and Burtons did not exercise bad faith in conducting their execution on the property.

POINT V

Even if Baldwin was entitled to an award of her attorney's fees, she was not entitled to recover "paralegal costs" inasmuch as there is no statutory basis for such an award, and the paralegal costs claimed in this case were not an adjunct of attorney's fees.

POINT VI

The discharge of Mr. and Mrs. Wood in bankruptcy on December 15, 1983 had no effect upon Burtons' judgment lien, as specified in 11 U.S.C. Section 524 and 506(d).

A R G U M E N T

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT BURTONS WERE REQUIRED TO BRING A SEPARATE ACTION IN ORDER TO SET ASIDE THE ALLEGED FRAUDULENT CONVEYANCES BY MR. WOOD

The District Court held, on page 5 of its Memorandum Decision:

If Burton believed that the Willard Wood conveyance to Tanya Wood was a fraudulent conveyance, made to defraud creditors, then he should have filed an action to have the said conveyance set aside so that his lien rights could be perfected. In such action, he would have named the Woods and the Baldwins as defendant, which would have given the Baldwins the right to litigate this issue, and have their due process rights protected. However, such was never done. Title has remained at all times in the Baldwins, and was in the Baldwins at the time Burton proceeded against the said property. (R. 576.)

Burtons submit that this holding by the District Court was erroneous as a matter of law, inasmuch as the Utah Fraudulent Conveyances Act, Utah Code Annotated Section 25-1-1 et seq.,² establishes that conveyances which are made with the intent to defraud creditors are void, and that creditors may disregard such

²This case is governed by the Utah Fraudulent Conveyances Act, Utah Code Annotated Section 25-1-1 et seq., which was first enacted by Utah Laws, 1925, ch. 42, Sec. 1. The Fraudulent Conveyances Act was repealed by Utah Laws, 1988, ch. 58, Sec. 16, and was replaced by the Utah Fraudulent Transfer Act, Utah Code Annotated Section 25-6-1 et seq., effective April 25, 1988. The Utah Fraudulent Conveyances Act governs this action because it was in effect on the date of the alleged fraudulent transfers. Smith v. Edwards, 17 P.2d 264 (Utah 1932); Blankenship v. Myers, 544 P.2d 314, 324 (Id. 1975). A true and correct copy of the 1977 edition of the Utah Fraudulent Conveyances Act is appended hereto as Exhibit "B."

conveyances and execute upon the property conveyed.³

Utah Code Annotated Section 25-1-8 states:

When conveyance or assignment void. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of rents or profits issuing therefrom, and every charge upon lands, goods or things in action or upon the rents or profits thereof, made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered, with the like intent, as against the person hindered, delayed or defrauded shall be void. (Emphasis added.)

Under Utah law, a fraudulent conveyance is not merely voidable, but is void in toto. W.P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-op. Inst., 42 P. 869 (Utah 1894). When a conveyance is found void under the Utah Fraudulent Conveyance Act, it is treated "as if the transaction never took place at all." Meyer v. General American Corporation, 569 P.2d 1094, 1098 (Utah 1977). Cardon v. Harper, 151 P.2d 99, 102 (Ut. 1944).

Baldwin argued at length in the District Court that the word "void" within Section 25-1-8 means "voidable." (R. 527-529.)

³There are actually two potential fraudulent conveyances by Mr. Wood in the present case. The first occurred through the May 1, 1980 Special Warranty Deed from Mr. Wood to Mrs. Wood, which Mr. Wood admits was performed for the purpose of shielding the home from his creditors. (R. 048.) The second consisted of Mr. Wood's execution of the September 30, 1981 Warranty Deed to the Baldwins. If Mr. Wood's May 1, 1980 conveyance to Mrs. Wood was fraudulent, then it was void, and Mr. Wood still possessed his joint interest in the property at the time he executed the September 30, 1981 Warranty Deed to Mr. and Mrs. Baldwin.

However, Baldwin did not address the Utah cases, including those cited above, which are to the contrary. Baldwin also failed to address Utah Code Annotated Section 25-1-15, which states:

Rights of creditors with matured claims. 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:

(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. (Emphasis added.)

This statute expressly allows creditors to disregard a fraudulent conveyance, and to execute upon property which is under the name of the fraudulent transferee. For example, in Jensen v. Eames, 519 P.2d 236 (Utah 1974), the plaintiff obtained a judgment against the defendant, and subsequently served a post-judgment garnishment upon a third party, to whom the defendant had transferred certain shares of stock. Within the garnishment proceeding, the plaintiff moved to have the transfer of stock set aside as a fraudulent conveyance. The trial court denied the motion on the ground that such action could not be taken in a garnishment proceeding and that the plaintiff must

file a separate action. The Utah Supreme Court reversed the decision of the trial court on this issue, holding, at page 428:

A judgment creditor may litigate the question of a fraudulent conveyance in a garnishment proceedings, in a creditor's bill in equity, or in an execution proceeding, provided that once contested the burden is upon the one alleging the fraudulent conveyance to prove by clear and convincing evidence that the transfer was in fact fraudulent.

The Decision in Jensen is similar to that which has been reached in other states when construing similar provisions of the Uniform Fraudulent Conveyance Act. For example, in Gagne v. Bailey, 564 P.2d 348 (Wash. App. 1977), the debtor quit claimed a one-half interest in two parcels of real property to her son. The plaintiffs subsequently obtained a judgment against the debtor and executed upon the property, which execution was upheld by the Court at page 349:

A judgment creditor may choose to levy execution upon a parcel which has been fraudulently conveyed in whole or in part by the judgment debtor without first clearing title. One who purchases such a parcel at an execution sale can clear that title by an appropriate action. But until that time, the fraudulent conveyance may be successfully attacked by a superior interest. (Citations deleted.)

Similar results were reached in the cases of Montana Ass'n of Credit Management v. Hergert, 593 P.2d 1059 (Mont. 1979) and Sackin v. Kersting, 458 P.2d 544 (Ariz. App. 1969). See generally, 37 Am.Jur.2d, "Fraudulent Conveyances," Section 161.

The District Court's Memorandum Decision suggests that the literal application of Utah Code Annotated Section 25-1-15(2) would deprive Baldwin of her interest in the real property

without due process. However, an alleged fraudulent transferee in circumstances such as the present case can assert any defenses she may have in the execution proceeding, or commence a separate action, such as Baldwin did in the present case. The procedure established by Utah Code Annotated Section 25-1-15(2) is necessary to ensure that the Utah Fraudulent Conveyance Act achieves its purpose of allowing creditors to "reach all artifices and evasions designed to rob the Act of its full force and effect in preventing debtors from paying the just claims of their creditors." Butler v. Wilkinson, 740 P.2d 1244, 1260 (Utah 1987).⁴

POINT II

THE DISTRICT COURT ERRED IN RULING THAT ANY CLAIM OF FRAUDULENT CONVEYANCE BY BURTONS IS BARRED BY LIMITATIONS

On page 6 of its Memorandum Decision, the District Court stated:

Burton's lien is only to that property owned by Willard Wood, but Willard Wood conveyed the property to Tanya Wood on May 1, 1980 and Tanya Wood conveyed the property to the Baldwins on September 30, 1981. No action has been filed to set that conveyance aside, and the Burtons have not so pled in this action. The statute of limitations has run on bringing an action for fraudulent conveyance and, therefore, the Court rules as a matter of law that Willard Wood has no ownership interest in the property in question, and has

⁴The Utah Fraudulent Transfer Act continues to allow creditors to execute upon fraudulently conveyed property within the possession of the transferee, although it appears to require an express order for such executions. UCA Section 25-6-8(2).

not had such since conveying away in May of 1980 and, therefore, Burton can establish no rights to any interest in the said property.

The District Court's conclusion regarding limitations appears to have been based upon its assumption that Burtons were required to bring a specific action to set aside the fraudulent conveyance, rather than directly executing upon the property. As argued within the preceding Point I hereof, this assumption by the District Court was error because the Utah Fraudulent Conveyance Act expressly allowed the type of execution which was performed by Burtons.

The District Court did not address the issue of when Burton's cause of action to set aside the fraudulent transfer accrued. However, that issue was addressed at length within Baldwin's Reply Memorandum Regarding Plaintiff's Motions for Summary Judgment, dated April 24, 1989 (hereinafter cited as "Reply Memorandum"). On pages 11 through 19 (R. 517-525) of her Reply Memorandum, Baldwin argues that Burton's cause of action to set aside the fraudulent conveyance accrued either at the time that the deed from Mr. Wood to Mrs. Wood was recorded, or from the date of Burton's judgment. In support of this argument Baldwin cites several cases from other jurisdictions.⁵

⁵Baldwins also assert that the applicable limitations period for Burtons' claim to set aside the fraudulent conveyance is established by Utah Code Annotated Section 25-6-10 of the Utah Fraudulent Transfer Act, and Utah Code Annotated Section 78-12-25(2). These provisions did not become effective until

Regardless of the positions which have been taken within other jurisdictions, the law within the State of Utah is that the statute of limitations upon a fraudulent conveyance commences at the time that the fraudulent conveyance is discovered. In Smith v. Edwards, 17 P.2d 264 (Ut. 1932), the defendants made several alleged fraudulent conveyances of real property to their sons, which were recorded on December 23, 1920. The plaintiffs brought suit to invalidate the conveyance in 1928. In addressing the defendants' limitations defense, the Court stated:

The parties agree the statute of limitations is three years. They divide on the question of discovery. They approach the question differently.

Some argue the recording of the deed imparts notice to all persons of the contents thereof and constitutes such notice as will start the statute of limitations running as to a creditor who may claim to be relying upon ownership, or implied ownership, of property as shown by the state of the record. Some argue otherwise. Some aspects may be examined: (1) Was the conveyance itself the fraud? or (2) was it fraud because the conveyance purported to be voluntary or without consideration? or (3) did the conveyance produce discoverable insolvency at the time it was made? If the conveyance itself constituted the fraud, its recordation was notice of its contents to all persons. . . .

April 25, 1988 and are, therefore, inapplicable to the present case. The applicable limitations period for any fraudulent conveyances occurring in the present case is established by Utah Code Annotated Section 78-12-26(3). Smith Land Co. v. Johnson, 107 P.2d 158 (Utah 1940).

The conveyances attacked all contain the statement of consideration of "one dollar and other valuable considerations" and one of them contains in addition the statement that two of the tracts are each subject to a mortgage in the "sum of \$1,000.00 which the grantee assumes and agrees to pay."

Under the statute from the time of filing the conveyance with the recorder it shall impart notice to all persons of the contents thereof. From the time of recording these conveyances all persons, including plaintiffs, notice was imparted to them that the conveyances contained the statements above quoted. That the plaintiffs and all other persons had notice that such conveyances had been made and recorded seems to go without saying, for surely, if one is charged with notice of the contents, he must be charged with notice of the existence of the document itself. When the document contains a statement of facts indicating that there was given for the property a fair consideration when as a fact no consideration at all had been given, a very different situation is presented than a document showing on its face that there was no consideration or only a nominal consideration. Under such circumstances all persons would be entitled to rely upon and would have imparted to them the information contained in the contents of the document, and until some information came to hand sufficient to put a reasonably prudent person upon inquiry he would be entitled to rely upon the contents of the document. It may be argued that fraud in the first situation consisted of the false statement contained in the document, because no consideration passed and there is the false statement in the document that there was a valuable consideration. The fraud was committed at that time but may not be discoverable then. A creditor would not discover the falsity of the statement until other information was brought to his attention sufficient to put him on inquiry.

The Court further stated, quoting the case of Duxburg v. Boice, 72 N.W. 838, 839 (Minn. 1897) that "Mere constructive notice of the deed by reason of its being filed for record is not notice of the facts constituting fraud."

The Smith Court ultimately held that the action was barred by limitations, based upon the factual circumstances existing at and subsequent to the time of the conveyances. Smith, 17 P.2d at 272. However, the Court clearly rejected the notion that mere constructive knowledge of a transfer, created by the recording of a deed, is equivalent to discovery of the fraudulent nature of a conveyance. See also Leach v. Anderson, 535 P.2d 1241 (Ut. 1975).

Subsequent to the decision in Smith v. Edwards, the Utah Legislature enacted 57-3-2(4) which states:

The fact that a recorded document recites only a nominal consideration, names the grantee as trustee, or otherwise purports to be in trust without naming beneficiaries or stating the terms of the trust does not charge any third person with notice of any interest of the grantor or of the interest of any other person not named in the document.

Under this provision, a statement of nominal consideration within a recorded deed, such as that from Mr. Wood to Mrs. Wood in the present case, does not impart notice of any interest in the property retained by the grantor. Therefore, the recital of nominal consideration within the May 1, 1980 Warranty Deed from Mr. Wood to Mrs. Wood was not sufficient in itself to give constructive notice of the fraudulent nature of the conveyance. In fact, the recitation of nominal consideration within deeds is so common that, as a practical matter, such recitals impart no such notice (See e.g., R. 006, R.143, R. 272.)

The record before the District Court is devoid of any facts indicating whether Burtons should or could have discovered the fraudulent nature of Mr. Wood's conveyances prior to the time that Burtons executed upon the property. Woods' bankruptcy in April of 1983 is not probative as to Mr. Wood's solvency in 1980 or 1981. There is no evidence of any other judgments or claims against Woods during the relevant time period. To the contrary, it appears that Woods paid off their lien to Valley Bank with their proceeds from the sale to Baldwins (Wood Depo., pages 25-26).

If Burtons had conducted a title search on the property at any time subsequent to September 30, 1981, such search would have revealed that their lien had attached to the property ahead of Kofoeds' Trust Deed. Burtons would also see that the Kofoed Trust Deed and the Baldwin Warranty Deed had been signed by Mr. Wood. With such information, Burtons could reasonably conclude that the conveyance from Mr. Wood to Mrs. Wood could be disregarded, and that the property could be executed upon at any time within the period prescribed by UCA Section 78-22-1. The Woods' conveyance to Baldwins would be no problem, since Baldwins apparently took the property subject to Burtons' lien.

Whether Mr. Wood's conveyances were fraudulent is immaterial in this case, because both the interest of Mr. Wood in the property and Burtons' judgment lien were of record at the time

that Baldwins purchased the property, and because UCA Section 25-1-15(2) allowed Burtons to disregard any fraudulent conveyance that might otherwise affect their lien. Therefore, Baldwins took the property subject to Burtons' lien, and Burtons were entitled to execute upon the property. The applicable limitations period for such execution was not UCA 78-12-26(3), but the eight-year period established by UCA 78-22-1. As stated in 37 Am.Jur.2d, Fraudulent Conveyances, Section 193:

The statute of limitations does not have the effect of converting a fraudulent deed into a valid deed by reason of the lapse of the prescribed time; it simply forbids the right of action for relief on the ground of fraud. Hence, if the question as to the fraudulent character of the deed arises in any way other than in such an action, there is nothing in the statute which forbids its being assailed for fraud. Thus, one who has made out a prima facie case for the recovery of land is not prevented from attacking as fraudulent a deed which is set up in defense, because the time for bringing an action to set aside the conveyance as fraudulent has expired. And the remedy of foreclosure by a creditor who has obtained a judgment that a conveyance is fraudulent may be pursued by the creditor even when his equitable action to set aside a conveyance has been barred by the statute of limitations.

A suit to remove a cloud on the title to property caused by a fraudulent conveyance thereof is not one for relief on the ground of fraud; and it is therefore not subject to the limitation imposed by statute on such a suit. An action at law by the execution purchaser to test the validity of his title is not necessarily barred because the judgment creditor has lost, by lapse of time, his equitable remedy to set aside the fraudulent conveyance.

In the case of Aberdeen Federal Sav. & Loan v. Hanson, 794 P.2d 1322 (Wash. App. 1990), the plaintiff sought to garnish

property in 1987 which had allegedly been fraudulently transferred in 1984. In response to the defendant's limitation defense, the plaintiff argued that limitations was not governed by the three-year statute of limitations for fraud, but by the ten-year limitations period applicable to judgments. The trial court accepted this argument. However, the Washington Court of Appeals disagreed, holding at page 1324:

Aberdeen Federal argues that the ten-year period of RCW 4.16.020 should apply because this action is primarily an effort to collect on a judgment. The gravamen of the claim determines the applicable statute of limitation. The three-year limitation of RCW 4.16.080(4) applies to fraudulent conveyance actions.

Aberdeen Federal seeks two distinct types of relief. First, it seeks to set aside the fraudulent conveyance. Second, it seeks to execute on the property to satisfy its judgment. In this step of the proceedings the gravamen of the claim is an action to set aside a purported fraudulent conveyance. Thus, the three-year statute of limitations applies. (Citations omitted.)

The Washington Court of Appeals nevertheless affirmed the trial court's decision because the fraud was first discovered within the three-year period. Id. at 1325.

Aberdeen Federal Sav. & Loan illustrates an important distinction in the present case. The "gravamen" of the present case is merely an execution action. Burtons have not requested that any fraudulent conveyance be set aside because such request is unnecessary, inasmuch as Burtons' judgment lien is of record. It makes no difference to Burton whether Mr. Wood's Deed to

Mrs. Wood was fraudulent, or non-delivered, or superseded by an unrecorded reconveyance by Mrs. Wood, or whatever. The fraudulent conveyance issue was first raised by Baldwins as a defense to Burtons' execution.

There is at least an issue of fact in this case as to when Burtons should have discovered the fraudulent nature of Mr. Wood's conveyances. Burtons submit that, under the applicable statute, they were not required to bring an action to set aside such conveyances, which prior to the filing of the present action, would have seemed superfluous. Burtons were justified in disregarding the alleged fraudulent conveyances and the imponderable mess of Woods' and Baldwins' dealings with the property, and execute upon their lien.

POINT III

THE DISTRICT COURT ERRED IN RULING THAT BALDWIN WAS A BONA FIDE PURCHASER OF THE PROPERTY

Baldwin argued throughout the District Court proceeding that she was a bona fide purchaser of the Lauri Kay property and, as such, took the property free from Burtons' judgment lien. The District Court implicitly accepted this argument in its Memorandum Decision (R. 576-577). However, Burtons submit that Baldwin was not a bona fide purchaser as a matter of law, or, in the alternative, that the evidence presented to the District

Court created a material issue of fact as to Baldwin's bona fide purchaser status.

In order to claim bona fide purchaser status, a purchaser must provide valuable consideration,⁶ and must obtain its interest in the property in good faith. Pender v. Dowse, 265 P.2d 644, 653 (Utah 1954). A purchase is not made with good faith if it is made with notice of a prior adverse interest in the property. Id. Such notice may be either actual or constructive. Constructive notice occurs "when circumstances arise that should put a reasonable person on guard so as to require further inquiry on his part." Meyer General American Corp., 569 P.2d 1094, 1097 (Utah 1977). As a general rule, the docketing of a judgment operates as constructive notice of the existence thereof. 77 Am.Jur.2d, Vendor and Purchaser, Section 664.

⁶In the present case, the property was listed for \$265,000.00 at the time that Baldwins commenced negotiations with Woods for the purchase of the property. According to Mr. Baldwin, "Willard Wood mentioned he was under some financial duress, and was willing to take a lower price on the home." (Baldwin Depo., page 5.) As consideration for the property, Baldwins paid Woods \$57,024.33, assumed a first mortgage to Equitable Life Insurance Company in the amount of \$25,780.00, and assumed the Woods' obligation to Kofoeds under the May 15, 1979 Uniform Real Estate Contract, in the amount of \$121,695.67, for a total purchase price of \$204,500.00. (R. 153; Wood Depo., page 22.) While Mr. Baldwin considered this to be a "very good deal" (Baldwin Depo., page 21), it does not appear to be grossly inadequate consideration. However, considering that Burton's judgment against Mr. Wood is only in the amount of \$4,323.73 (R. 240), Baldwins' purchase price may or may not reflect a discount for the Burton judgment.

Utah Code Annotated Section 78-22-1 states:

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. A transcript of judgment rendered in a district court or circuit court of this state, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any other county, and when so filed and docketed it shall have, for purposes of lien and enforcement, the same force and effect as a judgment entered in the district court in such county. The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as provided by law, in which case the lien of the judgment ceases.

Under this section, a judgment automatically becomes a lien upon all non-exempt real property of the judgment debtor at the time it is docketed, and the judgment creditor's right to such lien is unconditional and is not subject to alteration by a court on equitable grounds. Taylor Nat'l, Inc. v. Jensen Bros. Constr. Co., 641 P.2d 150, 155 (Utah 1982). The statute contains no exception for bona fide purchasers, nor is such an exception necessary, because judgment indexes afford ready access to information regarding judgment liens to prospective purchasers of real property, and purchasers who fail to inspect such records do so at their own peril. See generally 46 Am.Jur.2d, Judgments, Sections 155, 160.

Even if the docketing of Burton's judgment did not in itself create constructive notice of Burton's judgment lien, substantial evidence was presented to the District Court that Baldwins had actual notice of Burton's judgment lien at the time they purchased the property. First and foremost, it appears that Baldwin's title agent, Western States, had actual knowledge of the Burton lien at the time that it issued its title report to Baldwins, but omitted any reference to the lien within its Title Report for reasons that its agents do not recall. (R. 089-091, 110, 138.)

It is well settled that a principal is chargeable with and bound by notice which her agent receives while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends. 77 Am.Jur.2d, Vendor and Purchaser, 654. Western States' failure to discover or disclose Burton's judgment lien might give rise to a cause of action by Baldwins against Western States,⁷ but it is no defense to Burton's lien.

Evidence was also presented to the District Court that Baldwins personally had at least constructive notice of the fraudulent nature of their September 30, 1981 Warranty Deed from Woods. First, inasmuch as the May 1, 1980 Special Warranty Deed

⁷See e.g., Kiniskie v. Archway Motel, Inc., 586 P.2d 502 (Wash. App. 1969).

from Mr. Wood to Mrs. Wood was of record, Baldwins had constructive knowledge of that instrument, including its recitation of "other good and valuable consideration" and had the same obligation as Burtons (if any) to inquire as to the reason for the conveyance and the nature of the consideration. In fact, Baldwins have stated that the reason for Mr. Wood's signing of the September 30, 1981 Warranty Deed was that Mr. Wood appeared to have "some naked interest of record" in the property by virtue of his having signed the September 30, 1981 Trust Deed to Kofoeds. (R. 410, 413.) Further, Mr. Wood has stated that his reason for signing the Warranty Deed to Baldwins was that he thought he still had an interest in the property, notwithstanding his prior conveyance to Mrs. Wood. (R. 071.) Therefore, it appears that Baldwins were aware of the conveyance from Mr. Wood to Mrs. Wood at the time of their purchase, and of the fact that there was some question as to the validity of that conveyance. Baldwins were expressly notified by Mr. Wood that he was experiencing financial difficulties at the time of the purchase. (Baldwin Depo., page 5.) There is also a question as to the reason for Woods' execution of the September 30, 1981 Trust Deed to Kofoeds, since Woods presumably had no interest in the property after executing their Warranty Deed to Baldwins.

Finally, even if Baldwins were bona fide purchasers at the time of their initial purchase of the property, they have

subsequently lost that status. Baldwins interest under the September 30, 1981 Warranty Deed from Wood was extinguished through foreclosure of Kofoed's September 30, 1981 Trust Deed on June 10, 1987 (R. 368). Title to the property was subsequently returned to Baldwin by Quit-Claim Deed dated June 22, 1988. (R. 380.) Baldwin received such property by way of a gift from Mr. Baldwin's employer (Baldwin Depo., pages 28-30). Baldwin knew of Burton's lien at the time that she received the Quit-Claim Deed, and also provided no consideration for the Deed. Therefore, she had no claim to bona fide purchaser status at the time that the District Court entered its Memorandum Decision.⁸ The interest which Baldwins assert in this case is not the interest which they received pursuant to the September 30, 1981 Warranty Deed from Woods, but the interest of Kofoeds within their September 30, 1981 Trust Deed from Woods (R. 235).

⁸Baldwins commenced this action on May 12, 1987, at which time Badwins' claimed interest within the property was under their September 30, 1981 Warranty Deed from Woods. (Interestingly, the original Complaint filed by Baldwins named as Plaintiffs "Linda Baldwin and Gregory Blake Baldwin," even though Mr. Baldwin purported to convey all of his interest within the property to Mrs. Baldwin by Quit-Claim Deed on December 21, 1982 (R. 340). That interest of the Baldwins was subsequently foreclosed on June 10, 1987, as described in the text. Therefore, Baldwins' interest in the property as of the date of the District Court's Memorandum Decision was limited to that which had been reconveyed to Mrs. Baldwin and the Lynda C. Baldwin Trust on October 7, 1987 and June 23, 1988, respectively. The named Plaintiff within Baldwin's Amended Complaint dated January 3, 1989 is "Lynda C. Baldwin . . . in her name on behalf of the Lynda Baldwin Trust." [sic]

There is no evidence in the record as to what, if any, knowledge Kofoeds had, or of any inquiry which Kofoeds made, concerning Burton's judgment lien.

POINT IV

THE DISTRICT COURT ERRED IN
AWARDING BALDWIN'S ATTORNEY'S FEES AS DAMAGES

The sole item of damages which was awarded to Baldwin by the District Court consisted of Seven Thousand Eight Hundred Seventy-two and 66/100 Dollars (\$7,827.66) "representing payment for attorney's fees and related damages incurred by plaintiff in this matter" (R. 668.) The District Court did not indicate the legal basis for its award of Baldwin's attorney's fees within either its Judgment or within its May 25, 1989 Memorandum Decision. The sole basis alleged within Baldwin's Amended Complaint for an award of attorney's fees was under Utah Code Annotated Section 78-27-56 for a bad faith action or defense. Therefore, it is conceivable that the District Court's award of attorney's fees was (a) pursuant to Utah Code Annotated Section 78-27-56; (b) for slander of title; or (c) for wrongful execution.

Utah Code Annotated Section 78-27-56(1) allows a prevailing party reasonable attorney's fees only where the Court determines that the action or defense "was without merit and not brought or asserted in good faith" Recovery under the statute requires both that the action or defense be without merit, and

brought in subjective bad faith. Canyon Country Store v. Bracey, 781 P.2d 414, 421 (Utah 1989); Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). Neither of these elements exist in the present case. The argument herein demonstrates that this case poses several complex legal and factual issues, the merits of which cannot be easily determined. Regarding Burton's subjective intent, there is absolutely no evidence in the record of any malice or unprofessional conduct on the part of Burtons toward Baldwins. Burton's execution upon the property was induced by Burton Sr.'s receipt of a Notice of Default on the Lauri Kay property during the spring of 1986, which indicated that Baldwin's interest in the property was about to be foreclosed upon. (R. 047.) Burton, Sr. subsequently obtained a foreclosure report, dated May 8, 1986, which indicated that Burton's judgment lien had attached to the property prior to Kofoeds' September 30, 1981 Trust Deed. Burtons then proceeded to execute upon the property, as would any reasonable creditor under the circumstances.

In Utah, for one to be liable for slander of title, he must publish matter which is untrue and disparaging to another's interest in property. Pender v. Dowse, 265 P.2d 644, 664 (Utah 1954). In the present case, Burtons did not publish anything that was untrue: They had a judgment against Mr. Wood which was apparently attached to the property at the time of Woods'

conveyance to Baldwins. Baldwins were clearly "successors-in-interest" to Woods, whether or not Baldwins were bona fide purchasers or the conveyance from Woods was fraudulent. Although Pender v. Dowse implies that attorney's fees may at times be appropriate, in slander of title actions (Cf. 50 Am.Jur.2d, Libel and Slander, Section 550), the present case involves no facts which would warrant an assessment of attorney's fees against Burtons on such theory.

Attorney's fees have sometimes been awarded as damages in cases involving wrongful executions. Coggins v Wright, 526 P.2d 741 (Ariz. App. 1974); 30 Am.Jur.2d, Executions, Section 763. However, such damages are generally allowed only when the party performing the execution has acted in bad faith. Peterson v. Montana Bank of Bozeman, 657 P.2d 673, 681 (Mont. 1984). Accordingly, a party is not liable for a wrongful execution where the execution is caused by the misconduct of another person, such as the execution officer, Foley v. Audit Services, Inc., 693 P.2d 528, 531 (Mont. 1985), or where the execution results from an erroneously entered judgment, Schuman v. Wallace, 104 P.2d 432 (Okla. 1940).

In the present case, there is no evidence of bad faith on the part of Burtons. Any error in the execution was caused, not by Burtons, but by Woods' and Baldwins' conduct in acting as through Mr. Wood had an interest in the property.

Baldwin should not have been awarded damages against Burtons for the additional reason that Burton's execution upon the property caused no damage to Baldwin. At the time of Burton's execution, the assignee of the Kofoed Trust Deed had already issued a Notice of Default upon the property and the property was subsequently foreclosed upon through a Trustee's Sale on June 10, 1987. Therefore, at the time of Burton's execution, Baldwins were in default, and were about to lose their interest in the property in any event. Baldwins have subsequently regained an interest in the property and have asserted that interest as the successor-in-interest to the Kofoed's Trust Deed. However, Kofoeds were not the owners of the property at the time of Burton's execution, and any conflict between the interests of Burtons and Kofoeds (now Baldwin) constitutes a conflict as to lien priority, not a wrongful execution.

POINT V

THE DISTRICT COURT ERRED
IN AWARDING BALDWIN'S PARALEGAL COSTS

Burton's argued within the preceding Point IV hereof that the District Court should not have awarded Baldwin's attorney's fees in this case. However, even if Baldwin was entitled to her attorney's fees, the District Court erred in awarding Baldwin over Four Thousand Dollars (\$4,000.00) in "paralegal costs."

The Affidavit of attorney's fees, which was filed by Baldwin's attorney in the District Court set forth, inter alia,

the amount of Three Thousand One Hundred Ninety-two Dollars (\$3,192.00) in attorney's fees, Two Hundred Forty-five Dollars (\$245.00) in "secretarial fees" and Nine Thousand One Hundred Ninety-five and 19/100 Dollars (\$9,195.19) in "paralegal costs." (R. 643.) Attached to said Affidavit is a fifteen (15) page billing statement from "Paul H. Richins & Company Inc.," which purports to itemize the said Nine Thousand One Hundred Ninety-five and 19/100 Dollars (\$9,195.19) in paralegal costs. (R. 644-658.)

Burton filed a timely objection to Baldwin's proposed attorney's fees and costs (R. 659-662) in which Burtons argued, inter alia, that Baldwin's claims for "secretarial fees" and "paralegal costs" were not recoverable under Utah law.

The District Court held a hearing upon Baldwin's proposed attorney's fees and costs on May 14, 1990. The District Court subsequently issued its Judgment, dated June 4, 1990, which awarded Baldwin a total of Seven Thousand Eight Hundred Seventy-two and 66/100 Dollars (\$7,872.66) in attorney's fees and "related damages." (R. 668.) Although the District Court did not specify the portion of its award which related to secretarial fees and paralegal costs, inasmuch as the total amount of attorney's fees and undisputed costs claimed by Baldwins amounted to only Three Thousand Two Hundred Seventy-five and 06/100 Dollars (\$3,275.06), the balance of Four Thousand Five Hundred

Ninety-seven and 60/100 Dollars (\$4,597.60) must have been awarded for secretarial fees and/or paralegal costs.

The Utah Supreme Court has not specifically addressed the issue of whether or to what extent secretarial and paralegal expenses are recoverable. Other jurisdictions are much divided on this issue. Some courts have held that such expenses are not recoverable. Lemoine v. Cooney, 414 S.2d 391 (Fla. App. 1987); In re Trust of Brown, 517 A.2d 893 (N.J. Super. 1986). The reasoning in these decisions is that such expenses "are a necessary part or adjunct of a properly equipped lawyer's office," which are included within an attorney's hourly fee, and are not entitled to separate compensation. Levy v. State, 420 N.Y.S.2d 154 (1979).

Conversely, several Courts have held that such expenses are recoverable. Lea Co. v. North Carolina Bd. of Transp., 374 S.E.2d 868 (N.C. 1989); Multi-moto v. ITT Commercial Finance, 806 S.W.2d 560 (Tex. App. 1991); Aires v. Palmer Johnson, Inc., 735 P.2d 1373 (Ariz. App. 1987); Newport v. Newport, 759 S.W.2d 630 (Mo. App. 1988).⁹ The rationale behind these cases is that the

⁹In Alaska, paralegal fees are recoverable as an item of costs, pursuant to Alaska Civil Rule 79(b). Paralegal fees are routinely allowed by the Federal Courts in claims brought under federal statutes which provide for an award of attorney's fees. Hawkins v. Anheuser-Busch, 697 F.2d 810 (8th Cir. 1983); Sebastian v. Texas Dept. of Corrections, 558 F.Supp. 507 (Dist. Tex. 1983).

use of paralegals may result in savings to clients and lower overall fee awards. Lea Co. v. North Carolina Bd. of Transp., 374 S.E.2d at 871.

Utah has traditionally adhered to a strict application of the "American Rule," whereby parties are required to bear their own legal expenses unless an award of attorney's fees or costs is expressly allowed by statute or contract. Dyson v. Aviation Office, 593 P.2d 143 (Ut. 1979); Cobabe v. Crawford, 780 P.2d 834 (Ut. 1989). Any benefit in reduced legal expenses which can be achieved through the use of paralegals is not dependent upon the recoverability of such expenses from the opposing party. In fact, as the present case demonstrates, allowing recovery of paralegal fees may increase the costs of litigation and the amount of attorney's fee awards.

Even if the Court should determine that paralegal fees are recoverable in some instances, the paralegal fees claimed by Plaintiff in the present case should be disallowed. The Courts which have allowed recovery of paralegal fees have uniformly allowed such fees as an adjunct of attorney's fees, rather than as an item of costs. This distinction is not merely semantic: Treating paralegal expenses as an item of attorney's fees insures that such expenses are related to legal services and are performed under the auspices of an attorney. As the Court stated in Multi-moto v. ITT Commercial Finance, 806 S.W.2d at 570:

A party may separately assess and include in the award of attorney's fees compensation for a legal assistant if that assistant performs work traditionally done by an attorney. In order to recover such amounts, the evidence must establish: (1) the qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant. (Citations deleted.)

In the present case, not only have the factors referred to in Multi-moto not been set forth, it positively appears from the record that Mr. Richins largely operated outside of the control of Baldwin's attorney, prepared an independent billing statement according to Mr. Richins' own methods and disbursed his own costs. Allowing paralegal costs in the present case would encourage paralegals to act outside of the direction or control of a licensed attorney, in potential violation of Utah Code Annotated Section 78-51-25.

POINT VI

BURTON'S LIEN WAS NOT AFFECTED BY WOODS' DISCHARGE IN BANKRUPTCY

Baldwins argued at length in the District Court that Burton's judgment lien was rendered void by Woods' discharge in bankruptcy on December 15, 1983. (R. 474-475, 509-512.) Although the District Court mentioned Woods' bankruptcy in its May 25, 1989 Memorandum Decision (R. 577), the District Court made no express determination of the issue.

11 U.S.C. Section 524 states in part:

(a) A discharge in a case under this title -

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228 or 1328 of this title, whether or not discharge of such debt is waived;

This section expressly voids judgments only to the extent that they involve "the personal liability of the debtor." In the present case, Burton's judgment lien was upon the property, which passed to Baldwins upon Wood's execution of the September 30, 1981 Warranty Deed. After that time, Burton's lien was never an obligation of Woods, personal or otherwise. Burton's execution upon the property had no effect whatsoever upon Woods.

11 U.S.C. Section 506(d) states:

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless -

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

This provision expressly excludes from discharge liens which have not been made a part of the bankruptcy proceeding, either by the filing of a proof of claim or by being made an allowed secured claim. The legislative history of Section 506(d) states:

Subsection (d) permits liens to pass through the bankruptcy case unaffected. However, if a party in

interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void to the extent that the claim is not allowed. The voiding provision does not apply to claims disallowed only under section 502(e), which requires disallowance of certain claims against the debtor by a codebtor, surety,, or guarantor for contribution or reimbursement.

[House Report 95-595, 95th Cong., 1st Sess. 357 (1977); cf. Senate Report No. 95-989, 95th Cong. 2d Sess. 68 (1978).]

In Matter of Tarnow, 749 F.2d 464 (7th Cir. 1984), a secured creditor filed its proof of claim two (2) months after the deadline for filing claims had elapsed. The bankruptcy judge disallowed the claim because it was late, and further declared that the plaintiff's lien was extinguished. The Seventh Circuit Court of Appeals reversed the decision of the bankruptcy judge, to the extent that it invalidated the plaintiff's lien. In so doing, the Court stated:

A long line of cases . . . allows a creditor with a loan secured by a lien on the assets of a debtor who becomes bankrupt before the loan is repaid to ignore the bankruptcy proceeding and look to the lien for the satisfaction of the debt. (Citations deleted.)

One of the "long line of cases" cited in Matter of Tarnow is De Laney v. City and County of Denver, 185 F.2d 246 (10th Cir. 1950). In that case, the City of Denver, Colorado possessed tax liens upon certain personal property of the debtor, which personal property passed into the hands of a trustee in bankruptcy and was sold by him free of the liens. The City did

not file a notice of its tax liens and did not file a claim for taxes. However, following the sale of the personal property, the City filed a petition which asserted its liens against the proceeds from the sale of the personal property. In holding that the City was entitled to such proceeds, the Court stated at page 251:

A lien claimant may pursue one of three courses, (1) he may prove his claim as an unsecured claim and surrender his security; (2) he may prove his claim as a secured claim, give credit thereon for the value of the security, and share in the general assets as to the unsecured balance; or (3) he may not file a claim at all and rely solely upon his lien.

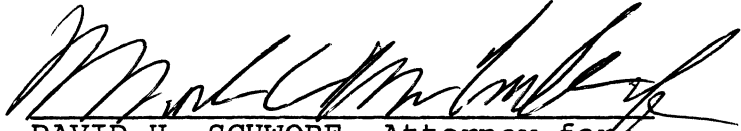
Delaney merely confirms the rule which is expressed in Sections 524 and 506(d) of the Bankruptcy Code, that liens which are not made a part of the bankruptcy proceeding are not discharged. Application of this rule is particularly proper in the present case where Woods did not claim the property and had no apparent interest in the property at the time of the bankruptcy.

CONCLUSION

Based upon the foregoing facts, authorities and argument, Burtons pray that this Honorable Court reverse the decision of the District Court and Order that Burtons' Sheriff Deed be reinstated. In the alternative, should the Court determine that genuine issues of material fact preclude the entry of summary judgment for either party at this time, Burtons request that this case be remanded to the District Court for trial.

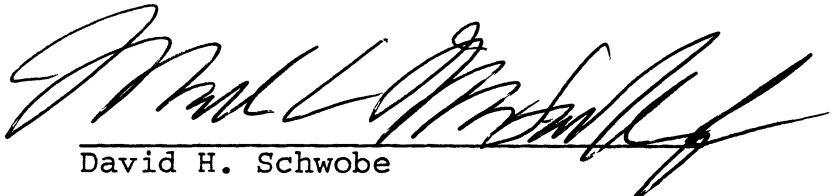
DATED this 24th day of November, 1991.

PERKINS, SCHWOBE & McLACHLAN


DAVID H. SCHWOBE, Attorney for
Defendants/Appellants Burton

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS was mailed, postage prepaid, to Paul H. Richins, Pro Se, Substitute Appellee, 68 South Main, 8th Floor, Salt Lake City, Utah 84101, this 26 day of November, 1991.


David H. Schwobe

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LYNDA C. BALDWIN,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-87-2971
vs.	:	
WILLARD D. WOOD, et al.,	:	
Defendant.	:	

Plaintiff's Motion for Summary Judgment and defendant's Motion for Summary Judgment came on for hearing on May 23, 1989. Both parties filed extensive Memoranda and Reply Memoranda of Points and Authorities which the Court reviewed prior to the hearing. Upon hearing argument the Court took the matter under advisement. The Court has now reviewed the argument of counsel, the points and authorities submitted by both parties, and herein renders its decision.

On December 19, 1979, Kofoeds conveyed the property in question by warranty deed to Willard and Tonya Wood. On May 1, 1980, Willard Wood conveyed to Tonya Wood by warranty deed his interest in the property. On June 9, 1981, defendant Burton obtained a Judgment against Willard Wood and one other. On September 30, 1981, Tonya Wood conveyed by warranty deed to Gregory and Lynda Baldwin the said property. (This warranty deed

was also signed by Willard Wood.) Also on September 30, 1981, Tonya Wood conveyed a trust deed to Kofoeds. (This trust deed was also signed by Willard Wood). The Baldwins in purchasing the said property took the same subject to the primary mortgage with Equitable Life Assurance Company, and the aforementioned trust deed.

Therefore, as of September 30, 1981, the Baldwins were owners of the property, subject to the underlying mortgage, the trust deed, and any liens of record. There were no liens of record against Tonya Wood, but there was the Burton Judgment lien of record against Willard Wood.

The fact that Willard Wood also signed the warranty deed to Baldwins does not affect the title of the property,* and is insufficient to put Baldwins on notice to inquire further as to Willard Wood since Tonya~~as~~ Wood~~as~~ was the only titled owner of record.*

It is Burton's claim that the conveyance from Willard Wood to Tonya Wood was a fraudulent conveyance to defraud creditors, and therefore, null and void, and that his lien against the said property was valid.

Baldwins claim that they were bona fide purchasers, purchasing the property from the only owner of record, Tonya Wood, and having no knowledge of the Judgment lien against

Willard Wood, therefore even if the conveyance was fraudulent, it doesn't affect their interest.

Burton claims Baldwins had actual notice of his Judgment against Willard Wood because the title company, which they retained, had actual notice of the same.

On April 21, 1983, *Willard Wood filed for bankruptcy, and listed Burton as a Judgment creditor. Willard Wood was subsequently discharged in bankruptcy. Burton maintains that his lien continued against the said property in spite of the said discharge.

On August 6, 1986, Burton obtained a Writ of Execution ordering the sheriff or constable of Salt Lake County to collect his Judgment against Burton by levying upon and selling enough of the unexempted real estate of Willard D. Wood to satisfy the Judgment. At or near the same time, the Burtons delivered to the sheriff of Salt Lake County a praecipe directing the sheriff to "levy on the right, title and interest of Gregory Blake Baldwin and Lynda Baldwin, successors in interest of Willard D. Wood." A Notice of Real Estate Levy was recorded on August 12, 1986 indicating that the sheriff on August 11, 1986 had levied upon all the right, title, claim and interest of Gregory Blake Baldwin and Lynda Baldwin, successors in interest of Willard Wood. A subsequent Notice of Sheriff's Sale indicated that all rights, title and interest of Gregory Blake Baldwin and Lynda Baldwin,

successors in interest of Willard D. Wood, to be sold on September 9, 1986. Proof of publication indicates notice of the real estate sale, again indicating the sale of the interest of Gregory Blake Baldwin and Lynda Baldwin, successors in interest of Willard D. Wood. The property sold for \$8,760.10 to Burtons. The Certificate of Sale at execution, dated September 12, 1986, indicates a verification that the Salt Lake County Sheriff's Department under the Execution issued out of the court sold the said property for \$8,760.10, which was the highest bid made on the interest of "said defendants" and further added "all right, title and interest of Gregory Blake Baldwin and Lynda Baldwin, successors in interest of Willard D. Wood." The caption on this document indicates the parties to the lawsuit to be Max D. Burton and Emily A. Burton v. Clealon Mann and Willard D. Wood. The document indicates the Judgment was entered on June 9, 1981, the Execution issued August 6, 1986, the property sold September 9, 1986, and the civil number to be C-81-1568. The Baldwins were not parties to that action, and do not so appear as parties in this certificate.

Burtons only lien rights in this matter were against the interest in real estate owned by his Judgment debtor, Willard Wood. Burton had no right to the interest in real estate owned by the Baldwins, and could not proceed against their rights.

If Burton believed that the Willard Wood conveyance to Tonya Wood was a fraudulent conveyance, made to defraud creditors, then he should have filed an action to have the said conveyance set aside so that his lien rights could be perfected. In such action, he would have named the Woods and the Baldwins as defendants, which would have given the Baldwins the right to litigate this issue, and have their due process rights protected. However, such was never done. Title has remained at all times in the Baldwins and was in the Baldwins at the time Burton proceeded against the said property.

This Court holds that the sheriff's sale was void. The Baldwins were never Judgment debtors of Burton. Burton never had a legal right to the interests of the Baldwins. The only interest Burton had pursuant to his lien was a right to Willard Wood's owned interest in any real property. The Writ of Execution appears to be correct on its face. However, the Praecipe was in error, as were all subsequent documents leading up to the sale of the property. In essence, Burton has obtained Baldwins' property by improperly prepared documents, all in violation of the rights of Baldwin. Therefore, the sheriff's deed is herein declared null and void, and set aside.

Burton attempts to obliquely attack the Baldwins' interest in this real property by alleging that Baldwins were, in some manner, the successors in interest to Willard Wood. There is no

factual evidence whatsoever to remotely suggest the Baldwins are successors in interest to Willard Wood, subjecting them to liability on the Judgment Burton has against Willard Wood.

Since the title of the property was and is clearly in Lynda Baldwin, the question remains whether or not Burton still has a lien against the property. Burton's lien is only to that property owned by Willard Wood, but Willard Wood conveyed the property to Tonya Wood on May 1, 1980, and Tonya Wood conveyed the property to the Baldwins on September 30, 1981. No action has been filed to set that conveyance aside, and the Burtons have not so pled in this action. The statute of limitations has run on bringing an action for fraudulent conveyance and, therefore, the Court rules as a matter of law that Willard Wood has no ownership interest in the property in question, and has not had such since conveying the same away in May of 1980 and, therefore, Burton can establish no rights to any interest in the said property.

The fact that Lynda Baldwin took no action to redeem the property after Burton's foreclosure sale is neither here nor there. Since the sale was void, there was nothing to redeem.

It is noted that Willard Wood filed for bankruptcy on April 21, 1983, and listed Burton as a Judgment creditor.

Issues of fact remain as to damages Lynda Baldwin is entitled to, including attorney's fees, in regards to her having

~~the above sheriff's sale and sheriff's deed set aside.~~ Those issues will be preserved for trial

Based on the above, and for the additional reasons as set forth in the Memorandum of Points and Authorities, and Reply Memorandum of Points and Authorities filed by the plaintiffs in this matter, plaintiff's ~~Motion for Summary Judgment is granted as to declaring the sheriff's sale and sheriff's deed to Burton to be null and void and set aside.~~ The issue of damages remains for trial

The Motion for Summary Judgment filed by Burton is denied for the reasons stated above, and for the additional reasons set forth in plaintiff's Memorandum and Reply Memorandum of Points and Authorities filed in this matter.

The attorney for the plaintiffs will prepare the appropriate Order and Partial Summary Judgment.

Dated this 25 day of May, 1989.

13/ Leonard H. Russon
LEONARD H. RUSSON
DISTRICT COURT JUDGE

History L. 1961, ch 53, § 20

Effective Date

Repealing Clause

Section 21 of Laws 1961, ch 53 provided "Sections 24 1 1, 24 1 2, 24 1 3, 24 1 4, 24 1 5, 24 1 6, 24 1 7, 24 1 8, 24 1 9, 24 1 10, 24 1 11, 24 1 12, 24 1 13, 24 1 14, 24 1 15 Utah Code Annotated 1953 are hereby repealed"

Section 22 of Laws 1961, ch 53 provided "This act shall take effect July 1, 1961"

Collateral References

Woods and Forests § 11
98 C J S Woods and Forests § 8

24-2 21 Violation of law, rule, regulation, or proclamation a misdemeanor—Any violation of any provisions of this chapter or of any rule, regulation, or proclamation issued by the board of forestry and fire control in consonance with this chapter shall be a misdemeanor

History C 1963, 24 2 21, enacted by L. 1973, ch. 37, § 1

demeanor to violate any provision of the state forestry and fire control law or any of the rules, regulations, or proclamations of the board of forestry and fire control—Laws 1973, ch 37

Title of Act.

An act enacting section 24 2 21, Utah Code Annotated 1953, making it a mis

TITLE 25

FRAUD

- Chapter 1** Fraudulent Conveyances, 25 1 1 to 25 1 16
 2 Sale of Merchandise in Bulk [25 2 1 to 25 2 5 Repealed]
 3 Leases and Sales of Livestock [25 3 1 to 25 3 4 Repealed]
 4 Marketing Wool [25 4 1 to 25 4 3 Repealed]
 5 Statute of Frauds, 25 5 1 to 25 5 9

CHAPTER 1

FRAUDULENT CONVEYANCES

- Section** 25 1 1 Definitions
 25 1 2 Insolvency
 25 1 3 Fair consideration
 25 1 4 Conveyances by insolvent
 25 1 5 Conveyances by persons in business.
 25 1 6 Conveyances by persons about to incur debts
 25 1 7 Conveyance to hinder, delay, defraud creditors
 25 1 8 When conveyance or assignment void
 25 1 9 Defrauding prior or subsequent purchasers—Effect of notice at time of purchase
 25 1 10 Conveyance of partnership property
 25 1 11 Trust for grantor void
 25 1 12 "Creditors, "purchasers" includes heirs
 25 1 13 Bona fide purchasers not affected
 25 1 14 Sales without change of possession
 25 1 15 Rights of creditors with matured claims
 25 1 16 Rights of creditors with claims not matured

25-1-1. Definitions—In this chapter

"Assets" of a debtor means property not exempt from liability for his debts To the extent that any property is liable for any debt 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 encumbrance

"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

History L. 1925, ch 42, § 1, R S 1933 & C 1943, 33-1 1

Columbia, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virgin Islands, Washington, Wisconsin and Wyoming

Comparable Provisions

States that have adopted the Uniform Fraudulent Conveyance Act include Arizona, California, Delaware, District of

Cross References

Defrauding creditors as a misdemeanor, 76 A 511

Fraudulent sales by decedents, 75 11 13

Homesteads generally, Title 28

Statute of Limitations, 78 12 26 (3)

Uniform Commercial Code—Bulk Transfers, 70A 6 101 et seq

Uniform Commercial Code—Sales, 70A 2 101 et seq

Construction and application

This act has no application to fraudulent conveyances occurring prior to its passage. *Smith v Edwards*, 81 U 244, 17 P 2d 264

Creditors

Persons having claim in tort against grantor which was not reduced to judgment at time of alleged fraudulent conveyance held "creditor" within meaning of this section. *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063

Exempt property

In action to set aside conveyance by grantor to daughters as fraudulent grantor was not entitled to homestead exemption since he was not head of family where his wife had died and children had all attained majority and were not dependent upon him. *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063

If judgment debtor's interest in certain land, which had been set aside to him as homestead by bankruptcy court, was greater in value than at time of debtor's conveyance of land to his wife without sufficient consideration which rendered debtor insolvent, Utah district court would be justified in setting aside such conveyance as fraud on creditors, and judgment creditor thereupon could have execution issued and land could be sold in accordance with 28 1 14 and 28 1 15. *Ostler Land & Livestock Co v Brough*, 111 U 336, 178 P 2d 911

In determining whether judgment debtor's interest in land, set aside to him as homestead, had increased in value so as to be worth more than his homestead exemption at time of debtor's conveyance of such land to his wife without sufficient consideration, so as to justify setting aside of such conveyance as fraud on creditors, trial court should have taken into consideration effect of wife's one third inchoate interest on market value of such land, for failure of which judgment setting aside such conveyance was reversed and remanded for new trial. *Ostler Land & Livestock Co v Brough*, 111 U 336, 178 P 2d 911

Fraudulent mortgage

A creditor with a matured claim may have a mortgage set aside to the extent necessary to satisfy his claim under 25 1 15 (1) where such conveyance was made without fair consideration, defined in 25 1 3, and would render the person making it insolvent. *Ned J Bowman Co v White*, 13 U (2d) 173, 369 P 2d 962

Intent

In suit to set aside conveyance from husband to wife, no actual fraudulent intent will be required, when there was no fair value or consideration given, and the effect of the transfer is to render the grantor insolvent. *Cardon v Harper*, 106 U 560, 151 P 2d 99, 154 A L R 906

Statute of Limitations

In suit by United States to recover taxes from taxpayer's transferee on theory that transfer of taxpayer's property had been fraudulently made, government was bound by six year federal statute of limitations rather than three year Utah statute of limitations on actions based upon fraud or mistake, even though United States was pursuing its common law remedy rather than its statutory remedy, rule that United States is not bound by state statutes of limitation unless Congress so provides was controlling. *United States v Decker*, 241 F Supp 283

Collateral References

Fraudulent Conveyances—§5

37 CJS Fraudulent Conveyances §5

37 Am Jur 2d 691, Fraudulent Conveyances §1

Conflict of laws as regards validity of fraudulent and preferential transfers and assignments, 111 A L R 787

Creditors' right to attack as fraudulent a conveyance by third person to debtor's spouse, 75 A L R 2d 8

Future tort conveyance as fraudulent where made in contemplation of possibility for, 38 A L R 3d 597

Gift or other voluntary transfer by husband as fraud on wife, 64 A L R 466, 49 A L R 2d 521

Jurisdiction, and priority of its exercise, to require real property in another state or country to be applied in satisfaction of debt (including the setting aside of a fraudulent conveyance thereof), 144 A L R 646

Right of creditors in respect of property gratuitously conveyed or transferred to a third person for alleged benefit of debtor, 147 A L R 1160

Rights as between creditors of grantor or transferor and those of grantees or

transferees in respect of property conveyed or transferred in fraud of creditors, 148 A L R 529

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 A L R 230

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 A L R 2d 589

Statute or rule relating to preferences by insolvent debtor as applicable to new

security given in renewal of, exchange or substitution for or addition to, existing security, 142 A L R 1407

Succession, estate, or gift tax in respect of or as affected by conveyance or transfer restoring to original owner property transferred by him to defraud or delay creditors, 108 A L R 1508

Law Reviews

The Bankrupt's Spouse: The Forgotten Character in the Bankruptcy Drama, Jonathan M Landers, 1974 Utah L Rev 709, 722

25-1 2 Insolvency—A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to satisfy his probable liability on his existing debts as they become absolute and matured

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

History L 1926, ch 42, §2, R S 1933 & C 1943, 33 1 2

Cross Reference

As to setting aside fraudulent or voluntary conveyances, see 25 1 15

Allegation of insolvency

Allegation that person is insolvent is allegation of a conclusion, and such statement must be amplified by allegations of fact as to amount of money required to pay his probable existing liabilities as they mature and of what fair salable value his property is, and that such property is insufficient to pay his debts which should be specified. *Smith v Id wards*, 81 U 244 17 1 21 264, disapproved in *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, in which it was said to be sufficient to allege, in addition to necessary matters of inducement that defendant made the conveyance, that he was then insolvent or thereby rendered insolvent and that conveyance was made without consideration or without adequate consideration

Allegation of insolvency in complaint in action to set aside conveyance held sufficient as against contention that it was conclusion. *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063

Assignments

Whether an assignment of an interest in an estate was in good faith and not to hinder, delay or defraud creditors, or was made for such purpose, depends upon the facts and circumstances surrounding the transaction, as gathered from the badges of fraud present. *Boe culero v Bee*, 102 U 12, 1 61 2d 1063

Intent

In suit to set aside conveyance from husband to wife, no actual fraudulent intent will be required, when there was no fair value or consideration given, and the effect of the transfer is to render the grantor insolvent. *Cardon v Harper*, 106 U 560, 151 P 2d 99, 154 A L R 906

Proof of insolvency

Judgment and fruitless execution are conclusive evidence of judgment debtor's insolvency. *Ogden State Bank v Barker*, 12 U 13 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Collateral References

Fraudulent Conveyances—§7(1)

37 CJS Fraudulent Conveyances §106

Right of insolvent to insure life for benefit of relatives, 31 A L R 51, 34 A L R 878

Valuation of notes and accounts receivable in determining question of insolvency or bankruptcy, 133 A L R 1274

25 1 3 Fair consideration—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 when compared with the value of the property or obligation obtained

History L 1925, ch 42, § 3, R S 1933
 & C 1943, 33-1 3

Evidence

Consideration clause in deed does not prove that deed was founded on valuable consideration, or on any consideration, and hence where consideration expressed in one dollar, it may be shown that larger sum actually was paid, and, where larger sum is expressed it may be shown that lesser sum actually was paid. *Ogden State Bank v Barker*, 12 U 13 40 P 765, distinguished in 54 U 481 182 P 357 and 102 U 12 126 P 2d 1063

Fact that grantor was permitted to introduce evidence, tending to show that his deed to his sons was made because grantees had remained at home with him, had rendered value in work to him, and had agreed to stay with him, could not change effect and operation of only consideration expressed in deed, namely one dollar. *Ogden State Bank v Barker*, 12 U 13 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Consideration entirely different from that expressed in deed cannot be shown by parol evidence. *Ogden State Bank v Barker*, 12 U 13 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Recited consideration of \$10 in deed from father to daughters was not fair consideration and expression "other good and valuable consideration" held to mean nothing in absence of extrinsic explanatory evidence. *Zuniga v Evans*, 87 U 198, 49 P 2d 513 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063

Whether an assignment of an interest in an estate was in good faith and not to hinder, delay or defraud creditors, or was made for such purpose, depends upon the facts and circumstances surrounding the transaction, as gathered from the badges of fraud present. *Boccalero v Bee*, 102 U 12, 126 P 2d 1063

'Fair equivalent'

"Fair equivalent" used in this section means something other than "exact equivalent" or "full value," since "fair" modifies and restricts "equivalent." *Utah Assets Corp v Dooley Bros Assn*, 92 U 577, 70 P 2d 738

Fraudulent intent

In suit to set aside conveyance from husband to wife, no actual fraudulent intent will be required, when there was no fair value or consideration given and the effect of the transfer is to render the grantor insolvent. *Cardon v Harper*, 106 U 560, 151 P 2d 99, 154 A L R 906

Fraudulent mortgage

A creditor with a matured claim may have a mortgage, a conveyance under 25 1 1, set aside to the extent necessary to satisfy his claim under 25 1 15 (1) where such conveyance was made without consideration and would render the person making it insolvent. *Ned J Bowman Co v White*, 13 U (2d) 173, 369 P 2d 962

Parent and child

Labor performed for parents by children during their minority will not entitle such children to compensation, so as to establish relation of debtor and creditor and permit parents lawfully to prefer children, convey their property to them, and thus place property out of reach of parents' creditors whose claims were in existence at time of deed's execution. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Valuable consideration

Where any promise or agreement of grantee sons to stay with grantor father was made at time when grantor was legally entitled to grantees' services with

out compensation such services would not constitute valuable consideration which would avail grantees as against grantor's creditors whose claims were in existence at time of deed's execution. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357, 102 U 12, 126 P 2d 1063

Notes, given for value, constitute valuable consideration for mortgage securing them. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Where there is a valuable consideration which is stated to be fair, equivalent for, and not disproportionate to value of property conveyed, requirement as to allegations and proof of fraud is more exacting. *Smith v Edwards*, 81 U 244, 17 P 2d 264

Where wife owned substantial interest in joint bank account and husband executed note to wife at her request upon withdrawing substantial sum from such account to invest in hazardous business, and when it became due husband executed renewal note secured by mortgage on undivided one half interest in property owned by them jointly, original note was supported by valuable consideration, and, hence, mortgage was not fraudulent as to creditors. *Williams v Peterson*, 80 U 526, 46 P 2d 674

A debt barred by statute of limitations may nevertheless be consideration for assignment of interest in an estate, even as between close relations. *Boccalero v Bee*, 102 U 12, 126 P 2d 1063

Voluntary conveyance

Deed, made for nominal consideration only, is mere voluntary conveyance and void as to grantor's creditors whose claims were in existence at time of its execution and who would, if it was to be given effect, be defrauded of their rights or hindered or delayed in collecting their claims. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

A conveyance without consideration is voluntary, but not for that reason alone fraudulent. *Smith v Edwards*, 81 U 244, 17 P 2d 264

An owner may convey exempt property to anyone including his wife with

out having such conveyance overthrown by creditors, provided he makes the proper defense when such transaction is assailed by or on behalf of creditors. *Williams v Peterson*, 80 U 526, 46 P 2d 674, *Carlson v Harper*, 106 U 560, 151 P 2d 99 154 A L R 906

Conveyance of property worth \$14,000 to \$15,000, which netted only about \$180 a year to party in satisfaction of pre-existing debt of \$10,000, held not a fraudulent conveyance. *Utah Assets Corp v Dooley Bros Assn*, 92 U 577, 70 P 2d 738

Collateral References

Fraudulent Conveyances—70(1)
 37 CJS Fraudulent Conveyances § 140
 37 Am Jur 2d 707, 708, Fraudulent Conveyances § 18, 19

Antecedent debt transaction in consideration of discharge of antecedent debt owed by one other than grantor as based on "fair consideration" under Uniform Fraudulent Conveyance Act, 30 A L R 2d 1209

Assumption of mortgage as consideration for conveyance attacked as in fraud of creditors 6 A L R 2d 270

Attorney's fees conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 A L R 2d 500

Conveyance in consideration of future support as fraudulent against creditors, 2 A L R 1438, 23 A L R 584

Conveyance pursuant to antenuptial agreement as fraud on creditors, 41 A L R 1163

Effect of words "value received" or similar words in written instrument, other than negotiable instrument or sealed instrument to create presumption or make prima facie case of consideration, 116 A L R 545

Future tort conveyance as fraudulent where made in contemplation of possible liability for future tort, 38 A L R 3d 597

Purchase of annuity by debtor as fraud on creditor, 154 A L R 727

Transfer of property by debtor to corporation, in consideration of its stock, as a fraud on creditors, 85 A L R 133

Validity of mortgage securing unlimited future advances, 81 A L R 631

25-1 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

History: L. 1925, ch. 42, § 4; R. S. 1933 & C. 1943, 33-1-4.

Application.

Conveyance of property worth \$14,000 to \$15,000, which netted only about \$180 a year, to partly in satisfaction of pre-existing debt of \$10,000, held not a fraudulent conveyance. *Utah Assets Corp. v. Dooley Bros. Assn.*, 92 U. 577, 70 P. 2d 738.

Conveyance between husband and wife.

Conveyance by husband to wife for nominal consideration, held, under circumstances, constructively fraudulent and void as to existing creditors, without proof of actual fraud. *Gustin v. Mathews*, 25 U. 168, 70 P. 402.

Assignment by husband to his wife of home held not fraudulent conveyance where widow established good faith of her transaction by showing evidence of advancement to husband for construction of the house and for carrying on his business. *Lund v. Howell*, 92 U. 232, 67 P. 2d 216.

In suit to set aside conveyance from husband to wife, no actual fraudulent intent will be required, when there was no fair value or consideration given, and the effect of the transfer is to render the grantor insolvent. *Cardon v. Harper*, 106 U. 560, 151 P. 2d 99, 154 A. L. R. 906.

Decree setting aside fraudulent conveyance by husband to wife can properly operate only to rescind the transfer of whatever title the husband conveyed to his wife. It cannot disturb the wife's rights accruing by virtue of 75-1-1 and 75-4-3. *Cardon v. Harper*, 106 U. 560, 151 P. 2d 99, 154 A. L. R. 906.

Conveyances between relations.

Conveyances between near relatives, calculated to prevent a creditor from realizing on his claim against one of such relatives, are subject to rigid scrutiny. *Paxton v. Paxton*, 80 U. 540, 15 P. 2d 1051, distinguished in 92 U. 232, 67 P. 2d 215 and 102 U. 12, 126 P. 2d 1063.

The mere fact that the transaction is among close relatives does not necessarily mean that it is invalid, but the true facts are subject to proof. *Givan v. Lambeth*, 10 U. (2d) 287, 351 P. 2d 959.

A note and mortgage executed by son in good faith to secure a pre-existing obligation which the son owed his father was not a fraudulent conveyance. *Ned J. Bowman Co. v. White*, 13 U. (2d) 173, 369 P. 2d 962.

Conveyances between close relatives are subject to rigid scrutiny, but the fact that close relatives are involved does not render the conveyance fraudulent. *Ned J.*

Bowman Co. v. White, 13 U. (2d) 173, 369 P. 2d 962.

Evidence.

Whether an assignment of an interest in an estate was in good faith and not to hinder, delay or defraud creditors, or was made for such purpose, depends upon the facts and circumstances surrounding the transaction, as gathered from the badges of fraud present. *Boccalero v. Bee*, 102 U. 12, 126 P. 2d 1063.

There was sufficient evidence to warrant finding that conveyance and bill of sale were executed on the part of both the grantor and grantees with actual intent to hinder, delay and defraud creditors, and that said transaction was fraudulent as to both present and future creditors. *Cardon v. Harper*, 106 U. 560, 151 P. 2d 99, 154 A. L. R. 906.

In an action on notes executed by the defendants and to establish a lien on property conveyed by one of the defendants to his children, the evidence was sufficient to sustain the lower court's findings that the conveyances were not fraudulent and to sustain a judgment denying a lien. *Givan v. Lambeth*, 10 U. (2d) 287, 351 P. 2d 959.

Whether a conveyance is fraudulent as to creditors must be determined from the facts of each case and from the circumstances surrounding the transaction, keeping in mind that the purpose of the Fraudulent Conveyances Act (25-1-1 to 25-1-16) is not to prevent a debtor from securing his honest debt. *Ned J. Bowman Co. v. White*, 13 U. (2d) 173, 369 P. 2d 962.

"Fair equivalent."

"Fair equivalent" used in 25-1-3 means something other than "exact equivalent" or "full value," since "fair" modifies and restricts "equivalent." *Utah Assets Corp. v. Dooley Bros. Assn.*, 92 U. 577, 70 P. 2d 738.

Mortgage as conveyance.

A mortgage made without fair consideration, which will render the person making it insolvent, constitutes statutory fraud, and the existence of a subjective intention to defraud is not required. *Ned J. Bowman Co. v. White*, 13 U. (2d) 173, 369 P. 2d 962.

Preferences.

Even if preference, effected by debtor by way of mortgage securing notes executed for value, was given with fraudulent design or with intent to hinder and delay judgment creditor in collecting his judgment, validity of mortgage would not be affected by such fact if neither trustee in mortgage nor owner of notes participat-

ed in or had knowledge of fraud. *Ogden State Bank v. Barker*, 12 U. 27, 40 P. 769, citing *Pettit v. Parsons*, 9 U. 223, 33 P. 1038. The *Ogden* case has been distinguished in 54 U. 481, 182 P. 357 and 102 U. 12, 126 P. 2d 1063. The *Pettit* case has been distinguished in 10 U. 96, 37 P. 242.

Debtor has right to prefer one creditor over another. *Ogden State Bank v. Barker*, 12 U. 27, 40 P. 769, distinguished in 54 U. 481, 182 P. 357 and 102 U. 12, 126 P. 2d 1063.

Collateral References.

Fraudulent Conveyances—74(1).

37 C.J.S. Fraudulent Conveyances § 163.

37 Am. Jur. 2d 694 et seq., *Fraudulent Conveyances* § 5 et seq.

Antenuptial agreement, conveyance pursuant to, as fraud on creditors, 41 A. L. R. 1163.

Right of insolvent to insure life for benefit of relatives, 31 A. L. R. 51, 34 A. L. R. 838.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by intestate as a fraud upon creditors, 7 A. L. R. 2d 1104.

Validity and effect as against creditors of change of beneficiary or assignment of insurance policy from estate to individual, 106 A. L. R. 506.

25-1-5. 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.

History: L. 1925, ch. 42, § 5; R. S. 1933 & C. 1943, 33-1-5.

Collateral References.

Fraudulent Conveyances—74(1).

37 C.J.S. Fraudulent Conveyances § 163.

Right of creditors or their representatives to complain of voluntary transfer or pledge of corporate assets by corporation which subsequently becomes insolvent, 117 A. L. R. 1263.

25-1-6. Conveyances by persons 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 to, or believes that he will, incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

History: L. 1925, ch. 42, § 6; R. S. 1933 & C. 1943, 33-1-6.

Collateral References.

Fraudulent Conveyances—74(1).

37 C.J.S. Fraudulent Conveyances § 163.

Order or to be rendered, as fraudulent as against creditors, 45 A. L. R. 2d 500.

Future tort, conveyance as fraudulent where made in contemplation of possible liability for, 38 A. L. R. 3d 597.

Tort claimant's right, prior to judgment, to attack conveyance or transfer as fraudulent, 73 A. L. R. 2d 740.

Attorney's fees: conveyance or transfer in consideration of legal services, ren-

25-1-7. Conveyance to hinder, delay, defraud creditors.—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.

History: L. 1925, ch. 42, § 7; R. S. 1933 & C. 1943, 33-1-7.

Cross-Reference.

Defrauding creditors as a misdemeanor, 76 6 511.

Construction and application

This section does not apply where no question of fraud is raised by the pleadings, nor any evidence offered relating to such question. *Skeen v Van Birkle*, 80 U 419, 15 P 2d 344

Conveyances between relations.

The mere fact that the transaction is among close relatives does not necessarily mean that it is invalid, but the true facts are subject to proof. *Givan v Lambeth*, 10 U (2d) 287, 351 P 2d 959

A note and mortgage executed by son in good faith to secure a pre-existing obligation which the son owed his father was not a fraudulent conveyance. *Ned J Bowman Co v White*, 13 U (2d) 173, 369 P 2d 962

Conveyances between close relatives are subject to rigid scrutiny but the fact that close relatives are involved does not render the conveyance fraudulent. *Ned J Bowman Co v White*, 13 U (2d) 173, 369 P 2d 962

Conveyance to wife

Where the debtors wife had both provided initial funds for purchasing real estate and had held previously owned real estate in her name, fact that property on which husband's creditors sought judgment lien had been transferred from husband to wife did not establish intent to defraud creditors. *Hillstead v Leavitt*, 25 U (2d) 82, 475 P 2d 1017

Voluntary conveyance

Fact that grantee in voluntary conveyance does not participate in any fraud against grantor's existing creditors, or that grantee accepts deed in good faith, without intent to defraud such creditors, will not relieve grantee from effect and operation of such conveyance. *Ogden State Bank v Barker*, 12 U 13, 40 P 765 distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Former rule was that voluntary conveyance, made by debtor who was in embarrassed financial circumstances was constructively fraudulent, and would be held void, as to existing creditors without proof of actual fraud, and even though grantee had no knowledge of fraudulent intent on part of grantor. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Collateral References

Fraudulent Conveyances § 24(2)
37 C I S Fraudulent Conveyances § 33
37 Am Jur 2d 696 et seq., Fraudulent Conveyances § 6 et seq

Admissibility of declarations of grantor or transferor on issue as to whether conveyance or transfer was in fraud of creditors, 83 A L R 1446

Admissibility of testimony of transferee as to his knowledge, purpose, intention or good faith on issue whether conveyance was in fraud of transferor's creditors, 62 A L R 2d 418

Agreement by husband that wife shall receive proceeds of sale of homestead as fraud on his creditors, 6 A L R 574

Attorney's fees conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent against creditors 45 A L R 2d 500

Conveyance between third persons upon consideration furnished by debtor as with in application of Fraudulent Conveyance Act, 61 A L R 741

Conveyance or transfer by stockholder as fraudulent as regards his liability as stockholder to creditors of corporation, 89 A L R 751

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent, 9 A L R 358

Creditor's right to attack as fraudulent a conveyance by third person to debtor's spouse, 35 A L R 2d 8

Denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 A L R 2d 589

Fact that the parties to a conveyance in fraud of creditors are not in pari delicto as affecting the right of the party guilty of fraud to relief, 7 A L R 150

Future tort conveyance as fraudulent where made in contemplation of possible liability for, 38 A L R 3d 597

Gift by husband as fraud on wife, 64 A L R 466, 49 A L R 2d 521

Gift of debtor's services to third person as fraud on creditors, 28 A L R 1046

Liens use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as a fraud upon creditors, 7 A L R 2d 1104

Mortgage assumption of mortgage as consideration for conveyance attacked as in fraud of creditors, 6 A L R 2d 270

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 A L R 1166

Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment, 5 A L R 1072

Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors, 8 A L R 527

Right of grantee, transferee or mortgagee in instrument fraudulent as to creditors to protection to extent of consideration paid by him, 79 A L R 132

Right of grantor or transferor or his privies to attack conveyance or transfer made for purpose of evading taxation, 118 A L R 1184

Right of parent as against creditor or lienor to make gift to minor child of latter's own services, 44 A L R 876

Tort claimant's right, prior to judgment, to attack conveyance or transfer as fraudulent, 73 A L R 2d 749

Transfer of property by debtor to corporation, in consideration of its stock, as a fraud on creditors, 85 A L R 133

Validity and effect as against creditors of change of beneficiary or assignment of insurance policy from estate to individual, 106 A L R 596

Validity as against creditors of change of beneficiary of insurance policy from estate to individual, 6 A L R 1178, 106 A L R 596

Validity as against creditors of trustee or one deriving his right from trustee, of conveyance or transfer to carry out terms of unenforceable parol trust, 64 A L R 576

Validity of assignment of future book accounts, 72 A L R 856

25 1-8 When conveyance or assignment void—Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of rents or profits issuing therefrom, and every charge upon lands, goods or things in action or upon the rents or profits thereof, made with the intent to delay, hinder or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suits commenced, or decree or judgment suffered, with the like intent, as against the person hindered, delayed or defrauded shall be void

History R S 1898 & O L 1907, § 2474, O L 1917, § 5821, R S 1933 & O 1943, 33-1 8

Compiler's Notes

Analogous former statutes, Comp Laws 1876, § 1017, 2 Comp Laws 1888, § 2814

Construction and application

This section is substantially the same as 13 Eliz c 5, and is merely declaratory of the principles of the common law. *United States v Late Corporation of Church of Jesus Christ of Latter Day Saints*, 5 U 538, 18 P 35

Under this section the assignment of the corporate property of the Church of Jesus Christ of Latter Day Saints, pending dissolution of that corporation by Act of Congress was held in fraud of the rights of the government and void as to the receiver, the government being included in the words "other persons." *United States v Late Corporation of Church of Jesus Christ of Latter Day Saints* 5 U 538, 18 P 35

Insolvency is not required to make this section operative. *Ogden State Bank v Barker*, 12 U 13 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Statute was not intended to prevent debtor from paying or securing his honest debts, or from doing equity and exact justice to all of his creditors by placing his means at their disposal. *Billings v Parsons*, 17 U 22, 53 P 730

Assignments generally

Under this section an assignment of property is not void which among other things provides that the assignees out of the proceeds of "personal property" will pay, and that assignees accept trust and agree to execute same by disposing of the property and collecting the choses in action due assignor and applying proceeds to payment of debts. It does not confer authority to sell on credit. *Sprecht v Parsons*, 7 U 107, 25 P 730

Rule that sale or assignment of chattels, unaccompanied by change of possession, is fraudulent per se as to execution creditors of, or subsequent purchasers from, seller or assignor does not necessarily apply to assignments for benefit of creditors, but long delay in taking possession is circumstance from which fraud may be prima facie inferred. *Snyder v Murdock*, 20 U 419, 59 P 91

Conditional sales

Assignment for benefit of creditors held void as to seller of personal property in assignor's possession under contract of conditional sale, condition of which was

unperformed since it empowered assignee to sell assigned property on credit. *Charles Lippincott & Co v Rich*, 19 U 140, 56 P 806

Evidence of fraud

A *prima facie* case that property was conveyed to son of one of the defendants with intent to defraud judgment creditors was established by evidence indicating both nominal consideration for the property and defendants' indebtedness at time of conveyance. *Brimhall v Grow*, 25 U (2d) 298, 480 P 2d 731

Extent of invalidity of assignment.

An general rule, assignment which is fraudulent in fact is void in toto. *W P Noble Mercantile Co v Mt Pleasant Equitable Co op Inst*, 12 U 213, 42 P 869 distinguished in 15 U 110, 47 P 604 and 18 U 42, 55 P 77

An general rule, assignment which is void in part is void in its entirety. *W P Noble Mercantile Co v Mt Pleasant Equitable Co op Inst*, 12 U 213, 42 P 869 distinguished in 15 U 110, 47 P 604 and 18 U 42, 55 P 77

Homesteads

A homestead cannot be made subject of attack by a creditor upon ground that it was sold or conveyed in fraud of such creditor. *Pison Exch Sav Bank v Dietz*, 63 U 221, 225 P 598, explained in 86 U 257, 42 P 2d 989

Presumption of fraud

Where grantor was heavily indebted at time of his execution of voluntary conveyance, inference is that conveyance was fraudulently made for purpose of hindering and delaying grantors creditors. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, applying identical section in *Comp Laws of 1888* distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063

Right of corporate directors to prefer themselves

Where corporation has become insolvent and abandoned objects for which it was created, its directors cannot, by voluntary deed of assignment prefer themselves, as corporate creditors, over other such creditors whose claims are equally

meritorious, so as to secure advantage over latter by reason of directors' official positions and their consequent superior knowledge of corporation's affairs. *W P Noble Mercantile Co v Mt Pleasant Equitable Co op Inst*, 12 U 213, 42 P 869, distinguished in 15 U 110, 47 P 604 and 18 U 42, 55 P 77

When assignment of property of corporation, which has become insolvent and abandoned objects for which it was created, contains fraudulent preferences in favor of directors as corporate creditors, such fact of itself indicates fraudulent intent on directors' part. *W P Noble Mercantile Co v Mt Pleasant Equitable Co op Inst*, 12 U 213, 42 P 869, distinguished in 15 U 110, 47 P 604 and 18 U 42, 55 P 77

Fact that directors assert that they had no fraudulent intent, when, after corporation had become insolvent, they made assignment of corporate property which constituted preference in their favor as corporate creditors, is immaterial as far as invalidity of assignment is concerned, since directors must be presumed to have intended probable consequences of their act. *W P Noble Mercantile Co v Mt Pleasant Equitable Co op Inst*, 12 U 213, 42 P 869, distinguished in 15 U 110, 47 P 604 and 18 U 42, 55 P 77

Collateral References

Fraudulent Conveyances 24(2)
37 C.J.S. Fraudulent Conveyances § 23

Enforceability, as between parties, of an executory agreement made in fraud of creditors, 172 A L R 1121

Excessive security for debt as affecting question of fraud upon creditors 138 A L R 1051

Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment, 5 A L R 1072

Rents and profits, accountability and liability for rents and profits of grantee of fraudulently conveyed real property, 60 A L R 2d 593

Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 A L R 524

fraudulent in favor of a subsequent purchaser who had actual or constructive notice thereof at the time of his purchase, unless it appears that the grantee in such conveyance, or the person to be benefited by such charge, was privy to the fraud intended

History R S 1898 & C L 1907, §§ 2464, 2465, C L 1917, §§ 5814, 5815, R S 1933 & C 1943, 33-1 9

Compiler's Notes

Analogous former statute, 2 Comp Laws 1888, § 2813

Mortgagor remaining in possession

Mortgage on stock of merchandise held fraudulent as to judgment creditor of mortgagor, where mortgagor remained in possession of mortgaged property and continued to sell it in usual course of business pursuant to merely verbal agreement with mortgagee which agreement contemplated that mortgage was not to

be paid on its due date but was to be extended from time to time. *McKibbin v Brigham*, 18 U 79, 55 P 66

Collateral References

Fraudulent Conveyances 71
37 C.J.S. Fraudulent Conveyances § 286

Grantor's continued possession of land after execution of deed as notice of his claim adverse to title conveyed, 105 A L R 845

Length of period of possession before accrual of rights of person sought to be affected by notice as affecting the rule regarding constructive notice from possession of real property, 105 A L R 892

25 1 10 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,

(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

History L 1925, ch 42, § 8, R S 1933 & C 1943, 33-1 10

Rights of partners when agreement is rescinded, 181 36

Cross References

Preferences to limited partner, 48 2 13

Collateral References

Partnership 180
68 C.J.S. Partnership § 180

25 1 11 Trust for grantor void—All deeds, gifts, conveyances, transfers or assignments, verbal or written, of goods, chattels, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person

History R S 1898 & C L 1907, § 2466, C L 1917, § 5816 R S 1933 & C 1943 33-1 11

Reservation to settlor of trust or other grantor of right to revoke or to withdraw securities or other property and substitute others as affecting validity as against creditors 92 A L R 282

Construction and application

This section relates only to transfers of personal property not real property. *Genay v Cunn*, 79 U 268, 9 P 2d 396

Validity as against creditors of conveyance in trust for settlor for life with remainder to his appointees, 93 A L R 1211

Collateral References

Fraudulent Conveyances 111
37 C.J.S. Fraudulent Conveyances § 219

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors, 69 A L R 306

Validity of trust created by nontestamentary instrument reserving benefit to settlor for life with power of revocation, 73 A L R 209, 32 A L R 2d 1270

25 1 9 Defrauding prior or subsequent purchasers—Effect of notice at time of purchase—Every conveyance of any estate or interest in lands, or the rents or profits of lands, and every charge upon lands, or the rents or profits thereof, made or created with intent to defraud prior or subsequent purchasers thereof for a valuable consideration shall be void as against such purchasers. But no such conveyance or charge shall be deemed

25 1-12 "Creditors," "purchasers" includes heirs—Every conveyance, charge, instrument or proceeding declared to be void by the provisions of this chapter as against creditors and purchasers shall be equally void as against the heirs, successors, personal representatives or assigns of such creditors or purchasers

History R S 1898 & C L 1907, § 2475, C L 1917, § 5822, R S 1933 & C 1943, 33-1-12

Collateral References
Fraudulent Conveyances—3
37 C.J.S. Fraudulent Conveyances § 4

25 1-13 Bona fide purchasers not affected—The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor

History R S 1898 & C L 1907, § 2476, C L 1917, § 5823, R S 1933 & C 1943, 33-1-13

Collateral References

Fraudulent Conveyances—192
17 C.J.S. Fraudulent Conveyances § 201

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance or transfer as against creditors 17 A L R 728

Presumption and burden of proof as regards good faith and consideration on part of purchaser or one taking encumbrance subsequent to unrecorded conveyance or encumbrance, 107 A L R 502

Right of grantee, mortgagee or transferee in instrument fraudulent as to creditors

25 1-14 Sales without change of possession—Every sale made by a seller of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same is accompanied by a delivery within a reasonable time, and is followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the seller or assignor, or subsequent purchasers in good faith. The word "creditors" as used in this section shall be construed to include all persons who shall be creditors of the seller or assignor at any time while such goods and chattels shall remain in his possession or under his control

History R S 1898 & C L 1907, § 2473, R S 1933 & C 1943, 33-1-14

Compiler's Notes

Analogous former statutes, Comp. Laws 1876, § 1016, 2 Comp. Laws 1888, § 2837

Assignee of prior claims

Under this section, where plaintiff, after filing of chattel mortgage, secured assignment of a claim against the mortgagor which had accrued previous to the filing,

tors to protection to extent of consideration paid by him 79 A L R 132

Right of grantee, or his privies, to maintain suit or proceeding for affirmative relief, where claim is made or anticipated that conveyance was made with intention on part of grantor, but without actual fraud by grantee, to defraud former creditors, 128 A L R 1504

Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors, 8 A L R 527

Rights as between creditors of fraudulent grantor, where one or more of them, in payment of or as security for his debt, receives deed or mortgage from fraudulent grantee, 114 A L R 406

plaintiff acquired all rights of such mortgagor therein, including right to invalidate mortgage Volker Lbr Co v Utah & Oregon Lbr Co, 45 U 603, 148 P 365, Ann Cas 1917D, 1158

Badges of fraud

Transaction of sale without delivery or change of possession of things sold, was fraudulent as against creditors of vendor so as to authorize granting of attachment Charleston Coop v A W

Allen & Bris 10 U 575, 123 P 578, Ann Cas 1914D, 1092

Many badges of fraud are set out in Bocanero v Iler, 102 U 12, 126 P 2d 1063

Bona fide purchasers

Conveyance of homestead by debtor to wife and by her to third person for cash, mortgage to her, and assumption of husband's debt to another, also secured by mortgage given by purchaser, who subsequently paid said assumed debt, where transactions were completed prior to any judgment against debtor husband, and purchaser from wife was unaware of this latter indebtedness, was not voidable as fraudulent State Bank of Beaver County v Mortensen, 66 U 290, 241 P 1055

Change of possession

Change of possession must be actual and not merely constructive or colorable Everett v Brigham, 14 U 242, 47 P 75

Possession must be continuous in purchaser and not merely delivery and surrender back Everett v Brigham, 14 U 242, 47 P 75

After delivery of possession, vendee may appoint vendor to hold property for him as his trustee or agent, or may make him his employee, but such appointment or employment must be in good faith, and may be regarded as suspicious circumstance and be considered by jury, with all of other evidence, in determining whether possession was taken and held in good faith Everett v Brigham, 14 U 242, 47 P 75

Sale of machinery by corporation to newly organized operational subsidiary in good faith cannot be voided on behalf of one who became creditor after transfer, on ground that there was no change of possession and transaction, therefore, was fraudulent Boston Arme Mines Development Co v Clawson, 66 U 103, 240 P 165

"Creditor" defined

The term "creditor" includes all persons who may have claims against mortgagor at any time while mortgaged goods and chattels remain in his possession Volker Lbr Co v Utah & Oregon Lbr Co, 45 U 603, 148 P 365, Ann Cas 1917D, 1158, applying this section and § 1-1 (since repealed) dealing with requisites for validity of a chattel mortgage

Evidence

In action for allegedly wrongful conversion of wool by defendant judgment creditor of owner, which owner had delivered wool to plaintiffs in payment of debt, held that, although arrangement

between owner and plaintiffs for transportation of wool by debtor of owner might be suspicious circumstance, it could not be regarded, as matter of law, as conclusive evidence of fraud Everett v Brigham, 14 U 242, 47 P 75

In action for allegedly wrongful conversion of wool by defendant judgment creditor of owner, which owner had delivered wool to plaintiffs in payment of debt, held that, under evidence, questions of whether plaintiffs' subsequent possession of wool was actual or merely colorable, and of whether it was continuous, were questions for jury Everett v Brigham, 14 U 242, 47 P 75

Where a debtor in a cleaning business gave a bill of sale to plaintiff but kept and used the equipment involved and received additional equipment from the plaintiff who retained title under a conditional sales contract, the plaintiff was not entitled to a summary judgment in an action involving the machinery since there was a disputed fact question as to notice to or knowledge of the sale by defendant who had loaned money secured by chattel mortgages on the machinery Martin Machinery v Strevell Paterson Finance Co, 7 U (2d) 316, 324 P 2d 776

History of section

It will be noted that this section was taken from Comp. Laws 1907, due to the fact that the last sentence was repealed by Comp. Laws 1917, and was restored in 1933 See Hansen v Daniels, 73 U 142, 272 P 941

Pleadings.

Allegation in action to set aside conveyance that grantor remains in possession of land after its conveyance is an allegation of fact, and may or may not prove fraud Smith v Edwards, 81 U 244, 17 P 2d 264

Presumptions and burden of proof

Rule that sale or assignment of chattels, unaccompanied by change of possession, is fraudulent per se as to execution creditors of, or subsequent purchasers from, seller or assignor does not necessarily apply to assignments for benefit of creditors, but long delay in taking possession is circumstance from which fraud may be prima facie inferred Snyder v Murdock, 20 U 419, 59 P 91

Reasonable time for delivery

Reasonable time should be allowed in which to make delivery White v Pease, 15 U 170, 49 P 416

In action for conversion by judgment creditor and officers levying execution on grain claimed by plaintiff to have

been sold and delivered to him by judgment debtor, held that under evidence questions of what was reasonable time, under all of circumstances of case, for making delivery of grain, and of whether transaction between judgment debtor and plaintiff was fraudulent, were questions for jury. *White v Pease*, 15 U 170, 49 P 416.

There is no fixed rule, which will govern all cases, as to what is necessary to constitute such delivery and change of possession as are required by this section, but each case must be governed by its own particular facts and circum-

stances. *Blish v McCormick*, 15 U 188, 40 P 5, 9.

What constitutes delivery within reasonable time, and actual and continued change of possession, are generally facts which depend largely on kind and nature of property, situation of parties, and circumstances peculiar to each case. *Blish v McCormick*, 15 U 188, 49 P 529.

Collateral References

Fraudulent Conveyances—135
37 C.J.S. Fraudulent Conveyances § 180
37 Am. Jur. 2d 731 et seq., Fraudulent Conveyances § 42 et seq.

25115 Rights of creditors with matured claims.—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

(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.

History. L. 1925, ch. 42, § 9, R. S. 1933 & C. 1943, § 115.

Defenses

Defendant in suit to set aside conveyance to his wife as fraudulent may interpose defense that property is exempt from execution, and does not exceed in value his maximum homestead, and upon submission of proof thereof by defendant, court will be required to make findings with respect thereto. *Cardon v Harper*, 106 U 560, 151 P 2d 99, 154 A 1 R 906, following *Williams v Peterson*, 86 U 526, 46 P 2d 674.

—evidence

When deed is attacked by creditors whose demands were in existence at time of its execution, and deed, if effective, put it beyond power of grantor to meet his liabilities, burden of proof is on grantee, or those claiming under him, to show such consideration as will release deed from imputation that it is fraudulent as to such creditors, and was made to hinder and defraud them in collecting their demands. *Ogden State Bank v Barker*, 12 U 13, 40 P 763, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063.

So far as grantee's burden of proving consideration is concerned, deed's recital of consideration is not evidence of fact thereof as against creditors whose claims accrued prior to deed's execution. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063.

Evidence in action to set aside conveyance by grantor of property of fair value of \$3,250 for \$10 and other valuable consideration to daughters, held to show that conveyance was fraudulent as to creditors. *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063.

Garnishment proceeding

Fact that pleadings in garnishment proceedings revealed that indebtedness sued upon was that of individuals and that those individuals had no account with garnishee bank, the only account being with corporation owned by individuals, did not make cause of action one, under this section, to set aside conveyance, and thus argument that court had never obtained jurisdiction of corporate defendant or of res since no service of summons was made upon corporation could not be maintained, the pleading sufficiently

averred a sham transaction between the individuals and the corporation so that they should be considered as identical for purpose of garnishment proceedings. *Stine v Grohn*, 9 U (2d) 22, 337 P 2d 62.

Transfer of stock could be set aside as a fraudulent conveyance on motion in garnishment proceeding, and it was not necessary to file a separate action to obtain such relief. *Jensen v James*, 30 U (2d) 423, 510 P 2d 236.

Presumptions and burden of proof

As to claims arising after a conveyance is made and placed upon record it is imperative that a creditor, before he can set it aside, must allege and prove that he was misled by some overt act into believing something different from what the record showed. *Smith v Edwards*, 81 U 244, 17 P 2d 264.

Where grantees were in possession of premises pursuant to duly recorded deed and were paying taxes thereon it was incumbent upon plaintiffs in action to set aside conveyance, to allege and prove that grantees as such did certain acts which misled plaintiffs, or held themselves out in a way that misled plaintiffs and that plaintiffs had knowledge and relied thereon. *Smith v Edwards*, 81 U 244, 17 P 2d 264.

Burden of proof is not on plaintiff to show that property, alleged to have been fraudulently conveyed, is not exempt from execution. *Cardon v Harper*, 106 U 560, 151 P 2d 99, 154 A L R 906.

Setting aside conveyance, limitation of action

Where action to set aside conveyance considered for which was stated to be one dollar and other good and valuable consideration, was not brought until seven years after conveyance was made and recorded action was barred under former three year statute of limitations since discovery was made, or situation was such as to furnish full opportunity for the discovery of fraud, if any existed more than three years before bringing of the action, and limitation statute began to run from time reasonably prudent person would have investigated the other valuable consideration and discovered the falsity, if any. *Smith v Edwards*, 81 U 244, 17 P 2d 264, distinguished in 535 P 2d 1241.

A creditor with a matured claim may have a mortgage, a conveyance under 25115, set aside under this section to the extent necessary to satisfy his claim, where such conveyance was made without fair consideration, defined in 25113, and would render the person making it insol-

vent. *Ned J. Bowman Co v White*, 13 U (2d) 171, 101 P 1962.

—homestead exemption

If judgment debtor's interest in certain land which had been set aside to him as homestead by bankruptcy court, was greater in value than at time of debtor's conveyance of land to his wife without sufficient consideration which rendered debtor insolvent Utah district court would be justified in setting aside such conveyance as fraud on creditors, and judgment creditor thereupon could have execution issued and land could be sold in accordance with 28114 and 28115. *Ostler Land & Livestock Co v Brough*, 111 U 110, 178 P 2d 911.

—pleadings

Under former statute held, in action in nature of creditor's bill brought to set aside voluntary conveyance by debtor to his sons that omission from bill of allegation of insolvency at time of conveyance's execution would not have been fatal to bill, since insolvency at such time was not fact of jurisdictional consequence and was not, per se, condition of relief. *Ogden State Bank v Barker*, 12 U 13, 40 P 765, distinguished in 54 U 481, 182 P 357 and 102 U 12, 126 P 2d 1063.

Allegations in action to set aside conveyance that conveyances were made for the purpose of placing property beyond reach of creditors and were made as part of a scheme, without statement of facts from which purpose could be inferred and without stating facts constituting a scheme amounted to no more than saying that conveyances were fraudulent. *Smith v Edwards*, 81 U 244, 17 P 2d 264.

Complaint in action to set aside conveyance was not objectionable for failure to allege that property involved in conveyance was not exempt. *Zuniga v Evans*, 87 U 198, 48 P 2d 513, 101 A L R 532, distinguished in 102 U 12, 126 P 2d 1063.

Collateral References

Fraudulent Conveyances—278
37 C.J.S. Fraudulent Conveyances § 309
37 Am. Jur. 2d 788 et seq., Fraudulent Conveyances § 106 et seq.

Admissibility of declarations of grantor or transferor on issue as to whether conveyance or transfer was in fraud of creditors. 83 A L R 1446.

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors. 64 A L R 797.

Assignability of executors or administrators right to attack conveyance or

transfer by decedent as fraud upon his creditors, 150 A L R 508

Conditions of creditor's bill or suit to avoid conveyance as a fraud on creditors where creditor has recovered foreign judgment, 129 A L R 506

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent, 9 A L R 868

Criterion of jurisdictional amount in action in form of creditors' bill or suit to avoid conveyance in fraud of creditors, 109 A L R 1185

Death of grantee or transferee of property conveyed or transferred in fraud of creditors as affecting rights of creditors of grantor or transferor to attach same, 116 A L R 1196

Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 A L R 699

Fact that debt, to pay or secure which conveyance was made, was barred by limitation as affecting attack made upon it as a fraud upon creditors, 109 A L R 1220

Judgment for fine or penalty as supporting creditors' suit to avoid fraudulent conveyance or transfer before its entry, 48 A L R 605

Necessity of exhausting remedies against other judgment debtor before bringing suit to set aside conveyance as fraudulent, 22 A L R 200

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance of transfer as against creditors, 17 A L R 728

Nonresidence or absence of debtor as obviating necessity of procuring judgment as condition of creditor's bill, 38 A L R 269

Pleading and proof of exempt character of property in suit to set aside its conveyance as in fraud of creditors, 154 A L R 913

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act, 65 A L R 251, 119 A L R 949

Remedy of judgment creditor where debtor surrenders property to vendee under prior security deed, 36 A L R 805

Right of creditor of decedent, before perfecting his claim or after loss of recourse against decedent's estate, to pursue remedy against property conveyed by the decedent in fraud of his creditors, 103 A L R 555

Right of creditor or one representing him to recover money paid or property transferred by debtor on illegal consideration, 84 A L R 1297

Right of creditors of one spouse, either before or after death of other spouse, to attack conveyance or encumbrance of estate by entirety by both spouses as in fraud of creditors, 121 A L R 1028

Right of creditor to benefit of redemption from, acquisition or extinction of, outstanding right, title, or interest, by grantee or transferee in fraud of creditors, 87 A L R 830

Right of creditor to set aside fraudulent transfer as affected by bankruptcy of debtor, 158 A L R 1274

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations, 14 A L R 2d 598

Right of individual creditor, or creditors of debtor in liquidation or receivership to maintain bill to set aside conveyances or transfers in fraud of creditors, 119 A L R 1339

Right to attack and conditions of attack upon conveyance, mortgage or transfer as fraudulent as against creditors as affected by mortgage or other security for indebtedness to attacking creditors, 116 A L R 1048

Tort claimant's right to attack conveyance or transfer as fraudulent, 39 A L R 175, 73 A L R 2d 749

25 1 16 Rights of creditors with claims 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

- (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

History L 1925, ch 42, § 10, R S 1933 & O 1943, 33-1 16

Collateral References.

Fraudulent Conveyances—217
37 C J S Fraudulent Conveyances § 74
37 Am Jur 2d 788 et seq, Fraudulent Conveyances § 106 et seq

Admissibility of declarations of grantor or transferor on issue as to whether conveyance or transfer was in fraud of creditors, 83 A L R 1446

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors, 64 A L R 797

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent, 9 A L R 358

Death of grantee or transferee of property conveyed or transferred in fraud of creditors as affecting rights of creditors of grantor or transferor to attach same, 116 A L R 1196

Denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 A L R 2d 589

Jurisdiction of equity to sequester, seize, enjoin transfer of, or otherwise provisionally secure assets for application upon money demand which has not been reduced to judgment, 116 A L R 270

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A L R 2d 395

Necessity of exhausting remedies against other judgment debtor before bringing suit to set aside conveyance as fraudulent, 22 A L R 200

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance of transfer as against creditors, 17 A L R 728

Right of creditor of decedent, before perfecting his claim or after loss of recourse against decedent's estate, to pursue remedy against property conveyed by the decedent in fraud of his creditors, 103 A L R 555

Right of creditor to set aside fraudulent transfer as affected by bankruptcy of debtor, 158 A L R 1274

Right of surety or one secondarily liable to bring an action before payment of obligation to set aside fraudulent conveyances by principal, 71 A L R 354

Right of tort claimant to attack conveyance or transfer as fraudulent, 39 A L R 175, 73 A L R 2d 749

Right to attack and conditions of attack upon conveyance, mortgage or transfer as fraudulent as against creditors as affected by mortgage or other security for indebtedness to attacking creditor, 116 A L R 1048

CHAPTER 2

SALE OF MERCHANDISE IN BULK

(Repealed by Laws 1965 ch 154, § 10 102)

25 2 1 to 25 2 5 Repealed.

Repeal.

Sections 25 2 1 to 25 2 5 (L 1923, ch 92, §§ 1 to 5, R S 1933 & C 1943, 33 2 1 to 33 2 5), relating to sale of merchandise

in bulk were repealed by Laws 1965, ch 154, § 10 102 For present provisions, see 70A 6 101 et seq

CHAPTER 3

LEASES AND SALES OF LIVESTOCK

(Repealed by Laws 1965, ch 154, § 10 102)

25 3 1 to 25 3 4 Repealed.

Repeal

Sections 25 3 1 to 25 3 4 (L 1917, ch 52, §§ 1 to 4, C L 1917, §§ 130 to 133 L 1921, ch 3, § 1, R S 1933 & C 1943,

33 3 1 to 33 3 4), relating to leases and sales of livestock were repealed by Laws 1965, ch 154 § 10 102