Creditors' Rights--Tort Liability for Fraudulent Conveyance

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litigation. Perhaps one can look to Gideon v. Wainwright, supra, Douglas v. California, supra, and Griffin v. Illinois, supra, as guidelines to what the answers to these questions may be. From these cases it is seen that the Court is in favor of construing the Constitution so as to extend its protection to the indigent and to prevent discrimination against him.

John I. Rogers, II

Creditors' Rights—Tort Liability for Fraudulent Conveyance

At the time P's judgment against D was entered by a New York court, D owned real estate in Puerto Rico. D, the judgment debtor, transferred this property to a third party. P claimed that D conveyed this property for the purpose of hindering and defrauding P in the collection of his judgment. P brought this action for the damages which resulted from D's alleged fraudulent transfer. D moved to dismiss P's action on the ground that P had no lien on the property transferred. Held, order denying the motion to dismiss affirmed. At common law whenever one improperly interfered with the execution of a judgment he was liable for any damages he caused to the judgment creditor. James v. Powell, 266 N.Y.S.2d 245 (1966).

Courts generally agree that a general creditor, without a lien, cannot maintain an action for damages. This principle is based upon the legal right of one to use, enjoy or dispose of his property without restriction until some other person obtains an interest in the property which the law will protect. The law determines the time and manner in which the property of a debtor ceases to be subject to his disposition and becomes subject to the interest of his creditor. Adler v. Fenton, 65 U.S. (24 How.) 407 (1860). The dissent in the principal case stated that a general creditor or a judgment creditor without a lien on specific property has no cause of action against his debtor. This statement, in so far as it relates to general creditors, is supported by numerous cases.

In Brunvold v. Victor Johnson & Co., 59 Cal. App. 2d 75, 138 P.2d 32 (1943), the court stated that it was settled law that no tort liability exists against those participating in a fraudulent transfer, at least where the creditor at the time of the transfer has not reduced his claim to judgment and holds no lien upon the
property conveyed. A general creditor was not permitted damages when the debtor corporation disposed of all its assets while misrepresenting to the plaintiff that it was solvent and would pay its debts. The court relied upon the fact that the plaintiff had not sued out a writ of attachment and had no present intention of seizing the property or of securing a lien. *Graham v. Peale*, 173 Fed. 9 (1st Cir. 1909). The dissent in the principal case relied in part on *Adler v. Fenton*, supra, which held that a general creditor cannot bring an action on the case against his debtor or against those combining and colluding with him to dispose of his property, even though the disposition was to hinder, delay and defraud creditors. The *Adler* case was to the effect that until a lien was acquired, the creditor has no action for damages. It should be noted that in the *Adler* case the plaintiff did not allege fraud, as did *P* in the principal case.

While the dissent's statement in the principal case that a general creditor cannot maintain an action for damages for fraudulent conveyances may be supported by cases, few courts would deny a judgment creditor a cause of action. In *Quinby v. Strauss*, 90 N.Y. 664 (1882), a judgment creditor brought an action against the debtor and his attorney for a fraudulent conspiracy to keep the debtor's personal property out of the reach of his creditors by the execution of chattel mortgages to secure fictitious debts under which the property was sold. On appeal the court affirmed a charge to the jury that if the defendants were found guilty, the plaintiff was entitled to a verdict for the amount of the judgment and an amount for trouble and inconvenience. In the principal case the court said the measure of damages is the loss or expense caused by the interference.

A significant case arising out of an action for fraudulent conspiracy to interfere with the collection of a judgment is *Findlay v. McAllister*, 113 U.S. 104 (1884). In that case the plaintiff had a judgment against a county for the payment of certain bonds and coupons which he held. The county court levied a special tax to pay these claims. Some residents of the county, the defendants, tried to prevent the county officials from collecting this tax. By a writ of mandamus the county officials were ordered to collect the tax. The Court stated, "The right of a judgment creditor to proceed by action against those who rescue the person of his debtor . . . or interfere with the goods of his debtor so as to
prevent a levy or sale by the sheriff to satisfy his judgment, is well recognized at common law." Findlay v. McAllister, supra, at 111. In Yates v. Joyce, 11 Johns. Cas. 136 (N.Y. 1814), where certain property of the debtor was disposed of to deprive a judgment creditor of satisfaction the court said,

It is the pride of the common law that whenever it recognizes or creates a private right, it gives a remedy for the willful violation of it. It is a sound principle that where the fraudulent misconduct of a party occasion injury to the private rights of another, he shall be responsible in damages for the same.

In Mott v. Danforth, 6 Watts 304 (Pa. 1837), the debtor sold his assets eight days before the due date on a promissory note to a buyer who knew of the debts. The court said the fact that the debt was not payable at the time of the alleged fraud was not a valid objection. The court stated the plaintiff's claim was for the injury suffered by the conveying of the property which might have been available for the satisfaction of his debts by legal proceeding. The court observed that the plaintiff's recovery could be defeated by acts committed just before the creditor was about to proceed to recover as well as by acts committed afterward.

In Lineker v. Dillon, 275 Fed. 460 (N.D. Cal. 1921), the court noted that while an ordinary judgment at law for damages casting no lien on the property of the judgment debtor presents no legal obstacle to the alienation of the property of the debtor, the disposition, in order to protect the debtor, must be for a legitimate purpose, for a valuable consideration and not for the fraudulent purpose of evading the judgment. And if the disposition is for the purpose of defeating the rights of the judgment creditor and is knowingly participated in by others, the conspiring parties will be liable to the creditor for damages caused him by their interference. By dicta the court in Phelan v. Middle States Oil Corp., 220 F.2d 593 (1d Cir. 1955), said that it was no longer necessary for the complaining creditor to have a lien.

In West Virginia every transfer of real and personal property with the intent to delay, hinder or defraud creditors is void unless the purchaser pays valuable consideration without notice of the fraudulent intent. W. Va. Code ch. 40, art. 1, § 1 (Michie 1961). It should be noted that while this statute permits the fraudulent
CASE COMMENTS

transfer to be set aside, it does not provide for damages against those who participate in the fraudulent conspiracy which is the issue in the principal case. By statute, W. Va. Code ch. 38, art. 3, § 6 (Michie 1961), it is provided that every judgment for money rendered in West Virginia shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, at or after the date of the judgment, and the lien shall continue so long as the judgment remains valid and enforceable. However, this lien is not effective against a bona fide purchaser until it is docketed in the county where the real estate is located. W. Va. Code ch. 38, art. 3, § 7 (Michie 1961).

These statutes create a lien only where the property is located within the state. If the real estate conveyed is located outside the state, perhaps the West Virginia court will follow the law of the principal case. As the court in Yates v. Joyce, supra, said, "The common law abhors all manner of fraud, and wherever a person is injured by the fraudulent acts or contrivance of another, it will afford a remedy." While it is understandable that a general creditor who has no lien nor judgment may be denied an action for damages, the interest of a party who has spent time and money to obtain a judgment should be protected from those who fraudulently conspire to deny him the fruits of his effort. If the debtor's acts are designed to prevent satisfaction of this judgment, the debtor and his conspirators should be required to compensate the judgment creditor for expenses or losses occasioned by their acts.

John Welton Fisher, II

Mortgages—The Doctrine of Future Advances

X, a corporation, borrowed money for the purpose of building homes upon certain real estate and executed a construction loan deed of trust upon the real estate to secure the loan. The deed of trust provided for a schedule of payments and that the lender could advance any part of, or the whole of, any payment before it became due, and the same would be deemed to be made in pursuance of the agreement. In a proceeding involving disbursement of proceeds of foreclosure sales, the circuit court ratified the auditor's reports disbursing proceeds to the holder of X's notes secured by the first deed of trust, and the trustee in bankruptcy and suppliers