

April 1937

The Right of Subsequent Creditors to Set Aside a Fraudulent Conveyance

M. E. L.

West Virginia University College of Law

E. W. E.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

M. E. L. & E. W. E., *The Right of Subsequent Creditors to Set Aside a Fraudulent Conveyance*, 43 W. Va. L. Rev. (1937).

Available at: <https://researchrepository.wvu.edu/wvlr/vol43/iss3/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

THE RIGHT OF SUBSEQUENT CREDITORS TO SET ASIDE A FRAUDULENT CONVEYANCE

The common law courts were unable to relieve creditors from the effects of fraudulent conveyances because a writ of execution would only permit levying upon property where the legal title was in the judgment debtor. Although the courts of equity might have by gradual development alleviated this situation, they were not given the opportunity to try their hand. Rather than entrust their problem to these courts the English merchants directed their pleas for relief to Parliament which resulted in the enacting of the Statute of 13 Elizabeth, similar to the statutes in many states today, declaring any conveyance void made by a debtor with intent to delay, hinder or defraud his creditors or others.¹ In West Virginia the modern counterpart of this statute is found in the Revised Code of 1931.²

A subsequent creditor, which the phrase "or others" has been construed to include,³ is obviously one to whom the debtor is not indebted at the time of the conveyance. In many states, a tort claim does not constitute a debt until reduced to judgment⁴ nor does a contingent liability on a contract create a debt;⁵ however, in West Virginia it is not necessary that any creditor reduce his claim to a judgment before he can invoke the aid of the statute,⁶ because our statute does not base the right entirely upon the theory that the fraud is upon the creditor's right of realization. Nevertheless, the distinction between prior and subsequent creditors still has far-reaching results as applied to the facts necessary to bring these two classes of creditors within the operation of the statute.

It has been well settled by statute⁷ and the courts⁸ that existing creditors have the right to set aside a mere voluntary convey-

¹ GLENN, CREDITORS' RIGHTS AND REMEDIES (1915) 49-69.

² W. VA. REV. CODE (1931) c. 40, art. 1, § 1.

³ GLENN, *op. cit. supra* n. 1, § 70. However some courts have held the word "creditors" to include subsequent creditors. *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946 (1889); *Home Life & Accident Co. v. Schichtl*, 169 Ark. 415, 287 S. W. 769 (1926).

⁴ *Exp. Mercer*, 17 Q. B. D. 290 (1836).

⁵ GLENN, *op. cit. supra* n. 1, at §§ 221, 72.

⁶ *Kinnison v. Scott*, 82 W. Va. 287, 95 S. E. 952 (1918); *Thomas v. Lupis*, 96 W. Va. 100, 122 S. E. 365 (1924).

⁷ W. VA. REV. CODE (1931) c. 40, art. 1, § 3.

⁸ *Lockhard & Ireland v. Beckley*, 10 W. Va. 87 (1877); *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74 (1892); *Arnold, Abney & Co. v. Slaughter*, 36 W. Va. 589, 15 S. E. 250 (1892); *McCue v. McCue*, 41 W. Va. 151, 23 S. E. 689 (1895); *Manufacturing Co. v. Carr*, 65 W. Va. 673, 64 S. E. 1030 (1909); *McCaskey, Trustee v. Potts*, 65 W. Va. 641, 64 S. E. 908 (1909).

ance, not supported by a consideration deemed valuable in law, but such right is not extended to the subsequent creditors unless there is a fraudulent intent shown. Prior to this statute there was some diversity of opinion as to whether such a conveyance was *prima facie* fraudulent upon existing creditors which *prima facie* intent was rebuttable or void as to those creditors irrespective of any fraud.⁹ However this statute has supplanted all such diversity and the conveyance is now held to be void as to existing creditors.¹⁰

Any discussion concerning the rights of subsequent creditors necessarily raises the question whether or not there were any existing creditors at the time of the conveyance because, in fact, debts usually exist at the time of these conveyances. The cases generally hold that where the conveyance is made in *mala fides* and there are existing creditors, the subsequent creditors may successfully impeach the conveyance whether the fraudulent intent relates to the existing creditors or exclusively to the subsequent creditors.¹¹ There is some authority to the effect that subsequent creditors may set aside a conveyance only when the fraudulent intent was specifically directed at them. A few courts have held that a conveyance fraudulent as to existing creditors is presumptively fraudulent as to subsequent creditors.¹² West Virginia has in several cases upheld the majority rule.¹³

The problem of subsequent creditors successfully attacking a fraudulent conveyance in the absence of any prior or existing creditors is not separate and distinct from the problem of attack by them where there are such prior and existing creditors, but can be distinguished only by the degree of proof necessary to show the requisite fraud to vitiate the conveyance. On the contrary there is no difficulty where the case concerns merely the rights of subsequent creditors to share in the distribution of assets after the conveyance has been set aside.¹⁴ The express fraudulent intent may, but need not, appear by direct and positive proof; circumstantial evidence is not only sufficient but in most cases is the only

⁹ See discussion by Judges Baldwin and Stanard in *Hunters v. Waite*, 3 Gratt. 26 (Va. 1846).

¹⁰ *Supra* n. 8.

¹¹ *Hutchinson v. Kelly*, 1 Rob. 131 (Va. 1842); *Lockhard & Ireland v. Beckley*, 10 W. Va. 87 (1877); *Silverman v. Greaser*, 27 W. Va. 550 (1886); (1916) 12 E. C. L. 495, 496, § 27.

¹² (1928) 22 ILL. L. REV. 673.

¹³ *Supra* n. 11; also *Rine v. Compton*, 188 S. E. 483, 485 (W. Va. 1936).

¹⁴ *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382 (1901).

available proof. The test seems to be that if the facts and circumstances are of such a character as to show the requisite intent to a reasonable man they are sufficient.¹⁵

The usual so-called "badges" of fraud are: gross inadequacy of price;¹⁶ no security taken for the purchase money;¹⁷ unusual length of credit for the bonds which have been taken at long periods;¹⁸ threats and pendency of suits;¹⁹ concealment of the transactions which relate to the conveyances;²⁰ failure to acknowledge and record for a considerable time;²¹ remaining in possession by the grantor as before the conveyance upon which the creditor relied;²² the immediate engagement in a hazardous business;²³ and the contracting of debts immediately after the transfer.²⁴ Any of the above "badges" may constitute a *prima facie* case of fraud requiring the debtor to explain the transaction, except that a subsequent creditor to succeed in avoiding the conveyance must show more than a mere voluntary conveyance and an existing indebtedness.²⁵

Therefore it seems reasonable to conclude that the rights of subsequent creditors to set aside such conveyances in the absence of prior or existing indebtedness depends solely upon whether the facts and circumstances of each case show a fraudulent intent as

¹⁵ Lockhard & Ireland v. Beckley, 10 W. Va. 87 (1877); Martin & Gilbert v. Rexroad, 15 W. Va. 512 (1879); Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780 (1887); Bronson v. Vaughan, 44 W. Va. 406, 29 S. E. 1022 (1898); Stauffer v. Kennedy, 47 W. Va. 714, 35 S. E. 892 (1900).

¹⁶ Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560 (1895); Foggin v. Furbee, 89 W. Va. 170, 109 S. E. 754 (1921); Schiffler v. Kissel, 103 W. Va. 545, 138 S. E. 107 (1927).

¹⁷ Hickman v. Trout, 83 Va. 478, 3 S. E. 131 (1887).

¹⁸ *Ibid.*

¹⁹ Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960 (1898); Sizemore v. Lambert, 78 W. Va. 243, 88 S. E. 839 (1916).

²⁰ Fishel v. Lockhard & Ireland, 52 Ga. 633 (1874); Hilliard v. Cagle, 46 Miss. 309 (1872).

²¹ Beeckman v. Montgomery, 14 N. J. Eq. 106 (1861); Case v. Phelps, 39 N. Y. 164 (1868); Sexton v. Wheaton, 8 Wheat. 299 (1823); Bank of Alexandria v. Patton, 1 Rob. 499 (Va. 1843).

²² Carter v. Grimshaw, 49 N. H. 100 (1869).

²³ Cramer v. Reford, 17 N. J. Eq. 367 (1866); Case v. Phelps, 39 N. Y. 164 (1868); Mullen v. Wilson, 44 Pa. 413 (1863); Williams v. Davis, 69 Pa. 21 (1871); 2 WILLISTON, SALES (2d ed. 1924) § 642.

²⁴ Herschfeldt v. George, 6 Mich. 456 (1859); City National Bank v. Hamilton, 34 N. J. Eq. 158 (1881); Carpenter v. Carpenter, 25 N. J. Eq. 194 (1874). However the time intervening between the date of the conveyance and the creation of the debt is material to show an injury to the subsequent creditors. Lee Hardware Co., Ltd. v. Johnson, 132 Ark. 462, 201 S. W. 289 (1918).

²⁵ *Supra* n. 8.

STUDENT NOTES

to such creditors. If no such intent can be discovered to the satisfaction of the court in view of the "conflicting interests"²⁶ involved they cannot prevail.

M. E. L.

E. W. E.

²⁶ Note (1924) 37 HARV. L. REV. 489, 492. The conflict of the debtor's interest to use and dispose freely of his property against the subsequent creditor's interest to secure adequately his claim.