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WHEN IS A VOLUNTARY CONVEYANCE FRAUDULENT IN NEW YORK?

"A conveyance . . . of an estate or interest . . . made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands or a bond or other evidence of debt given, suit commenced, or decree, or judgment suffered, with the like intent, is void as against every person so hindered, delayed, or defrauded."

Sec. 263, Real Property Law.

"The question of fraudulent intent in a case arising under this article shall be deemed a question of fact, and not of law, and a conveyance or charge shall not be adjudged fraudulent as against creditors, purchasers, or incumbrancers solely on the ground that it was not founded on a valuable consideration."

Sec. 265, Real Property Law.

"There is no question that at the time these conveyances were made the defendant Lancelot M. Berkley was indebted to the plaintiff, and the rule of law as stated in *Smith* vs. *Reid,* 134 N. Y. 569, is that a voluntary conveyance by one indebted at the time the conveyance is made is presumptively fraudulent as against existing creditors."

Per Cohalan, *J.,* in *Bushby* vs. *Berkley,* 85 Misc. 178.

The apparent contradiction between the provisions of the statute relating to fraudulent conveyances and the opinions and decisions of the courts, as well as the increasing frequency of litigation in which unsatisfied creditors seek to set aside dispositions of property by their debtors, seems to warrant an examination into the authorities on this subject. The provisions of the Real Property Law quoted (there are similar enactments in the statutes relating to personal property: Sections 35, 37, 38, Personal Property Law) are only re-enactments of a law which

has been upon the statute books from a very early period in our judicial history (2 R. S., Chap. 7, Tit. 3, Secs. 1, 4).

The earliest important case in this state dealing with the question, and the case which ultimately led to the enactment of the provisions of law referred to, is *Reade* vs. *Livingston* (3 Johns. Ch. Rep. 481), decided by Chancellor Kent in 1818. In that case a creditor attacked a voluntary settlement made by a debtor upon his wife, and the Chancellor laid down the rule that any voluntary settlement or disposition of property by a man indebted at the time was conclusively fraudulent and open to attack at the instance of an unsatisfied creditor. This conclusion, reached after an extended examination of the English cases, he states as follows at page 500 of his opinion:

> "The conclusion to be drawn from the cases is that if the party be indebted at the time of a voluntary settlement it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party."

This doctrine, that a man's debt casts a shade over all his property, however extensive, preventing any voluntary disposition of it, comes directly in conflict with the feeling inherent in most of us and fostered by the common law, that one's property, provided it be more than sufficient to meet his obligations, is his own to do with as he will. It is not surprising, therefore, that criticisms of the rule soon appeared in the cases,[1] nor that ultimately the statutes relating to fraudulent conveyances were enacted to limit its effect. The purpose of these statutes and their effect was to make what formerly had been an absolute conclusion of law, a question of fact, to be decided in each case, with the proviso, however, that no conveyance should be adjudged fraudulent solely upon the ground that it was voluntary.[2] The determining element in each case under the statute is the intent with which the conveyance is made.[3] This element, in addition to the provision that no conveyance should be adjudged fraudulent solely because voluntary, it appears has given rise to most of the mis-

[1]Mohawk Bank *vs.* Atwater, 2 Paige 54, 58; Wickes *vs.* Clarke, 3 Edw. Ch. 58, 61; Seward *vs.* Jackson, 8 Cow. 406, 422.
[2]Babcock *vs.* Eckler, 24 N. Y. 623.
[3]Citizens National Bank *vs.* Fonda, 18 Misc. 114.

understanding of the statute by lawyers, and to the apparently conflicting decisions of the courts. If a man's state of mind be innocent of any fraud, the question naturally presents itself, can any disposition of his property, however disastrous to creditors, be declared fraudulent. The courts have met this difficulty by holding that a man is deemed to intend the necessary consequences of his acts, and that where the inevitable result of his conduct is to prevent payment of his creditors, however innocent his motives, a fraudulent intent will be spelled out as a fact.[4] It has been held further that the provisions of the statute that fraudulent intent should be deemed a question of fact do not interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent be conclusively established on the face of the instrument of transfer, or by the uncontradicted verbal evidence.[5] The reason for this is that, in such a case, to direct a verdict, or to set aside a finding of a referee to the contrary, does not involve implying a presumption or conclusion of law that the transaction is fraudulent. It merely means that the proof in a particular case presents no issue of fact for a jury, and, irrespective of any legal presumption, conclusively shows fraud in fact.

What circumstances then, conclusively warrant the court in finding a fraudulent intent as a fact, and secondly what class of claims, coming to the attention of a possible debtor, render any subsequent transfer of his property without consideration open to future attack? Taking up the second question first, the statute has been liberally construed as its terms warrant, and its operation is not limited merely to the benefit of creditors in the ordinary sense of the term. It has been held that a contingent liability, as endorser on a promissory note,[6] a tort liability,[7] and even a possible future liability consequent upon engaging in a hazardous business, where property was transferred immediately before entering on the same,[8] are all such claims as come within the purvieu of the statute. As to the first question, insolvency at the time of conveyance,[9] a conveyance of all one's property when indebted or subject to contingent liability[10] or a conveyance of so much of it as to leave an insufficient amount to pay creditors' claims[11] have

[4]Cole *vs.* Tyler, 65 N. Y. 73; Coleman *vs.* Burr, 93 N. Y. 17.
[5]Bulger *vs.* Rosa, 119 N. Y. 459.
[6]Citizens National Bank *vs.* Fonda, *supra.*
[7]Martin *vs.* Walker, 12 Hun, 46.
[8]Young *vs.* Hermans, 66 N. Y. 374.
[9]Erickson *vs.* Quinn, 47 N. Y. 410.
[10]Tanner *vs.* Eckhardt, 107 App. Div. 79.
[11]Cole *vs.* Tyler, *supra.*

all been held to conclude the courts in finding a fraudulent intent in fact. It may well be questioned whether in so holding the courts have not overridden the statute's literal requirements that the fraudulent intent is always a question of fact on all the circumstances. However, whether justifiably or not, it is settled that in determining the fraudulent intent the courts will deem acts of more import than words.[12] Hence if a party does an act which must defraud another, his declaration that he did not intend to defraud, according to the decisions, is weighed down by the evidence of his own act. There can be no quarrel, however, with the expediency of the rule which holds that a man's intent will be deemed fraudulent if, while indebted or subject to the claims of others for damages, he disposes of all his property.

It is quite another thing, on the other hand, for a court to hold, as in *Bushby* vs. *Berkley, supra,* that a voluntary conveyance by one indebted is presumptively fraudulent. This would seem even to disregard the plain terms of the statute which make the question of fraudulent intent a question of fact. However, a right understanding of the cases and of the purpose intended to be effected by the statute will, we believe, resolve the question. The statute was passed to overcome the effect of the decision in *Reade* vs. *Livingston, supra.* That case made fraudulent intent a matter of law whenever a voluntary conveyance while indebted was shown. In cases criticizing it, it was suggested that in such a case the conclusion of fraud was not absolute, but *prima facie* only, in other words, a presumption in the strict sense of the term. The statute, it is submitted, was enacted merely to give effect to

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[12]"The statute provides that the question of fraudulent intent in cases of this character 'shall be deemed a question of fact and not of law', and the claim is made that here there is no finding by the referee of fraudulent intent; but that on the contrary he has found the whole transaction to be fair and honest. He has, however, found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eye of the law. Mr. Burr must be deemed to have intended the natural and inevitable consequence of his acts, and that was to hinder, delay and defraud his creditors", per Earl, J., in Coleman *vs.* Burr, *supra.*

"It is also claimed that there was no intent on Crawford's part to defraud his creditors and that the findings of the judge upon this subject were not sustained by the evidence. It was not necessary that there should be any actual fraudulent intent. * * * This presumption (of fraud), however, is not to be overthrown by mere evidence of good intent or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision and that the debtor still retained sufficient means to pay his debts", per Dwight, C., in Cole *vs.* Tyler, *supra.*

the doctrine of the cases in support of this latter rule.[13] This being its purpose as construed by the courts, though its terms admittedly are much broader, its effect is merely to remove the conclusive rule of law which formerly existed. There are two leading cases that seem to confirm this. (*Kain* vs. *Larkin,* 131 N. Y. 300, and *Smith* vs. *Reid,* 134 N. Y. 568.) In *Kain* vs. *Larkin,* which was an action by a judgment creditor (the judgment resulting from a tort liability) to set aside a conveyance by the debtor, the Court of Appeals, which at that time consisted of two divisions, held that under the statute a voluntary conveyance, even by one indebted at the time, was perfectly proper, unless other circumstances were shown which would justify a finding of fraudulent intent in fact. Chief Judge Earl, writing the opinion, said at page 307:

> "An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all just claims of his creditors . . . and when a judgment creditor assails a conveyance made by the judgment debtor, he cannot cast upon the grantee the *onus* of showing good faith and of establishing that the grantor was solvent after the conveyance by simply showing that the deed was not founded upon a valuable consideration, but the person assailing the deed assumes the burden of showing that it was executed in bad faith and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities."

In *Smith* vs. *Reid,* which reached the other division of the Court of Appeals shortly afterward, the court came to an apparently opposite conclusion. In that case, per Brown, *J.,* the court said:

> "The rule is well settled that a voluntary conveyance by one indebted at the time is presumptively fraudulent."

Both of these decisions were considered by the Court of Appeals recently in the case of *Kerker* vs. *Levy,*[14] and finding an apparent

[13] "In Jackson *vs.* Seward, 8 Cow. 406, it was held by the Court of Errors that a conveyance or settlement in consideration of blood and natural affection, though by one indebted at the time, was prima facie only and not conclusively fraudulent. Subsequently by Section 4 of Title 3, Chapter 7, Part 2 of the Revised Statutes (2 R. S. 137) it was declared that the question of fraudulent intent in all cases arising under the provisions of that chapter should be deemed a question of fact. * * * The statute substantially declares and was intended to declare the doctrine held in Jackson *vs.* Seward." Per Sutherland, J., in Babcock *vs.* Eckler, *supra,* at p. 633.

[14] 206 N. Y. 109.

contradiction in them the court, in a short *per curiam* opinion, held that the rule laid down in *Smith* vs. *Reid* was to be preferred to that of *Kain* vs. *Larkin.* It is submitted, however, that rightly understood there is no necessary conflict between the decisions, and that in reality both state correct propositions of law. The solution is found in the old distinction between the strict burden of proof, and the burden of going forward with the proof or the burden of evidence.[15] It seems that the true rule is, and always has been, that, under the statute as interpreted by the decisions, there is nothing wrong or to be condemned in a voluntary conveyance by one indebted whose property remains ample to meet his obligations. A judgment creditor attacking such a disposition would have to show on the whole case the fraudulent intent required by the law. In other words, such circumstances surrounding the conveyance as insolvency, or a grant of so much of the debtor's property as to leave him fairly unable to meet his obligations, would have to appear to warrant the court in finding the presence of this intent.[16] This is very different, however, from what the course of events would be on the trial of the issues involved. It seems that, on such a trial, upon proof of the two facts of existing indebtedness and voluntary conveyance of the debtor's property, *prima facie* a presumption of fraudulent intent arises. Hence a judgment creditor attacking such a conveyance, upon proof of these two facts, could rest his direct case, because, until some explanation were offered, the law would then imply some ulterior motive as the reason for the conveyance, which at this stage would require a finding of fraudulent intent. The burden of evidence, or the burden of going forward, would then shift to the defendant to show, in any way proper to the case, that no fraudulent intent within the meaning of the law existed in fact. Then the burden of evidence to rebut such proof would revert back to the plaintiff. On the whole case, however, the plaintiff could only succeed, since the true burden of proof or the burden of establishing never leaves him, by showing by evidence clearly preponderating in his favor the existence of facts and cir-

[15]"But, passing this point with this mere observation, the contestants assert that the burden of proof is always on the proponents. They seem to have confounded the 'burden of proof' with the 'burden of evidence'. The distinction between the rules relating to either of these burdens is clearly laid down by late writers of authority on the law of evidence. In this proceeding when the proponents had rested, the burden of taking up the proof or in other words the 'burden of evidence' was on the contestants," per Fowler, Surrogate, in Matter of Sperb, 71 Misc. 378.

[16]Babcock *vs.* Eckler, *supra.*

cumstances from which, as a fact, under the authorities, the conclusion of fraudulent intent must follow. That this is the true line of distinction in the cases is evident from the statement of Brown, *J.*, in *Smith* vs. *Reid, supra*:

> "There was no evidence introduced by the defendant upon the question, and we are of the opinion that the facts stated" (a voluntary conveyance while indebted) "raised a presumption that the deeds were executed by Taylor with intent to defraud his creditors, and in the absence of any explanation thereof it was the duty of the court to have determined the fact of the grantee's indebtedness in accordance with such presumption."

Clearly, then, the rule of *Smith* vs. *Reid* applies only to the *prima facie* case. In *Kain* vs. *Larkin, supra,* there was proof by the defendant that the conveyance was not voluntary because made in consideration of services rendered and moneys expended by a daughter of the grantor. The conclusion of the trial court was that the services would not constitute a sufficient consideration. The Court of Appeals held that it was not clear whether the trial court deemed such a contract invalid as a matter of law, or whether it meant to hold merely that, in this instance, the services were disproportionate in value to that of the property transferred. Hence it sent the case back for a new trial. It is clear, however, that the court's expressions in dealing with the plaintiff's burden referred to his burden on the whole issue involved, because that was the matter before the court, and not merely to the establishment of a *prima facie* case. It seems, therefore, that the true rule in this state is that a voluntary conveyance by one indebted is not necessarily improper and subject to avoidance by creditors, if explained by circumstances leading to a finding in fact of no fraudulent intent. What these circumstances usually are are discussed *supra* in this article. *Prima facie,* however, such a conveyance unexplained will be presumed fraudulent as a fact. Hence, in the absence of an assumption of the burden of going forward with the evidence on the part of the defendant, it will necessitate a finding of fraudulent intent in fact and a decision setting aside the conveyance which is the subject of attack.[17]

Although under this rule it seems that the courts have probably carried out the purpose of the legislature in enacting the statute, which, as stated above, was merely to do away with the

[17]Wilks *vs.* Greacen, 155 App. Div. 623; Sanitary Fire Proofing and Contracting Company *vs.* Scheidecker, 165 App. Div. 294.

effect of the decision in *Reade* vs. *Livingston,* it seems equally true that in so doing they have disregarded the plain language of the law, which is certainly broad enough to make the question of fraudulent intent a question of fact in every case and never the subject of a legal presumption.

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