DEBTORS' ESTATES

DEBTORS' ESTATES — PREFERENTIAL CONVEYANCES — TORT CLAIMANT AS CREDITOR

John W. Feightner, upon the death of his son-in-law, to provide for his daughter, paid the balance upon the home she occupied and made various improvements and payments upon personal property. The aggregate of such payments was $3,772.01 and in 1934 his daughter, Ada Rouch, the defendant, delivered to him a demand note for that amount. In March of 1937, plaintiff filed a suit against Ada Rouch for damages for wrongful death growing from an auto accident. At the demand of her father she immediately executed and delivered to him a mortgage upon her property for $3,772.01. In November, the plaintiff recovered a judgment in his action and brought this present suit to set aside the mortgage as fraudulent and a preference under Ohio G.C. secs. 11104, 11105 and 8618. The Court of Appeals for the Ninth District found that this was not a preferential conveyance because the non-judgment tort claimant is not a creditor, nor a fraudulent conveyance because no proof of actual fraud appeared. A preference or a transfer for past consideration is not actual fraud.[1]

Ohio G.C. sec. 11104 is in two parts; one deals with preferential and the other with fraudulent transfers. The latter part, dealing with "a sale, conveyance, transfer, mortgage or assignment made . . . with intent to hinder, delay or defraud creditors," is the modern version of the old statute 13 Eliz. Ch. 5 against fraudulent conveyances. It strikes at conveyances which are actually fraudulent, and is found in somewhat similar form in nearly every state. The first part of Ohio G.C. sec. 11104, dealing with "a sale, conveyance, transfer, mortgage or assignment . . . in contemplation of insolvency and with a design to prefer," is an outgrowth of the equity rule of equality among creditors.[2] It is found in but few, perhaps no other, state statutes. In the absence of statute no preferential transfer is void; but whenever possible equity enforces a rule of equality through administration.

The statute provides that the preferential or fraudulent assignment shall be void in a suit brought by any creditor. The court quotes 19 Ohio Jurisprudence, Fraudulent Conveyances, sec. 33, " . . . The bulk of Ohio decisions favors the view that until the claim arising out of tort is reduced to judgment the claimant cannot be considered a creditor." This is a decided minority view in the United States and

[1] Waxenfelter, Admr. v. Rouch *et al.*, 30 Ohio L. Abs. 376 (1940).
[2] See 3 OHIO JURISPRUDENCE, *Assignment For Benefit of Creditors*, sec. 117.

in England.[3] Ohio Jurisprudence cites five cases[4] in support of its proposition. They can all be traced directly or indirectly to one case, *Evans* v. *Lewis*.[5] That case clearly laid down that the existence of a cause of action sounding in tort does not eestablish the legal relation of debtor and creditor between the wrongdoer and the injured party. It says, "Such conveyance wil be set aside at the suit of a subsequent creditor only on proof that it was made with the intent, on the part of the grantor, thereby to defraud such subsequent creditor or creditors." This, then, must be the point at which this Ohio line of decisions first forked off from the main branch of the law for the court here cites *Creed* v. *Lancaster Bank*[6] which is not a case involving a tort claimant. Regardless of its weak origin, this line of decisions is firmly established in the law of Ohio. There are Ohio cases holding that a tort claimant is a creditor within the meaning of the statute.[7] These cases are not discussed in the principal case, in *Evans* v. *Lewis* or in any of the cases mentioned above, and stand almost alone. It is to be noted that *McVeigh* v. *Rittenour*[8] was decided later than *Evans* v. *Lewis* and makes no mention of it. *Evans* v. *Lewis* (sometimes cited *Allen* v. *Louis* or *Lewis*) is at the base of nearly every decision in Ohio in this area.

In our principal case there was clearly no fraud. As stated by the court, "It has long been the recognized law of Ohio that a preference, by a debtor who is insolvent, of one creditor over another has never constituted an actual fraud." There was, however, clearly a preference. Defendant clearly intended to prefer no one creditor, her father, over all her other creditors (if such there were) and especially over the plaintiff, the tort claimant. It is difficult to state on exactly what basis the case was decided from a reading of the brief opinion. There are words which seem to indicate that this court would require a fraudulent intent before a preference might be set aside, a ruling, in effect, that the preference section is mere surplusage. A probably more accurate conception is that the basis is the lack by the plaintiff of a creditor's status. Even

[3] Bumpus v. McGehee, 159 C.C.A. 400, 247 Fed. 306 (1917); Kain v. Larkin, 4 App. Div. 209, 38 N.Y. Supp. 546 (1896); Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709 (1901); Barling v. Bishopp, 29 Beav. 417, 54 Eng. Reprint 689 (1860). Vermont and Connecticut do not protect the tort claimant from the fraudulent assignor. Green v. Adams, 59 Vt. 602, 59 A. Rep. 761, 10 Atl. 742 (1887); Fox v. Hills, 1 Conn. 295 (1815).

[4] Pennick v. Pennick, 5 Ohio App. 416 (1916); Wheeler v. Kuntebeck, 31 Ohio App. 338 (1928); Kushmeder v. Overton, 26 Ohio App. 74, 159 N.E. 351 (1926); Detwiler v. Louison, 18 Ohio C.C. 434 (1899); Ilkovis v. Conrad, 16 Ohio C.C. (N.S.) 389 (1905).

[5] 30 Ohio St. 11 (1876).

[6] 1 Ohio St. 1 (1852).

[7] McVeigh v. Rittenour, 40 Ohio St. 107 (1883). Also cited in a note in 14 Am. St. Rep. 744; Halbert v. Armstrong, 14 Ohio C.C. 296 (1879).

[8] 40 Ohio St. 107 (1883).

so it would seem that the decision might have gone the other way. Either the doctrine of *Evans* v. *Lewis* could be disregarded in the field of preferences and the tort claimant be considered a creditor and allowed to upset the preference, or, should the court wish to follow the doctrine to which it professes to its logical conclusion, the tort claimant, having reduced his claim to a judgment and attained the status of a "subsequent creditor" should be allowed to overturn the mortgage made with intent to prefer another creditor over him, specifically. The question seems to be a novel one in Ohio and authority elsewhere is lacking because of the lack of similar statutes.

The disappointed tort claimant has other means of asserting his right. The first is the Federal Bankruptcy Act. While the non-judgment tort claimant cannot be a petitioning creditor,[9] he does have a claim which is provable in bankruptcy.[10] Other creditors can file the petition and the preference (if within four months) can be recovered for the benefit of all the creditors including the tort claimant with a suit pending at the time of the petition. He has also a remedy under the Ohio statute. Any other creditor could have a receiver appointed to hold the preference for all the creditors. The tort claimant would share in the fund once he had reduced his claim to judgment.[11]

R.C.H.

EQUITY

Distinguishing Between Equitable Defenses and Equitable Counterclaims — The Effect of Either on a Jury Trial

The plaintiff brought an action on a promissory note against two signers, Payer and Stanton, which note was secured by a mortgage of even date on certain property described therein. Defendant Stanton filed his answer admitting liability thereon. Defendant Payer filed an answer containing two defenses. The first defense denied that the plaintiff was the owner of the note, that all the credits for payments appear on the note and that he was liable on the note. The second defense the defendant described as a counterclaim and cross petition. The counterclaim set up facts indicating that his signature on the note and the mortgage which secured the note were obtained by fraud, and concluding with a claim for damages in the sum of $14,536.31. The

[9] Chandler Act, sec. 59b (1938).
[10] Chandler Act, sec. 63 (7) (1938).
[11] Lally v. Farr, 9 Ohio Dec. 119 (1889).