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THE LAW OF FRAUDULENT CONVEYANCES
IN WEST VIRGINIA

LUTHER E. WOODS, JR.*

The law of fraudulent conveyance is but a branch of the larger field of law dealing with rights of creditors and, therefore, a definition should be made at the outset. Glenn, in opening his excellent work on the subject states that "The fraudulent conveyance, as known in our law, may be roughly defined as an infringement of the creditor's right to realize upon the available assets of his debtor."¹

Now the word "fraudulent" certainly implies that a wrong has been committed for which a remedy will be given; and the term "conveyance" demands that either legal or equitable title to the debtor's assets be transferred to some one else.² But the question arises, when is there such a transfer? The Code of West Virginia³ answers with the following definitions: ". . . the word 'transfer' shall be taken to include every gift, sale, conveyance or assignment; and the word 'charge' shall be taken to include every confessed judgment, trust deed, mortgage, lien or encumbrance."⁴

We might, then, combine the two definitions and say that a fraudulent conveyance is an infringement of the creditor's right to realize upon the available assets of his debtor, due to the latter's having given, sold, conveyed, or assigned them to a third person, or

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¹ GLENN, THE LAW OF FRAUDULENT CONVEYANCES (1931).

² When the debtor simply hides his property from the creditor's reach the case is outside the scope of our inquiry.

³ W. VA. REV. CODE (1931). It may be well to point out that until 1863, West Virginia was a part of the state of Virginia, and much of the common law was developed prior to that date.

"The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State." *Id.* c. 2, art. 1, § 1. Virginia cases decided prior to that date shall, therefore, be included within this paper.

⁴ *Id.* c. 40, art. 1, § 2. These definitions are said to apply only to the sections dealing with voluntary and preferential transfers; but since both of these types of transfer may be void as to creditors, we are concerned with them. The section dealing with intent to hinder, defraud or delay, does not include the word "sale". It is not at all clear why this should have been left out.

It should be noted here that West Virginia does not have the Uniform Fraudulent Conveyance Law, but W. VA. REV. CODE (1931) c. 40 is devoted to this subject.

having confessed judgment, given a trust deed, mortgage, lien or encumbrance upon them. However, it should be noted that the value, if any, of such a definition lies only in its marking the scope of the subject. What actually is a fraudulent conveyance will be the question throughout this paper.

I. TYPES OF TRANSACTIONS WHICH MAY BE FRAUDULENT CONVEYANCES

It has often been stated that the particular form of conveyance is an immaterial matter since the statute embraces all transfers of property where the intent is to harm creditors in enforcing their claims.⁵ The present West Virginia Code clearly seems to bear this out, for it certainly is broad enough to include every possible method by which a debtor could rid himself of his assets. To enumerate all the ways this has been attempted would be a thankless task since the variety is almost limitless. However, a few of the less obvious situations should be mentioned.

The payment of consideration for a conveyance to a third person may be a fraudulent transfer. Thus where a debtor takes money that is liable for his debts and purchases property for the use of another, the transaction is in fraud of his creditors' rights and they may subject it to their lawful claims.⁶ Similarly, the payment of insurance premiums where the beneficiary is a third party,⁷ or the expenditure of money in improving the property of a third person⁸ may be avoided by creditors.

A deed of trust, even where given for good consideration, may be considered bad by the court. Thus where it discloses on its face the intention to permit the debtor to remain in possession and sell and dispose of the property, replenishing the goods sold by new purchases, it may be held fraudulent *per se*, and void as to creditors, subsequent as well as existing.⁹

⁵ Kanawha Valley Bank v. Wilson, 25 W. Va. 242 (1884); Shattuck v. Knight, 25 W. Va. 590 (1885); Hope v. Valley City Salt Co., 25 W. Va. 789 (1885).

⁶ McMasters v. Edgar, 22 W. Va. 673 (1883); Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780 (1887); Martin v. Warner, 34 W. Va. 182, 12 S. E. 477 (1890).

⁷ See *infra* at 271-274.

⁸ Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410 (1891); Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112 (1902); Hanley v. Nat. Loan & Investment Co., 44 W. Va. 450, 29 S. E. 1002 (1898).

⁹ Gilbert v. Peppers, 65 W. Va. 355, 64 S. E. 361 (1909). This case represents an interesting change of policy in the law on the subject and will be discussed in detail later.

West Virginia has the Uniform Bulk Sales Law,¹⁰ and a failure of the buyer to comply with the statute makes the sale void as against creditors of the seller.¹¹ Furthermore, the statute has been given rather broad application. Thus in a comparatively recent case,¹² a retail grocery merchant transferred a half interest in his business and stock of goods to *B*. The plan was to continue the business at the same location as a copartnership. *B* was to furnish the store with a quantity of goods equal in value to the stock then owned by the merchant as consideration for the agreement. The transaction was held to be within the Bulk Sales Act.

The application of a partnership asset to the payment of a non-firm debt, such as the debt of an individual partner, where the payment leaves the firm assets in such a condition that all the creditors cannot be satisfied, amounts to a fraudulent conveyance.¹³ The partnership estate (and for this purpose, at least, the firm is considered as an entity) is unjustly diminished as the result of the transfer. Indeed this has been suggested as a test in every case to determine whether the transfer is fraudulent. If the debtor's estate has been diminished to the extent that the creditor cannot satisfy his claim, he has been hindered, delayed, or defrauded within the meaning of the statute.

II. TYPES OF PROPERTY CAPABLE OF BEING FRAUDULENTLY CONVEYED

The West Virginia statute¹⁴ provides that every transfer or charge upon "any estate, real or personal", under named conditions, is void as to creditors. Now there are not very many cases in this state to help us with the question of just what is included within "any estate, real or personal." However, it would seem that any property, to the extent that it is liable for debts in one form or another, would be included. Furthermore, to be liable for debts, it must be capable of being seized by, or transferred to the creditor. He can only complain where the debtor's fraudulent act has placed such an asset beyond his reach.¹⁵

¹⁰ W. VA. REV. CODE (1931) c. 40, art. 2.

¹¹ *New River Grocery Co. v. Trent*, 101 W. Va. 118, 132 S. E. 487 (1926).

¹² *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386 (1917).

¹³ *Darby v. Gilligan*, 33 W. Va. 246, 10 S. E. 400 (1889).

¹⁴ W. VA. REV. CODE (1931) c. 40, art. 1, § 1.

¹⁵ *GLENN, op. cit. supra* n. 1, at 190.

If, then, we take this test of assignability, there are certain cases which will become clear. Thus it would seem impossible for a debtor to fraudulently transfer his labor;¹⁶ or the right to the earnings of his child by "emancipating" him;¹⁷ or, in the case of a female debtor, alimony;¹⁸ or a personal tort claim; or a mere hope or expectancy;¹⁹ or an estate in which the debtor only has the legal title, equitable title being in a third person.²⁰

On the other hand, it would seem that any tangible property, or interest which the debtor could sell, would come within the statute. Thus a patent, or a membership, having pecuniary value, in an organization such as the stock exchange, or board of trade, or a coöperative society,²¹ could be so transferred as to harm the creditor. Again, the debtor could release a claim for a tort against his property, which but for the release, would be a valuable asset for the creditor. An equity of redemption comes within the statute,²² and the creditor may set aside a fraudulent conveyance of such an equity, unless it is worthless.²³ On this last point, it would seem that if the property is clearly of no value, the court should not be troubled, no matter what type of property it is.²⁴

The problem of exempt property often becomes important in cases involving the rights of creditors. By statute, any person residing in West Virginia may hold a homestead of the value of one thousand dollars. This homestead is exempt from all debts incurred after he has recorded a writing signifying his intention to so

¹⁶ This is to be contrasted with an assignment of wages.

¹⁷ GLENN, *op. cit. supra* n. 1, at 192.

¹⁸ There is some conflict among the various states as to whether alimony is a liability of the husband in the nature of an obligation or duty to a stranger, or whether it is to be regarded as a general duty of support made specific and measured by the court. The position of the West Virginia courts on this point is not clear, but it is submitted that the latter view is the better one of the two.

¹⁹ This is to be contrasted with the case where the debtor has a contract right against some third person for the benefit of his expectancy, should it ever ripen. In such a case the debtor has given consideration for this right, and the creditor should be able to benefit from it. The asset the debtor has is not an expectancy, but a contract right.

²⁰ *Hamilton v. Steele*, 22 W. Va. 348 (1883). It was held in this case that where a man purchases property with funds derived from the separate estate of his wife, although he may take the title in his own name, the wife is the equitable owner, and a subsequent conveyance of the land by the husband to the wife is not in fraud of the rights of creditors of the husband.

²¹ This would be so, even where the assignment of the membership requires the approval of a third party.

²² *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 376 (1911).

²³ *Johnson v. Riley*, 41 W. Va. 140, 23 S. E. 698 (1895).

²⁴ *Cox v. Horner*, 43 W. Va. 786, 28 S. E. 780 (1897).

set the property aside. However, debts which were incurred prior to the recordation, or debts incurred for the purchase money of the property set aside, or taxes are not exempt.²⁵

Also by statute "Any husband or parent residing in this State, or the widow, or the infant children of deceased parents, may set apart and hold personal property not exceeding two hundred dollars in value to be exempt from execution or other process. . . ." And "Any mechanic, artisan or laborer residing in this State, whether he be a husband or parent, or not, may hold the working tools of his trade or occupation to the value of fifty dollars exempt from forced sale or execution. . . ." But "in no case shall the exemption allowed any one person exceed two hundred dollars."²⁶ Any deed of trust, mortgage or other writing made to give a lien on such property, if made within one year after it is set aside as exempt property, shall be void.²⁷ Every person is entitled to an exemption of clothing, but it has been held that it will be allowed only to the amount reasonably necessary to protect the person from indecent exposure or physical suffering.²⁸

Now, while there are no cases on the point, it seems clear that a transfer of such exempt property is not within the statute of fraudulent conveyances because there would be no intent to delay, hinder, or defraud creditors. Even if such an intent did exist, it would certainly be ill-advised for the creditor is not put in any worse position.²⁹ However, the question arises, suppose the debtor uses non-exempt property for the consideration in the purchase of property which can be exempted?³⁰ Is this a fraudulent conveyance? It will be noted that the homestead real property is not exempt from liens and other debts and liabilities contracted and incurred prior to the recordation of the homestead.³¹ Therefore, since the pre-existing creditor could still subject this property to his claims, it would seem that there could be no successful conveyance out of his reach. However, this does not apply to subse-

²⁵ W. VA. REV. CODE (1931) c. 38, art. 9; *Linsey v. McGannon*, 9 W. Va. 154 (1876); *Holt v. Williams*, 13 W. Va. 704 (1879).

²⁶ W. VA. REV. CODE (1931) c. 38, art. 8, § 1.

²⁷ *Id.* c. 38, art. 8, § 2.

²⁸ *State v. Allen*, 48 W. Va. 154, 35 S. E. 990 (1900).

²⁹ As a debtor's homestead is not subject to the demands of his creditors; a conveyance thereof, whether made with or without consideration, and irrespective of the intent of the parties, cannot be set aside as fraudulent as to creditors. *Williams v. Lord*, 75 Va. 390 (1881).

³⁰ This is to be distinguished from debts incurred for the purchase money of the exempt property which is specifically provided for.

³¹ W. VA. REV. CODE (1931) c. 38, art. 9, § 3.

quent creditors or to the personal property exemption which is absolute. Still it is highly probable that the strong public policy back of all exemption statutes would protect the debtor and prevent the creditor from setting aside such a conversion.

In this field of exempt property the life insurance of the debtor is another interesting subject. Suppose an insolvent debtor takes out a policy on his own life in favor of another, or takes it out in his own behalf and later assigns it; or suppose he is solvent when he takes it out and later becomes insolvent and pays premiums, thereby hindering creditors? Will they be able to get the proceeds of the policy on the ground of fraudulent conveyance? Without statutes or judicial decision, based upon a public policy similar to that which supports homestead exemptions, the answer would seem to be clearly in the affirmative. The policy is an asset of the debtor, and the beneficiary of the policy, by hypothesis, has given no consideration. But the theory early developed that a beneficiary had a "vested interest" provided the one effecting the insurance did not reserve the power to change the beneficiary. The reservation of this power complicates the matter still further.

The West Virginia Code has two sections dealing with the subject, and, since their wording is important, it will be perhaps best to quote them. Chapter 33, Art. 3, Sec. 34, provides:

"If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: *Provided*, That subject to the statute of limitations, the amount of any premiums for such insurance paid with intent to defraud creditors, with interest thereon, shall enure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless before such payment the company shall have written notice, by or in behalf of a creditor, of a

claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed.

Chapter 48, Art. 3, Sec. 23 provides:

“. . . and any person, whether her [any married woman's] husband or not, effecting any insurance on his own life, or on the life of another, may cause the same to be made payable to, or assign the policy to, a married woman, or to any person in trust for her or her benefit; and every such policy, when expressed to be for the benefit of, or assigned or made payable to, any married woman or any such trustee, shall be the property of such married woman, and shall inure to her own use and benefit, and in case of her surviving the period or term of such policy the amount of insurance shall be payable to her or her trustee for her own use and benefit, free from the control, disposition or claims of her husband, and of the person effecting or assigning such insurance, and from the claims of their representatives and creditors: *Provided, however,* That if the annual premium on any such policy shall exceed the sum of three hundred dollars and is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid in excess of such sum, with interest thereon, shall inure to the benefit of such creditors, subject, however, to the statute of limitations: . . .”

At first blush it would seem that these two sections are, at least in part, inconsistent, but upon closer analysis it will be seen that we can divide the situations into five distinct types. Four of these types are specifically provided for, while one is not. In each case we shall assume that there is an intent to hinder and defraud creditors.

(1) Suppose the debtor, while solvent, takes out a life insurance policy, or changes an existing one, naming *X* as the beneficiary. *X* represents any third person other than his wife or a married woman. Suppose further that he subsequently becomes insolvent but continues to pay premiums on the policy in hindrance of his creditors. At his death, what are the rights of the creditors and of *X*?

There are six possibilities: (a) It could be said that the creditors are entitled to the entire proceeds of the policy on the theory that the insurance company's liability is subject to the condition that the premiums be paid. This would be true of the last premium as well as the first and since the money used for the last premium was really money belonging to the creditors, it was paid in trust

for them. (b) Or it could be said that the creditors are entitled to the cash surrender value of the policy at the moment before the debtor died. (c) A third possibility is that they are entitled to that proportion of the proceeds as the amount of the premiums paid after insolvency stands to the total premiums paid. (d) A fourth solution would be to say that the creditors are entitled to the amount of premiums paid after insolvency. (e) Or the measure might be the excess over stated or reasonable amounts expended each year on the premiums. (f) Finally, it could be held that the creditors get nothing, but this would seem to be both unfair and undesirable.

The Code takes the fourth solution. Section 34 provides that the creditors can get the amount of any premiums paid by the debtor with intent to hinder his creditors, plus interest, but subject to the statute of limitations. This is equivalent to giving the creditors a sum equal to the amount of the premiums paid after insolvency, for, as we shall see later, upon insolvency there is a very strong presumption of fraudulent intent when there is a transfer of assets. *X* would get the residue of the policy.

(2) Suppose the same fact situation as in the first case, except instead of the insurance being made payable to *X*, it is made payable to the debtor's wife, or a married woman, not his wife.³² Then, under Section 23, the creditors can get only the excess over three hundred dollars of the annual premiums paid after the insolvency.

(3) Suppose the debtor is insolvent when he takes out the insurance naming *X* the beneficiary? The situation seems to be very much like our first case and Section 34 would apply. That is, the creditors would get the amount of the premiums paid.

(4) But suppose the debtor is solvent when he takes out a policy naming his estate the beneficiary, then he becomes insolvent and assigns the beneficial interest to *X*? This is the tricky one. Section 34 seems to specifically exclude this situation by the clause "except in cases of transfer with intent to defraud creditors." The subsequent clause providing that "the amount of any premiums for such insurance paid with intent to defraud creditors, with interest thereon, shall enure to their benefit from the proceeds of the policy", makes the meaning of the first clause quoted am-

³² It is interesting to speculate what the motive back of this married woman provision was.

biguous, but it is submitted that the statute does not cover this case. Section 23 would not apply because *X* is not a married woman, or debtor's wife.

If this interpretation is correct, the creditors' rights would depend upon the prior case law in the state, or judicial legislation, if there are no cases. Actually there is no direct holding on this point except for the recent and somewhat analogous case of *Mahood v. Maynard*.³³ That case is now covered by Section 23 and would come under our fifth fact situation, but it might be used as a basis of predicting the answer to our hypothetical problem. It was there held that the creditor's recovery would be limited to the "cash surrender value" rather than the face amount of the policy or a limited amount of the premiums. This case has been criticized as going too far, it being argued that the creditor should recover all the proceeds of the policy, since these proceeds "are the result of investment made from funds of the insolvent estate."³⁴ Logically it would seem that there is some basis for this criticism, but it is submitted that the court adopted the rule which is more in line with the policy of the state as expressed in the recent legislation³⁵ and can be justified. Indeed, the court may even go further and hold the creditor entitled only to a part of the premiums paid.

(5) Finally, suppose the same fact situation as in case three or four except that the beneficiary is the wife of the debtor, or a married woman? Once again Section 23 would seem to be applicable and the creditor could get only the excess over the three hundred dollars annual premium.

III. INTENT OF THE DEBTOR

The motive of the debtor when he makes the transfer constitutes the most important single question, and, as is to be expected, has given rise to the greatest amount of litigation in this field. In most jurisdictions the question could be divided into two parts: one, where there is an intent to delay, hinder, or defraud creditors; and two, where there is no motive to hinder, delay, or defraud but the debtor has reduced his assets by making a gift without consideration.³⁶ However, in West Virginia, because of

³³ 114 W. Va. 385, 71 S. E. 884 (1933).

³⁴ Comment (1934) 40 W. VA. L. Q. 383.

³⁵ Statutes cited above.

³⁶ It is to be noted that there can be an intention to defraud when the debtor makes a gift, but this is not essential to have the conveyance set aside.

express statutory provision, there is also a third type of case. The debtor may have no desire to defraud his creditors, and may make the conveyance for a good consideration, such as a pre-existing debt, and yet it will be set aside because it has created a preference among his creditors. Because of the importance of each type of case, we shall discuss them separately.

1. *Intent to hinder, delay, or defraud.* Following the statute of 13 Elizabeth, the first section of the chapter in the Code dealing with acts void as to creditors provides that every transfer made "with intent to delay, hinder, or defraud creditors" shall as to such creditors be void. This is similar to statutes in other jurisdictions which have not adopted the Uniform Fraudulent Conveyance Law, and to prior statutes of those states which have adopted it. The chief distinction between the West Virginia statute and the Uniform Law lies in the West Virginia requirement in every case of an actual intent to delay, hinder or defraud, while in the Uniform Law there are certain situations where the intent is immaterial.³⁷ They are alike in that any conveyance made with the intent to defraud a creditor, whether founded upon a valuable and adequate consideration or not, is fraudulent.³⁸

It has been held that the words "defraud", "hinder", and "delay" are not equivalent terms. To hinder and delay one's creditor is as much provided against as to wholly defraud him. A purpose to delay and hinder a creditor may be fraudulent, although the debtor may honestly intend that all his debts shall be paid ultimately.³⁹

The intent need not be entirely to defeat the claim of the creditor to come within the statute,⁴⁰ but it must exist at the inception of the transaction. Thus it has been held that if a conveyance is not fraudulent in its inception, it cannot become so by subsequent matters; because the statute requires that the act should be done with an actual purpose to harm the creditor. However, if it is afterwards employed for a fraudulent purpose, a court of equity will interpose to prevent such use of it.⁴¹

³⁷ Sections 4, 5 and 6.

³⁸ *Livesay v. Beard*, 22 W. Va. 585 (1883); *Claffin v. Foley*, 22 W. Va. 434 (1883).

³⁹ *Halfpenny & Hamilton v. Tate & McDevitt*, 65 W. Va. 296, 64 S. E. 28 (1909).

⁴⁰ *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402 (1901).

⁴¹ *Harden v. Wagner*, 22 W. Va. 356 (1883); *Hudkins v. Crim*, 72 W. Va. 418, 78 S. E. 1043 (1913).

If the defendant has conveyed away all of his property in order to avoid payment of a fine which he is afraid he might have to pay, his act comes within the statute;⁴² or if the intent is to defeat a recovery of damages for a tort committed by the defendant, it may be set aside.⁴³

Because of its subjective nature, fraudulent intent is a difficult thing to prove. But, except for a few cases,⁴⁴ proved it must be, or the creditor, under West Virginia law, will not be able to get relief. Of course it is possible to prove by direct and positive testimony that there was such an intent, but this is the most difficult type of case. Realizing this, the law early developed the doctrine that certain facts and circumstances would be considered as marks or signs of fraud, from which a fraudulent intent may be inferred.⁴⁵ These facts and circumstances are usually designated as badges of fraud. While they raise a *prima facie* presumption of fraud and call on the parties for an explanation, yet if they are negatived by well-established facts and circumstances clearly inconsistent with fraudulent intent, they are insufficient to overthrow the transaction.⁴⁶

A comparatively recent case⁴⁷ has classified them as follows: (a) the relationship of the parties; (b) the grantor's insolvency; (c) pursuit of the debtor by his creditors at the time; (d) want of consideration; (e) retention of possession of the property by the grantor; and (f) fraudulent incurrence of indebtedness after the conveyance. We shall discuss them in that order.

(a) It seems to be well settled that any relation between the transferee and transferor which gives rise to confidence, though

⁴² *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439 (1888). Defendant sold liquor unlawfully and, realizing he might be fined, conveyed all his property. After the conveyance he sold more liquor and for this subsequent sale he was fined. It was held fraudulent as to the state, although the conveyance was before the sale for which he was fined.

⁴³ *Thomas v. Lupis*, 96 W. Va. 100, 122 S. E. 365 (1924). The plaintiff in this case had obtained a verdict for damages, which had not yet been reduced to judgment. He then brought a bill in equity to set aside a conveyance as fraudulent. Pending this, his tort suit was reversed and a new trial was granted. But it was held that he may maintain suit under the fraudulent conveyance statute without having his claim reduced to judgment.

⁴⁴ As where it comes within the sections dealing with voluntary or preferential transfers, or where the act of the debtor is deemed fraudulent *per se*, as in *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361 (1909), discussed *infra* at 282-284.

⁴⁵ *Twyne's Case*, 3 Coke 80b (1601).

⁴⁶ *Schiffler v. Kissel*, 103 W. Va. 545, 138 S. E. 107 (1927).

⁴⁷ *Citizens' Bank v. Wilfong*, 66 W. Va. 470, 66 S. E. 636 (1909).

not a badge of fraud, strengthens the presumption that may arise from other circumstances and serves to elucidate, explain or give color to the transaction. Mere relationship is not a badge of fraud, but it calls upon the court for careful and close scrutiny of the transaction when such a conveyance renders the debtor unable to satisfy creditors.⁴⁸ The existence of relationship by consanguinity or affinity, plus other circumstances, makes the proof of fraud easier than where there is a more distant relationship.⁴⁹ "It is a circumstance having probative value in connection with others tending to prove fraud."⁵⁰ But the mere fact that the relationship exists, even the closest relationship, such as that of parent and child, is not by itself a badge of fraud. There must be some other circumstance present.⁵¹

The law is rather suspicious of any transaction between husband and wife, perhaps even more so than the relationship of parent and child, and less proof is required to show the transaction to be fraudulent. In fact, there is a presumption against *bona fides* and the burden is on the grantee, usually the wife.⁵² Thus the rule was laid down in *Miller v. Gillispie*⁵³ that in a contest against the

⁴⁸ *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268 (1904); *Watkins v. Wortman*, 19 W. Va. 78 (1881); *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263 (1907); *Foggin v. Furbee*, 89 W. Va. 170, 109 S. E. 754 (1921); *Miller v. Correll*, 97 W. Va. 215, 124 S. E. 683 (1924); *Schiffler v. Kissel*, 103 W. Va. 545, 138 S. E. 107 (1927); *Geary v. Salisbury*, 116 W. Va. 718, 182 S. E. 828 (1935).

⁴⁹ *Eine v. Compton*, 115 W. Va. 379, 176 S. E. 429 (1934); *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780 (1887); *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804 (1893); *Livey v. Winton*, 30 W. Va. 554, 4 S. E. 451 (1888).

⁵⁰ *Donohoe v. Collett*, 87 W. Va. 383, 105 S. E. 265 (1920).

⁵¹ *Farmers' Transportation Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592 (1900); *Smith v. Smith*, 48 W. Va. 51, 35 S. E. 876 (1900); *Bland v. Rigby*, 73 W. Va. 61, 79 S. E. 1013 (1913); *Vandervort v. Fouse*, 52 W. Va. 214, 43 S. E. 112 (1902). It has been said that a conveyance from a child to his parent, whether for valuable consideration or not, is presumed to be valid. *Pusey v. Gardner*, 21 W. Va. 469 (1883). Other cases where the question of the effect of relationship arises are where the parties are brother and sister, or uncle and nephew, *etc.*, and it has been uniformly held that while the relationship is not a badge of fraud in itself, the fact that it exists makes the case one for close scrutiny by the courts. *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302 (1896); *North American Coal Co. v. O'Neal*, 82 W. Va. 186, 95 S. E. 822 (1918).

⁵² *Bradley v. Kenova Trading Co.*, 93 W. Va. 102, 115 S. E. 866 (1923). Held, where creditors of the husband seek to subject real estate claimed by the wife, which has been conveyed to her, either directly or indirectly from her husband, the burden of showing that it was paid for by her out of her separate estate rests upon her, and, in the absence of such proof, it would be presumed that the purchase money was furnished by her husband. *Robertson Grocery Co. v. Kinser*, 93 W. Va. 172, 116 S. E. 141 (1923); *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 371 (1889).

⁵³ 54 W. Va. 450, 46 S. E. 451 (1903).

creditors of the husband, where the wife claims to have purchased real estate, or to have made improvements upon it after the purchase, the burden is cast upon her to prove the *bona fides* of the transaction by showing that the property and improvements were paid for with her money derived from some source other than her husband. It was urged, in that case, that the rule ought to be abolished, because, by statute now, a married woman may carry on business in her own name and acquire and hold property free from her husband's control and from liability for his debts. However the court rejected this argument, and it is submitted that this was a wise decision. While the improvement of the married women's status in every possible way is a thing to be desired, it has no vital bearing on the question. The real question is who can best furnish the evidence which will lead to justice, and as between the grantee and creditor, it would clearly seem to be the grantee, whether wife or husband. It should be noted that it is generally held that if the party claiming the benefit of a transaction impeached for fraud, has it within his power to establish the facts relied on by satisfactory proof, his failure to do so constitutes a badge of fraud. Furthermore, the case where the wife is in business for herself is the exceptional rather than the usual situation.

Of course a conveyance made under circumstances where the law would require that it be made anyhow is not fraudulent.⁵⁴ But suppose the husband makes a conveyance as security for a debt, and then the secured creditor, upon payment by the husband, conveys the property back to the wife at a time when the husband is insolvent? The wife's title is clearly subject to the claims of the husband's creditors.⁵⁵

(b) As has been pointed out before, the West Virginia statute differs from the Uniform Law in that, in the latter, certain acts by an insolvent debtor, or one who would thereby become insolvent, are fraudulent without any requirement of intent, while in West Virginia the intent is always material. However, the distinction is more apparent than real for insolvency is almost always considered as a badge of fraud. Especially is this true where the conveyance is without adequate consideration. Indeed one case has gone further in setting the test for insolvency than the Uniform

⁵⁴ *Atwood v. Dolan*, 34 W. Va. 563, 12 S. E. 688 (1890). The husband was the agent for his wife, and through mistake of the vendor, title was put in the husband's name.

⁵⁵ *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 376 (1911).

Law. It was said that a state of indebtedness which produces embarrassment and approaches insolvency or which, if any calamitous accident or fall in price should happen to the property retained, would probably leave the donor without the means of paying his creditors, is sufficient to authorize the presumption that a voluntary gift was made to defraud creditors.⁵⁶

This of course does not mean that it is easier in West Virginia to set aside a conveyance made by an insolvent than in a state having the Uniform Law. It is certainly harder to prove that the debtor was both insolvent and had a fraudulent motive than to prove that he was insolvent only. However, when the test, as laid down in the case cited, is adopted, the harder burden on the creditor in West Virginia approaches the simpler task of the creditor under the Uniform Law.

Since insolvency is merely a sign as to the probable motive of the debtor, it must be determined as of the date when the conveyance was made. Thus a voluntary settlement of real estate on a wife, made when the husband is not indebted, cannot be avoided by creditors upon the subsequent insolvency of the grantor, where there is no showing that the transfer caused the insolvency.⁵⁷ The creditor's right does not depend on the insolvency of the debtor,⁵⁸ and if a deed is fraudulent in fact, it does not matter whether the grantor had much or little property when the conveyance was made.⁵⁹

(c) If a debtor makes a conveyance when he is being pursued by creditors, he at once arouses the suspicion that his motive is not altogether pure. This is especially true when the transfer is made pending litigation. A conveyance made by a party of his entire property during the pendency of a suit brought to recover judgment against him on a debt would clearly seem to be a badge of fraud.⁶⁰ The same would be true even if the suit were brought to recover on a tort;⁶¹ or even before suit where the defendant is afraid he will be fined.⁶² It has been held to be a badge of fraud for the debtor to induce an attorney to delay bringing action on a

⁵⁶ *Wilson v. Buchanan*, 7 Gratt. 334 (Va. 1851).

⁵⁷ *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242 (1884).

⁵⁸ *Halfpenny & Hamilton v. Tate & McDevitt*, 65 W. Va. 296, 64 S. E. 28 (1909).

⁵⁹ *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750 (1890).

⁶⁰ *Ibid.*

⁶¹ *Thomas v. Lupis*, 96 W. Va. 100, 122 S. E. 365 (1924).

⁶² *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439 (1888).

claim, and, during the delay, convey away his property. It is the same as though the suit were actually pending.⁶³

(d) Inadequate consideration is one of the most common badges of fraud, but, like other similar suspicious circumstances, is not by itself sufficient to set the conveyance aside.⁶⁴ There have been dicta in numerous cases to the effect that if the inadequacy of consideration "is so gross as to shock the conscience" the court may consider this enough to establish fraud.⁶⁵ However, no case has been found where this was the sole factor. Always there are other badges of fraud or at least suspicious circumstances which, joined with the inadequacy of consideration, arouse a presumption of fraud.

The most common of these is the relationship of the grantor and grantee. Thus it has been stated that while a parent who is indebted to others can convey property to his child, to whom he is indebted for services rendered, without being adjudged guilty of an intent to defraud other creditors, yet all such transactions are subject to careful investigation and will not be upheld unless entirely free from fraud.⁶⁶ An agreement for future support between child and parent, while it is a valuable consideration for some purposes, is not sufficient to sustain a conveyance, which will operate to the prejudice of the grantor's existing creditors.⁶⁷

The rule is settled that neither the recital in a deed of payment of consideration, nor averment of payment in the answer of the fraudulent grantor or grantee is evidence against an attacking creditor who is not a party to the deed. The grantee, in order to sustain the conveyance to him, must clearly prove payment of a

⁶³ *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960 (1898).

⁶⁴ *Stuart v. Neely*, 50 W. Va. 508, 40 S. E. 441 (1901); *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804 (1893); *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671 (1893); *Schwenck v. Hess*, 84 W. Va. 111, 99 S. E. 255 (1919); *Foggin v. Furbee*, 89 W. Va. 170, 109 S. E. 754 (1921).

⁶⁵ *Maynard v. Shein*, 97 W. Va. 597, 125 S. E. 585 (1924); *Schiffler v. Kissel*, 103 W. Va. 545, 138 S. E. 107 (1927); *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560 (1895).

⁶⁶ *Bland v. Rigby*, 73 W. Va. 61, 79 S. E. 1013 (1913). The earnings of a minor child who has not been emancipated while laboring for another without the consent and approbation of the father, belong to the father; and, if received, either directly or indirectly by the father, they do not constitute a valuable consideration for a deed by the father to the child. But see *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821 (1887), which held pay for United States military service by the minor belongs to the minor, and when received by the father, a debt arises sufficient to sustain a conveyance between father and son.

⁶⁷ *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 46 S. E. 920 (1904); *Keener v. Keener*, 34 W. Va. 421, 12 S. E. 729 (1890). But see *Hume & Warwick Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56 (1898).

fair and adequate consideration.⁶⁸ Where a consideration is fictitious in part or not established with certainty, a deed of trust purporting to secure the whole of it may be vacated in its entirety by a creditor in so far as he is substantially prejudiced.⁶⁹

(e) The doctrine that retention of possession or apparent title by the grantor constitutes a badge of fraud dates back to Coke's "reading" with regard to *Twyne's Case*,⁷⁰ and the rule is attributed to estoppel through reputed ownership. The retention of possession can, in the mind of the court, produce injury to both existing and subsequent creditors. The present creditor, seeing no change in his debtor's position, may forbear to press his claim. The subsequent creditor may extend credit on the faith of the apparent assets of the debtor.⁷¹

The doctrine declared by the early Virginia cases as to the effect of the retention of possession or apparent title was neither certain nor uniform. The leaning seems to have been toward the rule that the retention was fraudulent *per se*.⁷² The cases were not all in accord.⁷³ The doctrine declared in the earlier cases was thoroughly reviewed in the case of *Davis v. Turner*⁷⁴ and the doctrine of fraud *per se* was repudiated. It was there decided that the retention of possession or apparent title by the vendor is merely *prima facie* evidence of fraud. When the presumption of fraud is raised, it becomes conclusive in the absence of satisfactory explanation. But such presumption is rebuttable by showing that there was no fraud in fact.⁷⁵

"With this rule of law arranged, it became apparent that there must be some hard and fast method of settling at the outset the question whether there was good reason for the transaction taking the form it did, or whether in truth it was a mere sham. It was thought to be better to provide a means

⁶⁸ *McCarthy Co. v. Saunders*, 83 W. Va. 612, 98 S. E. 800 (1919). But it was held in *Donohoe v. Collett*, 87 W. Va. 383, 105 S. E. 265 (1920) that the rule has no application in the case of a conveyance of a debtor's property, even to a close relative of his, made by a trustee in pursuance of a sale thereof under a valid deed of trust.

⁶⁹ *Elliott & Co. v. Johnson*, 85 W. Va. 706, 102 S. E. 681 (1920).

⁷⁰ 3 Coke 80b (1601).

⁷¹ GLENN, *op. cit. supra* n. 1, at 470.

⁷² *Clayton v. Hill*, 1 Wash. 177 (Va. 1793); *Fitzhugh v. Anderson*, 2 Hen. & M. 289 (Va. 1808); *Glascock v. Batton*, 6 Rand. 78 (Va. 1827).

⁷³ *Kroesen v. Seevers*, 5 Leigh 434 (Va. 1834).

⁷⁴ 4 Gratt. 422 (Va. 1849).

⁷⁵ *Bindley v. Martin*, 28 W. Va. 773 (1886); *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268 (1904); *Geary v. Salisbury*, 116 W. Va. 718, 182 S. E. 828 (1935).

for settling this at the outset rather than to compel the parties, if they were honest, to await the *arrière pensée* method attendant upon a trial. In that way belated explanations, afterthoughts, and perjury, would be avoided. Thus came the recording acts relating to transactions in goods, as to title. They were intended, and that is their effect, to provide a modern substitute for the notoriety recommended by Coke in *Twyne's Case*.⁷⁶

The West Virginia court early held that recordation takes the place of a change of possession if inconsistent with the purposes for which the deed is executed.⁷⁷

The West Virginia Code has several provisions concerning recordation,⁷⁸ the wording of which should be noted. They do not say that if the transaction is recorded it will be valid as to creditors, but merely that if not recorded it will be void. From this it would seem not impossible for a creditor to set aside such a transaction, even though recorded, and we find such a case in *Gilbert v. Peppers*.⁷⁹ There, a deed of trust on a stock of merchandise disclosed on its face the intention to permit the debtor to remain in possession and sell and dispose of the property, replenish the sold goods by new purchases, and keep the proceeds. It was held that this is fraudulent *per se* and void as to both existing and subsequent creditors.

The rule laid down in this case has not always been the same and its history is interesting. It was early held that where a deed of trust reserves to the grantor a power inconsistent with the avowed object for which the deed is made, it will be null and void, as against creditors and purchasers.⁸⁰ But then a group of cases, represented by *Horner-Gaylord Co. v. Fawcett*⁸¹, modified the rule as far as the subsequent creditors in equity were concerned, where the deed was given for the purchase money. It was said that a deed of trust on a stock of goods including goods subsequently

⁷⁶ GLENN, *op. cit. supra* n. 1, at 475.

⁷⁷ Klee & Bros. v. Reitzenberger, 23 W. Va. 749 (1884).

⁷⁸ W. VA. REV. CODE (1931) c. 40, art. 1, §§ 7, 8, 9, 10, 11, 12.

⁷⁹ 65 W. Va. 355, 64 S. E. 361 (1909).

⁸⁰ Kuhn v. Mack, 4 W. Va. 186 (1870); Gardner v. Bodwing, 9 W. Va. 121 (1876); Clafin & Co. v. Foley, 22 W. Va. 434 (1883). In this last case there was a deed conveying a stock of goods to a trustee to secure the payment of notes not then due. There was an after-acquired property clause, but the trustee was not to take possession or control of the goods until default by grantor. Held, fraudulent and void on its face as against the unsecured creditors of the grantor.

⁸¹ 50 W. Va. 487, 40 S. E. 564 (1901); Conaway's Adm'rs v. Stealey, 44 W. Va. 163, 28 S. E. 793 (1897).

acquired, executed in good faith to secure a *bona fide* debt was, if duly recorded, not fraudulent *per se*, or even *prima facie* fraudulent, as to subsequent creditors. Grounds given for the exception were that the recordation of the deed of trust constitutes notice of the encumbrance to all subsequent creditors; and that there are no prior or existing creditors who could be prejudiced or against whom any fraud in the transaction could have been directed.

However, this modification had a rather short life and "upon mature consideration" *Gilbert v. Peppers* returns to the former view. Thus it is now clear that a mortgage on a stock of goods is fraudulent *per se* if the mortgagor is allowed to retain the proceeds. But it should be pointed out that this rule has been limited in its application to cases where the situation is similar to that found in *Gilbert v. Peppers*. The stock of goods must be the principal property covered by the deed of trust and not merely incidental security. This is clearly shown in a recent case⁸² where it was contended that since the deed of trust, covering all the assets of a mining corporation, included the merchandise of the company store, and since the company was allowed to keep its earnings, the deed of trust was fraudulent *per se* under *Gilbert v. Peppers*. But the court found that the value of the merchandise at the date of the conveyance was "a sum too small, in proportion to the value of the entire subject of the trust, to suggest an ulterior motive." Again, it has been held that a deed of trust on furniture, fixtures, liquor license, and the leases of the building in which the saloon is located, is not void *per se* as to such property merely because it also covers the stock of liquors and other consumable merchandise employed in the business.⁸³

The policy against such a deed as in *Gilbert v. Peppers* seems to be that so long as it is allowed to operate in accordance with the intention disclosed, it does not secure the debt described in it because it leaves the debtor in absolute control of the property and free to sell and appropriate the proceeds for his own use. Yet, if valid, it would preclude any other creditor from resorting to the property. Such a mortgage would permit every merchant who found himself hard up to hold his assets for the purpose of continuing and keeping up his business and as he would hope, tiding

⁸² Wyoming Coal Sales Co. v. Smith-Pocahontas Coal Co., 105 W. Va. 610, 144 S. E. 410 (1926).

⁸³ Schmulback Brewing Co. v. Henaghen, 73 W. Va. 682, 80 S. E. 1107 (1914); Bartles & Dillon v. Dodd, 56 W. Va. 333, 49 S. E. 414 (1904) (hotel furniture with a few eatables).

him over the dull times. It would serve as a shield against all of his creditors except the mortgagee who might be quite friendly.

It is submitted that the rule, as limited, is sensible. The argument that subsequent creditors should, by the recordation, be put on notice of the actual financial condition of the merchant, sounds convincing theoretically. In practice, like so many other paper propositions, it falls. Especially is this true where the amount of the credit to be extended is small, and the cost of investigation prohibitive. Another argument sometimes advanced against the rule is that it prevents the merchant from getting enough credit to tide him over during a bad spell in his business. The answer to this would seem to be that if he must resort to secretive methods to save himself, he has passed the point worth saving.

(f) Like the matter of insolvency, so in the question of a fraudulent incurrance of indebtedness after the conveyance, the West Virginia law differs from the Uniform Act. The latter provides that such an act of the debtor may be fraudulent regardless of intent.⁸⁴ In West Virginia, such acts are only badges of fraud. Indeed, the section dealing with voluntary transfers⁸⁵ specifically provides that such a conveyance shall not be void as to subsequent creditors merely because it is void as to prior or existing ones. But it is clear that subsequent, as well as existing creditors, may attack the conveyance if fraud against them was intended.⁸⁶ Proving the fraudulent intention is the important thing, and the fact that the debtor has incurred debts after the conveyance is merely some evidence toward that proof.

(g) Finally, there are a few type situations which have been considered badges of fraud which cannot well be classified. Thus the debtor's conduct at trial, such as failure to call important witnesses;⁸⁷ or failure to produce documents and memoranda⁸⁸ may be considered in determining whether there was a fraudulent intent. It has been said that circumstances indicating excessive

⁸⁴ Section 5 of the Uniform Law provides: "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."

⁸⁵ W. VA. REV. CODE (1931) c. 40, art. 1, § 3.

⁸⁶ *Silverman v. Greaser*, 27 W. Va. 550 (1886); *Smith v. Johnson*, 78 W. Va. 395, 89 S. E. 3 (1916); Note (1937) 43 W. VA. L. Q. 225.

⁸⁷ *McCarthy Co. v. Saunders*, 83 W. Va. 612, 98 S. E. 900 (1919).

⁸⁸ *Mauch Chunk Nat. Bank v. Shrader*, 74 W. Va. 310, 81 S. E. 1121 (1914).

effort to show appearances of fairness or regularity not observed in other transactions by the debtor are to be regarded as badges of fraud.⁸⁹

The acts of the grantee as well as the grantor may arouse suspicion. Thus it is generally held that if the party claiming the benefit of the transaction has it within his power to establish the facts relied on by satisfactory proof, his failure to do so constitutes a badge of fraud.

Before leaving the question of intent to delay, hinder, or defraud creditors, the last sentence of the section in the Code dealing with it⁹⁰ should be considered. It provides that the section "shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." It is not enough that the purpose of the grantor be fraudulent; knowledge of such purpose must be clearly brought home to the grantee.⁹¹ But if he has such knowledge, he will not be protected even though he pays the full value and it is applied on a *bona fide* debt of the grantor.⁹²

Whether the grantee had knowledge or not is determined by an objective test. Thus it is said that if the circumstances involved in the making of the transfer are sufficient to put a man of ordinary prudence and experience in business transactions on inquiry, he must be held, though a purchaser for value, to have notice of the fraudulent intent of his vendor.⁹³ The fact that the grantor and grantee are related or are intimate leads to an inference that such knowledge exists.⁹⁴

If the conveyance is voluntary and without consideration, the fact that the donee had no notice of the intent of the donor is immaterial. This is true even as to subsequent creditors where there was an actual intent to defraud.⁹⁵

2. *Voluntary transfers.* We come now to the second type of transaction which creditors may set aside, namely, transfers which are voluntary or upon consideration not deemed valuable

⁸⁹ *McCarthy Co. v. Saunders*, 83 W. Va. 612, 98 S. E. 800 (1919).

⁹⁰ W. VA. REV. CODE (1931) c. 40, art. 1, § 1.

⁹¹ *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59 (1898); *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363 (1902).

⁹² *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761 (1899).

⁹³ *Keneveg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773 (1899).

⁹⁴ *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960 (1898).

⁹⁵ *Silverman v. Greaser*, 27 W. Va. 550 (1886); *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361 (1909).

in law, but in which there is no intention on the part of the donor to hinder, delay, or defraud. The development of the law on this subject was marked by much judicial discussion⁹⁶ on the question whether or not existing and subsequent creditors stand in the same position. There were strong arguments and authority on both sides; but for our purposes, the matter is settled by the positive position taken in the Code.⁹⁷ It seems to make a clear distinction between the rights of existing and subsequent creditors. A voluntary conveyance can not be impeached by subsequent creditors on the mere ground of its being voluntary if there is no actual fraudulent intent, although the party making it is indebted to some extent.⁹⁸

On the other hand, as to existing creditors it seems to be immaterial whether there was present in the minds of the grantor or grantee an intention to defraud anyone. It may appear that the intent of the grantor and grantee was entirely innocent, even laudable, and yet the conveyance will be void. Further, it seems to make no difference that the debtor may retain ample funds out of which his existing creditors may be paid. If the transfer or charge is voluntary and made without consideration deemed valuable, it is by the statute declared to be void as to all creditors whose debts were contracted at the time it was made.⁹⁹

However, the courts have found an "out" in some cases where the debtor clearly remained solvent after the gift. They simply find a consideration deemed valuable in law. Thus it has been held that a conveyance in consideration of future support may be valid against existing creditors, where the grantor retains an amount of tangible property largely more than sufficient to pay

⁹⁶ For a good summary of the history of this problem see the opinion of Lee, J., in *Johnston v. Zane's Trustees*, 11 Gratt. 552 (Va. 1854).

⁹⁷ "Every transfer or charge which is not upon consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made; but shall not, upon that account merely, be void as to creditors whose debts shall have been contracted, or as to purchasers who shall have purchased, after it was made; and though it be decreed to be void as to a prior creditor because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." W. VA. REV. CODE (1931) c. 40, art. 1, § 3.

⁹⁸ *Lockhard v. Beckley*, 10 W. Va. 87 (1877); *Bankhead v. Baughman*, 115 W. Va. 483, 176 S. E. 854 (1934).

⁹⁹ *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74 (1892).

all his just indebtedness,¹⁰⁰ while at the same time it has been held not sufficient to sustain a conveyance, when to do so would operate to their prejudice.¹⁰¹ There is also one case which goes so far as to hold that a "husband's love and affection for his wife, and a desire to secure her support," is sufficient consideration to sustain the gift.¹⁰² However, this case fails to mention the statute or cases under it, and seems to be a little out of line.

The question might arise as to who are prior and who are subsequent creditors. In *Peale v. Grossman*¹⁰³ there was a running account which extended over the date of a voluntary conveyance. It was held that the creditor, as to the part of the indebtedness contracted prior to the conveyance, is a prior creditor, and, as to the part contracted subsequent to the conveyance, is a subsequent creditor. He lost his position of prior creditor by accepting payments which lawfully go in full discharge of the indebtedness contracted prior to the voluntary conveyance. That is to say, the fact that he had the status of a prior creditor in part, did not change the effect of credits granted after the conveyance. The relation must be ascertained as of the time the debt was contracted.

3. *Preferences.* West Virginia is one of the few states which, by statutory provision, makes a transfer or charge creating a preference for one creditor over the other, void as to such preference. At common law, a debtor, though insolvent, could convey his property in trust, and prefer his creditor, although the conveyance transferred the entire estate, so long as there was no fraudulent intent.¹⁰⁴ But in 1895 this was changed by statute, and the provision is included in the 1931 Code.¹⁰⁵

¹⁰⁰ *Waddell v. McComas*, 113 W. Va. 344, 167 S. E. 866 (1933).

¹⁰¹ *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 46 S. E. 920 (1904).

¹⁰² *Hume & Warwick Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56 (1898).

¹⁰³ 70 W. Va. 1, 73 S. E. 46 (1911).

¹⁰⁴ *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484 (1890); *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797 (1893).

¹⁰⁵ "Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor, or to secure such a creditor or any surety or indorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor, and all the property so attempted to be transferred or charged shall be applied and paid pro rata upon all the debts owed by such debtor at the time such transfer or charge is made: *Provided*, That any such transfer or charge by an insolvent debtor shall be valid as to such preference or priority unless a creditor of such insolvent debtor shall institute a suit in chancery within one year after such transfer or charge was made to set aside and avoid the same and cause the property so transferred or charged to be applied toward the payment pro rata of all the debts

It will be noted that the saving clauses drastically reduce the number of situations where the statute applies. Thus in the time limitation, unless the creditor brings a suit within a year after the transfer (not within a year after he discovers the transfer), or if the transfer was recorded within eight months, unless the creditor brings suit within the next four months, his remedy is gone. In other words, a charge or transfer by an insolvent debtor to prefer a creditor "is not *ipso facto* void, but will be adjudged so if suit be brought by a creditor within the time fixed by the statute."¹⁰⁶

The clause providing that the section shall not apply where the security is given for a *bona fide* loan of money contracted at the time of the transfer, or for the payment of purchase money, *etc.*, indicates clearly that the only type of transaction aimed at is one where the assets of the debtor have been reduced to the harm of the remaining creditors. If the change in the debtor's estate consists only in a change of the type of property, no harm is done. Thus a mercantile firm, although insolvent, may sell its stock of merchandise to a disinterested party, and receive his notes in payment.¹⁰⁷ And it has been held that where the consideration of a conveyance is part cash and part antecedent debt due from the

of such insolvent debtor existing at the time such transfer or charge is made, subject, however, to the provisions hereinafter contained with reference to creditors uniting in such suit and contributing to the expenses thereof. But if such transfer or charge be admitted to record within eight months after it is made, then such suit to be availing must be brought within four months after such transfer or charge was admitted to record. Every such suit shall be deemed to be brought in behalf of the plaintiff and all other creditors of such insolvent debtor, but the creditor instituting such suit or proceeding, together with all creditors of such insolvent debtor who shall come into the suit and unite with the plaintiff before final decree and agree to contribute to the costs and expenses of such suit, shall be entitled to have their claims first paid in full pro rata out of the property so transferred or charged, in preference to any creditor of such debtor who shall before final decree decline or fail so to unite and agree to contribute to the costs and expenses of such suit, but not in preference to such creditor as may attempt to sustain the preference given him by such transfer or charge: *Provided further*, That nothing in this section shall be taken to prevent the making of a preference as security for the payment of purchase money or a bona fide loan of money or other bona fide debt contracted at the time such transfer or charge was made, or as security for one who at the time of such transfer or charge becomes an indorser or surety for the payment of money then borrowed: *And provided further*, That nothing in this section contained shall be taken to affect any transfer of bonds, notes, stocks, securities or other evidences of debt in payment of, or as collateral security for the payment of, a bona fide debt, or to secure any indorser or surety, whether such transfer is made at the time such debt is contracted or indorsement made or for the payment or security of a preexisting debt." W. VA. REV. CODE (1931) c. 40, art. 1, § 5.

¹⁰⁶ *New River Grocery Co. v. Trent*, 101 W. Va. 118, 121, 132 S. E. 487 (1926).

¹⁰⁷ *Merchant & Co. v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813 (1899).

insolvent to the purchaser, the conveyance will be held as a preference inuring to the benefit of all creditors of the insolvent, beyond the cash payment. However, the purchaser may keep the preference to the extent of such cash payment.¹⁰⁸

On the other hand, if the assets of the debtor are reduced, the transaction will be void because of the preference; and this applies as well to a transfer of specific property for particular debts as to a general assignment for the benefit of creditors.¹⁰⁹ The court will scrutinize the transaction. Thus if the debtor conveys his only asset, an equity of redemption in certain land in trust, to secure future repairs to be made thereon, and it does not appear that such repairs will add to or enhance the value, such a conveyance will be held void.¹¹⁰ Of course the court will not declare the transfer void merely because the debtor did not get as much consideration as the creditor thought he should.

It is the last clause of the section, however, which proves to be the most interesting and important. It turns out to be quite a "fly in the ointment." By excluding the transfer of bonds, notes, stocks, securities, *etc.*, from the operation of the statute, any debtor can give a preference whenever he chooses. True, he cannot give a lien on his real estate, or on his stock of goods, but what is to prevent him from converting such property into a type excluded from the operation of the statute and then prefer any creditor he likes? Of course, there must be no fraudulent intent because the debtor must still be on his guard for section one in the same article of the Code. But can it be said to be fraudulent merely to pay or secure a *bona fide* creditor? Also, there is a real practical difficulty for the insolvent to convert his property because usually it is already encumbered to the limit of its value. However, the statute in question has no concern with such property. A debtor can not possibly make a transfer of property and thereby prefer a creditor, when it already is subject to outstanding liens up to its full value. The section is concerned with unencumbered property which may come into the insolvent's hands, and this clause seems to provide a nice loophole for the disposal of such an asset.

¹⁰⁸ Herold v. Barlow, 47 W. Va. 750, 36 S. E. 8 (1900); Moore v. Thorn, 112 W. Va. 37, 163 S. E. 617 (1932).

¹⁰⁹ Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797 (1893).

¹¹⁰ Lawyer v. Barker, 45 W. Va. 468, 31 S. E. 964 (1898).

It is hard to understand why the legislature should go to the trouble of passing such a statute¹¹¹ and then include a clause which renders it of little real value. Might this be but another example of what a powerful lobbyist group can do to legislation?

IV. VOIDABLE CHARACTER OF A FRAUDULENT CONVEYANCE

The sections of the Code which we have been discussing say that the transfer is void as to creditors, purchasers, or other persons. However, affirmative action by the creditor is necessary to gain his right, and this being so, the transaction must be voidable and not void. A creditor can waive his right or ratify the transaction. Thus it has been held that where a creditor, with full knowledge of the purpose, assents to a gift by his debtor to a third person, he cannot subsequently charge the property of the donee with the debt of the donor on the ground that the gift was voluntary, or made with fraudulent intent.¹¹²

A suit in equity cannot be maintained by the grantor to cancel a deed which he made to defraud creditors, though the grantor and the grantee are equally guilty. Equity will take no step to help either, and will leave them where they placed themselves.¹¹³ On the other hand, if the grantee, being *in pari delicto*, seeks to enforce a fraudulent executory contract, the grantor may interpose as a defense the fraudulent character of the contract, even though it is the result of his own turpitude.¹¹⁴ It is submitted that a better rule would be to enforce the contract, since the "transaction was not *turpis causa* and therefore void, but was valid until avoided" by some creditor or other person given that right.¹¹⁵ However, the rule might be explained by the criminal provision of the Code which makes it a misdemeanor to secrete, assign or convey, or otherwise dispose of any property by a debtor with intent to defraud any creditor.¹¹⁶ Since the contract would be illegal, it would be unenforceable.

¹¹¹ It is to be remembered that West Virginia is one of the very few states having any such provision.

¹¹² *Willison Audit & System Co. v. Holden*, 101 W. Va. 310, 133 S. E. 360 (1926).

¹¹³ *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402 (1901); *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266 (1899); *Horn v. Star Foundry Co.*, 23 W. Va. 522 (1884).

¹¹⁴ *Gay v. Gibson*, 101 W. Va. 284, 132 S. E. 717 (1926).

¹¹⁵ *Harvey v. Varney*, 98 Mass. 118 (1867).

¹¹⁶ W. VA. REV. CODE (1931) c. 61, art. 3, § 24.

If the owner of land conveys it to another in trust for himself, in order to cover up his property and hide it from his creditors, either present or future, equity will decline to enforce the trust, either at the suit of the owner, or of his heirs after his death.¹¹⁷ But if it turns out that the grantor had no creditor entitled to subject the land to the payment of a debt, equity will enforce the trust notwithstanding the purpose of the parties in making such deed. The burden of proof is on the trustee to show that there was in fact a *bona fide* creditor.¹¹⁸

V. REMEDIES OF THE CREDITOR

We assume now that the conveyance is fraudulent as to the creditor. What can he do about it? The Statute of Elizabeth and its successors, including the present Code sections create no new method of plenary suit at common law. They create no original writ, nor do they authorize a new form of action on the case. At law the creditor gets no right of interference at all until he reaches judgment. The statutes cannot, therefore, be considered as doing more at law than authorize something additional at the foot of the judgment and by virtue of the judgment itself.

Once, however, he gets judgment the creditor is in a position to invoke the statute without aid of equity. As was said in *Metz v. Patton*:

“An impression to some extent prevails when a transfer has been made for the purpose of defrauding the creditors of the fraudulent vendor, that the legal title passes to the vendee as against such creditors, and that in any proceeding to reach the property thus transferred and subject it to the payment of their debts, they must, by their pleadings, allege the facts upon which they claim to be entitled to relief, or, in other words, that they must, in some mode, set aside the fraudulent transfer or enjoin the transferee from claiming under it. This . . . is erroneous. As against the creditors of the fraudulent transferor, the legal title remains in him, and they may, under execution, levy upon the property thus transferred to the same extent as if it still belonged to him. The judgment creditor may, it is true, proceed in equity and there obtain relief by annulling the fraudulent transfer or enjoining the fraudulent transferee from claiming under it; but

¹¹⁷ *Spaulding v. Spaulding*, 87 W. Va. 326, 104 S. E. 604 (1920); *Hubbard v. Robrecht*, 75 W. Va. 566, 84 S. E. 379 (1915).

¹¹⁸ *Thomas v. Anderson*, 76 W. Va. 496, 85 S. E. 657 (1915); *Criss v. Criss*, 65 W. Va. 683, 64 S. E. 905 (1909).

he is not obliged to resort to this proceeding. If he proceeds to sell the property levied on, the purchaser at such sale obtains a perfect legal as well as equitable title.' ¹¹⁹

Of course there is still the issue between the creditor, or his representative, the sheriff, and the transferee, whether the transfer does come under the statute. This must be settled, if the transferee raises it, either by resisting the sheriff when he attempts to take the property, or by suing him in a replevin or trover action. The same thing may be said of the purchaser at an execution sale. If the grantee claims the property, and brings replevin or trover against the purchaser, the issue must be decided.

However, in West Virginia, no execution issues against land, and the creditor has to proceed by some other method when he wants to subject land rather than personal property to his claims. One method is to proceed by way of attachment against the land which the grantor has fraudulently conveyed, and levy on it as the grantor's property. He would do this when he brings action on his debt since the attachment cannot issue until the action, in which the attachment is to be brought, is actually commenced.¹²⁰ A purchaser at the judicial sale under such attachment obtains a perfect title to the land so attached and sold.¹²¹

Another way for the creditor is to foreclose the lien which his judgment, from the moment of its docketing, acquires on all real property of the debtor. Of course this is actually a remedy in equity rather than in law, but it would seem that if the creditor had a judgment, he could proceed without first having the conveyance set aside in equity. This should be contrasted with the case, to be considered shortly, where the creditor has not had his claim reduced to judgment but sues in equity to have the conveyance set aside, and by receiving judgment, acquires a lien which he may then foreclose.

The statute of fraudulent conveyance gives the absolute right to a creditor to sue in equity to annul such a transfer, and he is not compelled first to subject other property of the debtor by exe-

¹¹⁹ 63 W. Va. 439, 60 S. E. 399 (1908).

¹²⁰ W. VA. REV. CODE (1931) c. 38, art. 7, § 1. The attachment can issue any time after the commencement of the suit until judgment.

¹²¹ Metz v. Patton, 63 W. Va. 439, 60 S. E. 399 (1908).

cution or otherwise.¹²² He is, of course, subject to statutory time limitations, or at least to the general equitable defense of laches. In some cases the statutory period is rather short. Thus under the section dealing with preferences, suit must be brought within one year from its date, or, if the conveyance is recorded within eight months after its date, the suit must be within four months after such recordation.¹²³ A voluntary conveyance must be set aside within five years; and while a suit to set aside a conveyance in which there was actual fraud is not subject to any statute of limitations, it is clearly subject to the equitable defense of laches. However, outside of these various defenses, the right seems to be about complete.

The Uniform Law does not require that the creditor have judgment or that his claim be matured or due in order to proceed in a competent court to set the conveyance aside. As has been stated before, West Virginia does not have the Uniform Act but Chapter 40 of the Code has a similar section.¹²⁴ The previous history of the law on this point, before the passage of this section, is interesting. There are really two points: one, that the creditor need not first obtain judgment; the second, that his claim need not be matured or due.

Prior to the Virginia Code of 1849 it was held that a creditor at large could not have the aid of a court of equity to prevent or interfere with, in any way, the disposition which his debtor might make of his property, unless such creditor had first proceeded as far as he could at law. To subject real estate, he must have obtained a judgment at law. To subject personal estate he must have obtained a judgment and execution, and have levied or returned, so as to show that his remedy at law had failed. This was held to apply to creditors attacking a voluntary conveyance as fraudulent,

¹²² *Hoffman v. Fleming*, 43 W. Va. 762, 28 S. E. 790 (1897). Furthermore, if the debt is against several persons, the creditor may maintain a bill to set aside a fraudulent conveyance of property by one of them before exhausting legal remedies against the others. *Rine v. Compton*, 115 W. Va. 379, 176 S. E. 429 (1934).

¹²³ *Andrews v. Floyd*, 114 W. Va. 96, 170 S. E. 897 (1933).

¹²⁴ "A creditor before obtaining a judgment or decree for his claim, may, whether such claim be due and payable or not, institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, assignment, or transfer of, or charge upon the estate of his debtor . . . and he may in such suit have all the relief in respect to such estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover." W. VA. REV. CODE (1931) c. 40, art. 1, § 6.

on the ground of its being fraudulent and void as to themselves; likewise as to those attacking conveyances as fraudulent in fact.

The provision, as contained in the Virginia Code of 1849, was that the creditor before obtaining a judgment or decree for his claim, could institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, *etc.*, declared void by the statutes. The provision was included in the West Virginia codes, and followed in the cases.¹²⁵ A case in 1930 raised some doubt,¹²⁶ but the Revised Code of 1931 clearly states that a creditor does not have to be a judgment creditor to set aside the conveyance.

Thus the old rule, that a creditor must pursue his remedy to its furthest extent at law before a court of equity would entertain jurisdiction to grant him relief, has been abrogated by the statute and supported by the cases construing the statute. It has been held that since fraud is one of the ancient grounds of equity jurisdiction, this section does not contravene the constitutional guaranty of trial by jury.¹²⁷

However, under the provision as first contained in the Code of 1849, the question, whether a creditor, whose claim was not due, came within the purview of the statute, was controverted and long unsettled. There were inadvertent rulings in fairly early cases¹²⁸ to the effect that a suit to set aside the fraudulent conveyance before the debt upon which the creditor's claim was predicated became due, could be maintained. But these inadvertent rulings were criticized and disapproved in *Frye v. Miley*¹²⁹ and the doctrine was there declared that a suit to set aside a fraudulent conveyance under the 1899 Code, instituted for a legal demand before maturity, could not be sustained.¹³⁰

¹²⁵ *Halfpenny & Hamilton v. Tate & McDevitt*, 65 W. Va. 296, 64 S. E. 28 (1909); *Thomas v. Lupis*, 96 W. Va. 100, 122 S. E. 365 (1924).

¹²⁶ *Charleston Trust Co. v. Consolidated Realty Corp.*, 109 W. Va. 225, 153 S. E. 502 (1930).

¹²⁷ *Kinnison v. Scott*, 82 W. Va. 287, 95 S. E. 952 (1918).

¹²⁸ *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288 (1897); *First Nat. Bank v. Prager*, 50 W. Va. 660, 41 S. E. 363 (1902).

¹²⁹ 54 W. Va. 324, 46 S. E. 135 (1903).

¹³⁰ "But for this statute, it is plain that no such suit could be brought. It is an enabling statute, doing away with the rule which prevented relief under certain conditions. It does away with that rule only to the extent of the right given by the statute, namely, to sue in equity to annul a fraudulent conveyance before reducing the claim to judgment. Whether such suit can be brought before the debt is due is an entirely different matter. *Id.* at 327.

This rule was finally overturned in 1931 by the provision, "whether such claim be due and payable or not" which was included in the section quoted above.¹³¹ It is stated in the Revisers' Note that this is intended to change the rule of *Frye v. Miley*.

It necessarily follows that a foreign judgment is a debt, and a suit in equity can be maintained on it to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law in this state.¹³²

In discussing their priority in rights, it should be kept in mind that there are four distinct types of creditors. First, there is the creditor at large, one whose debt has not yet fallen due. Then there is the general creditor, one whose debt has matured but who has not yet reduced it to judgment. Our third type is the creditor who has obtained judgment, and thereby, a lien on all the real property of the debtor including property fraudulently conveyed to a third person. Finally, there is the creditor who has filed a bill to set aside the fraudulent conveyance. As was pointed out above, he can represent any one of the other three.

Now in West Virginia a bill filed by a single creditor to set aside a fraudulent conveyance is representative for all the creditors;¹³³ but this does not affect the priority of that creditor. The creditor who first attacks a fraudulent conveyance obtains a lien on the property by the institution of his suit. Preferences among all of such creditors are determined by the dates of the commencement of their suits, if separate suits are brought, or by the commencement of the suit and the filing of petitions, if all assert their rights in the same suit.¹³⁴ But, this is true only if there are no prior judgment creditors. Thus a creditor at large is not entitled to priority over one who has obtained a judgment against the debtor, subsequent to the date of the fraudulent conveyance, but before the filing of the bill by such creditor at large.¹³⁵ He is, however, entitled to priority over one who obtains his judgment after the filing of such bill. On the other hand, a junior judgment

¹³¹ W. VA. REV. CODE (1931) c. 40, art. 1, § 6.

¹³² *Watkins v. Wortman*, 19 W. Va. 78 (1881).

¹³³ *Central Dist. Printing & Telegraph Co. v. Farmers' Bank*, 255 Fed. 59 (C. C. A. 4th, 1918).

¹³⁴ *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361 (1909); *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854 (1894).

¹³⁵ *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382 (1901); *Rine v. Compton*, 188 S. E. 483 (W. Va. 1936).

creditor who succeeds in having a conveyance or transfer set aside, obtains priority over senior judgment creditors.¹³⁶

When all the creditors, assailing a fraudulent or voluntary conveyance, are judgment creditors, the lien of each dates from the time he obtains his judgment, and not from the date of the filing of his bill attacking the conveyance. The priorities among them must be settled according to the dates of their judgments.¹³⁷ These judgment creditors have liens on the debtor's real estate from the dates of their respective judgments and on his personal property from the dates of the acquisitions thereof by execution, attachment or otherwise. This is true whether they are acquired before or after the conveyance, so long as they are preserved by compliance with registration and other laws provided for the purpose.¹³⁸

The rules of priority set forth in the preceding paragraphs relate solely to the case where the creditor seeks to set aside a conveyance either because it is fraudulent or without consideration. They must be sharply distinguished from relief sought under section five of the same article and chapter which deals with transfers or charges creating a preference. It was early held that the creditor seeking to avoid a conveyance creating a preference in some other creditor did not thereby acquire as a reward of his diligence a preference over other creditors.¹³⁹ The preferred creditors, that is, preferred by the fraudulent conveyance, are entitled to share pro rata with those creditors who attack the preference and succeed. But those who refuse to contribute to the costs and expenses of the suit instituted to avoid such preference are entitled to nothing until both the attacking and the attacked creditors are paid in full.¹⁴⁰

A creditor may maintain a bill for an injunction to prevent the debtor from disposing of his property in fraud of creditors. There were early rulings that this could not be done, unless the creditor had obtained a judgment for his claim.¹⁴¹ But it seems

¹³⁶ *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140 (1892).

¹³⁷ *Foley v. Euley*, 50 W. Va. 158, 40 S. E. 382 (1901).

¹³⁸ *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361 (1909).

¹³⁹ The "equitable rule of rewarding the diligence of the first assailant of the fraudulent deed of the insolvent debtor sometimes led to such hardship, especially where the deed had to be held to be fraudulent on its face, that the preference given the vigilant assailant was sometimes worse than fraud." *First Nat. Bank v. Parsons*, 42 W. Va. 137, 154, 24 S. E. 554 (1896).

¹⁴⁰ *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439 (1901).

¹⁴¹ *Rhodes v. Cousins*, 6 Rand. 188 (Va. 1926); *Tate v. Liggat*, 2 Leigh 84 (Va. 1830).

clear that now, under section six, this requirement has been dispensed with, since the creditor without judgment may "have all the relief . . . which he would be entitled to after obtaining a judgment or decree." The creditor may also have a receiver appointed if he can show circumstances which will justify it.¹⁴²

Finally as to the decree: Where the conveyance is set aside, the decree should provide for the sale of the property to pay the debts.¹⁴³ If the property is still in the possession of the fraudulent grantee, the creditor can not take a personal money decree for his debt, or the value of the property, against the grantee, but must subject the property itself. However, if the fraudulent purchaser has sold the property to a *bona fide* purchaser, so that it can not be reached, the creditor may have a money decree against the grantee for the amount he received for the property, or if that is less than its actual value, then for such value. If the *bona fide* purchaser still owes for the property, the money in his hands may be followed and subjected to the creditor's claims.¹⁴⁴

¹⁴² Ruffner v. Mairs, 33 W. Va. 655, 11 S. E. 5 (1890).

¹⁴³ Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288 (1897).

¹⁴⁴ Vance Shoe Co. v. Haight, 41 W. Va. 275, 23 S. E. 553 (1895).