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Fraudulent Conveyances—Necessity of Judgment to Set Aside

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statutes is race prejudice. The "Land of Liberty" is perpetrating a caste system by law. We cannot make colored people socially equal by court decree, but as individuals and citizens they deserve equality in law, in accordance with the intentions of the framers of the Fourteenth Amendment to the United States Constitution.

STUART W. CONNER.

FRAUDULENT CONVEYANCES—NECESSITY OF JUDGMENT TO SET ASIDE

I.

Section 29-209 (8605), Revised Codes of Montana, 1947, declares that "a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to property affected by the transfer or obligation." Interpretation of this statute has given rise to the rule that in an action to set aside a conveyance by an insolvent on grounds of intent to hinder, delay, or defraud creditors, the complaint must allege that the creditor has established a lien upon the property sought to be transferred, either by attachment or by judgment with a return nulla bona.[1] Several Montana decisions have adhered to this rule without specific reference to the statutory provision.[2]

In 1945 Montana adopted the Uniform Fraudulent Conveyance Act.[3] The question is posed: Does Section 29-209 (8605) conflict with sections 9 and 10 of the Uniform Act?[4] More specifically, how, if at all, has the adoption of the Act changed the preliminary conditions governing the remedy in equity? Thus far there has been no interpretation by the Supreme Court of Montana of the provisions pertinent to this article. The Act does not explicitly state that a judgment with a return unsatisfied is no longer essential to maintaining a suit in equity to annul a fraudulent conveyance. Certainty would have been promoted if such were the case. However, the Act appears to imply that a creditor can avoid a conveyance fraudulent as to

[1]Ferrell v. Elling (1929) 84 Mont. 384, 276 P. 432; First Natl. Bank v. Conner (1929) 85 Mont. 229, 278 P. 143.
[2]Northern Mont. State Bank v. Collins et al (1923) 67 Mont. 575, 216 P. 330; Missoula Trust and Saving Bank v. Boos (1938) 106 Mont. 294, 77 P. 385; Edenfield v. C. V. Seal Co., Inc., et al (1928) 83 Mont. 49, 270 P. 642; Stone-Ordean Wells Co. v. Strong et al (1933) 94 Mont. 20, 20 P.(2d) 639.
[3]R.C.M. 1947, §§29-101 to 29-113.
[4]R.C.M. 1947, §§29-109, 29-110.

him without first exhausting his remedies at law. A careful consideration of sections 1, 9, and 10 of the Act,[5] and an examination of reported decisions, where the pertinent provisions have been interpreted, support this assumption.

II.

1. Section 1 of the Act gives the definition of a creditor.[6] "Creditor is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." It might be arguable that the word "creditor" should be construed as a judgment creditor, but it can hardly be said that an unmatured creditor is in position to reduce his claim to judgment.

2. Section 9 states the remedies available to a creditor whose claims have matured.[7]

> (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such purchaser,
>
> (a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or,
>
> (b) Disregard the conveyance and attach or levy execution upon the property conveyed.

Judge (later Mr. Justice) Cardozo, delivering the majority opinion in the leading case of *American Surety Company* v. *Conner*,[8] held that the alternative remedy provided in subsection (1) (b) of section 9 of the Uniform Act does not deprive the creditor of the right to proceed in equity to have the conveyance set aside. Justice Cardozo's conclusion has since been adopted in many other decisions in jurisdictions where the Uniform Act has been adopted.[9]

3. Section 10 states the remedies available to the creditor whose claim has not matured.[10]

[5]R.C.M. 1947, §§29-101, 29-109, 29-110.
[6]R.C.M. 1947, §29-101.
[7]R.C.M. 1947, §29-109.
[8](1928) 232 N.Y.S. 94, 166 N.E. 783.
[9]American Bulb Co. v. Spicack (1935) 281 N.Y.S. 513, 156 Misc. 614; Herring-Curtis Co. et al v. Curtiss (1931) 252 N.Y.S. 106, 140 Misc. Rep. 857; Halsey et al v. Winant (1931) 251 N.Y.S. 81, 233 App. Div. 103; Aylor v. Richmond (1946) 183 Tenn. 196, 191 S.W. (2d) 529; Gatto v. Boyd (1930) 241 N.Y.S. 626, 137 Misc. Rep. 156.
[10]R.C.M. 1947, §29-110.

> "Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,
>
> (a) Restrain the defendant from disposing of his property,
>
> (b) Appoint a receiver to take charge of the property,
>
> (c) Set aside the conveyance or annul the obligation, or,
>
> (d) Make any order which the circumstances of the case may require."

The unmatured creditor could not maintain a suit at law, so the natural implication is that a judgment at law is not necessary to maintain a suit in equity to set aside a fraudulent conveyance. Should the creditor whose claim has matured be placed in a less advantageous position? Obviously not. The Act, in its definition of a creditor, seeks a rule of uniformity, and, in the words of Justice Cardozo,

> "This is plainly a remedial statute, designed to furnish a creditor, as therein defined, full, complete, and speedy relief against his fraudulent debtor. It should therefore receive a liberal construction by the courts to accomplish its purpose.[11]

III.

1. In New York, as in Montana, in the absence of enabling statute, it has been the practice of equity to refuse relief against a conveyance in fraud of creditors until the suitor has recovered a judgment at law establishing the debt.[12] New York adopted the Uniform Act in 1925, and in 1928 the majority opinion in the case of *American Surety Company* v. *Conner*[13] held that under the Act judgment and return unsatisfied are not necessary to maintain an action to annul a debtor's fraudulent conveyance. The creditor's attack failed on the merits of the case, but the thorough discussion of the question of procedure by Justice Cardozo established a rule of construction which has been applied in practically all of the cases where the question has been raised under the provisions of the Act.[14]

[11] *Supra*, note 8.
[12] Briggs v. Austin (1891) 129 N.Y. 208, 29 N.E. 4; Pusey and Jones Co. v. Hanssen (1923) 261 U.S. 491, 43 S.C. 454, 67 L.Ed. 763; Natl. Tube Works v. Ballou (1892) 13 S.C. 165, 146 U.S. 517.
[13] *Supra*, note 8
[14] *Supra*, note 9.

2. The Uniform Act was adopted in Michigan in 1919. In 1924, the Michigan Supreme Court, in the case of *Morse* v. *Roach,* held:

> "With the advent of the Uniform Fraudulent Conveyance Act, the troublesome question of whether a levy should be made and a bill in aid of execution filed, or a creditor's bill filed upon return of execution, or a bill with double aspects filed, has departed. Now, in case a conveyance is fraudulent as to a creditor, he may file the bills without making levies."[15]

Two years later, in 1926, substantially the same court, in *Comstock v. Horton et al.,* held:

> "This court has consistently held that to authorize the filing of a bill in aid of execution, there must be a judgment or decree fixing the amount, and execution issued thereon, and a levy by virtue thereof, and, to authorize the filing of a creditor's bill there must be a judgment or decree fixing the amount, and execution issued, and return unsatisfied in whole or in part."[16]

In this case neither the Uniform Act nor the 1924 ruling was mentioned. The form of pleading does not appear.

Later, in 1931, the Michigan Supreme Court, in the case of *Hartford Accident and Indemnity Company* v. *Jirasek,*[17] adopted the rule of construction laid down in *Morse* v. *Roach* in 1924. While an attachment suit by the plaintiffs was pending, it was learned that the defendant had deeded the property in question to his brother, thereby being rendered insolvent. A bill was filed to have the deed set aside and for a money decree against the original defendant. The court in its opinion was explicit in its interpretation of the Act.

> "To hold that these plaintiffs do not have a right to equitable relief in this case would be to say that the Uniform Fraudulent Conveyance Act affords a defrauded victim no remedy which he did not have prior to the enactment of this statute. For all practical purposes it would nullify the Act. We should and do hold that the court of equity has and retains jurisdiction to adjudicate the whole controversy between these litigants."[18]

[15](1924) 229 Mich. 495, 201 N.W. 471.
[16](1926) 235 Mich. 282, 209 N.W. 179.
[17](1931) 254 Mich. 282, 235 N.W. 836.
[18]*Id.*

The court in the instant case explained the ruling in the *Comstock* case only by saying the plaintiff in that case was not entitled to any equitable relief whatever, but only to damages, if any, recoverable at law.

3. The history of California decisions and legislative enactments concerning the question posed is of particular interest as regards Montana. In *James* v. *Schaeffer,* a 1924 case, the court held that under the provisions of section 3441 of the California Civil Code, which is identical with R.C.M. 1947, Section 29-209 (8605), it is essential to a creditor's action to set aside a fraudulent conveyance of a debtor's property that a claim against such property be reduced to judgment or so far prosecuted that legal process to which he is entitled is obstructed.[19] This is the same construction adopted by the Montana Supreme Court in its interpretation of Section 29-209 (8605).[20] California adopted the Uniform Act in 1939, and at the same time expressly repealed section 3441.[21] In a 1943 decision, in which sections 9 (1) (a) and (b)[22] of the Uniform Act were interpreted, the California court held that a creditor has the right to attack a fraudulent conveyance before judgment.[23]

4. In a South Dakota case[24] the court affirmed judgment for the amount due on a note and adjudged a conveyance by the debtor as fraudulent and void, the action having been brought on the note and the plaintiff having asked that the conveyance be set aside. The court ruled:

> "Under the Uniform Act, upon proper pleading and proof, relief may be gained by setting aside the conveyance fraudulent as to the plaintiff without the necessity of securing a specific lien upon the property alleged to have been fraudulently conveyed."

5. In Massachusetts, under the Uniform Act, a mortgagee who apparently had not reduced his claim to judgment was held entitled to have a fraudulent conveyance set aside to the extent necessary to satisfy the former's claim.[25]

6. The Supreme Court of Minnesota, in *Lind* v. *Johnson,*[26] held that the Uniform Act was a codification and an extension

[19]70 Cal. App. 372, 233 P. 70.
[20]*Supra,* note 1.
[21]Act of 1939, Chapt. 329.
[22]*Supra,* note 7.
[23]Brunvold v. Victor Johnson (1943) 59 Cal. App. 75, 138 P.(2d) 32.
[24]Virgil State Bank v. Wall (1929) 56 S.D. 318, 228 N.W. 392.
[25]Dandis v. Lash (1931) 277 Mass. 477, 178 N.E. 624.
[26]Lind v. Johnson (1938) 204 Minn. 30, 282 N.W. 661.

of the former law requiring judgment against the debtor before proceeding to set aside a fraudulent conveyance. The court thought that section 9 (1) (a) was broad enough to "include the old procedure of entry of judgment and return of execution unsatisfied as well as the more modern relief given a simple creditor." This decision fully raised the problem of limitations under the Uniform Act. The court refused to rule that the commencement of the period of limitations is the earliest date that the creditor could attack the conveyance, construing the Act as giving the creditor the choice of immediately attacking the conveyance or reducing his claim to judgment and then invoking the aid of equity.

This construction, implying a cumulative remedy, was adopted in Pennsylvania where the court held the Uniform Act "gives an additional optional remedy, by bill, to set aside the conveyance to the extent necessary to satisfy the creditor's claim, but it does not deny the judgment creditor, as formerly, to work out his remedy at law."[27]

7. Until 1938, Federal courts, being governed by the U. S. Judicial Code, required that a creditor first establish a claim at law before proceeding to equity to set the conveyance aside.[28] Now, under the Federal Rule, 18 (b),

> ". . . A plaintiff *may* state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."[29]

The rule was interpreted in *Armour and Company of Delaware* v. *B. F. Bailey, Incorporated.*[30] This was an action to recover on promissory notes and to fix a lien on real estate transferred by the maker of the notes. The court held the former rule was abrogated by Rule 18 (b) which

> ". . . contemplates a joinder of the action to set aside the conveyance with the action to establish the claim, the former being ancillary to the latter, and the debtor being an indispensable party."[31]

The federal rule now conforms with sections 9 and 10 of the

[27]Canemaugh Iron Works Co. (1929) 298 Pa. 182, 148 A. 94.
[28]Brown v. American Laundry Machine Co. (1932) 56 F. 2d 197; White v. Finance Corp. (1933) 63 F.(2d) 168; Scott v. Neeley (1891) 140 U.S. 106, 11 S.C. 712, 35 L.Ed. 358.
[29]Rule 18 (b), Federal Rules of Civil Procedure.
[30]C.C.A. 5th (1942) 132 F. 2d 386.
[31]*Id.*

Uniform Act,[32] as construed in the majority of cases where the question was raised under the provisions of the Act. The change suggests a desire by the framers to coordinate federal legislation with existing uniform legislation. The rule strongly implies that the remedy is cumulative.

IV.

1. Two New Jersey cases have declared the Uniform Act unconstitutional, so far as it purports to set aside a fraudulent conveyance without existence of a lien.[33] The question raised was a jurisdictional one, and likely to appear where a state adheres to a strict division between law and equity. The practice of maintaining separate courts of law and equity has survived in New Jersey, and the constitution prohibits the use of courts of equity for the purpose of establishing money judgments.[34] Sections 9 and 10 of the Act,[35] as amended in New Jersey, now specifically require that a claim be established according to law before a conveyance can be set aside.[36]

2. Arizona and Wisconsin have held, since adoption of the Uniform Act, that if a creditor wishes to follow property fraudulently transferred, it is necessary to first procure judgment and exhaust his remedies against the debtor.[37] However, in each of these cases, the decision was made without reference to the Act and without professing to construe it.

V.

The Uniform Fraudulent Conveyance Act recognizes the old legal remedy of a judgment creditor and simply extends it to the non-lien creditor.[38] Consequently, a creditor could still effectively proceed under the provisions of R.C.M. 1947, Section 29-209 (8605) regardless of how the Montana Supreme Court eventually construes Sections 29-109 and 29-110. However, Section 29-209 (8605) is an express limitation upon the right of a creditor to proceed in equity.[39] Without a judgment and return unsatisfied the right would not exist. If the Montana Supreme Court should hold with the majority rule under the Uniform Act, as expressed

[32]*Supra*, note 4.
[33]Horstman Co. v. Rothfuss (1940) 128 N.J. Eq. 168, 15 A.(2d) 623; Neild v. Morris (1941) 130 N.J. Eq. 53, 21 A.(2d) 153.
[34]Article VI, §§I, IV, *Constitution of N.J.* as Amended.
[35]*Supra*, note 4.
[36]N.J.S.A. 25: 2-15, 25: 2-16.
[37]Hookway v. Hammons (1928) 34 Ariz. 23, 267 P. 415; Lipman v. Langer (1924) 185 Wisc. 63, 200 N.W. 663.
[38]*Supra*, notes 26, 27.
[39]Ferrell v. Elling (1929) 84 Mont. 384, 392, 276 P. 432, 435.

in *American Surety Company* v. *Conner*,[40] the heart of Section 29-209 (8605), the "limitation" factor, will be cut out. Its existence in the codes would serve only to confuse and mislead. In this event, Montana should follow the lead of California and repeal the statute (29-209). If the court should hold that a judgment and return nulla bona is still a prerequisite to proceeding in equity, Sections 29-109 and 29-110 should be amended to avoid confusion with Section 29-209 (8605).[41]

In a suit to set aside a conveyance alleged to be fraudulent the plaintiff must establish a claim against the alleged fraudulent grantor in order to qualify as a "creditor" under the provisions of section 1 of the Act.[42] The debtor is an indispensable party.[43] Section 93-3203 (9130) states that ". . . The causes of action so united must . . . belong to one only of the classes, and must affect all the parties to the action." It could be argued that the causes of action can not be joined in that the alleged fraudulent grantee is not a party to the action attempting to establish the claim,[44] and that the claim must therefore be first established in a suit at law before equitable relief will be granted. On this point it is submitted that the Uniform Act being the later enactment, the rule expressed by section 29-3203 (9130) should not be applicable in actions to set aside fraudulent conveyances. The intention to modify the preexisting rule does not appear in the provisions of the Act, but it should be sufficient if it appears from the language that no other purpose than to permit the joinder of these actions is a permissible interpretation.

The form of trial should not be difficult to work out even though both legal and equitable issues are present, together with the constitutional right to trial by jury on the legal issue.[45] If the parties do not waive trial by jury the court may choose to have the equitable issues tried to the jury also and send the entire case to the jury. It is also possible for the court to hear the equitable issues along with consideration of the legal issues by the jury, the judgment proper to be entered by the court on the basis of various findings of fact. As another alternative, the equitable issues might be tried separate from the trial of the jury issues.[46]

[40] *Supra*, note 8.
[41] See note 36, *Supra*, whereby New Jersey amended sections 9 and 10 of the Uniform Act to require that a claim be established at law before proceeding to equity to set aside a fraudulent conveyance.
[42] R.C.M. 1947 §29-101.
[43] *Supra*, note 31.
[44] Baker v. Hanson et al. (1924) 72 Mont. 22, 31, 231 P. 902.
[45] Article 3, section 23, *Montana Constitution*.
[46] CLARK ON CODE PLEADING (1947), p. 106, 107.

The danger of innocent purchasers cutting off the creditor by a fraudulent conveyance pendente lite can be remedied by adoption of the rule of construction laid down in the majority of decisions under the Uniform Act. Multiplicity of suits can be avoided, and the creditor will be given the efficient optional remedy which the Act means to provide."[47]

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[47]*Supra*, notes 26, 27.

PEACEFUL PICKETING AS AN EXERCISE OF FREE SPEECH

Picketing is the favorite weapon used by trade unions during their disputes with management over what shall constitute equitable distribution of the fruits of industry. It enjoys union favor because of its effectiveness in promoting labor's ends. Employers receiving the picketing "treatment" are not so fond of the process however, and acting accordingly, have challenged its legality under constitutional provisions, statutes, and the judicial precedents. A portion of the resulting body of law is to be considered herein.

Today, the books record decisions of the highest American court wherein peaceful picketing is designated as a form of speech.[1] Therefore, an activity, formerly considered tortious by many courts, rests comparatively secure under the guardianship of the First Amendment to the Federal Constitution. It will be submitted below that Montana decisions holding picketing to be speech have contributed to this rather spectacular change in the legal status of the activity, and evidence supporting such assertion will be offered. Further, it will be contended that, although the doctrine as originally announced by the U. S. Supreme Court has been seriously limited by that body in subsequent cases, Montana law on the subject has not been generally affected thereby.

The contention that peaceful picketing is simply a form of speech is as old as the legal history of the activity itself. In *Sherry* v. *Perkins*,[2] the first peaceful picketing case,[3] counsel of-

[1]Thornhill v. Alabama (1940) 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; American Federation of Labor v. Swing (1940) 312 U.S. 321, 61 S.Ct. 568, 85, L.Ed. 855.

[2](1888) 147 Mass. 212, 17 N.E. 307.

[3]Mr. Justice Brandies credits Sherry v. Perkins with being the first peaceful picketing case in his dissent in Truax v. Corrigan (1921) 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.