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FRAUDULENT CONVEYANCES - CONTINGENT CREDITORS - BANK STOCKHOLDERS' DOUBLE LIABILITY

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FRAUDULENT CONVEYANCES — CONTINGENT CREDITORS — BANK STOCKHOLDERS' DOUBLE LIABILITY — A holder of bank stock conveyed real estate to her daughter in consideration of love and affection, leaving the grantor with no other assets than the bank stock. At the time, the bank stock had a market value of eleven dollars a share, and the bank was advertising for depositors; there was nothing in the record to indicate insolvency. About two years later the bank closed, and the superintendent of banks assessed the stockholders the amount of their statutory double liability. When the transfer was discovered the superintendent brought action to set aside the conveyance as fraudulent to the creditors of the bank. *Held*, that the bank creditors, because of the stockholders' double liability, were at the time of the conveyance creditors of the grantor within the meaning of the statute; [1] the bank superintendent, as representative of the creditors, could therefore set aside the conveyance as fraudulent to them. *Squire, Supt. of Banks v. Cramer*, 64 Ohio App. 151, 28 N. E. (2d) 516 (1940).

Since the court found that the bank creditors were creditors of the grantor at the time of the conveyance, it matters little that she admittedly had no bad faith in making the gift. Generally the rule is that a conveyance made without fair consideration and by a debtor who is or will be insolvent after the conveyance is presumptively fraudulent without regard to actual intent.[2] The main

[1] The Ohio statute is a variation of 13 Eliz.: "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts . . . shall be utterly void and of no effect." Ohio Gen. Code (Page, 1938), § 8618.

[2] In most jurisdictions the creditor has made a prima facie case by showing a gift and the insolvency of the donor debtor. This can be rebutted only by showing consideration or solvency. The fraudulent intent is presumed as a matter of law from the acts of the debtor. Lloyd v. Fulton, 91 U. S. 479 (1875). "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is

question in the instant case then is: who is a creditor within the meaning of the statutes against fraudulent conveyances? It is generally recognized that a contingent creditor is a creditor at the time of the conveyance within the meaning of the statute.[3] Stockholders of banks in most states are subject to double liability on their stock because of constitutional or statutory provisions; [4] and this liability is considered contractual because the stockholder has given his assent to it by purchasing the stock.[5] Thus the creditors of the bank are considered contingent creditors of the bank stockholders, and when the debt matures on the insolvency of the bank, the bank superintendent steps into the shoes of the bank depositors as creditor. It is easy to justify calling the bank depositor a contingent creditor of the bank stockholders when the gift was made just before the bank closed or just after it closed but before assessment of double liability by the superintendent of banks.[6] In such cases the contingency on which the stockholder's liability depends has occurred or is about to occur and the debt has become a mature obligation.[7] But the result is shocking when the gift was made several years before the bank's failure and at a time when it was in apparently good financial condition.[8] Perhaps the seeming harshness of a mechanical application

fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Uniform Fraudulent Conveyance Act, § 4.

In New York the question of fraudulent intent is a matter of fact. New York Real Property Law (McKinney, 1937), § 265; New York Personal Property Law (McKinney, 1937), § 36.

As to subsequent creditors the question of intent is always a matter of fact. Uniform Fraudulent Conveyance Act, § 7; 37 HARV. L. REV. 489 (1924).

[3] Those states having the Uniform Fraudulent Conveyance Act have this question settled for them by § 1: " 'Creditor' is a person having any claim, whether . . . absolute, fixed or contingent." In most other states without benefit of such specific wording in the statute, the same is held. See cases collected: 24 AM. JUR. 280 (1939); 27 C. J. 472 (1922); 71 A. L. R. 350 at 354 (1931). Not a creditor: Severs v. Dodson, 53 N. J. Eq. 633, 34 A. 7 (1895).

[4] ". . . except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible . . . for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Ohio Constitution of 1851, art. 13, § 3, as amended in 1912. In 1936 the same article was again amended so as to destroy the double liability provision, but this amendment did not go into effect soon enough to affect the instant case.

[5] Williams v. Travis, (C. C. A. 5th, 1922) 277 F. 134.

[6] Yardley v. Torr, (C. C. Pa. 1895) 67 F. 857; Williams v. Travis, (C. C. A. 5th, 1922) 277 F. 134; Wolf v. Eblen, (C. C. A. 6th, 1939) 101 F. (2d) 469; Duncan v. Freeman, 152 Ga. 332, 110 S. E. 5 (1921).

[7] This is analogous to the situation in which a covenantor of a warranty deed makes a gift which leaves him insolvent after he has received notice that the covenantee is about to be evicted by title paramount. See Bibb v. Freeman, 59 Ala. 612 (1877).

[8] Accord with the instant case: Peterson v. Wahlquist, 125 Neb. 247, 249 N. W. 678 (1933); noted in 19 IOWA L. REV. 121 (1933); 34 COL. L. REV. 373 (1934); 89 A. L. R. 747 at 751 (1934). *Contra*: Kester v. Helmer, (D. C. Idaho, 1935) 16 F. Supp. 260, affd. in Kester v. Adams, (C. C. A. 9th, 1936) 85 F (2d) 646; Gormely v. Askew, 177 Ga. 554, 170 S. E. 674 (1933).

of the rule in such cases can be justified by the policy of the banking laws,[9] but it seems more truthful to say that the stockholder was not putting his credit behind the bank, and that the bank depositors were not relying on him as so doing. This fact has led one writer to urge that a distinction be made between contracts of relatively short term that pledge the continuing credit of the obligor, such as indorsements of short-term notes, and contracts which convey no such implication because of their long and indefinite duration, such as the covenants of a warranty deed; and that the decision of the case should rest on the facts surrounding the maturity of the agreement and not the date of its inception.[10] An apparently more just solution has been reached by not calling the bank superintendent a present creditor at the time of conveyance.[11] If this view were taken, truly fraudulent transfers could be attacked on the basis of actual fraud by making use of fact presumptions based on the time element, lack of consideration, insolvency, and other badges of fraud. Whatever is done, the same standing should not be given to obligees under indefinite contracts subject only to possible maturity as to creditors under absolute contractual claims.[12]

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[9] "The bank invited public patronage by reason of that liability. Depositors entrusted their money to the bank in reliance on it. If a stockholder, who enjoys the fruits of his investment in stock while the bank is prosperous, is permitted to escape his stockholder's liability by transferring all his property to his wife without consideration before dividends cease or the bank fails, the purpose of the Constitution and the protection of depositors may be thwarted with impunity." Peterson v. Wahlquist, 125 Neb. 247 at 252, 249 N. W. 678 (1933).

[10] 1 GLENN, FRAUDULENT CONVEYANCES, rev. ed., §§ 330, 331, 332 (1940).

[11] Gormley v. Askew, 177 Ga. 554, 170 S. E. 674 (1933). "The basis of the claim that there existed creditors of the bankrupt at the time the deeds were executed by reason of his liability and the assessment on his shares of stock in the bank is not tenable under the evidence, for such liability arises solely out of the act of the Comptroller in making the assessment and at the time he makes his order." Kester v. Helmer, (D. C. Idaho, 1935) 16 F. Supp. 260 at 262.

[12] "Admitting that a conveyance might be fraudulent as against an unliquidated claim for damages, or an existing right of action upon a contingent claim, we think it would be going too far to give such claims the same standing, when considering inferences only, as would be given to existing acknowledged or contract debts." Petrovitsky v. Smith, 86 Wash. 151 at 153, 149 P. 641 (1915). There the defendant had assigned a real estate contract, which failed because of failure of title, after defendant had conveyed his property to his family; conveyance not set aside.