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Fraudulent Conveyances — Executory Consideration as "Fair Consideration" under the Uniform Fraudulent Conveyance Act —

Plaintiff, a purchaser of mortgaged realty, claimed that there had been a series of conveyances of this property originating with a remote grantor, fraudulent as to said grantor's creditors. At the time plaintiff learned of this, he had already paid taxes on the property and paid $4,605 on the purchase price, leaving a balance of $2,986 due on his contract. Since, allegedly, plaintiff would have been subject to an action of the creditors to have the conveyance to him set aside, plaintiff sought to join all creditors and defraiders in an attempt to clear the title, or, if the transaction were called fraudulent, to secure a lien for the sums he had paid on his contract and for taxes. He also sought, among other things, relief against the prior mortgagee and against his immediate grantor for misrepresentation in selling him the property. Held, under the Wisconsin Uniform Fraudulent Conveyance Act, that the original transfer of the property by the debtor-grantor was in fraud of creditors, and that the conveyance to plaintiff was void; that plaintiff had stated a good action for declaratory relief to establish a lien on the property for payments made and taxes paid before plaintiff learned of the fraud, against the receiver of the immediate grantor and against the creditors of the debtor-grantor. Angers v. Sabatinelli, (Wis. 1940) 293 N. W. 173.

Contracts, executory on the part of transferees from insolvent debtors, are important in the law of fraudulent conveyancing when there has been no actual intent to "hinder, delay, or defraud" creditors in making the conveyance. In those states where the Uniform Fraudulent Conveyance Act has not been adopted, the results of cases involving the transfer of property by a debtor for a promise have been varied. Perhaps some of this diversity of opinion may be explained by the categories into which courts in those states have placed the contracts involved, such as contracts for support, for services, for future ad-

1 Section 9 of the Uniform Fraudulent Conveyance Act, enacted by Wis. Stat. (1939), § 242.09, provides: "(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 a 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. (2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment." In the principal case, the plaintiff's promise stood as the first clean link in a chain of conveyances tainted with fraud. Plaintiff seems to stand clearly within § 9(2).

2 Wis. Stat. (1939), § 269.56.

3 Section 4 of the Uniform Fraudulent Conveyance Act, Wis. Stat. (1939), § 242.04, provides: "Every conveyance made and every obligation incurred by a person who is or will be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."


5 Bank of Willow Springs v. Lillibridge, 316 Mo. 968, 293 S. W. 116 (1927); I Glenn, Fraudulent Conveyances and Preferences, § 298(b) (1940).
But the primary emphasis in these cases has been on the good faith of
the parties at the time they made the contract. This good faith (having particu-
lar reference here to the intent of the grantee) is inferred largely from the
extent to which the contract is executed at the time when the legality of the
conveyance is questioned. Under the Uniform Fraudulent Conveyance Act,
however, section three imposes on the grantee the burden of conveying “prop-
erty” or making a “present advance” (satisfying an “antecedent debt” being
clearly irrelevant to the present discussion, since it is the very opposite of making
an executory promise) for the debtor’s property or obligation, in addition to
“good faith.” It has been stated that section three excludes unequivocally an
executory promise as “fair consideration.” But the truth of this assertion is
opened to question when the multitudinous legal definitions of “property” are
considered. And a contract right could conceivably be called a “present ad-

6 White v. Meiderhoff, (Mo. App. 1926) 281 S. W. 98; Boger v. Jones Cotton
Co., 238 Ala. 180, 189 So. 737 (1939); Taulbee v. First Nat. Bank of Jackson, 279
7 For instance, in Hanneman v. Olson, 209 Iowa 372, 227 N. W. 566 (1928),
it was held that a conveyance made to compensate for contemplated services of an
attorney was valid if reasonable and made in good faith; emphasis was placed on the
attorney’s intent in contracting.
8 The fact that the consideration was partially unexecuted was not enough to
make a transaction invalid for want of consideration in Cherokee Auto Co. v. Stratton,
210 Iowa 1236, 232 N. W. 646 (1930). In Ayer v. First Nat. Bank & Trust Co. of
Macon, 182 Ga. 765, 187 S. E. 27 (1936), support given for several months took a
transfer out of the class of voluntary conveyances into that of transfers for value.
9 Section 3 of the Uniform Act, Wis. Stat. (1939), § 242.03, provides: “Fair
consideration is given for property, or obligation, (a) When in exchange for such
property, or obligation, as a fair consideration therefor, and in good faith, property
is conveyed or an antecedent debt is satisfied, or (b) When such property, or obligation
is received in good faith to secure a present advance or antecedent debt in amount not
disproportionately small as compared with the value of the property, or obligation
obtained.” (Italics the writer’s.)
10 The first clause of section 9, quoted note 1, supra, imposes the limitation of
“fair consideration” and lack of “knowledge of the fraud” on at least one purchaser in
the chain of title out of the debtor. The latter limitation of lack of “knowledge of the
fraud” would seem to be mere surplusage because of the requirement of “good faith” on
the grantee’s part in the definition of “fair consideration” in section 3; it may have
been inserted, however, as a definition of “good faith.” For a discussion of “fair con-
sideration” cases under the Uniform Fraudulent Conveyance Act, see 1938 Wis. L.
Rev. 341.
11 McLaughlin, “Application of the Uniform Fraudulent Conveyance Act,” 46
Harv. L. Rev. 404 at 447 (1933), cites Schlecht v. Schlecht, 168 Minn. 168, 209
N. W. 883 (1926), as making a “clearly erroneous construction of section 3 in holding
an executory promise to be a fair consideration.” Hulsether v. Sanders, 54 S. D. 412,
223 N. W. 335 (1929), is proposed by McLaughlin as making a correct application of
the section.
12 Schlecht v. Schlecht, 168 Minn. 168, 209 N. W. 883 (1926). This case is
The principal case drew away from these holdings by overruling Farmers Exchange
This would seem paradoxical, however, since property is seldom if ever given to “secure” a promise; there is no indication that a security transaction was intended in the principal case. If an executory promise could be assigned presently by the debtor for an amount which would yield, together with the amount he has already received on the contract, a “fair equivalent” or an “amount not disproportionately small as compared with the value of the property or obligation obtained,” it would not seem absurd to say that “property” has been given by the transferee. That the draftsmen of the act or the legislatures of those states having the statute intended executory promises to come within the definition of “fair consideration,” however, is doubtful. Uniformity could hardly be achieved by opening the definitions of “property” or “present advance” to some executory promises, depending on their marketability or assignability. In the instant case, however, it would seem that the executory promise of the plaintiff should not fall within the definition of “fair consideration” even under the expanded concepts proposed. To suggest that a cash purchaser would pay nearly the amount which the plaintiff had remaining to pay on his contract, or to say that the plaintiff would be willing to continue making payments (which he clearly was not willing to do in the instant case) for a parcel of land which was encumbered with a tax lien and possibly a mortgage, seems far-fetched. And the creditor who wishes to satisfy his claim at once should not object if the transferee himself wishes to forego the possible benefits which might accrue to him on full performance of his contract and set the balance of his obligation aside.

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be noticed that whenever the conveyance of the debtor is mentioned in the Uniform Fraudulent Conveyance Act, the words “property, or obligation” are used. The word “property” may have been intended to include “obligations”; but probably the words were used to distinguish “tangible” from “intangible” property and to draw a distinction between other items mentioned in the definition of a “conveyance” in section 1 of the act. This possibility, however, suggests that “property” may include “intangible” obligations. An interesting question then arises whether a promise of a third party, assigned to the debtor by the transferee, would be fair consideration, as distinguished from a direct promise of the transferee. Query, whether such a distinction would be sound.

13 “The chief benefit to be derived from the adoption of a uniform act on conveyances in fraud of creditors is that, if properly enforced, it will give a known certainty to the law which it does not now possess.” 27 Proc. Nat. Conf. Commrs. Uniform State Laws 250 (1917).

14 Emphasis is generally placed on the creditor’s ability to realize on the debtor’s assets immediately. “In general the test would seem to be whether the ‘conveyance’ by the debtor . . . renders the debtor execution proof.” McCaslin v. Schouten, 294 Mich. 180 at 186, 292 N. W. 696 (1940).