

1950

CREDITORS' RIGHTS-REMEDIES AVAILABLE TO TORT CREDITOR WITHOUT JUDGMENT IN MICHIGAN AND UNDER THE UNIFORM FRAUDULENT CONVEYANCES ACT

Colvin A. Peterson, Jr. S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Torts Commons](#)

Recommended Citation

Colvin A. Peterson, Jr. S.Ed., *CREDITORS' RIGHTS-REMEDIES AVAILABLE TO TORT CREDITOR WITHOUT JUDGMENT IN MICHIGAN AND UNDER THE UNIFORM FRAUDULENT CONVEYANCES ACT*, 48 MICH. L. REV. 711 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss5/16>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CREDITORS' RIGHTS—REMEDIES AVAILABLE TO TORT CREDITOR WITHOUT JUDGMENT IN MICHIGAN AND UNDER THE UNIFORM FRAUDULENT CONVEYANCES ACT—During negotiations for settlement of a tort claim between plaintiff and X, X transferred some realty to his son, defendant. Plaintiff commenced suit against X on the claim¹ and, alleging that defendant and X were jointly liable on the claim, sued defendant in equity to enjoin a prospective transfer of the property by defendant to third parties. *Held*, for defendant; equity has no jurisdiction to

¹ Plaintiff was successful in his suit against X, to which defendant was not made a party. *Irwin v. Meese*, 325 Mich 344, 38 N.W. (2d) 867 (1949).

enjoin the transfer of assets for a claim that is not secured by a lien or reduced to a judgment. *Irwin v. Meese*, 325 Mich. 349, 38 N.W. (2d) 869 (1949).

By the great weight of authority, in the absence of statute, equity is without jurisdiction to seize or enjoin the transfer of assets for a claim not secured by a lien on the assets or not reduced to a judgment, even though the debtor is insolvent or a suit is pending to establish the debt.² The mere existence of a debt does not create any title, equity, or trust in the debtor's property upon which the court of equity may act.³ The rule is commonly justified by the belief that to subject a debtor's property to mere unadjusted claims would expose him to hardship and harassment at the suit of avaricious creditors.⁴ A garnishment proceeding would have been no more successful in Michigan, for garnishment does not lie in tort actions unless reduced to a judgment because prior to judgment it is impossible to determine what, if anything, is due the creditor.⁵ However, there are two possible theories of recovery on the facts of the principal case. In the first place, plaintiff could have proceeded on the theory that the transfer from X to his son was a fraudulent conveyance. Under the Uniform Fraudulent Conveyances Act, a conveyance may be set aside if it was made with the actual intent to hinder, delay, or defraud creditors.⁶ This includes tort creditors without judgment.⁷ The actual intent to defraud may be inferred from the circumstances, called "badges of fraud."⁸ Where the transaction takes place between relatives,

² *Smith v. Manning*, 155 Ga. 209, 116 S.E. 813 (1923); *Uhl v. Dillon*, 10 Md. 500 (1857). In exceptional circumstances equity may take jurisdiction. *Earle v. Grove*, 92 Mich. 285, 52 N.W. 615 (1892). See generally, *Sequestration in Equity*, 116 A.L.R. 270 et seq. (1938).

³ "It is only by . . . liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another; and he may alienate to a purchaser." *Moran v. Dawes*, *Hopk. Ch. (N.Y.)* 365 at 367 (1825). See 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* §9 (1940).

⁴ *Shuffeldt v. Boehm*, 96 Ill. 560 (1880). But due to the failure of equity to act, statutes relating to attachment and garnishment have been enacted to provide relief in these situations, with appropriate safeguards. See 116 A.L.R. 270, 277 (1938).

⁵ 22 Mich. Stat. Ann. (1938) §27.1855. See *Dinius v. Bolibrzuch*, 270 Mich. 618, 259 N.W. 156 (1935); *Talbert v. Solventol Chemical Products, Inc.*, 304 Mich. 557, 8 N.W. (2d) 637 (1943). The argument that the amount due is not determinable without judgment is not compelling, however, for in the same situation attachment lies. See *infra*, note 14.

⁶ U.F.C.A. §7; 19 Mich. Stat. Ann. (1937) §26.887. Furthermore, the same language is found in 19 Mich. Stat. Ann. (1937) §26.971 [the equivalent of N.Y. Rev. Stat. (1828) tit. III, §1] and has been construed to include the conception of constructive intent, as distinguished from actual intent. *Detroit, Bay City & Western R. Co. v. Lavell*, 224 Mich. 572, 195 N.W. 58 (1923).

⁷ U.F.C.A. §1; 19 Mich. Stat. Ann. (1937) §26.881, defines creditors as those having "any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." This is generally construed to include ordinary tort creditors. *Gatto v. Boyd*, 137 Misc. 156, 241 N.Y.S. 626 (1930); *Iden v. Huber*, 259 Mich. 3, 242 N.W. 818 (1932). See 119 A.L.R. 949 (1939); 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* §76 (1940).

⁸ "The only method of determining actual intent is by a consideration of the circumstances surrounding the transaction. Surrounding circumstances which usually accompany an intent to hinder, delay, or defraud creditors and from which fraud may be inferred are called 'badges of fraud.'" *Bentley v. Caille*, 289 Mich. 74 at 77-78, 286 N.W. 163 (1939).

only slight additional evidence is needed to establish a prima facie case of fraudulent intent.⁹ In the instant case the further fact is shown that both of the parties to the transfer knew of the existence of plaintiff's claim at the time of the transfer.¹⁰ An even stronger showing could be made with the establishment of a lack of consideration, insolvency,¹¹ or a retention of possession by the transferor, but under the facts presented the creditor could make a prima facie case of intent to defraud. In the second place, the creditor, having alleged that defendant was jointly liable with his father, could have recognized the transfer as valid and attached the property to satisfy his claim against the defendant.¹² This remedy is available under the Michigan statute for tort claims before judgment if a proper showing is made.¹³ Moreover, the fact that the creditor recovered judgment against the father does not affect his right to pursue his remedy against defendant for it is only the satisfaction of a judgment that precludes relief against others jointly and severally liable.¹⁴ It follows, therefore, that had the instant creditor utilized these specific remedies rather than relying upon the somewhat nebulous concept of "irreparable harm" to invoke equity jurisdiction, he would not have gone without recovery.

Colwin A. Peterson, Jr., S.Ed.

⁹ "Dealings between husband and wife which would operate to the disadvantage of creditors of either of them must be subjected to exacting scrutiny, and cannot be upheld unless free from doubt and suspicion." *Fanning v. Dennis*, 119 W.Va. 615 at 617, 198 S.E. 532 (1938). See 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §307 (1940).

¹⁰ "Where a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry . . . or to have been guilty of a degree of negligence equally fatal to his claim . . . [as] a *bona fide* purchaser." *Williamson v. Brown*, 15 N.Y. 354 (syll.) (1857). See *Webber v. Jackson*, 79 Mich. 175, 44 N.W. 591 (1890).

¹¹ In the case of insolvency, under U.F.C.A. §4; 19 Mich. Stat. Ann. (1937) §26.884 no actual fraudulent intent is necessary, it being enough that insolvency is present.

¹² Under 22 Mich. Stat. Ann. (1938) §27.1782 it is required that the plaintiff set forth in detail his cause of action and the circuit judge may authorize attachment; the plaintiff must also furnish bond.

¹³ This is specifically provided in 22 Mich. Stat. Ann. (1938) §27.1782: The applicable ground for attachment in the instant case is that "the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal any of his property with the intent to defraud his creditors."

¹⁴ *Larson v. Anderson*, 108 Wash. 157, 182 P. 957 (1919); *Ellis v. Stenning*, [1932] 2 Ch. D. 81; PROSSER, TORTS §109 (1941).