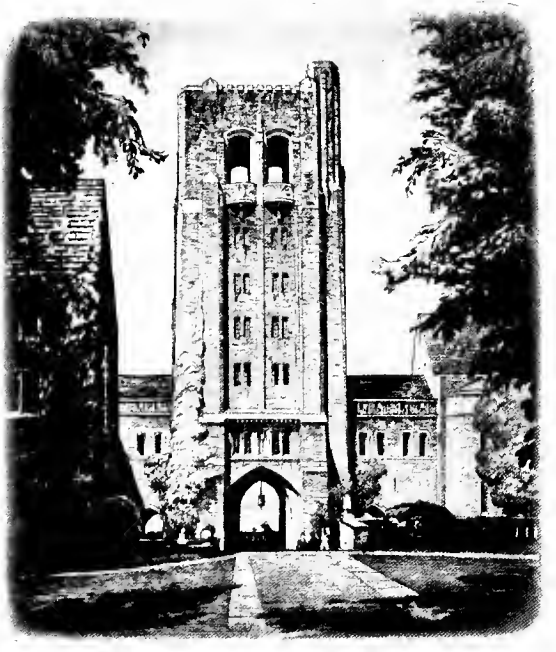

A TREATISE

ON

FRAUDULENT CONVEYANCES

AND

CREDITORS' REMEDIES

AT LAW AND IN EQUITY

INCLUDING A CONSIDERATION OF THE PROVISIONS OF THE BANKRUPTCY LAW APPLICABLE TO FRAUDULENT TRANSFERS AND THE REMEDIES THEREFOR, AND THE PROCEDURE OF TRUSTEES IN BANKRUPTCY IN ACTIONS EITHER IN STATE OR FEDERAL COURTS FOR THE RECOVERY OF PROPERTY FRAUDULENTLY TRANSFERRED BY THE BANKRUPT.

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THE LAW

OF

FRAUDULENT CONVEYANCES

CHAPTER XII.

RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR.

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37. Effect of failure to record or file instrument in general.
38. Rule as to conveyance of real estate.
39. Growing crops.
40. Burden of proof.

Section 1. **Retention of possession as element or evidence of fraud.**—To what extent the retention of possession of property by the vendor, after a transfer thereof, is to be considered as an element or evidence of fraud, is a question which has occasioned much discussion in the courts and has given rise to considerable conflict of opinion. It seems to be conceded in all cases that the retention of possession is to be regarded as some evidence of fraud as to the existing creditors of the vendor, but whether such evidence should be deemed merely presumptive and subject to explanation or rebuttal, or absolute and conclusive, as to the fraudulent character of the transaction, has been a perplexing question for the courts to determine as a rule of evidence, as well as for legislatures to decide upon as a rule of policy. In some states the subject is regulated by statutes, which have been variously interpreted, while in other states the question is determined according to the rules and principles of the common law.[1]

§ 2. **Transfers presumptively or prima facie fraudulent.**—It was the doctrine of the early English cases that a sale of chattels without any change of possession was fraudulent as a matter of law.[2] But later cases established clearly the rule that the retention of possession of property by the vendor, or the want of delivery of possession, does not make void a bill of sale of goods or chattels, but is a badge and evidence of fraud only or *prima facie* evidence of fraudulent intent, and is not conclusive, and that, in order to ascertain whether a conveyance be fraudulent or not, all the circumstances must be taken into consideration, and whether the retention of possession is consistent with the terms of the agreement, and the transaction was a fair one and intended to pass the property for a good and valuable consideration, are questions for the jury, having regard to all the circumstances of the transaction.[3] The same rule is maintained in

1. See cases cited in notes to next two sections.

2. Edwards v. Harbin, 2 T. R. 587, 1 Rev. Rep. 548; Wordall v. Smith, 1 Campb. 332.

3. Hale v. Metropolitan Saloon Om-

Canada, the retention of possession by the vendor being held to be only a matter for the consideration of the trial court in deciding whether or not fraud exists.[4] Many of the early American cases, in states where a different rule now prevails, held that a transfer of personal property, unaccompanied by a corresponding change of possession, was fraudulent *per se*, and void as to creditors.[5] But the rule now maintained by the weight of American authority is that the continuance in or retention of possession of chattels by the vendor, after a sale purporting to be absolute, or the transfer of personal property not accompanied by a change of possession of the property transferred, is not fraudulent *per se*, as against the vendor's creditors, subsequent purchasers or mortgagees, but is only presumptively or *prima facie* fraudulent. This presumption of fraud, going to the fact of the sale and the sufficiency of the consideration, may, however, be rebutted, but

nibus Co., 4 Drew, 492, 28 L. J. Ch. 777, 7 Wkly. Dig. 316; Martindale v. Booth, 3 B. & Ad. 498, 1 L. J. K. B. 166, 23 E. C. L. 223; Graham v. Thurber, 14 C. B. 410, 2 C. L. R. 10, 452, 18 Jur. 226, 23 L. J. C. P. 51, 2 Wkly. Rep. 163, 78 E. C. L. 410; Latimer v. Batson, 4 B. & C. 652, 10 E. C. L. 742, 7 D. & R. 106, 4 L. J. K. B. O. S. 25; Kidd v. Rawlinson, 2 B. & P. 59, 3 Esp. 52, 5 Rev. Rep. 540; Jezeph v. Ingram, 1 Moore C. P. 189, 8 Taunt, 838, 4 E. C. L. 406; Leonard v. Baker, 1 M. & S. 251; Watkins v. Birch, 4 Taunt, 823; Arundell v. Phipps, 10 Ves. Jr. 139, 32 Eng. Reprint, 797. The notoriety of the sale is a circumstance to rebut the presumption of fraud, when the seller remains in possession. Latimer v. Batson, *supra;* Kidd v. Rawlinson, *supra;* Cole v. Davies, 1 Ld. Raym. 724; Macdona v. Swiney, 8 Ir. C. L. 73.

4. Fraser v. Murray, 34 Nova Scotia, 186.

5. *N. Y.*—Tifft v. Barton, 4 Den. 171; Stoddard v. Butler, 20 Wend. 507; Sturtevant v. Ballard, 9 Johns. 337, 6 Am. Dec. 281; Marston v. Vultee, 21 N. Y. Super. Ct. 129.

Ala.—Seaman v. Nolen, 68 Ala. 463.

Dak.—First Nat. Bank v. Comfort, 4 Dak. 167, 28 N. W. 855.

Iowa.—Boothby v. Brown, 40 Iowa, 104.

La.—McCarhy v. Baze, 26 La. Ann. 382.

Mass.—Parsons v. Dickinson, 28 Mass. 352; Shumway v. Rutter, 24 Mass. 56; Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119.

Mich.—Webster v. Bailey, 40 Mich. 641.

N. J.—Chumar v. Wood, 6 N. J. L. 155.

S. C.—Kennedy v. Ross, 2 Mill Const. 125.

Va.—Clark v. Hardiman, 2 Leigh, 347; Thomas v. Soper, 5 Munf. 28.

it casts upon the purchaser the burden of explaining the vendor's continued possession, so as to make that fact consistent with the *bona fides* of the sale and the absolute disposition of the property.[6] The presumption of fraud arising from continued pos-

6. *N. Y.*—First Nat. Bank of Amsterdam v. Miller, 163 N. Y. 164, 57 N. E. 308, the existence of fraudulent intent is generally a question of fact; Prentiss Tool, etc., Co. v. Schirmer, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737; Preston v. Southwick, 115 N. Y. 139, 21 N. E. 1031; Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275; Blaut v. Gabler, 77 N. Y. 461; Tilson v. Terwilliger, 56 N. Y. 273; May v. Walter, 56 N. Y. 8; Mitchell v. West, 55 N. Y. 107; Miller v. Lockwood, 32 N. Y. 293; Ball v. Loomis, 29 N. Y. 412; Ford v. Williams, 24 N. Y. 359; Gardner v. McEwen, 19 N. Y. 123; Thompson v. Blanchard, 4 N. Y. 303; Van Buskirk v. Warren, 4 Abb. Dec. 457, 2 Keyes, 119; Willis v. Willis, 79 App. Div. 9, 79 N. Y. Supp. 1028; Menken v. Baker, 40 App. Div. 609, 57 N. Y. Supp. 541, *aff'd* 166 N. Y. 628, 60 N. E. 1116; National Hudson River Bank v. Chaskin, 28 App. Div. 311, 51 N. Y. Supp. 64; New York Ice Co. v. Cousins, 23 App. Div. 560, 48 N. Y. Supp. 799; Wallace v. Nodine, 57 Hun, 239; Tate v. McCormick, 23 Hun, 218; Schoonmaker v. Vervalen, 9 Hun, 138; Hollacher v. O'Brien, 5 Hun, 277; Brown v. Wilmerding, 5 Duer, 220; Betz v. Conner, 7 Daly, 550; Stark v. Grant, 16 N. Y. Supp. 526; Parmenter v. Fitzpatrick, 14 N. Y. Supp. 748; Southard v. Pinckney, 5 Abb. N. C. 184; Howard v. Stoddart, 9 St. Rep. 429; Marvin v. Smith, 22 Alb. L. J. 115; Stout v. Rappelhagen, 51 How. Pr. 75; Kellogg v. Wilkie, 23 How. Pr. 233; Hanford v. Artcher, 4 Hill, 271; Cole v. White, 26 Wend. 511; Smith v. Acker, 23 Wend. 653; Randall v. Cook, 17 Wend. 53; Murray v. Burtis, 15 Wend. 212; Collins v. Brush, 9 Wend. 198; Hall v. Tuttle, 8 Wend. 375; Divver v. McLaughlin, 2 Wend. 596, 20 Am. Dec. 655; Bissell v. Hopkins, 3 Cow. 166, 15 Am. Dec. 259; Butts v. Swartwood, 2 Cow. 431; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348; Barrow v. Paxton, 5 Johns. 258, 4 Am. Dec. 354; Jackson v. Cornell, 1 Sandf. Ch. 348; Walker v. Snediker, 1 Hoff. Ch. 145; Levy v. Welsh, 2 Edw. Ch. 438; Cram v. Mitchell, 1 Sand. Ch. 251.

Ala.—Teague v. Bass, 131 Ala. 422, 31 So. 4; Troy Fertilizer Co. v. Norman, 107 Ala. 667, 18 So. 201; Ullman v. Myrick, 93 Ala. 532, 8 So. 410; Crawford v. Kirksey, 55 Ala. 283, 28 Am. Rep. 704; Moog v. Benedicks, 49 Ala. 512; Mayer v. Clark, 40 Ala. 259; Wyatt v. Stewart, 34 Ala. 716; Upson v. Raiford, 29 Ala. 188; Millard's Adm'rs v. Hall, 24 Ala. 209; Borland v. Walker, 7 Ala. 269; Blocker v. Burness, 2 Ala. 354; Martin v. White, 2 Stew. 162; Hobbs v. Bibb, 2 Stew. 54. The mere failure to record a voluntary deed from a husband to his wife is not evidence of itself of a fraudulent conveyance, and, where consistent with good intentions, the law will attribute no bad motive to the grantee. Allen v. Caldwell, Ward & Co. (1906), 42 So. 855.

Ariz.—Leibes v. Steffy, 4 Ariz. 11, 32 Pac. 261.

Ark.—Smith v. Jones, 63 Ark. 232,

session by the vendor may be rebutted by proof of payment of a valuable or adequate consideration, that when the sale was made

37 S. W. 1052; Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707; Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. 137, the continuance of an insolvent vendor in the possession of goods is *prima facie* evidence of a secret trust, which is fraudulent as to his creditors; Collins v. Lightly, 50 Ark. 97, 6 S. W. 596; Martin v. Ogden, 41 Ark. 186; Apperson v. Burgett, 33 Ark. 328; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Danley v. Rector, 10 Ark. 211, 50 Am. Dec. 242; Dodd v. McCraw, 8 Ark. 83, 46 Am. Dec. 301; Field v. Simco, 7 Ark. 269; Cocke v. Chapman, 7 Ark. 197, 44 Am. Dec. 536.

Conn.—Dibble v. Morris, 26 Conn. 416; Meade v. Smith, 16 Conn. 346; Osborne v. Tuller, 14 Conn. 520; Ingraham v. Wheeler, 6 Conn. 277; Patten v. Smith, 4 Conn. 450.

D. C.—Justh v. Wilson, 19 D. C. 529.

Fla.—Volusia County Bank v. Bertola, 44 Fla. 734, 33 So. 448, the sale will be held fraudulent in law, unless the vendee shows that the possession was consistent with the bill of sale, or unavoidable, or for the temporary convenience of the vendee; Spencer v. Mugge (1903), 34 So. 271; Briggs v. Weston, 36 Fla. 629, 18 So. 852; Holliday v. McKinne, 22 Fla. 153; Sanders v. Pepoon, 4 Fla. 465; Gibson v. Love, 4 Fla. 217.

Ga.—Ross v. Cooley, 113 Ga. 1047, 39 S. E. 471; Pool v. Gramling, 88 Ga. 653, 16 S. E. 52; Collins v. Taggart, 57 Ga. 355; Goodwyn v. Goodwyn, 20 Ga. 600; Scott v. Winship, 20 Ga. 426; Beers v. Dawson, 8 Ga. 556; Carter v. Stanfield, 8 Ga. 49; Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Ill.—Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286; Kitchell v. Bratton, 2 Ill. 300.

Ind.—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347; Powell v. Stickney, 88 Ind. 310; Rose v. Colter, 76 Ind. 590; Kane v. Drake, 27 Ind. 29; Maple v. Burnside, 22 Ind. 139; Blystone v. Burgett, 10 Ind. 28, 68 Am. Dec. 658; Nutter v. Harris, 9 Ind. 88; South Branch Lumber Co. v. Stearns, 2 Ind. App. 7, 28 N. E. 117.

Iowa.—Osborn v. Ratliff, 53 Iowa, 748, 5 N. W. 746; Suiter v. Turner, 10 Iowa, 517.

Kan.—Locke v. Hedrick, 24 Kan. 763; Phillips v. Reitz, 16 Kan. 396; Wolfley v. Rising, 8 Kan. 297.

Ky.—Short v. Tinsley, 58 Ky. 397, 71 Am. Dec. 482; Enders v. Williams, 58 Ky. 346; Kendall v. Hughes, 46 Ky. 368; Christopher v. Covington, 41 Ky. 357; Vernon v. Morton, 38 Ky. 247.

La.—Hughes v. Mattes, 104 La. 218, 28 So. 1006; Yale v. Bond, 45 La. Ann. 997, 13 So. 587; Cochrane v. Gilbert, 41 La. Ann. 735, 6 So. 731; Cole v. Cole, 39 La. Ann. 878, 2 So. 794; Devonshire v. Gauthreaux, 32 La. Ann. 1132; Spivey v. Wilson, 31 La. Ann. 653; Pendleton v. Eaton, 23 La. Ann. 435; Guice v. Sanders, 21 La. Ann. 463; Keller v. Blanchard, 19 La. Ann. 53; Hill v. Hanney, 15 La. Ann. 654; Dyer v. Dyer, 14 La. Ann. 701; Zacharie v. Kirk, 14 La. Ann. 433; Griffith v. Frellsen, 11 La. Ann. 163; Wartel v. Darbein, 8 La. Ann. 506; McCandlish v. Kirkland, 7 La.

the vendor had sufficient other property to pay all his debts, declarations and acts of the parties to the transfer calculated to

Ann. 614; Brown v. Glathary, 4 La. Ann. 124; Jorda v. Lewis, 1 La. Ann. 59; Planters' Bank v. Watson, 9 Rob. 272; Thompson v. Chretien, 12 Mart. 250; Pierce v. Curtis, 6 Mart. 418.

Me.—Reed v. Reed, 70 Me. 504; Farrar v. Smith, 64 Me. 74; Fairfield Bridge Co. v. Nye, 60 Me. 372; McKee v. Garcelon, 60 Me. 165, 11 Am. Rep. 200; Googins v. Gilmore, 47 Me. 9, 74 Am. Dec. 472; Sawyer v. Nichols, 40 Me. 212; Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245; Gardiner Bank v. Hodgdon, 14 Me. 453; Ulmer v. Hills, 8 Me. 326; Holbrook v. Baker, 5 Me. 309, 17 Am. Dec. 236; Reed v. Jewett, 5 Me. 96.

Md.—Hambleton v. Hayward, 4 Harr. & J. 443; Bruce v. Smith, 3 Harr. & J. 499; Hudson v. Warner, 2 Harr. & G. 415.

Mass.—Ashcroft v. Simmons, 163 Mass. 437, 40 N. E. 171; Ingalls v. Herrick, 108 Mass. 351, 11 Am. Rep. 360; Allen v. Wheeler, 70 Mass. 123; Jones v. Huggeford, 44 Mass. 515; Oriental Bank v. Haskins, 44 Mass. 332, 37 Am. Dec. 140; Briggs v. Parkman, 43 Mass. 258, 37 Am. Dec. 89; Marden v. Babcock, 43 Mass. 99; Shurtleff v. Willard, 36 Mass. 202; Macomber v. Parker, 31 Mass. 497; Fletcher v. Willard, 31 Mass. 464; Parsons v. Dickinson, 28 Mass. 352; Adams v. Wheeler, 27 Mass. 199; Shumway v. Rutter, 25 Mass. 443, 19 Am. Dec. 340; Ward v. Sumner, 22 Mass. 59; Gould v. Ward, 21 Mass. 104; Wheeler v. Train, 20 Mass. 255; Homes v. Crane, 19 Mass. 607; Badlam v. Tucker, 18 Mass. 389, 11 Am. Dec. 202; Bartlett v. Williams, 18 Mass. 288; Brooks v. Powers, 15 Mass. 244, 8 Am. Dec. 99.

Mich.—Williams v. Brown (1904), 100 N. W. 786, 11 Det. L. N. 365; Jansen v. McQueen, 105 Mich. 199, 63 N. W. 73; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Kipp v. Lamoreaux, 81 Mich. 299, 45 N. W. 1002; Clark v. Lee, 78 Mich. 221, 44 N. W. 260; Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; Waite v. Matthews, 50 Mich. 392, 15 N. W. 524; Webster v. Anderson, 42 Mich. 554, 4 N. W. 288, 36 Am. Rep. 452; Webster v. Bailey, 40 Mich. 641; Molitor v. Robinson, 40 Mich. 200; Hatch v. Fowler, 28 Mich. 205; Jackson v. Dean, 1 Dougl. 519.

Minn.—Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761; Cortland Wagon Co. v. Sharvy, 53 Minn. 216, 53 N. W. 1147; Baker v. Pottle, 48 Minn. 479, 51 N. W. 383; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544; Chickering v. White, 42 Minn. 457, 44 N. W. 988; Murch v. Swensen, 40 Minn. 421, 42 N. W. 290; Camp v. Thompson, 25 Minn. 175; Benton v. Snyder, 22 Minn. 247; Vose v. Stickney, 19 Minn. 367; Blackman v. Wheaton, 13 Minn. 326.

Miss.—Charlotte Supply Co. v. Britton, etc., Bank (1898), 23 So. 630; Hilliard v. Cagle, 46 Miss. 309; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Johnston v. Dick, 27 Miss. 277; Comstock v. Rayford, 20 Miss. 369; Farmers' Bank v. Douglass, 19 Miss. 469; Garland v. Chambers, 19 Miss. 337, 49 Am. Dec. 63; Bogard v. Gardley, 12 Miss. 302; Rankin v. Holloway, 11 Miss. 614; Carter v. Graves, 7 Miss. 9.

give notoriety to the transaction, and other facts explanatory of the transaction and tending to show good faith. The existence

Mo.—Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212; Milburn v. Waugh, 11 Mo. 369; Boyd v. Pottle, 65 Mo. App. 374, 2 Mo. App. R. 1220.

Neb.—Snyder v. Dangler, 44 Neb. 600, 63 N. W. 20; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Fitzgerald v. Meyer, 25 Neb. 77, 41 N. W. 123; Miller v. Morgan, 11 Neb. 121, 7 N. W. 755; Densmore v. Tomer, 11 Neb. 118, 7 N. W. 535; Robison v. Uhl, 6 Neb. 328.

N. H.—The seller's retaining possession of chattels sold raises a presumption of a secret trust, which must be rebutted by evidence explaining the transaction, or the sale will be adjudged void as to creditors. Harrington v. Blanchard, 70 N. H. 597, 49 Atl. 576; Thompson v. Esty, 69 N. H. 55, 45 Atl. 566; Doucet v. Richardson, 67 N. H. 186, 29 Atl. 635; Parker v. Marvell, 60 N. H. 30; Towne v. Rice, 59 N. H. 412; Flagg v. Pierce, 58 N. H. 348; Sumner v. Dalton, 58 N. H. 295; Plaisted v. Holmes, 58 N. H. 293; Cutting v. Jackson, 56 N. H. 253; Walcott v. Keith, 22 N. H. 196; Kendall v. Fitts, 22 N. H. 1; Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375. Where there is an agreement that the vendor shall still have the right to use the thing sold in and about his business, the actual intention of the parties will not be inquired into, but it constitutes a secret trust from which fraud is an inference of law. Lang v. Stockwell, 55 N. H. 561.

N. J.—Shreve v. Miller, 29 N. J. L. 250; Sherron v. Humphreys, 14 N. J. L. 217; Hall v. Snowhill, 14 N. J. L. 8; Runyon v. Groshon, 12 N. J. Eq. 86.

N. C.—Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672; Boone v. Hardie, 83 N. C. 470; Cheatham v. Hawkins, 80 N. C. 161, 76 N. C. 335; Foster v. Woodfin, 33 N. C. 339; Hardy v. Skinner, 31 N. C. 191; Rea v. Alexander, 27 N. C. 644; Howell v. Elliott, 12 N. C. 76; Smith v. Niel, 8 N. C. 341; Trotter v. Howard, 8 N. C. 320, 9 Am. Dec. 640; Falkner v. Perkins, 3 N. C. 224; Vick v. Kegs, 3 N. C. 287; Ingles v. Donaldson, 3 N. C. 222.

N. D.—Retention of possession by the vendor is made by Rev. Code, § 5053, presumptively fraudulent. Conrad v. Smith, 6 N. D. 337, 70 N. W. 815. Under Dak. Comp. Laws, § 4657, the presumption of fraud was conclusive. Morrison v. Oium, 3 N. D. 76, 44 N. W. 288; Conrad v. Smith, 2 N. D. 408, 51 N. W. 720.

Ohio.—Thorne v. First Nat. Bank, 37 Ohio St. 254; Ferguson v. Gilbert, 16 Ohio St. 88; Collins v. Myers, 16 Ohio, 547; Hombeck v. Vanmetre, 9 Ohio, 153; Burbridge v. Seely, Wright, 359; Rogers v. Dare, Wright, 136.

Or.—Haines v. McKinnon, 35 Or. 573, 57 Pac. 903; Pierce v. Kelly, 25 Or. 95, 34 Pac. 963; Marks v. Miller, 21 Or. 317, 28 Pac. 14, 14 L. R. A. 190; McCully v. Swackhamer, 6 Or. 438; Moore v. Floyd, 4 Or. 101; Monroe v. Hussey, 1 Or. 188, 75 Am. Dec. 552.

R. I.—Mead v. Gardiner, 13 R. I. 257; Goodell v. Fairbrother, 12 R. I.

of fraudulent intent, under this rule, is a question of fact for the consideration of the jury, under appropriate instructions from

233, 34 Am. Rep. 631; Sarle v. Arnold, 7 R. I. 582; Anthony v. Wheatons, 7 R. I. 490.

S. C.—Perkins v. Douglass, 52 S. C. 129, 29 S. E. 400; Werts v. Spearman, 22 S. C. 200; Pregnall v. Miller, 21 S. C. 385, 53 Am. Rep. 684; Nelson v. Good, 20 S. C. 223; Kohn v. Meyer, 19 S. C. 190; Pringle v. Rhame, 10 Rich. 72, 67 Am. Dec. 560; Smith v. Henry, 1 Hill, 16; Smith v. Henry, 2 Bailey, 118; Cordery v. Zealy, 2 Bailey, 205; Footman v. Pendergrass, 3 Rich. Eq. 33; Howard v. Williams, 1 Bailey, 575, 21 Am. Dec. 483; Terry v. Belcher, 1 Bailey, 568.

Tenn.—Morris v. Clark (Ch. App. 1901), 62 S. W. 673; Carney v. Carney, 7 Baxt. 284; Tennessee Nat. Bank v. Ebbert, 9 Heisk. 153; Grubbs v. Greer, 45 Tenn. (5 Coldw.) 160; Ocoee Bank v. Nelson, 1 Coldw. 186; Wiley v. Lashlee, 8 Humphr. 717; Galt v. Dibrell, 10 Yerg. 146; Simpson v. Mitchell, 8 Yerg. 417; Maney v. Killough, 7 Yerg. 440; Young v. Pate, 4 Yerg. 164; Darwin v. Handley, 3 Yerg. 502; Callen v. Thompson, 3 Yerg. 475, 24 Am. Dec. 588

Tex.—Traders' Nat. Bank v. Day, 87 Tex. 101, 26 S. W. 1049; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; Kerr v. Hutchins, 46 Tex. 384; Thornton v. Tandy, 39 Tex. 544; Van Hook v. Walton, 28 Tex. 59; Stadtler v. Wood, 24 Tex. 622; Green v. Banks, 24 Tex. 508; Howerton v. Holt, 23 Tex. 51; Gibson v. Hill, 21 Tex. 225, 23 Tex. 77; Mills v. Walton, 19 Tex. 271; Earle v. Thomas, 14 Tex. 583; Converse v. McKee, 14 Tex. 20; McQuinnay v. Hitchcock, 8 Tex. 33; Morgan v. Republic of Texas, 2 Tex. 279; Bryant v. Kelton, 1 Tex. 415; Perry v. Patton (Civ. App. 1902), 68 S. W. 1018; Landman v. Glover (Civ. App. 1894), 25 S. W. 994; Johnston v. Luling Mfg. Co. (Civ. App. 1894), 24 S. W. 996.

Va.—King v. Levy (1895), 22 S. E. 492; Norris v. Lake, 89 Va. 513, 16 S. E. 663; Wray v. Davenport, 79 Va. 19; Sipe v. Earman, 26 Gratt. 563; Dance v. Seaman, 11 Gratt. 778; Curd v. Miller, 7 Gratt. 185; Forkner v. Stuart, 6 Gratt. 197; Davis v. Turner, 4 Gratt. 422.

W. Va.—Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685; Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. 171; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133; Bindley v. Martin, 28 W. Va. 773; Livesay v. Beard, 22 W. Va. 585.

Wis.—Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815, the presumption is rebutted by proof of payment of full consideration; Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114; Cook v. Van Horne, 76 Wis. 520, 44 N. W. 767; Norwegian Plow Co. v. Hanthorn, 71 Wis. 520, 37 N. W. 825; Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832; Williams v. Porter, 41 Wis. 422; Janvrin v. Maxwell, 23 Wis. 51; Bullis v. Borden, 21 Wis. 136; Mayer v. Webster, 18 Wis. 393; Livingston v. Littell, 15 Wis. 218; Grant v. Lewis, 14 Wis. 487, 80 Am. Dec. 785; Smith v. Welch, 10 Wis. 91; Gleason v. Day, 9 Wis. 498; Whitney v. Brunette, 3 Wis. 621; Sterling v. Ripley, 3 Pinn. 155, 3 Chandl. 166; Bond v. Seymour, 2 Pinn. 105, 1 Chandl. 40.

the court, and facts in explanation of the transaction tending to show good faith or the want of it are admissible in evidence.[7] If no satisfactory explanation of the vendor's retention of possession be given, it is the duty of the court to direct a verdict or a nonsuit.[8] A concurrent possession with the vendee does not change the general rule that fraud is inferred from the retention of possession of the property by the vendor after the sale;[9] nor is a conveyance of real estate duly executed and recorded, but fraudulent as to creditors, a substitute for a change of possession of personal property conveyed by bill of sale executed at the same time.[10]

§ 3. **Transfers fraudulent per se or conclusively.**—In some jurisdictions the statutes provide that a sale or mortgage of chattels not accompanied by an immediate delivery and an actual and continued change of possession is fraudulent *per se* and void as against existing creditors of the vendor and subsequent purchasers in good faith.[11] And the conveyance is held to be fraudulent although the vendee obtains possession before a creditor levies

7. See cases cited in last preceding note.

8. Stevens v. Fisher, 19 Wend. (N. Y.) 181; Randall v. Cook, 17 Wend. (N. Y.) 53; Doane v. Eddy, 16 Wend. (N. Y.) 523.

Statutory rule in New York.—Where the property is not delivered under an alleged sale, and no written evidence of the transfer of title exists, the sale will be presumed fraudulent and void as to creditors; and, under the express provisions of Personal Property Law, Laws 1897, chap. 417, § 25, this presumption will become conclusive, unless the person claiming the property affirmatively shows that the sale was made in good faith, and not to defraud creditors. Tuttle v. Hayes, 107 N. Y. Supp. 22.

9. Plaisted v. Holmes, 58 N. H. 293.

10. Flagg v. Pierce, 58 N. H. 348.

11. *Cal.*—Riebli v. Husler (1902), 69 Pac. 1061; McKee Stair Bldg. Co. v. Martin, 126 Cal. 557, 58 Pac. 1044; O'Kane v. Whelan, 124 Cal. 200, 56 Pac. 880, 71 Am. St. Rep. 42; Davis v. Winona Wagon Co., 120 Cal. 244, 52 Pac. 487; Howe v. Johnson, 117 Cal. 37, 48 Pac. 978; Rothschild v. Swope, 116 Cal. 670, 48 Pac. 911; Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; Dean v. Walkenhorst, 64 Cal, 78, 28 Pac. 60; Harter v. Donahoe (1886), 9 Pac. 651; Edwards v. Sonoma Valley Bank, 59 Cal. 148; Watson v. Rodgers, 53 Cal. 401; Whitney v. Stark, 8 Cal. 514, 68 Am.

thereon.[12] In other jurisdictions the rule is maintained by the courts that where the property transferred is susceptible of actual delivery a transfer of personal property, unaccompanied by an actual change of possession, is fraudulent *per se,* and void as to creditors, and the retention of the property by the vendor after a transfer thereof is conclusive evidence of fraud. These facts being established or admitted, the transaction is held, as a matter of law, fraudulent as to creditors of the vendor or mort-

Dec. 360; Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Colo.—Roberts v. Hawn, 20 Colo. 77, 36 Pac. 886; Baur v. Beall, 14 Colo. 383, 23 Pac. 345; Sweeney v. Coe, 12 Colo. 485, 21 Pac. 705; Bassinger v. Spangler, 9 Colo. 175, 10 Pac. 809; McCraw v. Welch, 2 Colo. 284; Helgert v. Stewart (App. 1904), 77 Pac. 1091; Willis v. Roberts, 18 Colo. App. 149, 70 Pac. 445; Israel v. Day, 17 Colo. App. 200, 68 Pac. 122; Goff v. Landon, 5 Colo. App. 452, 39 Pac. 69.

Dak.—First Nat. Bank v. Comfort, 4 Dak. 167, 28 N. W. 855.

Ida.—Hallett v. Parrish, 5 Ida. 496, 51 Pac. 109, such a sale is void as to creditors of the vendor levying execution on the chattels twenty days thereafter; Murphy v. Brasse, 3 Ida. 544, 32 Pac. 208; Harkness v. Smith, 2 Ida. 952, 28 Pac. 423.

Iowa.—In re Tweed (U. S. D. C. Iowa), 131 Fed. 355, unless the instrument is filed and recorded; Young v. Evans, 118 Iowa, 144, 92 N. W. 111; McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003, Hickok v. Buell, 51 Iowa, 655, 2 N. W. 512; McKay v. Clapp, 47 Iowa, 418; Boothby v. Brown, 40 Iowa, 104. *Compare* Jaffray v. Greenbaum, 64 Iowa, 492, 20 N. W. 775.

Mont.—Ettien v. Drum, 32 Mont. 311, 80 Pac. 369, the statute applies to a sale of range cattle and the brand; Morris v. McLaughlin, 29 Mont. 151, 64 Pac. 219; Yank v. Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522; Harmon v. Hawkins, 18 Mont. 525, 46 Pac. 439; Botcher v. Berry, 6 Mont. 448, 13 Pac. 45.

Nev.—Wilson v. Hill, 17 Nev. 401, 30 Pac. 1076; Tognini v. Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442; Lawrence v. Burnham, 4 Nev. 361, 97 Am. Dec. 540; Carpenter v. Clark, 2 Nev. 243; Doak v. Brubaker, 1 Nev. 218.

S. D.—Howard v. Dwight, 8 S. D. 398, 66 N. W. 935; Longley v. Daly, 1 S. D. 257, 46 N. W. 247.

Utah.—Johnson v. Emery (1906), 86 Pac. 869.

Wash.—Deggender v. Seattle Brew., etc., Co., 41 Wash. 385, 83 Pac. 898, a transfer of a liquor license is void as to creditors, where the instrument is not recorded and the assigner retains possession of it; Whiting Mfg. Co. v. Gephart, 6 Wash. 615, 34 Pac. 161; Banner v. May, 2 Wash. 221, 26 Pac. 248.

12. Edwards v. Sonoma Valley Bank, 59 Cal. 148; Watson v. Rodgers, 53 Cal. 401. *Contra.*—Scully v. Albers, 89 Mo. App. 118.

gagor and subsequent purchasers in good faith, and there is no question for the jury. Whether there was an actual change of possession is a question which may be submitted to the jury.[13] Some of the early cases in the federal courts held that a trans-

13. *Conn.*—Huebler v. Smith, 62 Conn. 186, 25 Atl. 658, 36 Am. St. Rep. 337; Hull v. Sigsworth, 48 Conn. 258, 40 Am. Rep. 167; Capron v. Porter, 43 Conn. 383; Hatstat v. Blakeslee, 41 Conn. 301; Webster v. Peck, 31 Conn. 495; Lake v. Morris, 30 Conn. 201; Beers v. Lyon, 21 Conn. 604; Toby v. Reed, 9 Conn. 216; Ingrahm v. Wheeler, 6 Conn. 277. The purpose of the provisions of Gen. St. 1902, § 4868, requiring a sale by a retail trader of his entire stock in one transaction and not in the regular course of business to be acknowledged and recorded in the office of the town clerk, like those of § 4864, requiring conditional sales to be acknowledged and recorded, was to prevent fraud, and not to change the law as to the effect of the retention of possession by the vendor of personal property after its sale. Spencer v. Broughton, 77 Conn. 38, 58 Atl. 236.

Del.—Miller v. Lacey, 7 Houst. 8, 30 Atl. 640; Bowman v Herring, 4 Harr. 458; Perry v. Foster, 3 Harr. 293; Colbert v. Sutton, 5 Del. Ch. 294.

Ill.—Huschle v. Morris, 131 Ill. 587, 23 N. E. 643; Wellington v. Heermans, 110 Ill. 564; Rozier v. Williams, 92 Ill. 187; Allen v. Carr, 85 Ill. 388; Johnson v. Holloway, 82 Ill. 334; Lewis v. Swift, 54 Ill. 436; Monell v. Scherrick, 54 Ill. 269; Bay v. Cook, 31 Ill. 336; Rhines v. Phelps, 8 Ill. 455; Thornton v. Davenport, 2 Ill. 296, 29 Am. Dec. 358; Schultz v. Reader, 69 Ill. App. 295; Orr v. Gilbert, 68 Ill. App. 429; Hewett v. Griswold, 43 Ill. App. 43; Gillette v. Stoddart, 30 Ill. App. 231; Curran v. Bernard, 6 Ill. App. 341. Upon a sale of personal property in the possession of the vendor, a change of possession is essential to protect the title of the vendee against attaching or execution creditors of the vendor. If possession remains with the vendor, it is fraudulent *per se* against creditors. Morris v. Coombs, 109 Ill. App. 176.

Ky.—Tabor v. Armstrong (1907), 99 S. W. 957; Vanmeter v. Estill, 78 Ky. 456; Morton v. Ragan, 5 Bush, 334; Foster v. Grigsby, 1 Bush, 86; Jarvis v. Davis, 14 B. Mon. 529, 61 Am. Dec. 166; Brummel v. Stockton, 3 Dana, 134; Hundley v. Webb. 3 J. J. Marsh. 643, 20 Am. Dec. 189; Waller v. Cralle, 8 B. Mon. 11; Dale v. Arnold, 2 Bibb. 605. *Compare* Wash v. Medley, 1 Dana, 269; Baylor v. Smithers, 1 Litt. 105.

Mo.—State v. Goetz, 131 Mo. 675, 33 S. W. 161; Mills v. Thompson, 72 Mo. 367; State v. Merritt, 70 Mo. 275; Claflin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; King v. Bailey, 6 Mo. 375; Sibley v. Hood, 3 Mo. 290; Foster v. Wallace, 2 Mo. 231; Potter v. Gratiot, 1 Mo. 368; Bowles Live Stock Commission Co. v. Hunter, 91 Mo. App. 418; Link v. Harrington, 41 Mo. App. 635; Knoop v. Nelson Distilling Co., 26 Mo. App. 303; Bosse v. Thomas, 3 Mo. App. 472. *Compare*

fer of personal property unless accompanied by a change of possession of the property transferred was fraudulent as a matter of law,[14] but in a later case it was held that it would seem to be difficult on principle, to maintain that the possession of goods sold is, *per se,* fraud, to be so pronounced by the court, as that it cuts off all explanation of the transaction, which might have been entirely unexceptional.[15] Later cases have held that the local rule of the state in which the court sits should be followed.[16]

State v. Evans, 38 Mo. 150, conclusive unless explained; McDermott v. Barnum, 16 Mo. 114; Shepherd v. Trigg, 7 Mo. 151.

Okla.—Washburn v. Oates, 14 Okla. 5, 76 Pac. 151; Walters v. Ratcliff, 10 Okla. 262, 61 Pac. 1070.

Pa.—White v. Gunn, 205 Pa. St. 229, 54 Atl. 901, the goods are subject to the rights of a *bona fide* purchaser of an execution creditor; Barlow v. Fox, 203 Pa. St. 114, 52 Atl. 57; McCullough v. Willey, 200 Pa. St. 168, 49 Atl. 944; Lehr v. Brodbeck, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. Rep. 828; Stephens v. Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868; Buckley v. Duff, 114 Pa. St. 596, 8 Atl. 188; McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Barr v. Reitz, 53 Pa. St. 256; Milne v. Henry, 40 Pa. St. 352; Born v. Shaw, 29 Pa. St. 288, 72 Am. Dec. 633; Cadbury v. Nolen, 5 Pa. St. 320; Stark v. Ward, 3 Pa. St. 328; Hoofsmith v. Cope, 6 Whart. 53; Steele v. Miller, 1 Atl. 434; Hoffner v. Clark, 5 Whart. 545; Streeper v. Eckart, 2 Whart. 302, 30 Am. Dec. 258; Clow v. Woods, 5 Serg. & R. 275, 9 Am. Dec. 346; Weller v. Meeder, 2 Pa. Super. Ct. 488; Medalis v. Weimer, 22 Pa. Co. Ct. 91; Eckfeldt v. Frick, 4 Phila. 116; Dick v. Lindsay, 2 Grant Cas. 431. The rule is otherwise as to subsequent creditors. Ditman v. Raule, 124 Pa. St. 225, 16 Atl. 819.

Utah.—Nelden-Judson Drug Co. v. Commercial Nat. Bank, 27 Utah, 59, 74 Pac. 195.

Vt.—Hildreth v. Fitts, 53 Vt. 684; Weeks v. Prescott, 53 Vt. 57; White v. Miller, 46 Vt. 65; Rothchild v. Rowe, 44 Vt. 389; Daniels v. Nelson, 41 Vt. 161, 98 Am. Dec. 577; Houston v. Howard, 39 Vt. 54; Hart v. Farmers', etc., Bank, 33 Vt. 252; Farnsworth v. Shepard, 6 Vt. 521; Weeks v. Wead, 2 Aik. 64; Mott v. McNiel, 1 Aik. 162; Boardman v. Keeler, 1 Aik. 158, 15 Am. Dec. 670; Durkee v. Mahoney, 1 Aik. 116.

14. Hamilton v. Russell, 5 U. S. 309, 2 L. Ed. 118; Smith v. Hunter, 22 Fed. Cas. No. 13,063, 5 Cranch C. C. 467; Smith v. Ringgold, Fed. Cas. No. 13,101, 4 Cranch C. C. 124; Moore v. Ringgold, Fed. Cas. No. 9,773, 3 Cranch C. C. 434; Phettiplace v. Sayles, 19 Fed. Cas. No. 11,083, 4 Mason, 312.

15. Warner v. Norton, 20 How. (U. S.) 448, 460, 15 L. Ed. 950.

16. Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Smith v. Craft, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267; Jewell

§ 4. **Sufficiency of change of possession — Open, visible, and notorious possession.**—The change of possession required to uphold a transfer of a debtor's personal property as against creditors must, when the property transferred is susceptible of it, be an actual, open, public, and notorious change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident to the world that a change of ownership has taken place and that the possession of the debtor has ceased, and such as to put one dealing with the debtor upon inquiry as to the ownership.[17] The change of possession

v. Knight, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; In re Rodgers, 125 Fed. 169, 60 C. C. A. 567.

17. *N. Y.*—Steele v. Benham, 84 N. Y. 634; Porter v. Parmley, 52 N. Y. 185; Hale v. Sweet, 40 N. Y. 97; Topping v. Lynch, 2 Robt. 484; Rheinfeldt v. Dahlman, 19 Misc. Rep. 162, 43 N. Y. Supp. 281; Spotten v. Keeler, 12 St. Rep. (N. Y.) 385; Stout v. Rappelhagen, 51 How. Pr. 75; Rendall v. Parker, 3 Sandf. 69.

U. S.—Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; Dooley v. Pease, 88 Fed. 446, 31 C. C A. 582; Cramton v. Tarbell, 6 Fed. Cas. No. 3,349; Comly v. Fisher, 6 Fed. Cas. No. 3,053, Taney, 121.

Ark.—Russell v. Haltom & Lester (1905), 89 S. W. 471, where delivery is made at the time of the sale, and the purchaser constitutes an employe of the seller his agent to hold the property for him, and it is given into his possession for that purpose, there is a sufficient change of possession.

Cal.—Hunt v. Hammel, 142 Cal. 456, 76 Pac. 378; Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313; McKee Stair Bldg. Co. v. Martin, 126 Cal. 557, 58 Pac. 1044; Byxbee v. Dewey (Cal.), 47 Pac. 52; Hart v. Mead, 84 Cal. 244, 24 Pac. 118; Engles v. Marshall, 19 Cal. 320.

Colo.—Cook v. Mann, 6 Colo. 21; McCraw v. Welch, 2 Colo. 284; Helgert v. Stewart (App. 1904), 77 Pac. 1091; Donovan v. Gathe, 3 Colo. App. 151, 32 Pac. 436; Goard of Gunn, 2 Colo. App. 66, 29 Pac. 918.

Conn.—Dann v. Luke, 74 Conn. 146, 50 Atl. 46; Potter v. Payne, 21 Conn. 361.

Dak.—Grady v. Baker, 3 Dak. 296, 19 N. W. 417.

Ill.—Second Nat. Bank v. Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Martin v. Duncan, 156 Ill. 274, 41 N. E. 43; Allen v. Carr, 85 Ill. 388; Morris v. Coombs, 109 Ill. App. 176; Gillette v. Stoddard, 30 Ill. App. 231.

Ind.—Nutter v. Harris, 9 Ind. 88.

Iowa.—Nuckolls v. Pence, 52 Iowa, 581, 3 N. W. 631; Woodworth v. Byerly, 43 Iowa, 106.

Mich.—Doyle v. Stevens, 4 Mich. 87.

Mo.—Rice v. Sally, 176 Mo. 107, 75 S. W. 398; State v. Goetz, 131 Mo. 675, 33 S. W. 161; State v. Merritt, 70 Mo. 275; Wright v. McCormick, 67 Mo. 426; Burgert v. Borchert, 59 Mo. 80; Bishop v. O'Con-

required in order to protect the vendee against creditors of the vendor must be indicated by appearances to an observer, and the creditors of the vendee are bound to see what others see, and to judge and act upon it with that prudence which is required of men in business affairs.[18] It is not indispensable to the change of possession that there should be any visible change of the position of the articles, as where the property sold is on the land of a third person.[19] In case of the sale of the furniture of a large hotel, actual delivery is not necessary. It is enough that the vendee assume the direction and control in such open and notorious manner as usually accompanies an honest transaction.[20] Actual possession of the property either by moving it or by placing some one in charge of it, or by removing all outward evidences of the former ownership, is not necessary, where the

nell, 56 Mo. 158; Lesem v. Herriford, 44 Mo. 323; Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292; Revercomb v. Duker, 74 Mo. App. 570; State v. Flynn, 66 Mo. App. 373; State v. Durant, 53 Mo. App. 493; Dyer v. Balsley, 40 Mo. App. 559; Knoop v. Nelson Distilling Co., 26 Mo. App. 303; Franklin v. Gumersell, 11 Mo. App. 306.

Mont.—O'Gara v. Lowry, 5 Mont. 427, 5 Pac. 583.

Neb.—Brunswick v. McClay, 7 Neb. 137.

Nev.—Gray v. Sullivan, 10 Nev. 416.

N. H.—Baldwin v. Thayer, 71 N. H. 257, 52 Atl. 852, 93 Am. St. Rep. 510; Clark v. Morse, 10 N. H. 236.

Okla.—Swartsburg v. Dickerson, 12 Okla. 566, 73 Pac. 282.

Or.—Pierce v. Kelly, 25 Or. 95, 34 Pac. 963.

Pa.—McMarlan v. English, 74 Pa. St. 296; Miller v. Garman, 69 Pa. St. 134; Trunick v. Smith, 63 Pa. St. 18; Cadbury v. Nolen, 5 Pa. St. 320; Hoofsmith v. Cope, 6 Whart. 53; Schwab v. Woods, 24 Pa. Super. Ct. 433.

Utah.—Ewing v. Merkley, 3 Utah, 406, 4 Pac. 244.

Vt.—Wheeler v. Selden, 63 Vt. 429, 21 Atl. 615, 26 Am. St. Rep. 711, 12 L. R. A. 600; Weeks v. Preston, 53 Vt. 57; Rothchild v. Rowe, 44 Vt. 389; Flanagan v. Wood, 33 Vt. 332; Kendall v. Samson, 12 Vt. 515; Gates v. Gaines, 10 Vt. 346.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758; Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251.

18. Stanley v. Robbins, 36 Vt. 422; Parker v. Kendrick, 29 Vt. 388, it must be such that anyone, on reasonable inquiry, would learn such facts that they would be bound to know the vendee's or mortgagee's lien and control of the property.

19. Merritt v. Miller, 13 Vt. 416.

20. McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588.

purchaser has taken open, notorious, and visible possession by acts showing a clear and unequivocal delivery.[21]

§ 5. **Exclusive possession necessary.**—Upon the sale of a chattel there must be a change of possession, and it must be exclusive in the vendee, or the sale will be void as against the creditors of the vendor. Concurrent or joint possession by both vendor and vendee after the sale is evidence of fraud, and will not place the property beyond the reach of the vendor's creditors.[22] Personal property situated upon the land occupied by the vendor and vendee in common may nevertheless be in the exclusive possession of the vendee.[23] A joint possession by the vendee and vendor, to make the sale fraudulent as to attaching creditors, must be such as carries with it signs of apparent ownership in both, or

21. Huels v. Boettger, 40 Mo. App. 310, allowing name of seller to remain on a store curtain; Farrar v. Levison, etc., Co., 33 Mo. App. 246; Kane v. Stern, 13 Mo. App. 581, retaining employees of former owner; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

22. *N. Y.*—Burnham v. Brennan, 42 N. Y. Super. Ct. 49; Jones v. O'Brien, 36 N. Y. Super. Ct. 58.

U. S.—Allen v. Massey, 84 U. S. 351, 21 L. Ed. 542.

Cal.—Regli v. McClure, 47 Cal. 612.

Colo.—Bassinger v. Spangler, 9 Colo. 175, 10 Pac. 809; Cook v. Mann, 6 Colo. 21.

Mo.—State v. Merritt, 70 Mo. 275; Claflin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292.

Nev.—Gray v. Sullivan, 10 Nev. 416.

N. H.—Sumner v. Dalton, 58 N. H. 295; Plaisted v. Holmes, 58 N. H. 293; Lang v. Stockwell, 55 N. H. 561; Trask v. Bowers, 2 N. H. 309.

Or.—Pierce v. Kelly, 25 Or. 95, 34 Pac. 963.

Pa.—Ziegler v. Handrick, 106 Pa. St. 87; Smith v. Crisman, 91 Pa. St. 428; Worman v. Kramer, 73 Pa. St. 378; Miller v. Garman, 69 Pa. St. 134; Brown v. Keller, 43 Pa. St. 104, 82 Am. Dec. 554; Rex v. Jones, 6 Pa. Co. Ct. 401; Myers v. Wood, 1 Phila. 24.

Tex.—Stadtler v. Wood, 24 Tex. 622.

Vt.—Weeks v. Prescott, 53 Vt. 57; Mills v. Warner, 19 Vt. 609, 47 Am. Dec. 711; Hall v. Parsons, 17 Vt. 271; Kendall v. Samson, 12 Vt. 515.

W. Va.—Livesay v. Beard, 22 W. Va. 585.

Wis.—Osen v. Sherman, 27 Wis. 501.

Eng.—Latimer v. Batson, 4 B. & C. 652, 10 E. C. L. 742, 7 D. & R. 106, 4 L. J. K. B. O. S. 25; Wordall v. Smith, 1 Campb. 332.

23. Potter v. Mather, 24 Conn. 551.

joint control,[24] or such as will lead persons to infer that there has been no actual change.[25] In case of a joint possession by the vendor and vendee, or the debtor and officer, if a candid observer would be at a loss to determine which of the two has the chief control and possession of it, the property may be seized for the debts of the vendor or debtor. In cases of doubt in this respect, the law resolves the doubt against the party who should make the change of possession open and visible to the world.[26]

§ 6. **Exclusive possession necessary where parties live together.**— Where the vendor and vendee are members of the same family, inhabiting the same house, or relatives residing together, and there has been no actual delivery and change of possession of the property, and no exclusive possession of it in the vendee, the sale is a fraud upon creditors and invalid as against them. The possession will be presumed to remain in the vendor until the contrary is shown.[27] But delivery of the property, followed by possession on the part of the vendee which is actual and continuous so far as it can be, considering the relation of the parties, while the property is publicly known and recognized as the vendee's, although the vendor continues to use it more or less, as he always has done, but not to the exclusion of the vendee and other persons who recognize the vendee's title, is an immediate delivery and followed by an actual and continued change of possession. Where the property thus remains in the family, in

24. Allen v. Edgerton, 3 Vt. 442.

25. McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588.

26. Flanagan v. Wood, 33 Vt. 332.

27. *U. S.*—Travers v. Ramsey, 24 Fed. Cas. No. 24,152, 3 Cranch C. C. 354.

Cal.—Kennedy v. Conroy (1896), 44 Pac. 795.

Colo.—Bassinger v. Spangler, 9 Colo. 175, 11 Pac. 809.

Ky.—Jarvis v. Davis, 53 Ky. 529, 61 Am. Dec. 166; Waller v. Cralle, 47 Ky. 11; Breckenridge v. Anderson, 3 J. J. Marsh, 710.

Me.—McKee v. Garcelon, 60 Me. 165, 11 Am. Rep. 200.

Mich.—McLaughlin v. Lange, 42 Mich. 81, 3 N. W. 267.

Pa.—Steelwagon v. Jeffries, 44 Pa. St. 407; Brawn v. Keller, 43 Pa. St. 104, 82 Am. Dec. 554; Hoffner v. Clark, 5 Whart. 545.

contemplation of law, it is in the possession of the vendee, and, if the vendor or donor sometimes controls it, it raises no presumption of fraud.[28] Where a wife accepts a bill of sale from her husband, and gives him authority to hold the property as her agent, they living together and using the property as hers and for the benefit of the family according to her directions, it is a constructive delivery of the property from him to her.[29] Where a husband sold cattle to his wife and also sold her the brand he had used, which was properly transferred in the record of marks and brands, and the cattle were kept on a tract, part of which belonged to the husband and part to the wife, and after the transfer the husband used a different brand for his cattle, there was a sufficient immediate delivery and actual and continued change of possession within the meaning of the statute.[30]

§ 7. **Gifts to minor children.**—The fact that an insolvent father retains possession of a chattel, which, while solvent, he has given to a minor child who lives with him, is not a badge of fraud,

28. *N. Y.*—Danforth v. Wood, 11 Paige, 9, where the parties lived together and used in common property purchased with funds of the vendee.

Ark.—Humphries v. McCraw, 9 Ark. 91.

Cal.—Morgan v. Ball, 81 Cal. 93, 22 Pac. 331, 15 Am. St. Rep. 34, 5 L. R. A. 579; Clark v. Rush, 19 Cal. 393.

Conn.—Gilligan v. Lord, 51 Conn. 562.

Ga.—Hargrove v. Turner, 112 Ga. 134, 37 S. E. 89, 81 Am. St. Rep. 24; Ector v. Welsh, 29 Ga. 443.

Ill.—Neece v. Haley, 23 Ill. 416, sale to minor brother who resided with the vendor.

Ky.—Enders v. Williams, 1 Metc. 346; Hamilton v. Combs, 22 Ky. L. Rep. 1263, 60 S. W. 371.

Miss.—Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412, that part of the property remains in possession of the vendor raises no presumption of fraud.

N. C.—Jones v. Hall, 58 N. C. 26; Bell v. Blaney, 6 N. C. 171.

Pa.—McClure v. Forney, 107 Pa. St. 414; Evans v. Scott, 89 Pa. St. 136, where the vendee used, treated and claimed the property as her own.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Perkins v. Douglas, 52 S. C. 129, 29 S. E. 400; Howard v. Williams, 1 Bailey, 575, 21 Am. Dec. 483.

Utah.—Farr v. Swigart, 13 Utah, 150, 44 Pac. 711.

29. Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

30. Webster v. Sherman (Mont. 1906), 84 Pac. 878.

but is consistent with the gift. Formal delivery is not necessary, where the father and child live together, and in such case the subsequent possession of the father is the possession of the child.[31]

§ 8. **Question for the jury.**—Whether or not there has been an actual and continuous change of possession is a question of fact to be determined on the evidence adduced in the case, and should be submitted to the jury where there is evidence tending to show such change. It is for the jury to say whether a vendee assuming control of personal property has done all that reasonably could be expected to show a *bona fide* sale to him, in view of the nature, use and situation of the property.[32] If a *bona fide* purchase of personal property has been made, and the price paid, slight acts are sufficient to show a delivery that will avail the buyer against the claims of third persons.[33] Absence of any acts by the vendor of control or ownership of the property is no evidence of transfer.[34]

31. *Ala.*—Sewall v. Glidden, 1 Ala. 52.

Ark.—Rector v. Danley, 14 Ark. 304.

Ga.—Hargrove v. Turner, 112 Ga. 134, 37 S. E. 89, 81 Am. St. Rep. 24; Ector v. Welsh, 29 Ga. 443.

Iowa.—Pierson v. Heisey, 19 Iowa, 114.

Ky.—Enders v. Williams, 1 Metc. 346; Forsyth v. Kreakbaum, 46 Ky. 97; Kenningham v. McLaughlin, 42 Ky. 30.

Miss.—Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412.

N. C.—Jones v. Hall, 58 N. C. 26; Bell v. Blaney, 6 N. C. 171.

S. C.—Howard v. Williams, 1 Bailey L. 575, 21 Am. Dec. 483.

Vt.—Ross v. Draper, 55 Vt. 404, 46 Am. Rep. 624.

See, however, Farr v. Simms, Rich. Eq. (S. C.) 122, 24 Am. Dec. 396.

32. *Cal.*—Feeley v. Boyd, 143 Cal. 282, 76 Pac. 1029, 62 L. R. A. 943; Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95.

Conn.—Lake v. Morris, 30 Conn. 201.

Ill.—Funk v. Staats, 24 Ill. 632; Neece v. Haley, 23 Ill. 416.

Mich.—McLaughlin v. Lange, 42 Mich. 81, 3 N. W. 267.

Mo.—White v. Gibson, 113 Mo. App. 568, 88 S. W. 120.

Pa.—Goddard v. Weil, 165 Pa. St. 419, 30 Atl. 1000, 36 W. N. C. 98, 25 Pittsb. L. J. N. S. 458.

Vt.—Burrows v. Stebbins, 26 Vt. 659; Stephenson v. Clark, 20 Vt. 624; Hall v. Parsons, 17 Vt. 271.

33. Stinson v. Clark, 6 Allen (Mass.) 340; Phelps v. Cutler, 4 Gray (Mass.), 137; Shumway v. Rutter, 7 Pick. (Mass.) 56.

34. Hickok v. Buell, 51 Iowa, 655, 2 N. W. 512; Boothby v. Brown, 40 Iowa, 104.

§ 9. **Continued change of possession.**—A continued, as well as an actual, change of possession, such as the subject matter of the sale or transfer is reasonably capable of, is essential to the validity of a sale of personal property, as against the creditors of the vendor or mortgagor.[35] What constitutes an actual and continued change of possession depends largely upon the kind and nature of the property, the situation of the parties, and other circumstances peculiar to each case.[36]

35. *N. Y.*—Steele v. Benham, 84 N. Y. 634; Blaut v. Gabler, 77 N. Y. 461; Tilson v. Terwilliger, 56 N. Y. 273; Topping v. Lynch, 2 Rob. 484; Rheinfeldt v. Dahlman, 19 Misc. Rep. 162, 43 N. Y. Supp. 281; Stout v. Rappelhagen, 51 How. Pr. 75; Butler v. Stoddard, 7 Paige, 163.

Cal.—Ruddle v. Givens, 76 Cal. 457, 18 Pac. 421; Schumacher v. Connolly, 75 Cal. 282, 17 Pac. 71; Gould v. Huntley, 73 Cal. 399, 15 Pac. 24; Engles v. Marshall, 19 Cal. 320; Bacon v. Scannell, 9 Cal. 271.

Colo.—McCraw v. Welch, 2 Colo. 284.

Conn.—Webster v. Peck, 31 Conn. 495.

Ill.—Allen v. Carr, 85 Ill. 388; Wood v. Loomis, 21 Ill. App. 604.

Ind.—Nutter v. Harris, 9 Ind. 88.

Iowa.—Sutton v. Ballou, 64 Iowa, 617.

Ky.—Meredith v. Sanders, 2 Bibb. 101.

Mich.—Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Clark v. Lee, 78 Mich. 221, 44 N. W. 260.

Minn.—Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544; Chickering v. White, 42 Minn. 457, 44 N. W. 988; Murch v. Swensen, 40 Minn. 421, 42 N. W. 290.

Mo.—Bishop v. O'Connell, 56 Mo. 158; Steppacher v. Saunders, 74 Mo. App. 475.

Nev.—Chamberlain v. Stern, 11 Nev. 268; Gray v. Sullivan, 10 Nev. 416; Carpenter v. Clark, 2 Nev. 243.

Pa.—Freedman v. Morrow Shoe Mfg. Co., 122 Pa. St. 25, 15 Atl. 690; Gray v. Trent (Pa.), 16 Atl. 107; McMarlan v. English, 74 Pa. St. 296; Garman v. Cooper, 72 Pa. St. 32; Miller v. Garman, 69 Pa. St. 134; Davis v. Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Barr v. Reitz, 53 Pa. St. 256; Steele v. Miller, 1 Pa. Cas. 151, 1 Atl. 434; McBride v. McClelland, 6 Watts & S. 94.

Utah.—Blish v. McCornick, 15 Utah, 188, 49 Pac. 529; Everett v. Taylor, 14 Utah, 242, 47 Pac. 75.

Vt.—Morris v. Hyde, 8 Vt. 352, 30 Am. Dec. 475.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758; Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251.

Can.—McMillan v. McSherry, 15 Grant Ch. (U. C.) 133; McMaster v. Garland, 31 U. C. C. P. 320; Burnham v. Waddell, 28 U. C. C. P. 263; Turner v. Mills, 11 U. C. C. P. 366; William v. Rapelje, 8 U. C. C. P. 186; Taylor v. Commercial Bank, 4 U. C. C. P. 447.

36. Tunnell v. Larson, 39 Minn. 268, 39 N. W. 628; Blish v. McCornick, 15 Utah, 188, 49 Pac. 529.

§ 10. **Subsequent possession by vendor after change of possession.**— It is not enough that there is an actual delivery and an actual change of possession between vendor and vendee, if the property afterwards, without legal excuse, is so placed back into the same condition and apparent relation to the vendor that there is no such manifest and continued change of possession as would indicate to the world that there had been a transfer of title.[37] If after sale and delivery, however long may be the interval, the property comes again into the possession of the vendor by the act, or with the knowledge and assent, of the vendee, with no intermediate change of title, the presumption of fraud arises, and it devolves upon the vendor to show that the transaction was in good faith and without intent to defraud.[38] The length of time between the sale and the coming again of the property into the possession of the vendor is immaterial, save as a circumstance to be considered by the jury on the issue of good faith and absence of intent to defraud.[39] But when it appears that the property has passed into the hands of the vendor for a mere temporary purpose and under circumstances which show that the return of the possession was not with the view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor are not authorized to attack the sale as fraudulent.[40] If, however, the vendor repossessed himself of the property forcibly or without authority, his creditors cannot hold it.[41]

37. *Cal.*—Van Pelt v. Littler, 10 Cal. 394. And see Hilliker v. Kuhn, 71 Cal. 214, 16 Pac. 707.

Conn.—Norton v. Doolittle, 32 Conn. 405.

Iowa.—Richardson v. Woodring, 74 Iowa, 149, 37 N. W. 122.

N. C.—Barrett v. Cole, 49 N. C. 40.

Vt.—Mills v. Warner, 19 Vt. 609, 47 Am. Dec. 711.

38. Tilson v. Terwilliger, 56 N. Y. 273; Wright v. Grover, 27 Ill. 426; Towne v. Rice, 59 N. H. 412. But see Wolf v. Hunter, 11 Ill. App. 32; Sutton v. Shearer, 1 Grant. Cas. (Pa.) 207; Jordan v. Frink, 3 Pa. St. 442; Town of Lyndon v. Belden, 14 Vt. 423; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568.

39. Tilson v. Terwilliger, 56 N. Y. 273.

40. Knight v. Forward, 63 Barb. (N. Y.) 311; Brown v. Riley, 22 Ill. 46; Towne v. Rice, 59 N. H. 412; Bond v. Bronson, 80 Pa. St. 360.

41. Hall v. Gaylor, 37 Conn. 550;

§ 11. **Possession by vendor as agent or bailee of purchaser.**—Although, in order to make a sale of personal property valid as against creditors of the vendor, the change of possession must be actual, not constructive or merely colorable, and it must be continuous, not merely a delivery and surrender back, yet the vendee may in good faith, after such a delivery, employ the vendor to hold the property for him as trustee, agent, bailee, or employee.[42] But, though a purchaser of personal property may employ the vendor without affecting the validity of the sale, he cannot leave him in such apparent charge of the property that there is no open and apparent means by which others can take notice that there has been any change of possession.[43] Where, however, the vendee has taken possession in good faith, the mere fact that he occasionally loans or hires the property to the vendor is not sufficient to invalidate the sale as to creditors of the ven-

Post v. Berwind-White Coal Min. Co., 176 Pa. St. 297, 35 Atl. 111; Morris v. Hyde, 8 Vt. 352, 30 Am. Dec. 475.

42. *Cal.*—Adams v. Weaver, 117 Cal. 42, 48 Pac. 972; Roberts v. Burr (1898), 54 Pac. 849; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Porter v. Bucher, 98 Cal. 454, 33 Pac. 335; Gould v. Huntley, 73 Cal. 399, 15 Pac. 24; Goldstein v. Nunan, 66 Cal. 542, 6 Pac. 451; Waldie v. Doll, 29 Cal. 555; Ford v. Chambers, 28 Cal. 13; Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178; Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500.

Me.—Goodwin v. Goodwin, 90 Me. 23, 37 Atl. 352, 60 Am. St. Rep. 231; Veazie v. Holines, 40 Me. 69.

Mass.—Hobbs v. Carr, 127 Mass. 532; Ingalls v. Herrick, 108 Mass. 351, 11 Am. Rep. 360; Green v. Rowland, 16 Gray, 58.

Mich.—Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Mo.—Claflin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336.

Mont.—Dodge v. Jones, 7 Mont. 121, 14 Pac. 707; O'Gara v. Lowry, 5 Mont. 427, 5 Pac. 583.

Nev.—Lewis v. Wilcox, 6 Nev. 215.

Tenn.—Overall v. Parker (Ch. App. 1899), 58 S. W. 905.

Utah.—Everett v. Taylor, 14 Utah, 242, 47 Pac. 75.

On a rescission of a sale of personalty in good faith upon the purchaser being unable to pay for it, an actual redelivery to the seller is not necessary, as against the purchaser's creditors, to revest title in the seller, if left in the purchaser's possession under an agreement that he is to hold it as bailee. Shaul v. Harrington, 54 Ark. 305, 15 S. W. 835.

43. Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. 668, 25 Am. St. Rep. 180.

dor.[44] Where a sale of personal property is perfected, as against creditors, by such a visible, notorious, and long continued change of possession as that creditors may be presumed to have notice of the transaction, the purchaser may suffer the seller to use, or to perform any other service in regard to, the thing, with the same safety as he might a stranger.[45]

§ 12. **Possession by vendor as clerk or servant of purchaser.**—Where the vendee has taken actual possession or has assumed the possession and control in an open and notorious manner, the fact that the vendor is employed about the premises in a capacity holding out no *indicia* of ownership is not evidence of a concurrent ownership indicating fraud.[46] Fraud will not be inferred from a subsequent agreement that the debtor shall retain possession of the property as agent, manager, clerk, or servant for the purchaser or creditor, manufacturing or selling the stock and converting it into money, receiving pay for his services. The employment of the vendor as a clerk or agent by the vendee is no indication of ownership, if there has been a sufficient actual or constructive delivery, and the vendee is in actual possession, nor is the mere fact of such agency an act of fraud sufficient to invalidate the sale.[47] The subsequent employment of the vendor by the

44. *N. Y.*—Knight v. Forward, 63 Barb. 311.

Ark.—Stone v. Waggoner, 8 Ark. 204.

Ill.—Brown v. Riley, 22 Ill. 45.

Iowa.—Deere v. Needles, 65 Iowa, 101, 21 N. W. 203.

Vt.—Town of Lyndon v. Belden, 14 Vt. 423.

45. Dewey v. Thrall, 13 Vt. 281.

46. In re Fisher, 25 Or. 64, 34 Pac. 1024; Ziegler v. Handrick, 106 Pa. St. 87; McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588.

47. *N. Y.*—Preston v. Southwick, 115 N. Y. 139, 21 N. E. 1031; Blumenthal v. Michel, 33 App. Div. 636, 54 N. Y. Supp. 81; Brown v. Harmon, 29 App. Div. 31, 51 N. Y. Supp. 820; Sommers v. Cottentin, 26 App. Div. 241, 49 N. Y. Supp. 652; Kelly v. Mesier, 18 App. Div. 329, 46 N. Y. Supp. 51; Drury v. Wilson, 4 App. Div. 232, 38 N. Y. Supp. 538.

U. S.—Olney v. Tanner, 10 Fed. 101; Reed v. Minor, 20 Fed. Cas. No. 11,647, 3 Cranch C. C. 82.

Ala.—Troy Fertilizer Co. v. Norman, 107 Ala. 667, 18 So. 201; Ullman v. Myrick, 93 Ala. 532, 8 So. 410.

Cal.—Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313; Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178.

vendee in the subordinate capacity of clerk or salesman is not so incompatible with an absolute and continued change of possession as to be conclusive evidence of fraud, but it is a circumstance for the jury on the issue as to the sufficiency of the change of possession.[48] It is otherwise where possession was not actually delivered to the vendee.[49]

§ 13. **Possession by vendor as lessee of purchaser.**—A sale or conveyance of real estate by an insolvent debtor to a creditor is not rendered fraudulent by the fact that the vendor remains in possession of the premises as a tenant of the vendee. A vendor's retaining possession is only presumptive evidence of fraud; and proof of a contract in good faith, leasing the property to the grantor, will ordinarily repel it.[50] So where a transfer of per-

Conn.—Dann v. Luke, 74 Conn. 146, 50 Atl. 46.

Dak.—Grady v. Baker, 3 Dak. 296, 19 N. W. 417.

Del.—Groff v. Cooper, 6 Houst. 36.

Ill.—Warner v. Carlton, 22 Ill. 415; Brown v. Riley, 22 Ill. 46; Read v. Wilson, 22 Ill. 376, 74 Am. Dec. 159; Blakely Printing Co. v. Pease, 95 Ill. App. 341; Sechler Carriage Co. v. Dryden, 71 Ill. App. 583; McCord v. Gilbert, 64 Ill. App. 233; Loucheim v. Seyfarth, 49 Ill. App. 561.

Ky.—McGuire v. West, 19 Ky. L. Rep. 1364, 43 S. W. 458.

Minn.—Bruggemann v. Wagener, 72 Minn. 329, 75 N. W. 230; Vose v. Stickney, 19 Minn. 367.

Mo.—Hibbard v. Heckart, 88 Mo. App. 544; Baker, etc., Co. v. Schneider, 85 Mo. App. 412; State v. Flynn, 56 Mo. App. 236; Pollard v. Farwell, 48 Mo. App. 42.

Mont.—Gallick v. Bordeaux, 22 Mont. 470, 56 Pac. 961.

Nev.—Gray v. Sullivan, 10 Nev. 416.

N. H.—Robinson v. Mitchell, 62 N. H. 529.

N. J.—Dresser v. Zabriskie (Ch. 1898), 39 Atl. 1066.

Pa.—Billingsley v. White, 59 Pa. St. 464; Hugus v. Robinson, 24 Pa. St. 9; Steele v. Miller, 1 Pa. Cas. 151, 1 Atl. 434; Gattle v. Kremp, 6 Pa. Super. Ct. 514.

R. I.—Mead v. Gardiner, 13 R. I. 257.

Utah.—Everett v. Taylor, 14 Utah, 242, 47 Pac. 75; Ewing v. Merkley, 3 Utah, 406, 4 Pac. 244.

Vt.—Dewey v. Thrall, 13 Vt. 281.

Va.—Alsop v. Catlett, 97 Va. 364, 34 S. E. 48; Benjamin v. Madden, 94 Va. 66, 36 S. E. 392.

48. Goldstein v. Nunan, 66 Cal. 542, 6 Pac. 451; Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178.

49. Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

50. *Ala.*—Danner Land, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184; Crawford v. Kirksey, 50 Ala. 590.

Ark.—Smith v. Jones, 63 Ark. 232, 37 S. W. 1052.

sonal property is actually paid for and symbolic delivery made, and the property is leased by the vendee to the vendor in whose possession it remains, it is not void as to the vendor's creditors in the absence of proof of actual fraud.[51] The delivery of a bill of parcels to the purchaser, however, who thereupon gives a lease of the goods sold to the seller, is not sufficient to pass the title as against a subsequent purchaser in good faith from the seller, there having been no other delivery or change of possession.[52] A sale of chattels not accompanied by actual or constructive delivery is not valid as against creditors, where the seller does not continue in possession as agent, servant or lessee, and the buyer exercises no control over the property, although the sale is good between the parties thereto.[53]

§ 14. **Constructive and symbolical delivery — Vessels and cargoes.**—Where property abroad is transferred, as in the case of a ship or cargo at sea or in a foreign port, either as security or absolutely, the delivery of a deed of transfer of the vessel or a bill of sale of the cargo passes the title to the vendee, as against creditors of the vendor, if the purchaser uses due diligence and takes possession within a reasonable time after her return to port and he has knowledge of their being within reach.[54] Where property at sea was assigned to one creditor it was held invalid as

Md.—Glenn v. Grover, 3 Md. 212.

Mo.—Wall v. Beedy, 161 Mo. 625, 61 S. W. 864.

W. Va.—Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

51. *Mass.*—Wheeler v. Train, 20 Mass. 255.

N. H.—Thompson v. Esty, 69 N. H. 55, 45 Atl. 566.

Pa.—McCullough v. Willey, 200 Pa. St. 168, 49 Atl. 944, 192 Pa. St. 176, 43 Atl. 999; Bell v. McCloskey, 155 Pa. St. 319, 26 Atl. 547.

S. C.—Pringle v. Rhame, 10 Rich. L. 72, 67 Am. Dec. 569.

52. Harlow v. Hall, 132 Miss. 232; Packard v. Wood, 4 Gray (Mass.), 307.

53. Hastings v. Sproul, 10 Pa. Super. Ct. 82, 44 W. N. C. 37, 16 Lanc. L. Rev. 169, 44 Wkly. Notes Cas. 37.

54. *N. Y.*—White v. Cole, 24 Wend. 116.

U. S.—Harris v. De Wolf, 29 U. S. 147, 7 L. Ed. 811; Meeker v. Wilson, Fed. Cas. No. 9,392, 1 Gall. 419.

Me.—Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245; Brinley v. Spring, 7 Me. 241.

Mass.—Turner v. Coolidge, 43 Mass. 350; Joy v. Sears, 26 Mass. 4;

against another creditor attaching it before possession taken under the assignment, although there has been no unreasonable delay.[55] Where personal property is in the possession of a sheriff at the time of an assignment by the judgment debtor for creditors, the transaction is not within the statute of frauds, which requires an immediate delivery of goods sold.[56]

§ 15. **Where actual delivery is impossible or property is not susceptible of complete manual delivery.**—Where, from the nature of the transaction, possession either could not be delivered at all, or at least without defeating fair and honest objects intended to be affected by, and which constitute the motive for entering into, the contract, or where personal property sold is not reasonably susceptible of an actual or complete manual delivery, a symbolical or constructive delivery is sufficient, as against creditors of the vendor, and the fair and honest purpose of the vendor and vendee will not be defeated, if the conduct of the parties showed that there was an intention to transfer the possession as well as the title, and the vendee assumes such control of the property as ought reasonably to indicate a change of ownership.[57] Thus, a delivery of the key of a granary is a sufficient symbolical

Gardner v. Howland, 19 Mass. 599; Badlam v. Tucker, 18 Mass. 389, 11 Am. Dec. 202; Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115; Putnam v. Dutch, 8 Mass. 287; Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253.

Eng.—Lempriere v. Pasley, 2 T. R. 485.

55. White v. Cole, 24 Wend. (N. Y.) 116; Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119.

56. Mumper v. Rushmore, 79 N. Y. 19.

57. *N. Y.*—Fisher v. Stout, 74 App. Div. 97, 77 N. Y. Supp. 945; Hollingsworth v. Napier, 3 Caines, 182, 2 Am. Dec. 268.

U. S.—Stelling v. G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81.

Cal.—Feeley v. Boyd, 143 Cal. 282, 76 Pac. 1029, 65 L. R. A. 943; Harris v. Smith, 132 Cal. 316, 64 Pac. 409; Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462; How v. Johnson, 117 Cal. 37, 48 Pac. 978; Woods v. Bugbey, 29 Cal. 466; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Cartwright v. Phoenix, 7 Cal. 281.

Colo.—Cook v. Mann, 6 Colo. 21.

Conn.—Dann v. Luke, 74 Conn. 146, 50 Atl. 46; Hull v. Hull, 48 Conn. 250, 40 Am. Rep. 165.

Idaho.—Rapple v. Hughes (1904),

delivery of a lot of wheat therein as against the seller's creditors, this being the only delivery practicable at the time.[58] Where the buyer and seller of corn in cribs went to the cribs, and possession was formally delivered, and the buyer nailed up the opening, it was a sufficient delivery.[59] Heavy printing machinery and appliances not susceptible of immediate and complete delivery may be symbolically delivered by locking the doors of the premises where they are contained, and delivering the keys to the purchaser.[60] The rule as to symbolical delivery is also applicable to chattels in process of manufacture,[61] ore in a mine,[62] piles of

77 Pac. 722; Simons v. Daly (1903), 72 Pac. 507.

Ill.—Hart v. Wing, 44 Ill. 141.

Ky.—Kenton v. Ratcliff, 105 Ky. 376, 20 Ky. L. Rep. 1239, 49 S. W. 14; Street v. Tuggle, 13 Ky. L. Rep. 539.

Me.—Boynton v. Veazie, 24 Me. 286; Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245.

Md.—Atwell v. Miller, 6 Md. 10.

Mass.—Russell v. O'Brien, 127 Mass. 349; Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318; Cushing v. Breed, 96 Mass. 376, 92 Am. Dec. 777; Stinson v. Clark, 88 Mass. 340; Homes v. Crane, 19 Mass. 607; Badlam v. Tucker, 18 Mass. 389, 11 Am. Dec. 202; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Allen v. Smith, 10 Mass. 308.

Minn.—Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

Mont.—Tuttle v. Merchants' Nat. Bank, 19 Mont. 11, 47 Pac. 203.

N. H.—Baldwin v. Thayer, 71 N. H. 257, 52 Atl. 852, 93 Am. St. Rep. 510.

Okla.—Masters v. Teller, 7 Okla. 668, 56 Pac. 1067.

Pa.—Goddard v. Weil, 165 Pa. St. 419, 30 Atl. 1000; McGuire v. James, 143 Pa. St. 521, 22 Atl. 751; Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Buckley v. Duff, 114 Pa. St. 596, 8 Atl. 188; Cessna v. Nimick, 113 Pa. St. 70, 4 Atl. 193; Evans v. Scott, 89 Pa. St. 136; McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Benford v. Schell, 55 Pa. St. 393; Boon v. Shaw, 29 Pa. St. 288, 72 Am. Dec. 633; Schwab v. Woods, 24 Pa. Super. Ct. 433; Huffman v. McIlvaine, 13 Pa. Super. Ct. 108.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758.

Eng.—Harman v. Anderson, 2 Campb. 243, 11 Rev. Rep. 706; Manton v. Moore, 7 T. R. 67.

58. Sharp v. Carroll, 66 Wis. 62, 27 N. W. 822.

59. Pope v. Cheney, 68 Iowa, 563, 27 N. W. 754.

60. Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300.

61. Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318, unfinished piano left with manufacturer for completion; Macomber v. Parker, 30 Mass. 175, bricks in kiln; Bond v. Bronson, 80 Pa. St. 360, a wagon.

62. Finding v. Hartman, 14 Colo. 596, 23 Pac. 1004.

brick,[63] and logs floating in the water or piled upon the banks of a stream.[64]

§ 16. **Bulky, cumbersome and ponderous articles.**—A manual delivery is unnecessary where the goods or articles are ponderous, bulky, cumbersome, and difficult to remove. It is enough if they are placed in the power of the vendee.[65] The law requires good faith and such acts only as are practicable according to the character of the property, the nature of the transaction and the circumstances attending the sale.[66] The delivery of a shop, so separa-

63. Hawkins v. Kansas City, etc., Brick Co., 63 Mo. App. 64.

64. *U. S.*—Leonard v. Davis, 1 Black, 476, 17 L. Ed. 222; Stelling v. G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81.

Me.—Bethel Steam Mill Co. v. Brown, 59 Me. 9, 99 Am. Dec. 752; Boynton v. Veazie, 24 Me. 286.

Mass.—Riddle v. Varnum, 37 Mass. 280.

Vt.—Kingsley v. White, 57 Vt. 565; Ross v. Draper, 55 Vt. 404, 45 Am. Rep. 624; Sterling v. Baldwin, 42 Vt. 306; Fitch v. Burk, 38 Vt. 683; Birge v. Edgerton, 28 Vt. 291; Hutchins v. Gilchrist, 23 Vt. 82; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

It is a good delivery of timber in rafts in a river to go within sight of it and point it out to the vendee as the timber conveyed. Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74.

65. *N. Y.*—Hayden v. Demets, 53 N. Y. 426, tender of warehouse receipts and payment of warehouse charges for fifty thousand pounds of copper held sufficient.

Cal.—Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135.

Ill.—Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St. Rep. 300, heavy printing machinery; Tecknor v. McClelland, 84 Ill. 471; Funk v. Staats, 24 Ill. 633; Taylor v. Thurber, 68 Ill. App. 114; Hewett v. Griswold, 43 Ill. App. 43.

Ky.—Street v. Tuggle, 13 Ky. L. Rep. 539.

Md.—Thompson v. Baltimore, etc., R. Co., 28 Md. 396; Van Brunt v. Pike, 4 Gill, 270, 45 Am. Dec. 126.

Mass.—Rice v. Austin, 17 Mass. 197.

Minn.—Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

Pa.—Haynes v. Hunsicker, 26 Pa. St. 58, where the vendee of lumber takes every precaution to secure his purchase, but is prevented by bad roads from removing it, the lumber is not subject to levy.

Vt.—Kingsley v. White, 57 Vt. 565.

The rule applies to stacks of hay and standing corn, but not to farming implements and live stock. Ticknor v. McClelland, 84 Ill. 471.

66. Hayden v. Demets, 53 N. Y. 426; Barr v. Reitz, 14 Pittsb. L. J. (Pa.) 421.

ated from the realty as to be an article of personal property, may well be affected by the delivery of the key, though that delivery take place at a distance from the shop itself.[67] Upon the sale of a safe, a delivery of its key, as well as the key of the room in which it is situated, is sufficient to constitute a valid sale as against creditors.[68] The sale of personal property must be attended by such a delivery and change of possession as will accord with the nature of the property, followed by removal and actual possession as soon as the circumstances of the case permit.[69] The actual removal or change in the location of personal property is not an essential to a valid transfer.[70] But the bulky and cumbersome character of chattels sold, while it may affect the nature of the acts of delivery and taking possession to render the sale valid as against creditors, does not dispense with a delivery. Some act, definite and distinct, is always required; something tantamount to an actual delivery, some plain surrender of possession on the one hand and assumption of it on the other, is necessary.[71]

§ 17. **Property in possession of third person as bailee.**—Where personal property sold is in the possession or actual custody of a third person as bailee no actual delivery is necessary. The owner of such property does not have actual possession of it, and a transfer of it by bill of sale alone is good and valid as against creditors and subsequent purchasers, if the vendor gives the bailee notice of the sale, or the purchaser gives the bailee notice of the

67. Vining v. Gilbreth, 39 Me. 496.

68. Benford v. Schell, 55 Pa. St. 393.

69. Haynes v. Hunsicker, 26 Pa. St. 58; Kingsley v. White, 57 Vt. 565, sale of saw logs piled on land.

70. *N. Y.*—Lee v. Huntoon, 1 Hoff. Ch. 447.

Cal.—Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95; Cartwright v. Phoenix, 7 Cal. 281.

Ill.—Ticknor v. McClelland, 84 Ill. 471; Hart v. Wing, 44 Ill. 141, sale of corn in the crib.

Ky.—Kenton v. Ratcliffe, 105 Ky. 376, 20 Ky. L. Rep. 1239, 49 S. W. 14.

Minn.—Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

Pa.—Ayers v. McCandless, 147 Pa. St. 49, 23 Atl. 344; Cessna v. Nimick, 113 Pa. St. 70, 4 Atl. 193; Crawford v. Davis, 99 Pa. St. 576; Steele v. Miller, 1 Pa. Cas. 151, 1 Atl. 434.

71. Stimson v. Wrigley, 86 N. Y. 332.

sale before the goods are taken from his possession, or if the vendee takes possession and leaves the property in the hands of the bailee for a special purpose. Notice to a bailee in possession of goods of a sale thereof is sufficient to effect a change of possession of the goods into the hands of the vendee.[72] Where the purchaser of goods in storage in the warehouse of a third person, at the time of payment and execution of the bill of sale, is given also the warehouse receipts thereof, and then allows the goods

72. *N. Y.*—Mumper v. Rushmore, 79 N. Y. 19.

U. S.—Strahorn-Hutton-Evans Commission Co. v. Quigg, 97 Fed. 735, 38 C. C. A. 395.

Ark.—Field v. Simes, 7 Ark. 269.

Cal.—Cameron v. Calberg (1892), 31 Pac. 530; Morgan v. Miller, 62 Cal. 492; Williams v. Lerch, 56 Cal. 330. See also Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95.

Colo.—Jones v. Mackenzie Bros. Wall Paper, etc., Co., 19 Colo. App. 121, 73 Pac. 847; Weiland v. Potter, 8 Colo. App. 79, 44 Pac. 769.

Ida.—Murphy v. Braase, 3 Ida. 544, 32 Pac. 208; Lufkin v. Collins, 2 Ida. 150, 7 Pac. 95.

Ill.—Hodges v. Hurd, 47 Ill. 363; Christy v. Ashlock, 93 Ill. App. 651; National Bank v. Buckeye Iron, etc., Works, 46 Ill. App. 526.

Iowa.—Campbell v. Hamilton, 63 Iowa, 293, 19 N. W. 220; Case v. Burrows, 54 Iowa, 679, 7 N. W. 130; Sansee v. Wilson, 17 Iowa, 582; Thomas v. Hillhouse, 17 Iowa, 67.

Me.—Wheeler v. Nichols, 32 Me. 233.

Mass.—Dempsey v. Gardner, 127 Mass. 381, 34 Am. Rep. 389; Cushing v. Breed, 96 Mass. 376, 92 Am. Dec. 777; Bullard v. Wait, 82 Mass. 55; Hardy v. Potter, 76 Mass. 89; Appleton v. Bancroft, 51 Mass. 231; Carter v. Willard, 36 Mass. 231; Tuxworth v. Moore, 26 Mass. 347, 20 Am. Dec. 479.

Mich.—Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974.

Minn.—Freiberg v. Steenbock, 54 Minn. 509, 56 N. W. 175.

Mo.—How v. Taylor, 52 Mo. 592; Wachtel v. Ewing, 82 Mo. App. 594; Halderman v. Stillington, 63 Mo. 212; Harrison v. Foster, 62 Mo. App. 603.

Nev.—Estey v. Cooke, 12 Nev. 276; Doak v. Brubaker, 1 Nev. 218.

N. H.—Stowe v. Taft, 58 N. H. 445; Kendall v. Fitts, 22 N. H. 1; Morse v. Powers, 17 N. H. 286.

Pa.—Woods v. Hull, 81 Pa. St. 451; Worman v. Kramer, 73 Pa. St. 378; Linton v. Butz, 7 Pa. St. 89, 47 Am. Dec. 501; Keil v. Harris, 4 Pa. Cas. 201, 6 Atl. 750; Steele v. Miller, 1 Pa. Cas. 151, 1 Atl. 434.

R. I.—Anthony v. Wheatons, 7 R. I. 490.

Vt.—Wing v. Peabody, 57 Vt. 19; Flanagan v. Wood, 33 Vt. 332; Whitney v. Lynde, 16 Vt. 579; Potter v. Washburn, 13 Vt. 558, 37 Am. Dec. 615; Pierce v. Chipman, 8 Vt. 334; Spaulding v. Austin, 2 Vt. 555.

Va.—Kroesen v. Seevers, 5 Leigh, 434.

to remain in the warehouse, there is such a change of possession as to make the transfer good as against the seller's creditors. The possession of the warehouse receipts is equivalent to possession of the property itself.[73] The rule that, to render the sale of personal property valid against the seller's creditors, it must be accompanied by an immediate, open, notorious, and continued change of possession, has no application where, prior to the sale, the seller has bailed the property to a third person, and the bailee has taken open and notorious possession thereof; but in such case a direction by the purchaser to the bailee to hold the property for him is sufficient.[74] In some cases it has been held that unless the bailee consents to act as the agent of the purchaser, he ought to take actual possession of the property,[75] and that unless the bailee assent and agree to keep the property for the vendee, it is liable to be attached by creditors of the vendor.[76] But it has also been held that in case of the bailee's non-consent and retention of the property he will become the vendee's agent by operation of law.[77]

§ 18. **Grain stored in elevator.**— Where several parties store grain in a grain elevator, and it is put into one mass, according to the usage of the trade, they are tenants in common thereof and

73. Kerner v. Boardman, 133 N. Y. 539, 30 N. E. 11, 48, *aff'g* 14 N. Y. Supp. 787; Niagara County Nat. Bank v. Lord, 33 Hun (N. Y.), 557; Broadwell v. Howard, 77 Ill. 305. But giving a bill of sale and warehouse receipts for goods in the possession of a vendor who also is a warehouseman, is not a sufficient delivery. Stoneford v. Scannell, 10 Cal. 7; Stewart v. Scannell, 8 Cal. 80.

74. Hendrie, etc., Mfg. Co. v. Collins, 29 Colo. 102, 67 Pac. 164, *rev'g* 13 Colo. App. 8, 56 Pac. 815; Christy v. Ashlock, 93 Ill. App. 651.

75. Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974; Sheldon v. Warner, 26 Mich. 403.

76. Whitney v. Lynde, 16 Vt. 579.

77. Buhl Iron Works v. Teuton, 67 Mich. 623. There can be no actual delivery until the bailee accepts the order for delivery, but the bailee may lay himself liable to an action for refusing to do do. Bentall v. Burn, 3 B. & C. 423, 10 E. C. L. 197, 5 D. & R. 284, 3 L. J. K. B. O. S. 42, R. & M. 107, 21 E. C. L. 712, 27 Rev. Rep. 391.

the proprietors of the elevator are their agents, and a valid title to a quantity of the grain will pass by a delivery from the vendor to the vendee of an order to deliver such quantity, directed to the owners of the elevator, and accepted by them in the usual manner by retaining the order and entering it on their books, although there is no separation of the quantity sold from the rest of the mass.[78]

§ 19. **Possession by agent or servant of vendor.**—Where the known and previously recognized agent of the seller remains in possession of personal property, there must be substantial and visible signs of a change of title, in order to protect the sale against third persons, and a mere employment, by the vendee of personal property, of the vendor's servant to take charge of it for him, is not a sufficient change of possession as against creditors of the vendor.[79] But there is a change of possession, so as to save a sale of chattels from being fraudulent as to creditors, where delivery is made at the time of the sale, and the purchasers constitute an employee of the seller their agent to hold the property for them, and it is given into his possession for such purpose.[80]

§ 20. **Delivery of a part for the whole.**—An actual delivery of a part of the property in token of a delivery of the whole is a sufficient delivery to enable the purchaser to hold the property as

78. Cushing v. Breed, 96 Mass. 376, 92 Am. Dec. 777.

79. *Cal.*—Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 190; Chester v. Bower, 55 Cal. 46; Hurlburd v. Bogardus, 10 Cal. 518.

Conn.—Crouch v. Carrier, 16 Conn. 505, 41 Am. Dec. 156.

Ida.—Coombs v. Collins, 6 Ida. 536, 57 Pac. 310.

Ill.—Second Nat. Bank v. Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Watkins v. Petefish, 49 Ill. App. 80.

Ind.—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

Nev.—Sharon v. Shaw, 2 Nev. 289, 90 Am. Dec. 546; Doak v. Brubaker, 1 Nev. 218.

Pa.—Stephens v. Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. Rep. 868.

Vt.—Flanagan v. Wood, 33 Vt. 332; Sleeper v. Pollard, 28 Vt. 709, 67 Am. Dec. 741.

80. Russell v. Haltom & Lester (Ark.), 89 S. W. 471.

against the creditors of the vendor,[81] and a delivery of a part for the whole applies to all goods embraced in the contract of sale, although they happen to be scattered in different and distant places, even if in the hands of a person having a lien upon them.[82]

§ 21. **Intangible property.**— The rules pertaining to a change of possession of goods and chattels upon a sale or pledge thereof, and the dominion required to be exercised by a purchaser, mortgagee, or pledgee of tangible property, cannot be applied to a sale or pledge of indebtedness intangible in itself, only the evidence of which, if in writing, is perceptible. The conditions are not the same, and the rules of law applicable to transfers of the two classes of property differ. As to one, the possession of which is evidence of ownership, the dealings must be open, visible, and public; while as to the other the business may be, as it usually is, private. The necessities of business require it. Aside from the provisions of the bankrupt law prohibiting preferences and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit.[83] Debts and accounts on the books of an assignor,[84] an equity of redemption in stocks and bonds which have been pledged,[85] rights or benefits under an executory contract,[86] and other choses in action,[87] are not "goods and chattels" within the contemplation of the statute, and may be assigned by transfer and notice to the debtor. So a liquor tax certificate issued under the liquor tax law of New York is per-

81. Leonard v. Davis, 1 Black (U. S.), 476, 17 L. Ed. 222; Hobbs v. Carr, 127 Mass. 532; Macomber v. Parker, 30 Mass. 175; Thompson Mfg. Co. v. Smith, 67 N. H. 409, 29 Atl. 405.

82. Legg v. Willard, 34 Mass. 140, 28 Am. Dec. 282.

83. Stackhouse v. Holden, 66 App. Div. (N. Y.) 423, 73 N. Y. Supp. 203.

84. Stackhouse v. Holden, *supra;* Kane v. Drake, 27 Ind. 29; Schawacker v. Ludington, 77 Mo. App. 415.

85. National Hudson River Bank v. Chaskin, 28 App. Div. (N. Y.) 311, 51 N. Y. Supp. 64.

86. Frankfort Chair Co. v. Buchanan, 21 Ky. L. Rep. 269, 51 S. W. 179.

87. Young v. Upson, 115 Fed. (U. S. C. C. N. Y.) 192; Livingston v. Littell, 15 Wis. 218.

sonal property, but it is not a chattel, and a transfer thereof as security for a loan is valid without change of possession.[88] The words "goods and chattels" do not include choses in action, but only personal property which is visible, tangible, and movable.[89] The sale of personal property is void as to creditors, unless possession is given before they acquire rights in the same; and if personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor, to seizure and attachment in behalf of his creditors. This rule of law extends to the sale of a promissory note or bill of exchange,[90] and to corporate stocks and bonds.[91]

§ 22. **Delivery of bill of sale.**—The delivery of a bill of sale or bill of parcels of the property sold to the purchaser, for a valuable consideration, with no actual delivery of the goods or chattels, when the property is reasonably susceptible of actual delivery, or with no symbolical delivery, is not sufficient to pass the title as against attaching creditors of the seller or subsequent purchasers in good faith.[92]

§ 23. **Possession of land on which personal property is situated.**—Where goods described in a bill of sale are in the posses-

88. Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184, *aff'g* 20 App. Div. 483, 47 N. Y. Supp. 38.

89. Booth v. Keloe, 71 N. Y. 341; State Trust Co. v. Casino Co., 19 App. Div. (N. Y.) 344, 46 N. Y. Supp. 492; Haskins v. Kelley, 1 Rob. (N. Y.) 170; Marsh v. Woodbury, 42 Mass. 436; Bacon v. Bonham, 27 N. J. Eq. 212; Kilbourne v. Fay, 29 Ohio St. 264.

90. Hill v. Hanney, 15 La. Ann. 654.

91. Pinkerton v. Manchester & L. R. Co., 42 N. H. 424.

92. *Ark.*—Davis v. Meyer, 47 Ark. 210, 1 S. W. 95.

Me.—McKee v. Garcelon, 60 Me. 165, 11 Am. Rep. 200.

Mass.—Dempsey v. Gardner, 127 Mass. 381, 34 Am. Rep. 389; Burge v. Cone, 87 Mass. 412; Veazie v. Somerby, 86 Mass. 280; Rourke v. Bulleus, 74 Mass. 549; Packard v. Wood, 70 Mass. 307; Carter v. Willard, 36 Mass. 1; Shumway v. Rutter, 24 Mass. 56, 25 Mass. 443, 19 Am. Dec. 340; Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119.

Mo.—Mitchell v. Tinsley, 83 Mo. App. 386.

Nev.—Cornaita v. Kyle, 19 Nev. 38, 5 Pac. 666.

N. H.—Flagg v. Pierce, 58 N. H.

sion of the vendee, or upon his premises, no formal delivery is necessary to pass the property. When the purchaser of personal property takes possession of the real estate on which it is situated this carries with it the possession of the personal property, and neither a temporary or permanent removal of the property is required.[93] But the securing of a deed or acquiring of title to the land is not sufficient to establish possession of personal property thereon in the grantee, where the grantor remains in possession and control of the land,[94] unless he is in possession and control as a tenant or agent of the purchaser.[95] Where a purchaser, however, buys a farm with the personal property on it and puts his deed on record and enters upon the premises and assumes full control of the property, this is sufficient where neither of the parties reside upon the premises.[96]

§ 24. **Delivery to common carrier.**—A delivery of goods to a common carrier on board the cars at the seller's place of residence, upon a previous order of the purchaser, and the consignment of the cars to the purchaser at his place of residence, is a complete delivery to and invests the title in the purchaser, as against attaching creditors of the seller.[97]

§ 25. **Vendee already in possession.**—Where the goods or chattels described in a bill of sale are at the time it is made and delivered already in the possession and under the exclusive control of the vendee or his agent, the sale is complete, and a

348; Solomons v. Chesley, 58 N. H. 238.

93. Gilligan v. Lord, 51 Conn. 562; Elmer v. Welch, 47 Conn. 56; Nichols v. Patten, 18 Me. 231, 35 Am. Dec. 713; Weeks v. Prescott, 53 Vt. 57; Burrows v. Stebbins, 26 Vt. 659; Stephenson v. Clark, 20 Vt. 624.

94. Dorman v. Soto (Cal. 1894), 36 Pac. 588; Weeks v. Prescott, 53 Vt. 57; Flanagan v. Wood, 33 Vt. 332; Stiles v. Shumway, 16 Vt. 435.

95. Banning v. Marleau, 101 Cal. 238, 35 Pac. 772; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Visher v. Webster, 13 Cal. 58.

96. Wilson v. Hooper, 12 Vt. 653, 36 Am. Dec. 366.

97. Hope Lumber Co. v. Foster, etc., Hardware Co., 53 Ark. 196, 13 S. W. 731; Everett v. Taylor, 14 Utah, 243, 47 Pac. 75.

formal delivery is not necessary to make the sale good as against the creditors of the vendor.[98] The rule is the same where a partner or a tenant in common of personalty sells his interest to his partner or cotenant already in possession.[99] On a sale of partnership goods by a partner to his copartner, a delivery of the property is necessary to the validity of the sale; but such delivery consists rather in the surrender of the possession and control of the goods, than in the actual tradition of them by the seller to the purchaser.[1]

§ 26. **Separation or marking of property purchased.**—The rule that an absolute sale of chattels capable of removal is fraudulent as to the seller's creditors if the same remain in his possession applies where the property sold was separated from the vendor's stock, but remained under his control,[2] and even where it was separated and marked with the buyer's brand.[3] But when the vendee takes possession of property not readily removable, and, without removing it, causes it to be marked or cards placed thereon with his name, or notice of ownership, thereon, this is a sufficient change of possession to make the sale valid as against creditors.[4] Some actual possession, however,

98. Lake v. Morris, 30 Conn. 201; Nichols v. Patten, 18 Me. 231, 35 Am. Dec. 713; Martin v. Adams, 104 Mass. 262; Warden v. Marshall, 99 Mass. 305; Macomber v. Parker, 30 Mass. 175; Edwards v. Edwards, 54 Mich. 347, 19 N. W. 164. See also Banning v. Marleau, 101 Cal. 238, 35 Pac. 772.

99. Cushing v. Breed, 96 Mass. 376, 92 Am. Dec. 777; Macomber v. Parker, 30 Mass. 175; Kittridge v. Sumner, 23 Mass. 50; Beaumont v. Crane, 14 Mass. 400; Yank v. Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522.

1. Shurtleff v. Willard, 36 Mass. 202.

2. Windmueller v. Van Horne, 44 Ill. App. 143; Harts v. Jones, 21 Ill. App. 150; Frieberg v. Sanger (Tex.), 12 S. W. 1136; Moss v. Sanger, 75 Tex. 321, 12 S. W. 616.

3. Vance v. Boynton, 8 Cal. 554; Burchinell v. Weinberger, 4 Colo. App. 6, 34 Pac. 911; Stewart v. Nelson, 79 Mo. 522; Dougherty v. Haggerty, 96 Pa. St. 515; Eagle v. Eichelberger, 6 Watts (Pa.), 29.

4. Byxbee v. Dewey (Cal. 1896), 47 Pac. 52; Waldie v. Dole, 29 Cal. 555; Hawkins v. K. C. Hydraulic Press Brick Co., 63 Mo. App. 64; Tognini v. Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442; Ayers v. McCandless, 147 Pa. St. 49, 23 Atl. 344,

other than stenciling the vendee's name on the side of railroad cars must be proved to make a valid sale against creditors,[5] and merely putting a red dot on certain ties by the vendee is not a taking of possession sufficient against the vendor's creditors.[6] Where cattle purchased while running at large were separated from the other cattle of the seller at the time of the sale, but were afterwards allowed to run with them as before, there was not such a change of possession as to constitute a valid sale;[7] and so where the cattle were never separated from other cattle.[8] But it has been held that where certain horses in a corral were sold to a *bona fide* purchaser for value, and were given a distinguishing mark at the time of the sale, and then immediately turned on the vendor's range in the actual possession of no one, that there was a sufficient change of possession, though only constructive.[9] Whether the acts of separation and marking or identification which might constitute a delivery did or did not amount to a delivery may be a question for the jury.[10]

§ 27. **Time of delivery — Must be within reasonable time.**— A delivery of property must be made at the time of the sale, or within a reasonable time thereafter, or with such convenient promptness as the transaction warrants. Delivery within a reasonable time is an immediate change of possession within the meaning of the statute. No definite rule is laid down as to what is a reasonable time, but it must be determined by the circumstances of the given case, such as the nature, condition, and situation of the property at the time of the transaction.[11] Where

20 Wash. L. Rep. 560; Haynes v. Hunsicker, 26 Pa. St. 58.

5. Rafferty v. McKennan (Pa. 1885), 1 Atl. 546.

6. Stewart v. Nelson, 79 Mo. 522.

7. Sutton v. Ballou, 46 Iowa, 517.

8. Crane v. Timberlake, 81 Mo. 431.

9. Dodge v. Jones, 7 Mont. 121, 14 Pac. 707.

10. Wylie v. Kelly, 41 Barb. (N. Y.) 594.

11. *N. Y.*—Drury v. Wilson, 4 App. Div. 232, 38 N. Y. Supp. 538; Kellogg v. Wilkie, 23 How. Pr. 233.

U. S.—Kleinschmidt v. McAndrews, 117 U. S. 282, 6 Sup. Ct. 761, 29 L. Ed. 905.

Ala.—Bank of Alabama v. McDade, 4 Port. 252.

there is evidence as to the circumstances surrounding the transfer, the question whether or not there was an immediate delivery is one for the jury.[12]

§ 28. **Change of possession before levy.**—The rule is generally maintained that upon a *bona fide* sale of personalty, if an absolute bill of sale, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the property is seized upon execution or attachment, or the adverse rights of any creditor of the vendor attaches, or a specific lien upon it is otherwise acquired, the change of possession is sufficient and the sale is good as against the vendor's creditors.[13]

Cal.—Feeley v. Boyd, 143 Cal. 282, 76 Pac. 1029, 60 L. R. A. 943; Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95; Porter v. Bucher, 98 Cal. 454, 33 Pac. 335; Hogan v. Cowell, 73 Cal. 211, 14 Pac. 780.

Colo.—Bailey v. Johnson, 9 Colo. 365, 12 Pac. 209, one day.

Conn.—Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685; Seymour v. O'Keefe, 44 Conn. 128, twelve days held an unreasonable time; Ingraham v. Wheeler, 6 Conn. 277.

Del.—Miller v. Lacey, 7 Houst. 8, 30 Atl. 640; Sanders v. Clark, 6 Houst. 462.

Ill.—Cruikshanks v. Cogswell, 26 Ill. 366; Hardin v. Sisson, 36 Ill. App. 383.

La.—Russell v. Keefe, 28 La. Ann. 928.

Mo.—McIntosh v. Smiley, 107 Mo. 377, 17 S. W. 979; Bishop v. O'Connell, 56 Mo. 158; Bass v. Walsh, 39 Mo. 192; Cunningham v. Ashbrook, 20 Mo. 553; Dillin v. Kincaid, 70 Mo. App. 670; Kendall Boot, etc., Co. v. Bain, 46 Mo. App. 581; State v. Hellman, 20 Mo. App. 304; Kane v. Stern, 13 Mo. App. 581.

Mont.—O'Gara v. Lowry, 5 Mont. 427, 5 Pac. 583, one day's delay does not necessarily render the sale void.

Pa.—McMarlan v. English, 74 Pa. St. 296; Chase v. Garrett, 1 Pa. Cas. 16, 1 Atl. 912; Wilt v. Franklin, 1 Bin. 502, 2 Am. Dec. 474.

Tex.—Osborn v. Koenigheim, 57 Tex. 91.

Utah.—White v. Pease, 15 Utah, 170, 49 Pac. 416.

12. Kellogg v. Wilkie, 23 How. Pr. (N. Y.) 233; Porter v. Bucher, 98 Cal. 454, 33 Pac. 335; Bailey v. Johnson, 9 Colo. 365, 12 Pac. 209; State v. Hellman, 20 Mo. App. 304.

13. *Conn.*—Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685.

Ida.—Cornwall v. Mix, 3 Ida. 687, 34 Pac. 893.

Iowa.—Blake v. Graves, 18 Iowa, 312.

La.—Brown v. Glathary, 4 La. Ann. 124.

Mass.—Adams v. Wheeler, 27 Mass. 199; Shumway v. Rutter, 25 Mass. 443, 19 Am. Dec. 340; Bartlett v. Williams, 18 Mass. 288.

Mo.—Halderman v. Stillington, 63 Mo. App. 212; Toney v. Goodley, 57

But in some jurisdictions it is held that a sale of personal property, unaccompanied by immediate delivery, is void as to creditors, under the statute requiring immedate delivery and a continued change of possession to validate such a sale, though the property is delivered before levy of the creditor's execution thereon.[14]

§ 29. **Assignment in trust for creditors.**—Retention of the possession of property by an assignor for the benefit of creditors consistent with the terms and object of the deed of assignment is not fraudulent as to creditors. The assignee has a reasonable time to reduce the property to possession, and the fact of the retention by the assignor of the assigned property does not necessarily show fraud and render the assignment void, but, with other conduct of the parties after the assignment, is for the consideration of the jury on the question of fraud and is susceptible of explanation.[15] The title to an estate assigned for creditors passes to the assignee upon the execution, delivery, and recording of the assignment, with the right in him to reduce the property to possession within a reasonable time; and no lien is acquired superior to the assignee's title by levies, made under execution thereafter coming into the sheriff's hands, although the assignee

Mo. App. 235; Markey v. Umstattd, 53 Mo. App. 20. *Contra.*—Franklin v. Gumersell, 9 Mo. App. 84, 11 Mo. App. 306.

Nev.—Clute v. Steele, 6 Nev. 335.

Vt.—Kendall v. Samson, 12 Vt. 515.

Va.—Carr's Adm'rs v. Glasscock's Adm'r, 3 Gratt. 343; McKinley v. Ensell, 2 Gratt. 333; Snyder v. Gee, 4 Leigh, 535.

14. Edwards v. Sonoma Val. Bank, 59 Cal. 148; Watson v. Rodgers, 53 Cal. 401; Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493; Autrey v. Bowen, 7 Colo. App. 408, 29 N. E. 1036.

15. *Conn.*—Ingraham v. Wheeler, 6 Conn. 277.

Ky.—Christopher v. Covington, 2 B. Mon. 357; Vernon v. Morton, 8 Dana, 247.

Mich.—Stamp v. Case, 41 Mich. 267, 2 N. W. 27, 32 Am. Rep. 156.

Mo.—Goodwin v. Kerr, 80 Mo. 276.

Ohio.—Johnson v. Sharp, 31 Ohio St. 611, 27 Am. Rep. 529.

Pa.—Mitchell v. Willock, 2 Watts & S. 253; Wilt v. Franklin, 1 Binn. 502, 2 Am. Dec. 474.

is not at the time in possession of the assigned property, if he is acting with reasonable diligence in his efforts to get possession.[16]

§ 30. **Possession remaining with mortgagor.**—In the absence of a statute, a chattel mortgage of all the goods and stock in trade of the mortgagor is not *per se* void because of a provision contained in it, allowing the mortgagor to remain in possession of it and to sell and dispose of the mortgaged property in the usual course of trade, but upon condition that he will account to the mortgagee and apply the proceeds of such sales to the payment of the debt which the mortgage secures; but the question of good faith is for the jury.[17] Such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect, and it is impossible that any fraud or injury to others can be imputed to the agreement. The mortgagor becomes the agent of the mortgagee, and the proceeds are a satisfaction of the mortgage debt *pro tanto,* whether paid over or not.[18] But a chattel mortgage

16. Lowe v. Matson, 140 Ill. 108, 29 N. E. 1036, *rev'g* 35 Ill. App. 602.

17. *N. Y.*—Brackett v. Harvey, 91 N. Y. 214; Brown v. Kiefer, 71 N. Y. 610; Frost v. Warren, 42 N. Y. 204; Russell v. Winne, 37 N. Y. 591, 97 Am. Dec. 755; Miller v. Lockwood, 32 N. Y. 293; Conkling v. Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Ford v. Williams, 24 N. Y. 359; Ostrander v. Fay, 3 Abb. Dec. 431, 2 Keyes, 586; Southard v. Pinckney, 5 Abb. N. C. 184.

U. S.—Davis v. Turner, 120 Fed. 605 56 C. C. A. 669.

Ala.—Thornton v. Cook, 97 Ala. 630, 12 So. 403.

Kan.—Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171.

Mass.—Hall v. Tay, 131 Mass. 192; Jones v. Huggeford, 44 Mass. 515.

Mont.—Noyes v. Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

Neb.—Lepin v. Coon, 54 Neb. 664, 74 N. W. 1079.

N. C.—Cheatham v. Hawkins, 76 N. C. 335, 80 N. C. 161, such a transaction approaches the verge of being on its face fraudulent in law, but is not so.

N. D.—Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

Ohio.—Kleine v. Katzenberger, 20 Ohio St. 110, 5 Am. Rep. 630.

S. D.—Meyer Boot, etc., Co. v. Shenkberg Co., 11 S. D. 620, 80 N. W. 126.

Tenn.—McGrew v. Hancock (Ch. App.), 52 S. W. 500.

Tex.—Scott v. Alford, 53 Tex. 82.

18. Brackett v. Harvey, 91 N. Y.

permitting the mortgagor to remain in possession and sell the stock and use the proceeds generally in his business, or appropriate them or any part of them to his own use or for his own benefit, is fraudulent and void in law, as against the creditors of the mortgagor.[19] And where the chattels mortgaged are of a perishable nature, the use of which consists in their consumption, as the conversion of growing timber into lumber, a mortgage reserving to the mortgagor the right of possession and use in the prosecution of his business is fraudulent *per se*.[20]

§ 31. **Effect of retaining vendor's sign.**—It has been held that although a purchaser of a stock of goods notifies the clerks that they are to act for him, and the vendor thenceforth has no further control with the purchaser's consent, if the latter permits the goods to remain without taking down the vendor's sign, the change of possession is not so unequivocal as to be a valid delivery, as against the vendor's creditors.[21] Likewise that a change of possession is not effected by merely installing the seller's brother as a clerk, without otherwise indicating any change in the business,[22] or where the vendee did not take personal possession, and the same manager and clerks continued in charge without objection, paid bills made out in the name of the vendor, and the name of the vendor continued on the windows of the store and in the newspaper advertisements of the business.[23] But

214; Conkling v. Shelley, 28 N. Y. 360; Robinson v. Elliott, 22 Wall. (U. S.) 524.

19. Brackett v. Harvey, 91 N. Y. 214; Southard v. Benner, 72 N. Y. 424; Black v. Fuller, 4 Neb. (Unoff.) 303, 93 N. W. 1010; Robinson v. Baugh (Tenn. Ch. App. 1900), 61 S. W. 98; McTeer v. Huntsman (Tenn. Ch. App. 1898), 49 S. W. 57; Collins v. Corwith, 94 Wis. 514, 69 N. W. 349; Blakeslee v. Rossman, 43 Wis. 116.

20. Acme Lumber Co. v. Hoyt, 71 Miss. 106, 14 So. 464; Harman v. Hoskins, 56 Miss. 142; Ewing v. Cargill, 13 Sm. & M. (Miss.) 79; Farmers' Bank v. Douglass, 11 Sm. & M. (Miss.) 469; Simpson v. Mitchell, 8 Yerg. (Tenn.) 417; Sommerville v. Horton, 4 Yerg. (Tenn.) 541, 26 Am. Dec. 242; Darwin v. Handley, 3 Yerg. (Tenn.) 502.

21. Wright v. McCormick, 67 Mo. 426.

22. Revercomb v. Duker, 74 Mo. App. 570.

23. Howard v. Dwight, 8 S. D. 398, 66 N. W. 935.

a *bona fide* sale of the contents of a store, accompanied by delivery to and possession by the vendee, is not rendered void as against creditors by the fact that the signs and signboards remain unchanged,[24] nor because the vendee failed to remove a curtain having the vendor's name on it, when his acts were otherwise sufficient to constitute an open and notorious change of possession.[25] Especially so, where there is no evidence of a restoration of possession to the vendor, and the bill of sale was publicly recorded and public advertisement made of the sale to and that the business would be conducted by the vendee.[26] That the old sign was not removed, nor any new one set up, are not facts sufficient to overcome other evidence of facts showing open, notorious and unequivocal change of possession.[27]

§ 32. **Notice of transaction — Publicity and notoriety.**—The presumption of fraud created by the failure to deliver immediate possession does not arise where the transfer is founded on a valuable consideration and there is no intention in fact to defraud creditors, and the instrument of transfer is recorded pursuant to law or otherwise given publicity and notoriety, as publicity avoids the fraud which the statute provides against.[28]

§ 33. **Judicial and public sales.**—The statute of frauds, which makes sales of personal property void where the possession remains in or returns to the vendor, and the rule that retention of possession of personal property by the vendor is *prima facie* evidence of fraud, do not apply to judicial sales or public sales at

24. Hugus v. Robinson, 24 Pa. St. 9, although the vendor remained in the store, settling up his own business and assisting in selling goods.

25. Huels v. Boettger, 40 Mo. App. 310. See also Pollard v. Farwell, 48 Mo. App. 42.

26. Benjamin v. Madden, 94 Va. 66, 26 S. E. 392.

27. Greenthal v. Lincoln, 68 Conn. 384. See also Burchinell v. Smidle, 5 Colo. App. 417, 38 Pac. 1097, where also the bill of fare in a restaurant, which was the subject of the sale, had not been changed to indicate the change of ownership.

28. Lowe v. Watson, 140 Ill. 108, 29 N. E. 1036; Seehler Carriage Co. v. Dryden, 71 Ill. App. 583.

auction, as the publicity and notoriety of the sale take away any presumption of fraud which might otherwise arise from such possession. The continuance in possession of personal property, after the property has been in good faith publicly sold under execution or under a mortgage or deed of trust is not even *prima facie* evidence of fraud, so as to subject the property to the creditors of the grantor or execution debtor, especially when purchased by a third person or a stranger to the proceeding.[29] The rule

29. *Ala.*—Wyatt v. Stewart, 34 Ala. 716; Montgomery's Ex'rs v. Kirksey, 26 Ala. 172; Creagh v. Savage, 14 Ala. 454; Simerson v. Branch Bank, 12 Ala. 205; Anderson v. Brooks, 11 Ala. 953; Abbey v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Ravisies v. Alston, 5 Ala. 297.

Cal.—Mattencci v. Whelan, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 60. See also O'Brien v. Chamberlain, 50 Cal. 285.

Del.—Pennington v. Chandler, 5 Harr. 394; Perry v. Foster, 3 Harr. 293.

Ill.—Lowe v. Watson, 140 Ill. 108, 29 N. E. 1036; Hanford v. Obrecht, 49 Ill. 146.

Ky.—Allen v. Johnson, 27 Ky. 235; Kilby v. Haggin, 26 Ky. 208; Greathouse x. Brown, 21 Ky. 280, 17 Am. Dec. 67; Howe v. Lillard, 7 Ky. L. Rep. 298.

La.—Porche v. Labatut, 33 La. Ann. 544; Holms v. Barbin, 15 La. Ann. 553. But see D'Armand v. Sheriff, 21 La. Ann. 198.

Miss.—Ewing v. Cargill, 21 Miss. 79; Foster v. Pugh, 20 Miss. 416; Garland v. Chambers, 19 Miss. 337, 49 Am. Dec. 63.

Mo.—Thompson v. Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885; Clark v. Cox, 118 Mo. 652, 24 S. W. 221; Lampert v. Haydel, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L. R. A. 113; Gutzweiler v. Lachman, 28 Mo. 434.

Pa.—Bisbing v. Third Nat. Bank, 93 Pa. St. 79, 39 Am. Rep. 726; Smith v. Chrisman, 91 Pa. St. 428; Maynes v. Atwater, 88 Pa. St. 496; Appeal of Craig, 77 Pa. St. 448; Schott v. Chancellor, 20 Pa. St. 195; Walter v. Gernant, 13 Pa. St. 515; Staller v. Kirkpatrick, 1 Monag. 486; Sharp v. Congregational Pub. Co., 2 Pa. Co. Ct. 620; Dick v. Lindsay, 2 Grant. 431; Lover v. Mann, 2 Am. L. J. N. S. 95.

S. C.—Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Richardson v. Mounce, 19 S. C. 477; Garrett v. Rhame, 9 Rich. 407, 67 Am. Dec. 557; Guignard v. Aldrich, 10 Rich. Eq. 253; Poole v. Mitchell, 1 Hill, 404; Coleman v. Bank of Hamburg, 2 Strob. Eq. 285, 49 Am. Dec. 671.

Tenn.—Carlock v. Atlee (Ch. App. 1899), 53 S. W. 186; Floyd v. Goodwin, 16 Tenn. 484, 29 Am. Dec. 130.

Vt.—Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. 39; Austin v. Soule, 36 Vt. 645; Gates v. Gaines, 10 Vt. 346; Bates v. Carter, 5 Vt. 602; Batchelder v. Carter, 2 Vt. 168, 19 Am. Dec. 707; Boardman v. Keeler, 1 Aik. 158, 15 Am. Dec. 670.

Va.—Roberts Adm'r v. Kelly, 2

declaring void a sale of personalty as to attaching creditors, unless there is a change of possession, does not apply to a *bona fide* sale made by a sheriff on execution, after compliance with all legal formalities, even though the execution creditor is himself the purchaser.[30] But in New York, where the statute, with its presumptions founded upon non-delivery and absence of changed possession, draws no distinction between modes of transfer, a sale of chattels under execution is fraudulent as to creditors, if there is no change of possession, whether the plaintiff in the execution or a third person be the purchaser.[31]

§ 34. **Effect of knowledge or notice as to existing creditors.**—The doctrine of notice is not applicable to the sales of personal or movable property, and the existing creditors may seize and sell when there has been no delivery of possession, although informed of an agreement to sell, and where one purchases a chattel from another against whom an execution is about to be levied on such chattel, and pays the amount of such execution, he is not affected with notice of a prior transfer or lien without a change of possession.[32] Notice is not a substitute for change of possession, so as to render valid a sale of personal property.[33]

§ 35. **Effect of knowledge or notice as to subsequent creditors and purchasers.**—A sale of personal property whereof the seller remains in possession is valid against his subsequent creditor or

Pat. & H. 396; Carr v. Glasscock, 3 Gratt. 343; Wilson v. Butler, 3 Munf. 559.

30. Huebler v. Smith, 62 Conn. 186, 25 Atl. 658.

31. Stimson v. Wrigley, 86 N. Y. 332; Masten v. Webb, 19 Hun (N. Y.), 172; Gardenier v. Tubbs, 21 Wend. (N. Y.) 169; Fonda v. Gross, 15 Wend. (N. Y.) 628; Taylor v. Mills, 2 Edw. Ch. (N. Y.) 318; Dickenson v. Cook, 17 Johns. (N. Y.) 332; Farrington v. Caswell, 15 Johns. (N. Y.) 430. But see Woodworth v. Woodworth, 21 Barb. (N. Y.) 343; Acker v. White, 25 Wend. (N. Y.) 614; Brown v. Wilmerding, 12 N. Y. Super. Ct. 220.

32. Rothchild v. Swope, 116 Cal. 670, 48 Pac. 911; Lassiter v. Bussy, 14 La. Ann. 699; Stark v. Ward, 3 Pa. St. 328; Warwick Iron Co. v. First Nat. Bank, 10 Pa. Cas. 14, 13 Atl. 79; Perrin v. Reed, 35 Vt. 2.

33. Hart v. Farmer's & Mechanics' Bank, 33 Vt. 252.

a subsequent purchaser having knowledge of the sale when the debt was contracted.[34] A sale of which a judgment creditor had notice before his rights attached cannot be attacked by him on the ground that the property has not been delivered.[35] A gift will be supported against subsequent creditors with notice, although the donor retain possession after the gift.[36] But where a statute makes a sale, without delivery or change of possession, void as against subsequent creditors or purchasers, the fact that a subsequent attaching creditor knew of the sale, and continued to deal with the debtor as "manager," is immaterial.[37]

§ 36. **Constructive notice and want of it — Recording instrument of transfer.**— Where an instrument is not authorized or required by law to be recorded, the recording of it does not constitute notice to any one.[38] Since it is not necessary to the validity of a contract between husband and wife, based upon consideration of marriage, that it should be recorded, or that any publicity or notoriety should be given to it, secrecy or concealment in such a case is not evidence of fraud.[39] But if an instrument be duly recorded according to law, it is notice to all persons, no matter who is in possession of the property affected by it.[40]

§ 37. **Effect of failure to record or file instrument in general.** —Under the recording statutes, where the grantee or mortgagee withholds his conveyance from record and permits the grantor

34. Vanmeter v. Estill, 78 Ky. 456.

35. Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245.

36. Madden v. Day, 1 Bailey (S. C.) 587.

37. Harkness v. Smith, 2 Ida. 952, 28 Pac. 423.

38. Fechheimer v. Baum, 43 Fed. 719, 2 L. R. A. 153, the fact that an agreement by a debtor to prefer a certain creditor in case of insolvency is not recorded, does not render it fraudulent; Bassinger v. Spangler, 9 Colo. 175, 10 Pac. 809, the statute requiring change of possession applies, whether or not the seller's creditors are aware of the sale.

39. Cochran v. McBeath, 1 Del. Ch. 187.

40. Mitchell v. Steelman, 8 Cal. 363.

or mortgagor to retain possession and the apparent title, the transaction, although it may be valid as between the parties, will not stand as against creditors of the grantor or mortgagor who, in ignorance of the conveyance, have credited him on the strength of his ownership of the property, or upon the faith of his apparent title.[41] The right of a creditor to subject the prop-

41. *N. Y.*—Raymond v. Richmond, 78 N. Y. 351; Chemung Canal Bank v. Payne, 22 App. Div. 353, 47 N. Y. Supp. 877.

U. S.—Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; Hodgson v. Butts, 7 U. S. 140, 2 L. Ed. 391; Clayton v. Macon Exch. Bank, 121 Fed. 630, 57 C. C. A. 656; Corwine v. Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442.

Ala.—Griffin v. Hall, 129 Ala. 289, 29 So. 783; Watt v. Parsons, 73 Ala. 202.

Ark.—Sumpter v. Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577; Bunch v. Schaer, 66 Ark. 98, 48 S. W. 1071.

Cal.—Stafford v. Lick, 7 Cal. 479.

Conn.—Curtis v. Lewis, 74 Conn. 367, 50 Atl. 878.

Fla.—American Freehold Land, etc., Co. v. Maxwell, 39 Fla. 489, 22 So. 751; Campbell Printing Press Co. v. Walker, 22 Fla. 412, 1 So. 59.

Ga.—Ross v. Cooley, 113 Ga. 1047, 39 S. E. 471.

Ill.—Lewis v. Lanphere, 79 Ill. 187.

Ind.—National State Bank v. Sandford Fork, etc., Co., 157 Ind. 10, 60 N. E. 699.

Iowa.—Lemert v. McKibben, 91 Iowa, 345, 59 N. W. 207; Miller v. Bryan, 3 Iowa, 58.

Ky.—Scrivenor v. Scrivenor, 7 B. Mon. 374.

La.—First Nat. Bank v. Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379.

Me.—Shaw v. Wilkshire, 65 Me. 485.

Mich.—Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; Talcott v. Crippen, 52 Mich. 633, 18 N. W. 392.

Minn.—Baker v. Pottle, 48 Minn. 479, 51 N. W. 383.

Miss.—Charlotte Supply Co. v. Britton, etc., Bank (1898), 23 So. 630; Loughridge v. Bowland, 52 Miss. 546; Hilliard v. Cagle, 46 Miss. 309.

Mo.—Singer Mfg. Co. v. Stephens, 169 Mo. 1, 69 S. W. 903, although the owner did not have actual knowledge of the obtaining of the credit; Williams v. Kirk, 68 Mo. App. 457; Sauerwein v. Renard Champagne Co., 68 Mo. App. 29; Sauer v. Behr, 49 Mo. App. 86.

N. J.—Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

Or.—Davis v. Bowman, 25 Or. 189, 35 Pac. 264.

Pa.—Hartley v. Millard, 167 Pa. St. 322, 31 Atl. 641.

Tenn.—Williams v. Walton, 16 Tenn. 387, 29 Am. Dec. 122; Douglass v. Morford, 16 Tenn. 373; Malone v. Brown (Ch. App. 1897), 46 S. W. 1004.

Tex.—Puckett v. Reed, 3 Tex. Civ. App. 350, 22 S. W. 515; Russell v.

erty of one having title thereto to the debt of another, on the theory that credit was extended to the possessor on the faith of his apparent ownership, rests on purely equitable ground, the doctrine of equitable estoppel, the underlying principle of which is that the owner, by concealing his title, permitted the person in possession and use of the property to commit a fraud on the creditor.[42] It has been held also that the grantee or mortgagee is estopped by his laches from asserting his interest in the property.[43] But withholding a deed or mortgage from record is not fraudulent as to creditors, in the absence of evidence that the grantor or mortgagor thereby obtained a fictitious credit and that his creditors extended credit to him in reliance on his unincumbered ownership of the property.[44]

Nall, 2 Tex. Civ. App. 60, 20 S. W. 1006, 23 S. W. 901.

Va.—Grasswitt's Assignee v. Connally, 27 Gratt. 19; Lewis v. Caperton, 8 Gratt. 148; Shirley v. Long, 6 Rand. 764.

Wash.—Deggenger v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 Pac. 898, a transfer of a liquor license is void as to creditors where the instrument of transfer is not recorded and the assignor retains possession of the license.

Wis.—Kickbush v. Corwith, 108 Wis. 634, 85 N. W. 148; Van Dusen v. Hinz, 108 Wis. 178, 84 N. W. 151.

A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors. Moore v. Wood (Tenn. Ch. App. 1901), 61 S. W. 1063.

42. Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. Supp. 753; Ross v. Cooley, 113 Ga. 1047, 39 S. E. 471. See cases cited in the last preceding note.

43. Sumpter v. Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577.

44. *N. Y.*—Castleman v. Mayer, 55 App. Div. 515, 67 N. Y. Supp. 229; Hardin v. Dolge, 46 App. Div. 416, 16 N. Y. Supp. 753.

U. S.—Corwine v. Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442.

Ala.—Danner Land, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184.

Del.—Cochran v. McBeath, 1 Dec. Ch. 187.

Ga.—Trounstine v. Irving, 91 Ga. 92, 16 S. E. 310.

Ill.—German Ins. Co. v. Bartlett, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172; Earl v. Earl, 186 Ill. 370, 57 N. E. 1079.

Ind.—State Bank v. Backus, 160 Ind. 682, 67 N. E. 512.

Iowa.—Atkinson v. McNider (1905), 105 N. W. 504; Ward v. Parker (1905), 103 N. W. 104, in the absence of an agreement that it shall be so withheld; Groetzinger v. Wyman, 105 Iowa, 574, 75 N. W. 512; Brown v. Bradford, 103 Iowa, 378, 72 N. W. 648; Lemert v. McKibben, 91

§ 38. **Rule as to conveyances of real estate.**—The rule, in the case of sales of personal property, that retention of or continuance in possession by the vendor amounts to fraud as matter of law or is *prima facie* evidence that the conveyance was fraudulent, does not apply to sales of real estate, and continuance in possession by a grantor of real estate after conveyance, while a circumstance to be considered with the other evidence, does not in itself warrant the legal conclusion that the conveyance was fraudulent.[45] The

Iowa, 345, 59 N. W. 207.

Ky.—United States Bank v. Huth, 43 Ky. 423.

Mich.—Campbell v. Remaly, 112 Mich. 214, 70 N. W. 432, 67 Am. St. Rep. 393.

Mo.—Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Gentry v. Field, 143 Mo. 399, 45 S. W. 286; First Nat. Bank v. Rohrer, 138 Mo. 369, 39 S. W. 1047; Jones v. Levering, 116 Mo. App. 377, 91 S. W. 980, in the absence of an agreement that it should be so withheld.

Neb.—News Pub. Co. v. Tyndale, 2 Neb. (Unoff.) 256, 96 N. W. 125.

N. J.—Andrus v. Burke, 61 N. J. Eq. 297, 48 Atl. 228.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86.

Wis.—McFarlane v. Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

See also Concealment of or failure to record conveyance, chap. VI, § 16, *supra*.

Delay in recording not available to subsequent creditor.—The fact alone that deeds conveying property were withheld from record by the grantee for a number of years affords no ground for setting aside such deeds in a creditors' suit by a judgment creditor of the grantor whose judgment was not obtained until after they were recorded, although it is entitled to consideration on the question of the *bona fides* of the transaction; nor does the further fact that during such time portions of the lands were sold and deeds were made to the purchasers by the grantor, who still held the title of record, sustain a claim of fraud, where it is shown that the proceeds were paid to the grantee. Brown v. Easton, 112 Fed. 592.

An unrecorded mortgage being absolutely void until it is recorded, until that time amounts to no more than an agreement to give a mortgage, and the mere fact that it was withheld from record does not constitute fraud as against other creditors as to whom it would have created a valid lien, if executed, at the time it was filed. In re Shirley, 112 Fed. 301, 50 C. C. A. 252.

45. *N. Y.*—Clute v. Newkirk, 46 N. Y. 684; Willis v. Willis, 79 App. Div. 9, 79 N. Y. Supp. 1028; Every v. Edgerton, 7 Wend. 259.

U. S.—Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Phettiplace v. Sayles, 19 Fed. Cas. No. 11,083, 4 Mason, 312.

Ala.—Miller v. Rowan, 108 Ala. 98, 19 So. 9; Tompkins v. Nichols, 53 Ala. 197; Noble v. Coleman, 16 Ala. 77; Paulling v. Sturgus, 3 Stew. 95.

title to real estate is evidenced by possession, not of the thing, but of the title deeds, which, like manual occupation in the case of a chattel, is the criterion.[46] But the fact that a grantor, after executing a conveyance, remains in possession, is a circumstance proper to be considered as tending to show fraud, and a long and unexplained continuance of the grantor's possession taken in connection with other suspicious circumstances may be sufficient to establish that the sale was colorable and fraudulent and that some trust for the grantor's benefit was intended.[47] An absolute

But see Cooper v. Davison, 86 Ala. 367, 5 So. 650.

Ark.—Godfrey v. Herring (1905), 85 S. W. 232; Apperson v. Burgett, 33 Ark. 328.

Conn.—Tibbals v. Jacobs, 31 Conn. 428.

Ga.—Smith v. McDonald, 25 Ga. 377; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Ind.—Pennington v. Flock, 93 Ind. 378; Tedrowe v. Esher, 56 Ind. 443.

Iowa.—Suiter v. Turner, 10 Iowa, 517.

Ky.—Anglin v. Conley, 114 Ky. 741, 24 Ky. L. Rep. 1551, 71 S. W. 926; Screvenor v. Screvenor, 46 Ky. 374.

La.—Cole v. Cole, 39 La. Ann. 878, 2 So. 794; Spivey v. Wilson, 31 La. Ann. 653; Parmer v. Mangham, 31 La. Ann. 348; Richardson v. Cramer, 28 La. Ann. 357; Hobgood v. Brown, 2 La. Ann. 323.

Md.—Thompson v. Williams, 100 Md. 195, 60 Atl. 26.

Mo.—Stam v. Smith, 183 Mo. 464, 81 S. W. 1217; King v. Moore, 42 Mo. 551; Stewart v. Thomas, 35 Mo. 202.

N. H.—Merrill v. Locke, 41 N. H. 486.

N. J.—Dresser v. Zabriskie (Ch. 1898), 39 Atl. 1066.

Ohio.—Barr v. Hatch, 3 Ohio, 527. But see Starr v. Starr, 1 Ohio, 321.

Or.—Marks v. Crow, 14 Or. 382, 13 Pac. 55.

Pa.—Allentown Bank v. Beck, 49 Pa. St. 394; Avery v. Street, 6 Watts, 247.

S. C.—Kid v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Va.—Keagy v. Trout, 85 Va. 390, 7 S. E. 329.

46. Avery v. Street, 6 Watts (Pa.), 247; see also other cases in last preceding note.

47. *N. Y.*—Clute v. Newkirk, 46 N. Y. 684; Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733; Willis v. Willis, 79 App. Div. 9, 79 N. Y. Supp. 1028.

Ala.—Miller v. Rowan, 108 Ala. 98, 19 So. 9; Cooper v. Davison, 86 Ala. 367, 3 So. 650; Noble v. Coleman, 16 Ala. 77; Ravisies v. Alston, 5 Ala. 297.

Ark.—Apperson v. Burgett, 33 Ark. 328.

Ind.—Tedrowe v. Esher, 56 Ind. 443.

La.—Cole v. Cole, 39 La. Ann. 878, 2 So. 794.

Miss.—Wooten v. Clark, 23 Miss. 75.

Mo.—King v. Moon, 42 Mo. 551.

Ohio.—Starr v. Starr, 1 Ohio, 321.

S. C.—Anderson v. Fuller, 1

conveyance of property, by a person at the time largely indebted, especially when this indebtedness is about to ripen into judgments, and his subsequent possession and continued enjoyment of the property, create such a presumption of fraud as to require clear and satisfactory proof of its fairness.[48] Where, after an absolute conveyance by a debtor in failing circumstances, he remains in possession of the land, without contract and without accounting for its use, these facts are evidence of fraudulent intent.[49] In some cases, it has been held that a conveyance of real estate is fraudulent *per se*, and void as to creditors, if the grantor continues to hold possession of the premises.[50] In other cases the retention of possession by the grantor of land is held to be *prima facie* evidence that the conveyance was fraudulent.[51] Possession of land and receipt by the grantor of the profits after an absolute conveyance is evidence of fraud, unless such possession be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood.[52] The presumption of fraud is stronger where the conveyance was made to near relatives of the grantor.[53] The provisions of the New York statutes declaring sales or mortgages of chattels void as against creditors, when not filed or followed by actual and continued change of possession, do not apply to leases of real estate.[54]

McMul. Eq. 27, 36 Am. Dec. 290; Hipp v. Sawyer, 1 Rich. Eq. 410.

Tex.—Hancock v. Horan, 15 Tex. 507.

48. Johnston v. Dick, 27 Miss. 277; Owens v. Foley, 30 Tex. Civ. App. 86, 69 S. W. 811.

49. Collins v. Taggart, 57 Ga. 355; Timms v. Timms, 54 W. Va. 414, 46 S. E. 141.

50. *Ga.*—Mitchell v. Stetson, 64 Ga. 442.

Ky.—Short v. Tinsley, 58 Ky. 397, 71 Am. Dec. 482.

N. J.—Embury v. Klemm, 30 N. J. Eq. 517.

Vt.—Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252.

51. Cooper v. Davidson, 86 Ala. 367, 5 So. 650; Perkins v. Patten, 10 Ga. 241; Van Hook v. Walton, 28 Tex. 59; Hancock v. Horan, 15 Tex. 507.

52. Alexander v. Todd, Fed. Cas. No. 175, 1 Bond, 175; Noble v. Coleman, 16 Ala. 77.

53. Dennis v. Ball-Warren Commission Co. (Ark. 1903), 77 S. W. 903; Perrine v. Perrine (N. J. Ch. 1901), 50 Atl. 694.

54. Booth v. Kehoe, 71 N. Y. 341.

§ 39. **Growing crops.**—What is delivery depends on the circumstances of the sale. If one sells a field of corn standing on his farm, and the buyer does not commence to harvest it, nor otherwise visibly to take charge of the corn or control the field on which it stands, the actual possession is not changed. Obviously there can be no actual delivery of standing or growing crops without putting the vendee in possession of the land itself.[55] Hence, the rule that possession must accompany the title, or a sale will be void as to subsequent purchasers and creditors of the vendor, does not extend to a growing crop, which is not susceptible of delivery, and which cannot, without destroying it, be removed at the time.[56] Growing periodical or annual crops, produced by the industry of the owner of the soil, *fructus industriales,* are not goods and chattels within the meaning of the statute of frauds, of which a sale, in order to be valid as against creditors of the vendor, must be followed by an immediate delivery and continued change of possession, and not being susceptible of manual delivery until harvested and reduced to actual possession, they pass by conveyance from the necessity of the case.[57] The purchaser of standing crops need not take actual manual possession thereof until it is time to harvest them,[58] and a suffi-

55. Noble v. Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399; Smith v. Champney, 50 Iowa, 174, possession is changed within the meaning of the statute when the instrument evidencing the sale is recorded; Raventas v. Green, 57 Cal. 254, an unripe growing crop may be levied upon by attachment, and the levy is valid if the statutory notice and copies of the writ are served, on defendant, although the sheriff does nothing further until the crop is ripe, when he gathers it; Brantom v. Griffits, 2 C. P. D. 212, 46 L. J. C. P. 408, 36 L. T. Rep. N. S. 4, 25 Wkly. Rep. 313.

56. Morton v. Ragan, 68 Ky. 334. The sale of a growing crop of tobacco, paid for by the vendee, which the vendor was to cut and cure, is not constructively fraudulent as to creditors merely because the vendor retained possession. Cummins v. Griggs, 63 Ky. 87, 87 Am. Dec. 482; Robbins v. Oldham, 62 Ky. 28.

57. O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; Quiriaque v. Dennis, 24 Cal. 154; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Bours v. Webster, 6 Cal. 661.

58. Ticknor v. McClelland, 84 Ill. 471; Thompson v. Wilhite, 81 Ill. 356; Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Bull v. Griswold, 19

cient change of possession of a crop purchased while growing takes place where the purchaser immediately after the crop is harvested puts it in sacks marked with his initials in a pile by itself.[59] Where a lessee conveyed to his lessor, by an instrument executed with all the formalities of a lease, all the crops which might be grown upon the leased premises during the term, a delivery of possession of the crops, after they were harvested, was not necessary to make the lessor's title to them valid, as against attaching creditors.[60] Where a field of growing wheat is sold, the storage of the wheat in sheaf in the seller's barn, and a delay of weeks, will not prevent constructive possession being in the buyer, or operate as a fraud on creditors so as to render the wheat liable to execution as the property of the seller.[61] A purchaser of a growing crop may maintain trespass against a subsequent lessee of the premises on which the crop is growing, who interferes with his rights to remove the crop.[62] But the sale of a growing crop standing in the field, where the possession is permitted to remain with the vendor for his own benefit and where only a portion of the crop not particularly described or bounded was the subject of the sale, is fraudulent *per se* and void as to creditors and subsequent purchasers.[63] As we have said, what is a sufficient delivery or transfer of possession depends upon the circumstances of the sale.[64] Growing perennial crops, *fructus*

Ill. 631. The buyer of a large growing crop of corn may have the vendor crib it on the premises, and the quantity then be ascertained and agreed upon. This will be a valid delivery as against the vendor's creditors. Vaughn v. Owens, 21 Ill. App. 249.

59. Ticknor v. McClelland, 84 Ill. 471.

60. Bellows v. Wells, 36 Vt. 599.

61. Emery v. Scarlett, 8 Pa. Co. Ct. 123.

62. Dutton v. Wetmore, 10 Pa. Super. Ct. 530.

63. Davis v. Shepherd, 87 Ill. App. 467. A mortgage of growing grain, which provided that the mortgagor was to care for, cut, thresh and sell the grain, and the mortgagee was to be paid out of the proceeds, was fraudulent, as there was no change of possession. Welsh v. Bekey, 1 Pen. & W. (Pa.) 57.

64. State v. Durant, 53 Mo. App. 493, there is no sufficient delivery of a crop of standing corn, where the bargain therefor is made at another place, and the purchaser first visits the place where the corn is located

naturales, the natural products of the land, such as grass, trees, and the emblements, are incident to the ownership of the realty, and title to them will not pass by a constructive delivery or until they are harvested and delivered, as against the vendor's creditors.[65]

§ 40. **Burden of proof.**—In a contest with creditors who seek to set aside as fraudulent a sale by the debtor, where the sale was not followed by an immediate delivery and a continued change of possession, the burden is upon the grantee to show that the sale was made in good faith and without any intent to defraud creditors.[66]

more than a month after the bargain, and merely walks through it, without any other act to give notoriety to the sale, especially where the contract provides that the seller shall gather the corn and feed it to the purchaser's cattle; State v. Casteel, 51 Mo. App. 143, where the purchaser of two patches of standing corn, to be penned or thrown into piles at his choice, rode through both patches, and made a substantial payment on each, there was a good change of possession, as against a creditor of the seller levying after one patch had been cut and partly shocked.

65. Stone v. Peacock, 35 Me. 385; Lamson v. Patch, 87 Mass. 586, 81 Am. Dec. 765, plucking a handful of half-grown grass, and delivering it to a purchaser in a field, upon the sale of the grass, with an agreement that the vendor shall cut it for the vendee at the proper time, is not a constructive delivery of the hay, as a chattel, which will pass a title to it as against third persons.

66. *N. Y.*—Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275.

Ala.—Teague v. Bass, 131 Ala. 422, 31 So. 4.

Ark.—Coche v. Chapman, 7 Ark. 197, 44 Am. Dec. 536. *Compare* Shaul v. Harrington, 54 Ark. 305.

Ind.—Rose v. Colter, 76 Ind. 590.

Ken.—Phillips v. Reitz, 16 Kan. 396.

La.—Baldwin v. Bond, 45 La. Ann. 1012, 13 So. 742.

Me.—Hartshorn v. Eames, 31 Me. 93.

Mich.—Angell v. Pickard, 61 Mich. 561, 28 N. W. 680.

Miss.—Comstock v. Rayford, 12 Sm. & M. 369. *Compare* Summers v. Roos, 42 Miss. 749, 9 Am. Dec. 653.

Mo.—Albert v. Besel, 88 Mo. 150.

Neb.—Snyder v. Dangler, 44 Neb. 600, 63 N. W. 20.

N. J.—Beakley v. Nelson, 56 N. J. Eq. 674, 39 Atl. 912.

Tenn.—Grubbs v. Greer, 5 Coldw. 160.

Tex.—Mills v. Walton, 19 Tex. 271.

Va.—Curd v. Miller, 7 Gratt. 185.

W. Va.—Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

See also cases cited Retention of possession as evidence of fraud, chap. XII, § 1, *supra;* Evidence where there is no change of possession, chap. XVII, § 11, *infra.*

CHAPTER XIII.

FRAUDULENT KNOWLEDGE AND INTENT.

Section 1. Intent of grantor to hinder, delay or defraud creditors.
2. Intent to defraud one or more creditors.
3. Accomplishment of purpose; knowledge and intent of grantee.
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5. Effect of want of knowledge or notice where transfer is voluntary.
6. Effect of knowledge or notice where transfer is to one not a creditor.
7. Effect of proper application of proceeds.
8. Knowledge of co-grantee.
9. Effect of knowledge or notice where transfer is to a creditor; participation in fraudulent intent where debt is sole consideration.
10. Participation in fraudulent intent where debt is only part of consideration.
11. Recital of false consideration.
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20. Matters of common or general knowledge.
21. Knowledge or notice of indebtedness or insolvency of grantor.
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23. Sale of business and entire stock of goods.
24. Knowledge or notice of the pendency of suits against the grantor.
25. Knowledge that debtor is about to abscond.
26. What inquiry is sufficient.
27. Examination of books and papers.
28. Knowledge of, or notice to, agent.
29. Knowledge or notice implied from relation of parties.
30. Transactions founded on consideration.

Section 1. **Intent of grantor to hinder, delay, or defraud creditors.**—To constitute a transfer of property fraudulent and render it void as against creditors, it must have been made, as a general rule, with intent on the part of the debtor to defraud,

delay, or hinder creditors; and to obtain the setting aside of a conveyance as fraudulent as against creditors, the plaintiff must prove that the grantor made the conveyance with intent to hinder, delay, or defraud his creditors.[1] To avoid a conveyance as being fraudulent as against creditors, there must have existed a design

1. *N. Y.*—Truesdale v. Sarles, 104 N. Y. 164, 10 N. E. 139; Bedell v. Chase, 34 N. Y. 386; Allen v. Cowan, 23 N. Y. 502, 80 Am. Dec. 316; McCormick v. Wilder, 61 App. Div. 619, 70 N. Y. Supp. 627; Pochel v. Read, 20 App. Div. 208, 46 N. Y. Supp. 775.

U. S.—Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; In re Jewett, 3 Fed. 503; Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

Ala.—Griffin v. Stoddard, 12 Ala. 783.

Ark.—Norton v. McNutt, 55 Ark. 59, 17 S. W. 362; Erb v. Cole, 31 Ark. 554.

Cal.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576.

Ga.—Powell v. Westmoreland, 60 Ga. 572; Nicol v. Crittenden, 55 Ga. 497.

Ill.—Bowden v. Bowden, 75 Ill. 143; Hovey v. Holcomb, 11 Ill. 660.

Ind.—Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146.

Iowa.—Atkinson v. McNider (1905), 105 N. W. 504; Dunham v. Bentley, 103 Iowa, 136, 72 N. W. 437; Drummond v. Couse, 39 Iowa, 442.

Kan.—Van Vliet v. Halsey, 37 Kan. 116, 14 Pac. 482.

Ky.—Griffith v. Cox, 79 Ky. 562.

La.—Byrne v. Hiberbia Bank, 31 La. Ann. 81; Ziques v. Rivas, 16 La. Ann. 402; Wederstrandt v. Marsh, 11 Rob. 533; La Fleur v. Hardy, 11 Rob. 493; Planters' Bank v. Watson, 9 Rob. 267; Taylor v. Whittemore, 2 Rob. 99; Potier v. Harman, 1 Rob. 527.

Me.—Stevens v. Robinson, 72 Me. 381.

Md.—Zimmer v. Miller, 64 Md. 296, 1 Atl. 858.

Mass.—Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 957; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; King v. Cram, 185 Mass. 103, 69 N. E. 1049.

Mich.—Ryan v. Meyer, 108 Mich. 638, 66 N. W. 667; Warren v. Carpenter, 99 Mich. 287, 58 N. W. 308; First Nat. Bank v. Buck, 56 Mich. 394, 23 N. W. 57; Hollister v. Loud, 2 Mich. 309.

Minn.—Horton v. Williams, 21 Minn. 187.

Mo.—Sibly v. Hood, 3 Mo. 290; Gens v. Hargadine, 56 Mo. App. 245.

Neb.—Brower v. Fass, 60 Neb. 590, 83 N. W. 832.

N. C.—Worthy v. Brady, 91 N. C. 265; Moore v. Hinnant, 89 N. C. 455.

N. D.—Dalrymple v. Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Ohio.—Creed v. Lancaster Bank, 1 Ohio St. 1.

Pa.—Ahl's Appeal, 129 Pa. 49, 18 Atl. 475; Ditman v. Raule, 124 Pa. St. 225, 16 Atl. 819; McKibben v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Heiney v. Anderson, 9 Lanc. Bar, 13.

S. C.—Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Hamilton v.

on the part of the debtor to prevent the application of the whole or a part of his property to the payment of his debts.[2] It is not enough that he intended to satisfy or secure one creditor at the expense of others. A transfer out of the usual course of business and tending to create a preference is insufficient as evidence of fraud.[3] Where a conveyance is voluntary, and therefore fraudulent and void as to then existing creditors of the debtor, though without intent to defraud, the intention of the parties is immaterial and actual fraudulent intent on the part of the grantor need not be shown.[4] The nature of the intent ordinarily will not be presumed as matter of law, but must be inferred by the jury from the facts in evidence.[5] By statute in some cases and in

Greewood, 1 Bay, 173, 1 Am. Dec. 607.

S. D.—Gardner v. Haines (1905), 104 N. W. 244.

Tenn.—Floyd v. Goodwin, 8 Yerg. 484, 29 Am. Dec. 130.

Tex.—Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863.

W. Va.—Douglass Merchandise Co. v. Laird, 37 W. Va. 687, 17 S. E. 188; Duncan v. Custard, 24 W. Va. 730; Bishoff v. Hartley, 9 W. Va. 100.

Wis.—Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148.

Can.—Carr v. Corfield, 20 Ont. 218; Gottwalls v. Mulholland, 15 U. C. C. P. 62.

Eng.—In re Holland (1902), 2 Ch. 360, 9 Manson, 259, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 50 Wkly. Rep. 575.

Insolvency of the debtor is not an indispensable element in the proof of a fraudulent intent as to creditors; it is only an item of evidence on this issue. The intent may have been fraudulent, notwithstanding the solvency of the debtor; it may have been innocent notwithstanding his insolvency. Weeks v. Hill, 88 Me. 111, 33 Atl. 778; Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; Hastings v. Crossland, 13 Mo. App. 592; Arnold v. Peoples, 13 Tex. Civ. App. 26, 34 S. W. 755. See also Insolvency of debtor, chap. VII, *supra*.

2. Nicholson v. Leavitt, 4 Sandf. (N. Y.) 252; Alabama Life Ins. Co. v. Peltway, 24 Ala. 544; Wheaton v. Neville, 19 Cal. 41; Lucas v. Claflin, 76 Va. 269.

3. Roberts v. Burr, 135 Cal. 156, 67 Pac. 46; Lucas v. Clafflin, 76 Va. 269. See Preferences, chap. XI, *supra*.

4. Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; James v. Mallory (Ark. 1905), 89 S. W. 472; Farmers', etc., Bank v. Price, 41 Mo. App. 291; Bouquet v. Heyman, 50 N. J. Eq. 114, 24 Atl. 266. See Effect of want of consideration as to existing creditors, chap. VIII, § 32, *supra*.

5. Nicol v. Crittenden, 55 Ga. 497. See also Evidence of knowledge and intent, chap. XVII, § 35, *infra;* Questions for jury, chap. XVIII, § 4, *infra*.

others by the established rule of law, the question of fraudulent intent is made one of fact and not of law,[6] and is to be determined from all the facts and circumstances of the case.[7] A fraudulent intent cannot be deduced from what the law pronounces honest,[8] and where the circumstances attending a conveyance are consistent either with a fraudulent intent or honesty of purpose, fraud will not be imputed.[9] Where, however, the operation of a conveyance or the effect of a transaction by a debtor is to hinder, delay, or defraud creditors, an intent so to do is imputed to the parties, and to avoid a transfer, on the ground that it operates to

6. *U. S.*—Atlas Nat. Bank v. Abram French Sons Co., 134 Fed. 746.

Cal.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Harris v. Burns, 50 Cal. 140, by statute.

Ill.—Bowden v. Bowden, 75 Ill. 143; Eickstaedt v. Moses, 105 Ill. App. 634.

Ind.—Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146; Pence v. Croan, 51 Ind. 336, by statute.

Iowa.—McCreary v. Skinner, 83 Iowa, 362, 49 N. W. 986; Davenport v. Cummings, 15 Iowa, 219.

Me.—Wheelden v. Wilson, 44 Me. 11.

Md.—Zimmer v. Miller, 64 Md. 296, 1 Atl. 858.

Mich.—Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679; Baldwin v. Buckland, 11 Mich. 389.

Minn.—Hicks v. Stone, 13 Minn. 434.

Mo.—Burgert v. Borchert, 59 Mo. 80.

N. D.—Stevens v. Myers, 104 N. W. 529, by statute.

Tex.—Weisiger v. Chisholm, 28 Tex. 780.

W. Va.—Reynolds v. Gawthrop, 37 W. Va. 3, 16 S. E. 364.

See also Evidence of knowledge and intent, chap. XVII, § 35, *infra;* Questions for jury, chap. XVIII, § 4, *infra.*

7. *U. S.*—Rea v. Missouri, 17 Wall. 532, 21 L. Ed. 707; Warner v. Norton, 20 How. 448, 15 L. Ed. 950; Foster v. Lincoln, 79 Fed. 170, 24 C. C. A. 470.

Colo.—Eversman v. Clements, 6 Colo. App. 224, 40 Pac. 575.

Ill.—Young v. Ward, 115 Ill. 264, 3 N. E. 512.

Md.—Ecker v. McAllister, 45 Md. 290.

Mass.—Winchester v. Charter, 102 Mass. 272.

Mich.—Gumberger v. Treusch, 103 Mich. 543, 61 N. W. 872; Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483.

Minn.—Riddell v. Munro, 49 Minn. 532, 52 N. W. 141.

W. Va.—Lockhard v. Beckley, 10 W. Va. 87.

Eng.—In re Holland (1902), 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson, 259, 50 Wkly. Rep. 575.

8. Shibler v. Hartley, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811.

9. Drummond v. Couse, 39 Iowa, 442.

hinder and delay the creditors of the grantor therein, it is not necessary to show that the act of the grantor therein was corruptly fraudulent. If the conveyance hinders and delays creditors, it is fraudulent in law, irrespective of the motives of the grantor. Every man is presumed by the law to intend the natural and necessary consequences of his acts, and in such case the law presumes the intent to defraud because the fraud is a necessary consequence of the act or acts established.[10] Every

10. *N. Y.*—Spotten v. Keeler, 12 St. Rep. 385, 22 Abb. N. C. 105; Angrave v. Stone, 25 How. Pr. 167.

U. S.—Barber v. Coit, 144 Fed. 381; Thompson v. Crane, 73 Fed. 327; Fleischman v. Bowser, 62 Fed. 259, 10 C. C. A. 370.

Ala.—McDowell v. Steele, 87 Ala. 493, 6 So. 288; Sims v. Gaines, 64 Ala. 392; Pope v. Wilson, 7 Ala. 690.

Cal.—Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

Colo.—Knapp v. Day, 4 Colo. App. 21, 34 Pac. 1008.

Del.—Logan v. Brick, 2 Del. Ch. 206.

Fla.—McKeown v. Allen, 37 Fla. 490, 20 So. 556; Logan v. Logan, 22 Fla. 561, 10 Am. St. Rep. 212; Gibson v. Love, 4 Fla. 217.

Ill.—Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51; Marmon v. Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Lawson v. Funk, 108 Ill. 502; Bell v. Devore, 96 Ill. 217; Ramsey v. Nichols, 73 Ill. App. 643.

Ind.—Ewing v. Gray, 12 Ind. 64.

Iowa.—Runnels v. Smith, 89 Iowa, 636, 57 N. W. 589.

Md.—Farrow v. Hayes, 51 Md. 498; Schuman v. Peddicord, 50 Md. 560; Whedbee v. Stewart, 40 Md. 414.

Mich.—Viers v. Detroit Paper Package Co., 119 Mich. 192, 77 N. W. 700; Cutcheon v. Buchanan, 88 Mich. 594, 50 N. W. 756; Fellows v. Smith, 40 Mich. 689; Oliver v. Eaton, 7 Mich. 108; Buck v. Sherman, 2 Dougl. 176.

Minn.—Greenleaf v. Edes, 2 Minn. 264.

Miss.—Marks v. Bradley, 69 Miss. 1, 10 So. 922; Harman v. Hoskins, 56 Miss. 142; Henderson v. Downing, 24 Miss. 106; Arthur v. Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Seger v, Thomas, 107 Mo. 635, 18 S. W. 33; Payne v. Stanton, 59 Mo. 158; Potter v. McDowell, 31 Mo. 62; Dunham-Buckley v. Halberg, 69 Mo. App. 509.

Neb.—Selz v. Hocknell, 63 Neb. 503, 88 N. W. 767, 62 Neb. 101, 86 N. W. 905.

N. J.—Cook v. Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

N. C.—Booth v. Carstarphen, 107 N. C. 395, 12 S. E. 375; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672; Boone v. Hardie, 87 N. C. 72, 83 N. C. 470; Cheatham v. Hawkins, 80 N. C. 161.

Ohio.—Jones v. Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480; Brannon v. Purcell, 8 Ohio Dec. 159, 6 Cinc. L. Bul. 67; Johnson v. Burn-

party, it is held in New York, must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary and necessarily operate to defraud others, he must be deemed to have intended the fraud.[11] There can be no fraud in law or in fact without a breach of some legal or equitable duty, and although there may be fraud in law where no actual fraudulent intent is proved, it exists only when the acts upon which it is based carry in themselves inevitable evidence of it independently of the motive of the actor.[12] But it has been held that while it is true, in general, that a man is presumed to intend the natural and probable consequences of his own acts, it is not true that he is presumed to intend all their necessary consequences; that consequences may be necessary, and yet quite remote and unexpected; and that the fact that a given act was followed necessarily by delay to creditors, in the particular case, however strong as a circumstance to be weighed by the jury, is not ground for presuming, as matter of law, that it was intended to have that effect.[13] It is not necessary, in order to render a conveyance void, that there should have been an intent to hinder,

side, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

Or.—Crawford v. Beard, 12 Or. 447, 8 Pac. 537.

Pa.—McKibben v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Appeal of Kisterbock, 51 Pa. St. 483; Clark v. Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Hays v. Heidelberg, 9 Pa. St. 203.

R. I.—Robinson v. McKenna, 21 R. I. 117, 42 Atl. 510, 79 Am. St. Rep. 793; Eichenberg v. Marcy, 18 R. I. 169, 26 Atl. 46.

Tenn.—Churchill v. Wells, 47 Tenn. 364.

Tex.—Miller v. Jannett, 63 Tex. 82.

Va.—Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756. *Compare* Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

11. Coursey v. Morton, 132 N. Y. 556, 30 N. E. 231; Colcman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160; Babcock v. Eckler, 24 N. Y. 623; Ford v. Williams, 24 N. Y. 359; Wilson v. Robertson, 21 N. Y. 587; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Briggs v. Mitchell, 60 Barb. 288; New York Commercial Co. v. Carpenter, 4 Misc. Rep. 240, 24 N. Y. Supp. 248; Cunningham v. Freeborn, 11 Wend. 240; Sieling v. Clark, 18 Misc. Rep. 464, 41 N. Y. Supp. 982. But such presumption may be rebutted by competent evidence. Filkins v. People, 69 N. Y. 101.

12. Delaney v. Valentine, 154 N. Y. 692, 49 N. E. 65.

13. Nicol v. Crittenden, 55 Ga. 497.

delay, and defraud creditors, but an intent either to hinder, or to delay, or to defraud is sufficient; the statute being in the disjunctive, either intent is held to be sufficient.[14] A debtor may sell his property, though the effect of the sale is to hinder creditors, if the sale is an honest one, made in good faith and for a valuable consideration, and is not made for the purpose of hindering creditors.[15] And a debtor, although in failing circumstances or insolvent, may make such sale or disposition of his property, in good faith, as he may deem necessary to meet his obligations and pay off his creditors, although such sale may in fact hinder and delay creditors, and the fact that the sale hinders or delays creditors will not avoid it.[16] It is not enough that the effect of a conveyance is to delay creditors. It must be executed with such

14. *N. Y.*—McConnell v. Sherwood, 84 N. Y. 522, either intent, both by the common law and the statute, is a fraud; Buell v. Rope, 6 App. Div. 113, 39 N. Y. Supp. 479; Warner v. Lake, 14 N. Y. Supp. 10.

Ala.—Lehman v. Kelly, 68 Ala. 192.

Ill.—Adams v. Pease, 113 Ill. App. 356.

Iowa.—McCreary v. Skinner, 75 Iowa, 411, 39 N. W. 674.

Mo.—Rupe v. Alkire, 77 Mo. 641; Dougherty v. Cooper, 77 Mo. 528; Coon v. Beardsley, 68 Mo. 435; Burgert v. Borchert, 59 Mo. 80; Baer v. Lisman, 85 Mo. App. 317; Dunham-Buckley v. Halberg, 69 Mo. App. 509; State v. Nauert, 2 Mo. App. 295.

Neb.—Foley v. Doyle, 1 Neb. (Unoff.) 643, 95 N. W. 1067; Knapp v. Fisher, 58 Neb. 651, 79 N. W. 553.

N. C.—Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

Tex.—Ellis v. Valentine, 65 Tex. 532; Cook v. Greenberg (Civ. App. 1896), 34 S. W. 687; Houston, etc., R. Co. v. Shirley (Civ. App. 1894), 24 S. W. 809.

Va.—Quarles v. Kerr, 14 Gratt. 48.

W. Va.—Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402; Lockhard v. Buckley, 10 W. Va. 87.

Wis.—Norwegian Plow Co. v. Hawthorn, 71 Wis. 529, 37 N. W. 825; David v. Birchard, 53 Wis. 492, 10 N. W. 557; Pilling v. Otis, 13 Wis. 495.

Can.—Murthau v. McKenna, 14 Grant Ch. (U. C.) 59. *Compare* Meade v. Smith, 16 Conn. 346.

15. In re Strenz, 8 Fed. 311; Hessing v. McCloskey, 37 Ill. 341; Forrester v. Moore, 77 Mo. 651; Rupe v. Alkire, 77 Mo. 641; Dougherty v. Cooper, 77 Mo. 528; Gardner v. Haines (S. D.), 104 N. W. 244.

16. Pochel v. Read, 20 App. Div. (N. Y.) 208, 46 N. Y. Supp. 775; Lowery v. Howard, 35 Ind. 170, 9 Am. Rep. 676; Farwell v. Norton, 77 Ill. App. 685; State v. Purcell, 131 Mo. 312, 33 S. W. 13; Adam Roth Grocery Co. v. Ashton, 69 Mo. App. 463.

an intent and purpose. The fact that a conveyance may incidentally delay or hinder creditors, or does actually hinder and delay creditors, is not sufficient to make it void, if there was no intent on the part of the grantor.[17] A trust mortgage given by an insolvent corporation to secure creditors which requires all creditors to accept its terms before they can take any benefit therefrom, and if their debts become due before the mortgage to so extend the time of payment that they cannot be enforced until after the mortgage matures, a period of ninety days, and thus places the property of the mortgagor beyond the reach of creditors for an indefinite period, constrains the creditors to forego, by affirmative action, a right provided by law, and hinders and delays creditors, within the meaning of the statute against fraudulent conveyances, and is therefore void.[18]

§ 2. **Intent to defraud one or more creditors.**—It is not necessary in order to vitiate a sale or conveyance by a debtor that he intended to defraud all of his creditors. If a conveyance is made with intent to defraud one existing creditor or some of the creditors, it is fraudulent and the conveyance is rendered void as to

17. *U. S.*—Strauss v. Abrahams, 32 Fed. 310.

Ill.—Murry Nelson & Co. v. Leiter, 93 Ill. App. 176, *aff'd* 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

Ind. T.—Noyes v. Tootle, 2 Ind. T. 144, 48 S. W. 1031.

La.—Succession of Coyle, 32 La. Ann. 79; United States v. United States Bank, 8 Rob. 262.

Mass.—Kimball v. Thompson, 4 Cush. 441, 50 Am. Dec. 799.

Miss.—Ingraham v. Grigg, 13 Sm. & M. 22.

Mo.—State v. Estel, 6 Mo. App. 6; State v. Laurie, 1 Mo. App. 371.

N. H.—McCormick v. Towns, 64 N. H. 278, 9 Atl. 97; True v. Congdon, 44 N. H. 48.

N. J.—Bergen v. Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523; Atwood v. Impson, 20 N. J. Eq. 150.

N. C.—Moore v. Hinnant, 89 N. C. 455.

Va.—Harvey v. Anderson, 24 S. E. 914.

U. S.—Straus v. Abrahams, 32 Fed. 310.

18. Dearing v. McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708, *citing* Grover v. Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Hyslop v. Clarke, 14 Johns. (N. Y.) 458; Marsh v. Bennett, 16 Fed. Cas. No. 9,110, 5 McLean, 117, 126.

all existing creditors; and if it is made with intent to defraud one or some of the subsequent creditors, it is fraudulent and void as to all subsequent creditors.[19] A deliberate and avowed intention on the part of a debtor who makes an assignment, that certain creditors shall not be paid out of the property assigned until a preferred class of creditors is paid, is not *per se* a fraudulent intent.[20] Whether a conveyance fraudulent as to existing creditors is fraudulent as to subsequent creditors is discussed elsewhere.[21]

§ 3. **Accomplishment of purpose.**—A mere intent to defraud on the part of a grantor does not render a conveyance fraudulent which is otherwise valid;[22] to avoid a sale as made to hinder or delay creditors of the vendor, not only such fraudulent intent, but some accomplishment thereof must be shown.[23] Fraud does not consist in mere fraudulent intention; it is something done in pursuance of the intention; something which operates prejudicially on the right of others, and which was intended to have such effect. In addition to the sale or conveyance actual fraud, hindrance, or delay resulting therefrom to creditors must be shown.[24] But it has been held that whatever the legal effect of a

19. *Ala.*—Lehman v. Kelly, 68 Ala. 192.

Conn.—Allen v. Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Ind.—Personette v. Cronkhite, 140 Ind. 586, 40 N. E. 59.

Md.—Spuck v. Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

Mass.—Washburn v. Hammond, 151 Mass. 132, 24 N. E. 33.

Mich.—Nugent v. Goldsmith, 59 Mich. 593, 26 N. W. 778; Allen v. Kinyon, 41 Mich. 281, 1 N. W. 863.

N. C.—Savage v. Knight, 92 N. C. 493, 53 Am. Rep. 423.

Pa.—Barrett v. Nealon, 119 Pa. St. 171, 12 Atl. 861, 4 Am. St. Rep. 628; Miner v. Warner, 2 Grant, 448.

Vt.—Corey v. Morrill, 71 Vt. 51, 42 Atl. 976.

20. Wilson v. Eifler, 47 Tenn. 31.

21. See Effect of fraud on pre-existing creditors, chap. V, § 4, *supra;* Effect of want of consideration as to subsequent creditors, chap. VIII, § 36, *supra.*

22. Bancroft v. Blizzard, 13 Ohio, 30.

23. Rice v. Perry, 61 Me. 145.

24. *N. C.*—Briscoe v. Norris, 112 N. C. 671, 16 S. E. 850, a conveyance from husband to wife, of lands purchased with her separate moneys and taken in his name, with her consent, upon an agreement to convey to her when requested, is not fraudulent as

deed, if the parties to it supposed that it would have the effect to hinder and delay a creditor, the fact that this object was not accomplished, would not relieve the disability attached to the fraudulent intention.[25] It is not necessarily conclusive that a conveyance was not made with fraudulent intent that aside from the property embraced therein the debtor had real estate worth more than the incumbrances on it and the unincumbered personal property within reach of creditors,[26] or that he was not insolvent,[27] though it is competent evidence tending in some measure toward that conclusion.

§ 4. Knowledge and intent of grantee; Effect of want of knowledge or notice where transfer is for a valuable consideration.—The statute of 13 Elizabeth provided among other things that a conveyance, "upon good consideration and *bona fide* law-

to creditors, in the absence of any consent on her part that the land remain in his name to enable him to acquire a fictitious credit, or any act or word on her part, which can create an estoppel.

Pa.—Williams v. Davis, 69 Pa. St. 21; Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639. See also Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51, though the purchaser of goods knew at the time of the purchase that he was unable to pay for them, and did not intend to do so, but used no actual artifice intended and fitted to deceive the vendor, the latter cannot, after delivery, avoid the contract.

Tenn.—Wagner v. Smith, 13 Lea, 560, a conveyance is not in fraud of creditors of the grantor where the rights of the grantee to the land were in any event paramount to those of the grantor's creditors, and could have been enforced notwithstanding their opposition.

Tex.—Moore v. Robinson (Civ. App. 1903), 75 S. W. 890, a transfer of property from a debtor to a creditor is not invalidated because he intended to defeat another creditor in the collection of his claim, if he transferred no more property than was reasonably sufficient to pay his debt; Ellis v. Valentine, 65 Tex. 532, a hindrance or delay contemplated and effected by a conveyance by way of preference, to render the conveyance invalid, must operate to defraud other creditors, as well as to hinder and delay them.

But see Main v. Lynch, 54 Md. 658. See also Prejudice to rights of creditors, chap. III, § 9, *supra*.

25. Drum v. Painter, 27 Pa. St. 148.

26. First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64.

27. Hager v. Shindler, 29 Cal. 47.

fully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion," shall not be fraudulent.[28] Under this and similar statutes in the United States it is held, as a general rule, that in order to vitiate a conveyance based upon a valuable consideration and render it void as to creditors on the ground that it was made with intent to defraud them, it must be shown either that the grantee had actual knowledge or notice of such fraudulent intent, or knowledge or notice of facts calculated to and which would put a reasonable and ordinarily prudent man upon inquiry which, if followed up, would lead to a discovery of such fraudulent intent of the grantor, or that the grantee participated in the fraudulent intent of the grantor.[29]

28. St. 13 Eliz. chap. 5, § 6. See Statute of 13 Elizabeth and earlier English statutes, chap. I, §§ 7, 8, *supra*.

29. *N. Y.*—Galle v. Tode, 148 N. Y. 270, 42 N. E. 673; Starin v. Kelly, 88 N. Y. 421; Dudley v. Danforth, 61 N. Y. 626; Jaeger v. Kelley, 62 N. Y. 274; Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Buongierno v. Schiller, 112 App. Div. 916, 98 N. Y. Supp. 464; Lary v. Pettit, 55 App. Div. 631, 66 N. Y. Supp. 834; Bogert v. Hess, 50 App. Div. 253, 63 N. Y. Supp. 977; Demarest v. House, 91 Hun, 290, 36 N. Y. Supp. 291; Dorr v. Beck, 76 Hun, 540, 28 N. Y. Supp. 206; Van Wyck v. Baker, 16 Hun, 168; Stowell v. Haslett, 5 Lans. 380; Holmes v. Clark, 48 Barb. 237; Newman v. Cordell, 43 Barb. 448; Carpenter v. Muren, 42 Barb. 300; Hall v. Arnold, 15 Barb. 599; Gowing v. Warner, 30 Misc. Rep. 393, 62 N. Y. Supp. 797; Ravin v. Subin, 30 Misc. Rep. 193, 61 N. Y. Supp. 1104, *rev'd* 31 Misc. Rep. 742, 64 N. Y. Supp. 138; First Nat. Bank v. Hamilton, 27 N. Y. Supp. 1029; Laidlaw v. Gilmore, 47 How. Pr. 67; Sands v. Hildreth, 14 Johns. 493.

U. S.—Rea v. Missouri, 17 Wall. 532, 21 L. Ed. 707; Clements v. Nicholson, 6 Wall. 299, 18 L. Ed. 786; Astor v. Wells, 4 Wheat. 466, 4 L. Ed. 616; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Vansickle v. Wells, 105 Fed. 16; Evans v. Mansur, etc., Implement Co., 87 Fed. 275, 30 C. C. A. 640; Moline Wagon Co. v. Rummell, 14 Fed. 155; Howe Mach. Co. v. Claybourn, 6 Fed. 438; Jenkins v. Einstein, 13 Fed. Cas. No. 7,265, 3 Biss. 128; Magniac v. Thompson, 16 Fed. Cas. No. 8,956, Baldw. 344, *aff'd* 7 Pet. 348, 8 L. Ed. 709.

Ala.—Teague v. Bass, 131 Ala. 422, 31 So. 4; Roden v. Ellis, 113 Ala. 652, 21 So. 71; Simmons v. Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39; Carter v. O'Bryan, 105 Ala. 305, 16 So. 894; Jaffrey v. McGough, 83 Ala. 202, 3 So. 594; Keel v. Lar-

This rule applies to deeds of trust, mortgages, pledges, confes-

kin, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702; Kiser v. Gamble, 75 Ala. 386; Bradley v. Ragsdale, 64 Ala. 558; Pickett v. Pipkin, 64 Ala. 520; Coleman v. Smith, 55 Ala. 368; Governor v. Campbell, 17 Ala. 566; Borland v. Mayo, 8 Ala. 104; Stover v. Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Ark.—Wallace v. Bernheim, 63 Ark. 108, 37 S. W. 712; Erb v. Cole, 31 Ark. 554; Galbreath v. Cook, 30 Ark. 417; De Prato v. Jester (1892), 20 S. W. 807.

Cal.—Grunsky v. Perlin, 110 Cal. 179, 42 Pac. 575; Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

Colo.—Riethmann v. Godsman, 23 Colo. 202, 46 Pac. 686.

Conn.—Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12; Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580; Sisson v. Roath, 30 Conn. 15.

D. C.—Droop v. Ridenour, 11 App. Cas. 224; Birdsall v. Welch, 6 D. C. 316.

Ga.—Hollis v. Sales, 103 Ga. 75, 29 S. E. 482.

Ill.—Hughes v. Noyes, 171 Ill. 575, 49 N. E. 703; Marmon v. Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70; Sawyer v. Moyer, 109 Ill. 461; Seeders v. Allen, 98 Ill. 468; Jewett v. Cook, 81 Ill. 260; Hatch v. Jordan, 74 Ill. 414; Miller v. Kirby, 74 Ill. 242; Mathes v. Dobschuetz, 72 Ill. 438; Herkelrath v. Stookey, 63 Ill. 486; Gridley v. Bingham, 51 Ill. 153; Hessing v. McCloskey, 37 Ill. 341; Meixsell v. Williamson, 35 Ill. 529; Myers v. Kinzie, 26 Ill. 36; Brown v. Riley, 22 Ill. 45; Ewing v. Runkle, 20 Ill. 448; Eickstraedt v. Moses, 105 Ill. App. 634; Edwards v. Story, 105 Ill. App. 433; Ball v. Callahan, 95 Ill. App. 615; Johnston v. Hirschberg, 85 Ill. App. 47; Oakford v. Dunlap, 63 Ill. App. 498; Rhoades, etc., Co. v. Smith, 43 Ill. App. 400; Griffin v. Wolf, 31 Ill. App. 554.

Ind.—Hedrick v. Hall, 155 Ind. 371, 58 N. E. 257; Marmon v. White, 151 Ind. 445, 51 N. E. 930; Straight v. Roberts, 126 Ind. 383, 26 N. E. 73; Neisler v. Harris, 115 Ind. 560, 18 N. E. 39; First Nat. Bank v. Carter, 89 Ind. 317; Trentman v. Swartzell, 85 Ind. 443; Moore v. Lampton, 80 Ind. 301; Brown v. Rawlings, 72 Ind. 505; Spaulding v. Myers, 64 Ind. 264; Johnston v. Field, 62 Ind. 377; Kyger v. F. Hull Skirt Co., 34 Ind. 249; McCormick v. Hyatt, 33 Ind. 546; Palmer v. Henderson, 20 Ind. 297; Ewing v. Gray, 12 Ind. 64; Stewart v. English, 6 Ind. 176; Doe v. Horn, 1 Ind. 363, 50 Am. Dec. 470; South Bend Iron Works Co. v. Duddleson (App. 1891), 27 N. E. 312; Wilson v. Clark, 1 Ind. App. 182, 27 N. E. 310.

Ind. T.—Purcell Wholesale Grocery Co. v. Bryant (1905), 89 S. W. 662.

Iowa.—Atkinson v. McNider (1905), 105 N. W. 504; Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 917; Thompson v. Zuckmayer (1903), 94 N. W. 476; Brooks v. Jones, 114 Iowa, 385, 82 N. W. 434, 86 N. W. 300; Roberts v. Press, 97 Iowa, 475, 66 N. W. 756; Davis v. Garrison, 85 Iowa, 447, 52 N. W. 359; Stroff v. Swafford, 81 Iowa,

sions of judgment, and other transfers to secure creditors,[30] as

695, 47 N. W. 1023; Kellogg v. Aherin, 48 Iowa, 299; Jones v. Hetherington, 45 Iowa, 681; Drummond v. Couse, 39 Iowa, 442; Preston v. Turner, 36 Iowa, 671; Chase v. Walters, 28 Iowa, 460; Steele v. Ward, 25 Iowa, 535; Fifield v. Gaston, 12 Iowa, 218; Miller v. Bryan, 3 Iowa, 58.

Kan.—Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634; Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; Farlin v. Sook, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100; Wilson v. Fuller, 9 Kan. 176; Diefendorf v. Oliver, 8 Kan. 365; Roach v. Barry, 5 Kan. App. 879, 48 Pac. 866.

Ky.—Anglin v. Conley, 27 Ky. L. Rep. 1177, 87 S. W. 1137, 24 Ky. L. Rep. 1551, 71 S. W. 926; Beadles v. Miller, 51 Ky. 32; Brown v. Smith, 46 Ky. 361; Brown v. Foree, 46 Ky. 357, 46 Am. Dec. 519; Boyce v. Waller, 41 Ky. 91; Violett v. Violett, 32 Ky. 323; Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397; American Brewing Co. v. McGruder, 17 Ky. L. Rep. 762, 32 S. W. 603; Farmers', etc., Nat. Bank v. Connor, 13 Ky. L. Rep. 592; Meyer v. Specker, 10 Ky. L. Rep. 116; Wiseman v. McAlpin, 6 Ky. L. Rep. 660; Allen v. Gilliland, 5 Ky. L. Rep. 320; Ferguson v. May, 4 Ky. L. Rep. 989.

La.—Chaffe v. Gill, 43 La. Ann. 1054, 10 So. 361; Lowenstein v. Fudickar, 43 La. Ann. 886, 9 So. 742; Leen Kee v. Smith, 35 La. Ann. 518; Bastian v. Christesen, 34 La. Ann. 883; Montgomery v. Wilson, 31 La. Ann. 196; Shultz v. Morgan, 27 La. Ann. 616; Billgery v. Schnell, 26 La. Ann. 467; Southern Dry Dock Co. v. Bayou Sara Packet Co., 24 La. Ann. 217; Whiting v. Prentice, 12 Rob. 141; Planters' Bank v. Watson, 9 Rob. 267; Barrett v. His Creditors, 4 Rob. 408; Thompson v. Gordon, 12 La. 260; Rhodes v. Beaman, 10 La. 363; McManus v. Jewett, 9 La. 170; Bauduc v. His Creditors, 4 La. 247; Kenney v. Dow, 10 Mart. 577, 13 Am. Dec. 342.

Me.—Tolman v. Ward, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556; Stevens v. Hinckley, 43 Me. 440; Davis v. Tibbetts, 39 Me. 279.

Md.—Crooks v. Brydon, 93 Md. 640, 49 Atl. 921; Cooke v. Cooke, 43 Md. 522; Troxall v. Applegarth, 24 Md. 163; Waters v. Riggin, 19 Md. 536.

Mass.—Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Morse v. Aldrich, 130 Mass. 578; Snow v. Paine, 114 Mass. 520; Hamilton v. Cone, 99 Mass. 478; Green v. Tanner, 49 Mass. 411; Foster v. Hall, 29 Mass. 89, 22 Am. Dec. 400; Kittredge v. Sumner, 28 Mass. 50; Harrison v. Phillips Academy, 12 Mass. 456.

Mich.—Delavan v. Wright, 110 Mich. 143, 67 N. W. 1110; Spring Lake Ins. Co. v. Waters, 50 Mich. 13, 14 N. W. 679.

Miss.—Osborn v. McCallum (1905), 38 So. 609; Tennent-Stribling Shoe Co. v. Davie, 75 Miss. 447, 23 So. 188; Ladnier v. Ladnier, 64 Miss. 368, 1 So. 492; Ewing v. Cargill, 13 Sm. & M. 79; Pope v. Andrews, S. & M. Ch. 135; Bernheim v. Dibrell (1892), 11 So. 795.

Mo.—Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213, 60 S. W. 87; Alberger v. White, 117 Mo. 347, 23 S. W. 92; State v. Mason, 112 Mo.

well as to absolute conveyances, and to transfers of personal as

374, 20 S. W. 629, 34 Am. St. Rep. 390; State v. Hope, 102 Mo. 410, 14 S. W. 985; Hurley v. Taylor, 78 Mo. 238; Byrne v. Becker, 42 Mo. 264; Wise v. Wimer, 23 Mo. 237; Little v. Eddy, 14 Mo. 160; Kelly-Goodfellow Shoe Co. v. Vail, 84 Mo. App. 94; Wachtel v. Ewing, 82 Mo. App. 594; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Simon-Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 406; Pierson v. Slifer, 52 Mo. App. 273; Gens v. Hargadine, 45 Mo. App. 38; Hausmann v. Hope, 20 Mo. App. 193.

Mont.—Curtis v. Valiton, 3 Mont. 153.

Neb.—Farmers', etc., Nat. Bank v. Mosher, 63 Neb. 130, 88 N. W. 552; Steinberg v. Buffum, 61 Neb. 778, 86 N. W. 491; Powell v. Yeazel, 46 Neb. 225, 64 N. W. 695; Blumer v. Bennett, 44 Neb. 873, 63 N. W. 14; Edwards v. Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Farrington v. Stone, 35 Neb. 456, 53 N. W. 389; Crabb v. Morrisey, 31 Neb. 161, 47 N. W. 697; Hedman v. Anderson, 6 Neb. 392.

Nev.—Gregory v. Frothingham, 1 Nev. 253.

N. H.—Currier v. Taylor, 19 N. H. 189; Badger v. Story, 16 N. H. 168.

N. J.—Kinmonth v. White (Ch. 1900), 47 Atl. 1; Flemington Nat. Bank v. Jones, 50 N. J. Eq. 244, 24 Atl. 928; Mathiez v. Day, 36 N. J. Eq. 88; Roe v. Moore, 35 N. J. Eq. 526; New York Fire Ins. Co. v. Tooker, 35 N. J. Eq. 408; Muirhead v. Smith, 35 N. J. Eq. 303; First Nat. Bank v. Irons, 28 N. J. Eq. 43, 625; Tantum v. Green, 21 N. J. Eq. 364; Atwood v. Impson, 20 N. J. Eq. 150.

N. C.—Wolf v. Arthur, 118 N. C. 890, 24 S. E. 671; Nadal v. Britton, 112 N. C. 180, 16 S. E. 914; Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482; Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Beasley v. Bray, 98 N. C. 266, 3 S. E. 497; Savage v. Knight, 92 N. C. 493, 53 Am. Rep. 423; Tredwell v. Graham, 88 N. C. 208; Lassiter v. Davis, 64 N. C. 498.

Ohio.—Bancroft v. Blizzard, 13 Ohio, 30.

Okla.—McFadyen v. Masters, 8 Okla. 174, 56 Pac. 1059; Kansas Moline Prow Co. v. Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33; Jackson v. Glaze, 3 Okla. 143, 41 Pac. 79; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

Or.—Livesley v. Heise (1906), 85 Pac. 509; Jennings v. Frazier (1905), 80 Pac. 1011; Garnier v. Wheeler, 40 Or. 198, 66 Pac. 812; Sabin v. Columbia Fuel Co., 25 Or. 15, 34 Pac. 692, 42 Am. St. Rep. 756; Bonser v. Miller, 5 Or. 110.

Pa.—Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Thompson v. Lee, 3 Watts & S. 479; Towar v. Barrington, Brightley N. P. 253. See Helfrich v. Stem, 17 Pa. St. 143.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Weinges v. Cash, 15 S. C. 44; Means v. Feaster, 4 S. C. 249.

Tenn.—Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873.

Tex.—Sanger v. Colbert, 84 Tex. 688, 19 S. W. 863; Dodd v. Gaines, 82 Tex. 429, 18 S. W. 618; Le Page v. Slade, 79 Tex. 473, 15 S. W. 496;

well as real property.[31] It is held by some of the authorities

Tillman v. Heller (1890), 14 S. W. 271; Hadock v. Hill, 75 Tex. 193, 12 S. W. 974; Collins v. Cook, 40 Tex. 238; Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331; Matador Land & Cattle Co. v. Cooper (Civ. App. 1905), 87 S. W. 235; Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786; Koch v. Bruce, 20 Tex. Civ. App. 634, 49 S. W. 1101; Garahy v. Bayley, 25 Tex. Suppl. 294; Mills v. Waller, Dall. 416; Hillholdt v. Waugh (Civ. App. 1898), 47 S. W. 829; Tempel v. Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686; Cox v. Morrison (Civ. App. 1895), 31 S. W. 67; Dittman v. Weiss (Civ. App. 1895), 31 S. W. 67; Ward v. Wofford (Civ. App. 1894), 26 S. W. 321; Bailey v. Crittenden, 3 Tex. Civ. App. Cas., § 179.

Vt.—Wilson v. Spear, 68 Vt. 145, 34 Atl. 429; Leach v. Francis, 41 Vt. 670.

Va.—Wheby v. Moir, 102 Va. 875, 47 S. E. 1005; Merchants' Bank v. Belt (1898), 30 S. E. 467; Clay v. Walter, 79 Va. 92.

W. Va.—R. M. Sutton & Co. v. Christie (1906), 53 S. E. 602; Dent v. Pickens (1906), 53 S. E. 154; Timms v. Timms, 54 W. Va. 414, 46 S. E. 141; Baer Sons Grocer Co. v. Williams, 43 W. Va. 323, 27 S. E. 345; Casto v. Fry, 33 W. Va. 449, 10 S. E. 799; Lockhard v. Beckley, 10 W. Va. 87; Bishoff v. Hartley, 9 W. Va. 100; Hill v. Ruffner, 3 W. Va. 538.

Wis.—Bannister v. Phelps, 81 Wis. 256, 51 N. W. 417; Second Nat. Bank v. Merrill, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870; Mehlhop v. Pettibone, 54 Wis. 652, 11 S. W. 553, 12 N. W. 443; Hopkins v. Langton, 30 Wis. 379. See Bleiler v. Moore, 94 Wis. 385, 69 N. W. 164; Shoemaker v. Katz, 74 Wis. 374, 43 N. W. 151.

Can.—Smith v. Moffatt, 28 U. C. Q. B. 486, 27 U. C. Q. B. 195; Bank of Montreal v. Condon, 11 Manitoba, 366; Tucker v. Young, Manitoba T. Wood, 186; Mason v. Scott, 20 Grant Ch. (U. C.) 84; Allan v. McTavish, 8 Ont. App. 440; Brown v. Sweet, 7 Ont. App. 725.

Eng.—In re Reis (1904), 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. Rep. N. S. 592, 11 Manson, 229, 20 L. T. Rep. 547, 53 Wkly. Rep. 122; Halifax Banking Co. v. Gledhill (1891), 1 Ch. 31, 60 L. J. Ch. 181, 63 L. T. Rep. N. S. 623, 39 Wkly. Rep. 104; Parnell v. Stedman, 1 Cab. & E. 153; Golden v. Gillam, 51 L. J. Ch. 503, 20 Ch. 389, 51 L. J. Ch. 154, 46 L. T. Rep. N. S. 222.

30. *N. Y.*—Fuller Electrical Co. v. Lewis, 101 N. Y. 674, 5 N. E. 437; Metcalf v. Moses, 35 App. Div. 596, 55 N. Y. Supp. 179; Smith v. Post, 3 Thomps. & C. 647.

Ark.—Cornish v. Dews, 18 Ark. 172.

Cal.—Roberts v. Burr, 135 Cal. 156, 67 Pac. 46.

Conn.—Hamilton v. Staples, 34 Conn. 316.

Del.—Slessinger v. Topkis, 1 Marv. 140, 40 Atl. 717; Gamble v. Harris, 5 Del. Ch. 512.

Ga.—Newhoff v. Clegg, 99 Ga. 167, 25 S. E. 184.

Ill.—Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; School Trustees v. Mason (1887), 13 N. E. 235; Webber v. Mackey, 31 Ill. App. 369.

Ind.—Pinnell v. Stringer, 59 Ind. 555.

that to render a conveyance void as to creditors, on the ground that it was made with intent to defraud them, the grantee must have knowledge of, and participate in, the fraud of the grantor.[32]

Ind. T.—Purcell Wholesale Grocery Co. v. Bryant (1905), 89 S. W. 662.

Iowa.—Mills v. Miller, 109 Iowa, 688, 81 N. W. 169; Cox v. Collis, 109 Iowa, 270, 80 N. W. 343; Roberts v. Press, 97 Iowa, 475, 66 N. W. 756; Kohn v. Clement, 58 Iowa, 589, 12 N. W. 550; Moss v. Dearing, 45 Iowa, 530.

Kan.—Davis v. McCarthy, 52 Kan. 116, 34 Pac. 399.

Ky.—Foster v. Grigsby, 64 Ky. 86; Ford v. Williams, 42 Ky. 550.

Mich.—Franklin Needle Co. v. Amazon Hosiery Co., 128 Mich. 198, 87 N. W. 211; Andrews v. Fillmore, 46 Mich. 315, 9 N. W. 431; Beurmann v. Van Buren, 44 Mich. 496, 7 N. W. 67.

Mo.—Byrne v. Becker, 42 Mo. 264; Chouteau v. Sherman, 11 Mo. 385; Frank v. Curtis, 58 Mo. App. 349; Kendall v. Baltis, 26 Mo. App. 411.

Neb.—National Bank of Commerce v. Chapman, 50 Neb. 484, 70 S. W. 39; Hedman v. Anderson, 6 Neb. 392.

N. J.—Platt v. McClong (Ch. 1901), 49 Atl. 1125; Folk v. Fonda (Ch. 1894), 29 Atl. 676; Demarest v. Terhune, 18 N. J. Eq. 45.

N. C.—Battle v. Mayo, 102 N. C. 413, 9 S. E. 384. But see Mitchell v. Eure, 126 N. C. 77, 35 S. E. 190.

Pa.—Magee v. Raiguel, 64 Pa. St. 110; Greenwalt v. Austin, 1 Grant, 169; Jennings v. Smith, 22 Pa. Co. Ct. 554, 30 Pitts. L. J. 125.

S. C.—Anderson v. Pilgram, 41 S. C. 423, 19 S. E. 1002, 20 S. E. 64; Smith v. Pate, 3 S. C. 204.

Tenn.—Wilson v. Eifler, 47 Tenn. 31.

Tex.—Galveston Dry Goods Co. v. Blum, 23 Tex. Civ. App. 703, 57 S. W. 1121; White v. Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909; Lewis v. Alexander (Civ. App. 1895), 31 S. W. 414.

Va.—Oberdorfer v. Meyer, 88 Va. 384, 13 S. E. 756.

Wash.—Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509.

W. Va.—Baer Sons Grocer Co. v. Williams, 43 W. Va. 323, 27 S. E. 345.

Wis.—Dornbrook v. M. Rumely Co., 120 Wis. 36, 97 N. W. 493.

31. See cases cited in last two preceding notes.

32. *N. Y.*—Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

U. S.—Means v. Montgomery, 23 Fed. 421; Wilson v. Prewett, 30 Fed. Cas. No. 17,828, 3 Woods, 631, *rev'd* Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360.

Ala.—Marshall v. Croom, 52 Ala. 554.

Ark.—Trieber v. Andrews, 31 Ark. 163; Splawn v. Martin, 17 Ark. 146.

Conn.—Partelo v. Harris, 26 Conn. 480.

Ga.—Claflin v. Ballance, 91 Ga. 411, 18 S. E. 309.

Ill.—Rothgerber v. Gough, 52 Ill. 436; Aultman & Taylor Co. v. Weir, 34 Ill. App. 615; Webber v. Mackey, 31 Ill. App. 369.

Ind.—Scott v. Davis, 117 Ind. 232, 26 N. E. 139.

Kan.—La Clef v. Campbell, 3 Kan. App. 756, 45 Pac. 461.

Me.—Blodgett v. Chaplin, 48 Me.

To render an ante-nuptial settlement void as in fraud of creditors, both parties must concur in or have notice of the intended fraud.[33] A marriage settlement is valid, though made with design to defraud creditors, if the grantee had no knowledge of the fraud; and notice by creditors after the deed, though before the marriage, that the intent of the deed was fraudulent, will not affect the grantee with knowledge.[34] Notice to the vendee of the indebtedness of the vendor and participation in the intent to defraud are necessary elements of the fraud.[35] Under a statute providing that a judgment suffered with intent to defraud creditors shall be void, such fraudulent intent on the part of the debtor alone does not render the judgment void.[36] To avoid a mortgage it is not necessary to show confederation between mortgagor and mortgagee to delay and defraud creditors. An intent of the two parties to delay or defraud is sufficient.[37]

§ 5. **Knowledge and intent of grantee; Effect of want of knowledge or notice where transfer is voluntary.**—It is not necessary, in order to avoid a voluntary conveyance, that is, one not based on a valuable consideration, that the grantee should

322; McLarren v. Thompson, 40 Me. 284.

Mass.—Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Mich.—Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Fisher v. Hall, 44 Mich. 493, 7 N. W. 72.

Mo.—Henderson v. Henderson, 55 Mo. 534; Stevens Lumber Co. v. Kansas City Planing Mill Co., 59 Mo. App. 373.

N. H.—Blake v. White, 13 N. H. 267.

Pa.—Benson v. Maxwell (1888), 14 Atl. 161.

S. C.—Union Bank v. Toomer, 2 Hill Eq. 27.

Tex.—Kraus v. Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025.

Wis.—Sterling v. Ripley, 3 Chand. 166, 3 Pin. 155.

33. *U. S.*—Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360; Magniac v. Thompson, 32 U. S. 348, 8 L. Ed. 709.

Ala.—Nance v. Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

Or.—Bonser v. Miller, 5 Or. 110.

Pa.—Ethridge v. Dunshee, 31 Pitts. Leg. J. 39.

Va.—Noble v. Davies (1887), 4 S. E. 206.

34. Clay v. Walter, 79 Va. 92.

35. De Prato v. Jester (Ark. 1892), 20 S. W. 807.

36. Galle v. Tode, 148 N. Y. 270, 42 N. E. 673, *rev'g* 74 Hun, 542, 26 N. Y. Supp. 633.

37. State v. Nauert, 2 Mo. App. 295.

have been cognizant of the fraud, or should have actually participated with the grantor in his fraudulent purpose, or have been privy to it. It is wholly void, without reference to knowledge or want of it on the part of the grantee, and although the grantee or transferee was innocent of any fraudulent intent, and the good faith of the grantee does not render it valid.[38] The

38. *N. Y.*—Young v. Heermans, 66 N. Y. 374; Whyte v. Denike, 53 App. Div. 320, 65 N. Y. Supp. 577; Truesdale v. Bourke, 29 App. Div. 95, 51 N. Y. Supp. 409; Wood v. Hunt, 38 Barb. 302; Savage v. Murphy, 8 Bosw. 75; New York, etc., R. Co. v. Kyle, 5 Bosw. 587; White's Bank v. Farthing, 10 St. Rep. (N. Y.) 830; Salomon v. Moral, 53 How. Pr. 342; Hildreth v. Sands, 2 Johns. Ch. 35; Mohawk Bank v. Atwater, 2 Paige, 54.

U. S.—Beecher v. Clark, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256.

Ala.—Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Hudson v. Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Early v. Owens, 68 Ala. 171; Pickett v. Pipkin, 64 Ala. 520; Anderson v. Anderson, 64 Ala. 403.

Ark.—Hershy v. Latham, 46 Ark. 542; Dodd v. McCraw, 8 Ark. 83, 46 Am. Dec. 301.

Cal.—Bush, etc., Co. v. Helbing, 134 Cal. 676, 66 Pac. 967; Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271.

Colo.—Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Gwynn v. Butler, 17 Colo. 114, 28 Pac. 466.

Conn.—Mallory v. Gallagher, 75 Conn. 665, 55 Atl. 209; Hitchcock v. Kiely, 41 Conn. 611.

Del.—Russell v. Thatcher, 2 Del. Ch. 320.

Fla.—McKeown v. Allen, 37 Fla. 490, 20 So. 556.

Ga.—Westmoreland v. Powell, 59 Ga. 256.

Ill.—Bauer Grocer Co. v. McKee Shoe Co., 87 Ill. App. 434; Head v. Harding, 62 Ill. App. 302; Marmon v. Harwood, 26 Ill. App. 341.

Ind.—York v. Rockwood, 132 Ind. 358, 31 N. E. 1110; Heaton v. Shanklin, 115 Ind. 595, 18 N. E. 172; Meredith v. Citizens' Nat. Bank, 92 Ind. 343; Wright v. Nipple, 92 Ind. 310; Sherman v. Hogland, 73 Ind. 472, Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123; Trent v. Edmonds, 32 Ind. App. 432, 70 N. E. 169; Spiers v. Whitesell, 27 Ind. App. 204, 61 N. E. 28.

Iowa.—Gaar v. Hart, 77 Iowa, 597, 42 N. W. 451; Lyons v. Hamilton, 72 Iowa, 759, 33 N. W. 655; Lyons v. Hamilton, 69 Iowa, 47, 28 N. W. 429; Watson v. Riskamire, 45 Iowa, 231.

Me.—Spear v. Spear, 97 Me. 498, 54 Atl. 1106; Weeks v. Hill, 88 Me. 111, 33 Atl. 778; Laughton v. Harden, 68 Me. 208; Emery v. Vinall, 26 Me. 295; Tucker v. Andrews, 13 Me. 124.

Md.—Rickards v. Rickards, 98 Md. 136, 56 Atl. 397, 103 Am. St. Rep. 379, 63 L. R. A. 724; Goodman v. Wineland, 61 Md. 449; Foley v. Bitter, 34 Md. 646; Dorn v. Bayer,

intent of the grantor in such cases, and not the knowledge of the intent by the grantee, determines the fraud, and it is immaterial whether the creditors as to whom the fraudulent character of the conveyance is alleged became such prior or subsequent to the grant.[39] A conveyance by a debtor to his wife, with intent to defraud his creditors and without consideration, will be set aside, though she had no knowledge of the fraudulent intent,[40] and

16 Md. 144; Worthington v. Bullitt, 6 Md. 172.

Mass.—Gray v. Chase, 184 Mass. 444, 68 N. E. 676; Clark v. Chamberlain, 95 Mass. 257; Blake v. Sawin, 92 Mass. 340.

Mich.—Schaible v. Ardner, 98 Mich. 70, 56 N. W. 1105; Matson v. Melchor, 42 Mich. 477, 4 N. W. 200.

Minn.—Knatvold v. Wilkinson, 83 Minn. 265, 86 N. W. 99.

Miss.—Young v. White, 25 Miss. 146.

Mo.—Bohannon v. Combs, 79 Mo. 305; Gamble v. Johnson, 9 Mo. 605; Farmers', etc., Bank v. Price, 41 Mo. App. 291.

Neb.—Nebraska Nat. Bank v. Hallowell, 63 Neb. 309, 88 N. W. 556; Ayres v. Wolcott, 62 Neb. 805, 87 N. W. 906; Smith v. Schmitz, 10 Neb. 600, 7 N. W. 329.

N. H.—Preston v. Cutter, 64 N. H. 461, 13 Atl. 874; Carter v. Grimshaw, 49 N. H. 100.

N. J.—Bouquet v. Heyman, 50 N. J. Eq. 114, 24 Atl. 266; Providence Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Morris Canal, etc., Co. v. Stearns, 23 N. J. Eq. 414.

N. C.—Helms v. Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; Lassiter v. Davis, 64 N. C. 498; Green v. Kornegay, 49 N. C. 66, 67 Am. Dec. 261.

N. D.—Faber v. Wagner, 10 N. D. 287, 86 N. W. 963.

Pa.—Clark v. Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

R. I.—First Nat. Bank v. Randall, 20 R. I. 319, 38 Atl. 1055, 78 Am. St. Rep. 867; McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354.

S. C.—Jackson v. Lewis, 34 S. C. 1, 12 S. E. 560; Woody v. Dean, 24 S. C. 499; Beckham v. Secrest, 2 Rich. Eq. 54; Miller v. Tollison, Harp. Eq. 145, 14 Am. Dec. 712.

Tenn.—Wilson v. Eifler, 47 Tenn. 31.

Tex.—Brown v. Texas Cactus Hedge Co., 64 Tex. 396; Belt v. Raguet, 27 Tex. 471; Clark v. Bell (Civ. App. 1905), 89 S. W. 38. See Bank v. Foster, 74 Tex. 515, 12 S. W. 223.

Vt.—Corey v. Morrill, 71 Vt. 51, 42 Atl. 976.

W. Va.—Lockhard v. Beckley, 10 W. Va. 87.

Can.—Oliver v. McLaughlin, 24 Ont. 41.

39. Gilliland v. Jones, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210; Wilson v. Spear, 68 Vt. 145, 34 Atl. 429.

40. *N. Y.*—Smart v. Harring, 52 How. Pr. 505.

Cal.—Threlkel v. Scott (1893), 34 Pac. 851.

Ind.—McCole v. Loehr, 79 Ind. 430; Spinner v. Weick, 50 Ind. 213.

whether she participated in the fraud or not.[41] Where the confession of a judgment includes a debt not due, and is part and parcel of a scheme to remove property from the reach of creditors, it is void, not to the extent of the fraud, but absolutely, and it is immaterial whether the plaintiff was cognizant of the fraud or not.[42] Where a conveyance is invalidated by reason of the fraud of the grantor towards his creditors, only an innocent purchaser is protected thereunder, and not a donee.[43]

§ 6. **The effect of knowledge or notice where transfer is to one not a creditor.**—A sale of real or personal property made by a debtor to one not a creditor with the intention of delaying, hindering, or defrauding creditors, though an adequate consideration be paid,[44] where the purchaser has knowledge or notice of the fraudulent intent of the seller,[45] is fraudulent and void as against creditors.[46] A sale of real or personal property to a

41. Knapp v. Day, 4 Colo. App. 21, 34 Pac. 1008.

42. Simons v. Goldbach, 56 Hun (N. Y.), 204, 9 N. Y. Supp. 359.

43. Swartz v. Hazlett, 8 Cal. 118.

44. Roeber v. Bowe, 26 Hun (N. Y.), 554; Hayes v. Reilly, 49 N. Y. Super Ct. 334; Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co. (N. J. Ch.), 62 Atl. 421. See also Effect of consideration, § 30, *infra*.

45. See Constructive or implied notice, § 17, *infra*.

46. *N. Y.*—Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Gilmore v. Colcord, 96 App. Div. 358, 89 N. Y. Supp. 689; New York Ice Co. v. Cousins, 23 App. Div. 560, 48 N. Y. Supp. 799; Union Nat. Bank v. Warner, 12 Hun, 306; Gowing v. Warner, 30 Misc. Rep. 493, 62 N. Y. Supp. 797; Sands v. Codwise, 4 Johns. 536, 4 Am. Dec. 305.

U. S.—Collinson v. Jackson, 14 Fed. 305, 8 Sawy. 357; Singer v. Jacobs, 11 Fed. 559, 3 McCrary, 638.

Ala.—Reeves v. Skipper, 94 Ala. 407, 10 So. 309; Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704; Pulliam v. Newberry, 41 Ala. 168.

Ark.—Galbreath v. Cook, 30 Ark. 417.

Ga.—Conley v. Buck, 100 Ga. 187, 28 S. E. 97; Cothran v. Forsyth, 68 Ga. 560; Watts v. Kilburn, 7 Ga. 356; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Ill.—Jewett v. Cook, 81 Ill. 260; Boies v. Henney, 32 Ill. 130; Hoff v. Larimore, 106 Ill. App. 589. Oaksford v. Dunlap, 63 Ill. App. 498.

Ind.—Hoffman v. Henderson, 145 Ind. 613, 44 N. E. 629; Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; Buck v. Vories, 89 Ind. 116; Bishop v. Redmond, 83 Ind. 157; Tyner v. Somerville, 1 Ind. 175; Johnson v. Brandis, Smith, 263; Basey v. Daniel, Smith, 252.

person who has notice of a judgment against the seller and purchases for the purpose of defrauding the creditor's execution is

Iowa.—Liddle v. Allen, 90 Iowa, 738, 57 N. W. 603; Baxter v. Myers (1891), 47 N. W. 879; Douglass v. Hannah, 81 Iowa, 469, 46 N. W. 1053; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302; Sweet v. Wright, 57 Iowa, 510, 10 N. W. 870; Chapel v. Clapp, 29 Iowa, 191.

Ky.—Brite v. Guy, 28 Ky. L. Rep. 57, 88 S. W. 1069; Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397; McFarland v. McFarland, 1 Ky. L. Rep. 422.

La.—Shultz v. Morgan, 27 La. Ann. 616; Danjean v. Blacketer, 13 La. Ann. 595; Barker v. Phillips, 11 Rob. 190; Hiriar v. Roger, 13 La. 126.

Me.—Dockray v. Mason, 48 Me. 178; Howe v. Ward, 4 Me. 195.

Md.—Glenn v. Randall, 2 Md. Ch. 220. See Biddinger v. Wiland, 67 Md. 359, 10 Atl. 202.

Mass.—Day v. Cooley, 118 Mass. 524; Wadsworth v. Williams, 100 Mass. 126.

Mich.—Coon v. Henry, 49 Mich. 208, 13 N. W. 518.

Miss.—Buckingham v. Wesson, 54 Miss. 526; Farmers' Bank v. Douglass, 11 Sm. & M. 469.

Mo.—Stewart v. Outhwaite, 141 Mo. 562, 44 S. W. 326; Garesche v. MacDonald, 103 Mo. 1, 15 S. W. 379; Stone v. Spencer, 77 Mo. 356; Shelley v. Boothe, 73 Mo. 74, 39 Am. Rep. 481; Johnson v. Sullivan, 23 Mo. 474; Kurtz v. Troll, 86 Mo. App. 649; Christian v. Smith, 85 Mo. App. 117; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Monarch Rubber Co. v. Bunn, 78 Mo. App. 55; Sellers v. Bailey, 29 Mo. App. 174; Clark v. Finn, 12 Mo. App. 583.

Neb.—Snyder v. Dangler, 44 Neb. 600, 63 N. W. 20; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928; Meyer v. Stone, 21 Neb. 717, 33 N. W. 420; Savage v. Hazard, 11 Neb. 323, 9 N. W. 83; Tootle v. Dunn, 6 Neb. 93.

N. H.—Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

N. J.—Kinmonth v. White (Ch. 1900), 47 Atl. 1; Atwood v. Impson, 20 N. J. Eq. 150; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

N. C.—Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59; Hudson v. Jordan, 108 N. C. 10, 12 S. E. 1029; Cansler v. Cobb, 77 N. C. 30.

N. D.—Salemonson v. Thompson (1904), 101 N. W. 320; Flulgel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Ohio.—Brown v. Webb, 20 Ohio, 389; Shur v. Statler, 2 Ohio Dec. 70, 1 West. L. Month. 317.

Or.—Lyons v. Leahy, 15 Or. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

Pa.—Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Ashmead v. Hean, 13 Pa. St. 584.

S. C.—Lenhardt v. Ponder, 64 S. C. 354, 42 S. E. 169; Thomas v. Jeter, 1 Hill, 380; Hipp v. Sawyer, Rich. Eq. Cas. 410.

Tenn.—Carny v. Palmer, 42 Tenn. 35; Trotter v. Watson, 25 Tenn. 509.

Tex.—Weisiger v. Chisholm, 28 Tex. 780, 22 Tex. 670; Tuttle v. Turner, 28 Tex. 759; Walcott v. Brander,

void as against the judgment creditor.[47] Active participation in the fraud is not necessary where the vendee had knowledge, but knowledge or implied notice is held to be equivalent to, and to constitute, participation, where the transfer is to one not a credi-

10 Tex. 419; Mosely v. Gainer, 10 Tex. 393; Wallace v. Butts (Civ. App. 1895), 31 S. W. 687; Thomson v. Shackleford, 6 Tex. Civ. App. 121, 24 S W. 980; Balnkenship v. Turner 3 Tex. App. Civ. Cas., § 427.

Vt.—Fuller v. Sears, 5 Vt. 527; Edgell v. Lowell, 4 Vt. 405.

Va.—Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756.

Wash.—O'Leary v. Duvall, 10 Wash. 666, 39 Pac. 163.

W. Va.—Murdoch v. Baker, W. Va. 78, 32 S. E. 1009; Frank v. Zeigler, 46 W. Va. 614, 33 S. E. 761; Gillespie v. Allen, 37 W. Va. 675, 17 S. E. 184; Livesay v. Beard, 22 W. Va. 585; Hedrick v. Walker, 17 W. Va. 916; Goshorn v. Snodgrass, 17 W. Va. 717.

Wis.—Gardinier v. Otis, 13 Wis. 460.

Can.—Merchants' Bank v. Clark, 18 Grant Ch. (U. C.) 594; Wood v. Irwin, 16 Grant Ch. (U. C.) 398.

Eng.—Cornish v. Clerk, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; Bulmer v. Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. Rep. N. S. 942; Bott v. Smith, 21 Beav. 511, 52 Eng. Reprint, 957; Harman v. Richards, 10 Hare, 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

When rule does not apply.—If one is so connected with the property of another, and the business in which it is used, that he honestly supposes it necessary for the preservation of his business interests to purchase it, and does purchase it for a full consideration for that reason, and with no intent to aid the seller in a fraud upon his creditors, the sale will be valid, so far as regards the purchaser, as against the creditors of the vendor, notwithstanding the purchaser knows that the object of the seller in making the sale is to defraud his creditors. Root v. Reynolds, 32 Vt. 139. But *aliter*, if the purchaser, with knowledge of the vendor's fraudulent intent, be a mere volunteer in the purchase, and buy the property simply because he can make a good bargain. *Id.*

Question of consideration not material.—Where the grantee has knowledge that the grantor intends by conveyance to defraud his creditors, the question whether consideration was paid is not material. Wiggington v. Winter, 28 Ky. L. Rep. 79, 88 S. W. 1082.

The fact that the vendor assigned the notes for the purchase price of the goods to the holder of a valid demand against himself does not render a transaction valid where otherwise fraudulent. Kurts v. Troll, 86 Mo. App. 649.

47. Jackson v. Myers, 18 Johns. (N. Y.), 425; Jackson v. Terry, 13 Johns. (N. Y.) 471; Wickham v. Miller, 12 Johns. (N. Y.) 320; Beals v. Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353; Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

tor.[48] Participation need not be by some affirmative action on the part of the transferee, but the taking of a conveyance with actual notice of the grantor's fraudulent intent, or under circumstances where the law will impute knowledge of the fraudulent purpose, renders one a participator in the fraud.[49] Fraud may be imputed to a grantee, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it and carrying the design upon such notice into operation.[50] It is not necessary to allege or prove that the purchaser entered into the transaction with the intention of aiding the debtor's fraudulent design,[51] or that there was any confederation between the parties to the transfer to delay or defraud creditors;[52] the only questions in order to determine whether the sale was fraudulent are as to the vendor's intent and the purchaser's notice of it.[53] Where a purchaser of property is a mere volunteer, and the seller intends by the sale to hinder, delay, or defraud his creditors, it is not necessary that it should be shown that the purchaser bought with a like intent.

48. *N. Y.*—Holmes v. Clarke, 42 Barb. (N. Y.) 237.

Ala.—Lehman v. Kelly, 68 Ala. 192.

Iowa.—Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317; Redhead v. Pratt, 72 Iowa, 99, 33 N. W. 382; Jones v. Hetherington, 45 Iowa, 681.

Ky.—Huffman v. Leslie, 23 Ky. L. Rep. 1981, 66 S. W. 822.

Mich.—Gumberg v. Treusch, 110 Mich. 451, 68 N. W. 236; Bedford v. Penny, 58 Mich. 424, 25 N. W. 381; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809.

N. H.—Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

N. J.—Hancock v. Elmer, 61 N. J. Eq. 558, 49 Atl. 140, 63 N. J. Eq. 802, 52 Atl. 1131.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60; Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Tex.—Humphries v. Freeman, 22 Tex. 45.

49. Kansas Moline Plow Co. v. Sherman, 3 Okl. 204, 41 Pac. 623, 32 L. R. A. 33.

50. Magniac v. Thomson, 32 U. S. 348, 8 L. Ed. 709.

51. Cowling v. Estes, 15 Ill. App. 255; Ferguson v. May, 4 Ky. L. Rep. 989; Summers v. Taylor, 4 Ky. L. Rep. 290; Cansler v. Cobb, 77 N. C. 30.

52. State v. Nauert, 2 Mo. App. 295; Burgert v. Borchert, 59 Mo. 80.

53. Hathaway v. Brown, 18 Minn. 414.

It is sufficient that the latter had knowledge of the fraudulent intent of the former.[54]

§ 7. **Effect of proper application of proceeds.**—A transfer of property by an insolvent debtor is void at common law as to his creditors, even though the purchase money is applied on *bona fide* debts of the debtor to the amount of the fair value of the property, if the debtor intended thereby to hinder, delay and defraud his other creditors and the transferee had notice of such fraudulent intent, although the persons whose debts were paid did not participate in such fraudulent purpose.[55] But it has been held that a conveyance to one with notice of the fraudulent intent of the grantor to defeat a creditor is valid so far as the consideration for the conveyance was devoted to the payment of the grantor's honest debts.[56]

§ 8. **Knowledge of co-grantee.**—A conveyance by an insolvent debtor to a number of grantees jointly, while void as to the grantees who had knowledge of the fraudulent intent of the grantor, is valid as to such of them as had no knowledge or were without notice of such intent.[57] But the fact that one grantee for a valuable consideration must have known that his co-grantee gave no consideration, and, from his knowledge of the grantor's affairs, that, as to his co-grantee, the conveyance was void as to creditors by the statute of fraud, shows him, as matter of law,

54. Lyons v. Hamilton, 69 Iowa, 47, 28 N. W. 429, 72 Iowa, 759, 33 N. W. 655; Edgell v. Lowell, 4 Vt. 405.

55. Kurtz v. Lewis Voight & Sons Co., 175 Mo. 506, 75 S. W. 386; Frank v. Zeigler, 46 W. Va. 614, 33 S. E. 761. A third person who, in consideration of a transfer of the property of a debtor, pays the amount due a creditor, occupies the position of the creditor in respect to the question whether the sale is to be considered fraudulent, as the effect of the transaction is nothing more than a preference of such creditor. Sammons v. O'Neill, 60 Mo. App. 530, 544. See also Duty to see to application of proceeds, § 16, *infra*.

56. Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

57. Livesay v. Beard, 22 W. Va. 585.

to have been so far implicated in the fraud that the conveyance is void as to him.[58]

§ 9. **Effect of knowledge or notice where transfer is to a creditor — Participation in fraudulent intent when debt is sole consideration.**—A creditor who accepts property from an insolvent debtor in payment of a valid pre-existing debt occupies a more favored position than a purchaser for a present consideration.[59] The right of a creditor to accept the amount of his debt, or security or property therefor, from his debtor, is indisputable, although the creditor knows that other creditors will thus be prevented from obtaining payment of their debts, and although friendship constitutes the debtor's motive in giving the preference. Where, however, one not a creditor purchases and pays full value for the property of one whom the purchaser knows to intend defrauding his creditors by placing his property beyond their reach, such purchaser will not be protected in the possession of the property so

58. Swartz v. Hazlett, 8 Cal. 118.

59. *U. S.*—Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374.

Ala.—Pollock v. Meyer, 96 Ala. 172, 11 So. 385; Carter v. Coleman, 84 Ala. 256, 4 So. 151; Hodges v. Coleman, 73 Ala. 103; Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Me.—Hartshorn v. Eames, 31 Me. 93.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60, "the reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchases in satisfaction of a pre-existing debt are sound and unassailable. The former is in every sense a volunteer. He has nothing at stake, —no self interests to serve. He may, with perfect safety, keep out of the transaction. Having no motive of interest prompting him to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and, if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge."

purchased, as against the seller's creditors.[60] A sale or transfer of property to a creditor by way of preference is not invalidated by a fraudulent intent on the vendor's part to defeat his other creditors, or by the fact that, as a result, the remaining creditors of the vendor cannot obtain payment of their debts, although the vendee had knowledge of such fraudulent intent, unless the vendee or preferred creditor actually participates in the fraudulent intent or purpose of the debtor.[61] A preference secured for a *bona*

60. Greenleve v. Blum, 59 Tex. 124; Lewy v. Fischl, 65 Tex. 311.

61. *N. Y.*—Knower v. Central Nat. Bank, 124 N. Y. 552, 27 N. E. 247, 21 Am. St. Rep. 700; Hine v. Bowe, 114 N. Y. 350, 21 N. E. 732; Dudley v. Danforth, 61 N. Y. 626; Seymour v. Wilson, 19 N. Y. 417; Shidlovsky v. Gorman, 51 App. Div. 253, 64 N. Y. Supp. 993; Hyde v. Bloomingdale, 23 Misc. Rep. 728, 51 N. Y. Supp. 1025; Carpenter v. Muren, 42 Barb. 300; Dart v. Farmers' Bank, 27 Barb. 337; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

U. S.—Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Rindskopf v. Vaughan, 40 Fed. 394.

Ala.—Morrow v. Campbell, 118 Ala. 330, 24 So. 852; Henderson v. Perryman, 114 Ala. 647, 22 So. 24; Goetter v. Norman, 107 Ala. 585, 19 So. 56; Hornthall v. Schonfeld, 79 Ala. 107; Meyer v. Sulzbacher, 76 Ala. 120; Hodges v. Coleman, 76 Ala. 103; Kiser v. Gamble, 75 Ala. 386; Cromelin v. McCauley, 67 Ala. 542; Alabama Life Ins., etc., Co. v. Pettway, 24 Ala. 544.

Ark.—Rice v. Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Wood v. Keith, 60 Ark. 425, 30 S. W. 756; Trieber v. Andrews, 31 Ark. 163.

Cal.—Wheaton v. Neville, 19 Cal. 41.

Del.—Slessinger v. Topkis, 1 Marv. 140, 40 Atl. 717.

Ill.—Walsh v. O'Neill, 192 Ill. 202, 61 N. E. 409; Rothgerber v. Gough, 52 Ill. 436; Gray v. St. John, 35 Ill. 222; Funk v. Staats, 24 Ill. 633; Ball v. Callahan, 95 Ill. App. 615, *aff'd* 197 Ill. 318, 64 N. E. 295; Mayr v. Hodge, etc., Co., 78 Ill. App. 556; Oakford v. Dunlap, 63 Ill. App. 498; Kuhlenbeck v. Hotz, 53 Ill. App. 675; Aultman, etc., Co. v. Weir, 34 Ill. App. 615; Webber v. Mackey, 31 Ill. App. 369; Chapman v. Windmiller, 29 Ill. App. 393; Anderson v. Warner, 5 Ill. App. 416.

Iowa.—Thompson v. Zuckmayer (1903), 94 N. W. 476; Kerr v. Kennedy, 119 Iowa, 239, 93 N. W. 353; Johnson v. Johnson, 101 Iowa, 405, 70 N. W. 598; Richards v. Schreiber, etc., Co., 98 Iowa, 422, 67 N. W. 569; Bussard v. Bullitt, 95 Iowa, 736, 64 N. W. 658; Stewart v. Mills Co. Nat. Bank, 76 Iowa, 571, 41 N. W. 318; Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240, 60 Am. Rep. 783; Aultman v. Heiney, 59 Iowa, 654, 13 N. W. 856; Chase v. Walters, 28 Iowa, 460; Wilson v. Horr, 15 Iowa, 489.

fide indebtedness, either at the instance of the creditor or by the free, voluntary act of the debtor creating the preference, either in

Compare Kelliher v. Sutton, 115 Iowa, 632, 89 N. W. 26; Bixby v. Carskaddon, 55 Iowa, 533, 8 N. W. 354.

Kan.—First Nat. Bank v. Marshall, 56 Kan. 441, 43 Pac. 774; Hasie v. Connor, 53 Kan. 713, 37 Pac. 128.

Ky.—Brown v. Smith, 46 Ky. 361; Worland v. Kimberlin, 45 Ky. 608, 44 Am. Dec. 785. *Compare* Foster v. Grigsby, 64 Ky. 86; Wrad v. Trotter, 19 Ky. 1.

Me.—McLarren v. Thompson, 40 Me. 284; Hartshorn v. Eames, 31 Me. 93.

Mass.—Carr v. Briggs, 156 Mass. 78, 30 N. E. 470; Banfield v. Whipple, 96 Mass. 13; Bridge v. Eggleston, 14 Mass. 245; Harrison v. Phillips Academy, 12 Mass. 456.

Mich.—Eureka Iron, etc., Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834; Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Olmstead v. Mattison, 45 Mich. 617, 8 N. W. 555; Fisher v. Hall, 44 Mich. 493, 7 N. W. 72.

Miss.—Ferguson v. Oxford Mercantile Co. (1900), 27 So. 877; Brister v. Moore (1895), 16 So. 596; Hirsch v. Richardson, 65 Miss. 227, 3 So. 569. *Compare* Harney v. Pack, 4 Sm. & M. 229.

Mo.—Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213, 60 S. W. 87; Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; Stokes v. Burns, 132 Mo. 214, 33 S. W. 460; Alberger v. White, 117 Mo. 347, 23 S. W. 92; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; State v. Hope, 102 Mo. 410, 14 S. W. 985; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564; Holmes v. Braidwood, 82 Mo. 610; Shelley v. Boothe, 73 Mo. 74, 39 Am. Rep. 481; Henderson v. Henderson, 55 Mo. 534; White v. Million, 102 Mo. App. 437, 76 S. W. 733; Haydon v. Alkire Grocery Co., 88 Mo. App. 241; Mayfield Woolen Mills v. Wilson, 87 Mo. App. 145; Kurtz v. Lewis Voight, etc., Co., 86 Mo. App. 649; Esselbruegge Mercantile Co. v. Troll, 79 Mo. App. 558; Monarch Rubber Co. v. Bunn, 78 Mo. App. 55; Schawacker v. Ludington, 77 Mo. App. 415; Ross v. Ashton, 73 Mo. App. 254; Mapes v. Burns, 72 Mo. App. 411; Sammons v. O'Neill, 60 Mo. App. 530; Frank v. Curtis, 58 Mo. App. 349; Russell v. Letton, 56 Mo. App. 541; Morgan v. Wood, 38 Mo. App. 255; Deering v. Collins, 38 Mo. App. 80; Schroeder v. Mason, 25 Mo. App. 190; State v. Mason, 24 Mo. App. 321; Gaff v. Stern, 12 Mo. App. 115. *Compare* Roan v. Winn, 93 Mo. 503, 4 S. W. 736; Kitchen v. St. Louis, etc., R. Co., 69 Mo. 224.

Neb.—Blair State Bank v. Bunn, 61 Neb. 464, 85 N. W. 527; Sunday Creek Coal Co. v. Burnham, 52 Neb. 364, 72 N. W. 487; Steinberg v. Buffum, 61 Neb. 778, 86 N. W. 491; Grosshaus v. Gold, 49 Neb. 599, 68 N. W. 1031; Bank of Commerce v. Schlotfeldt, 40 Neb. 212, 58 N. W. 727; Jones v. Loree, 37 Neb. 816, 56 N. W. 390, to say that knowledge on the part of an existing creditor of the debtor's intention to defraud creditors would render any security demanded by such creditor fraudulent would be equivalent to saying that the creditor is estopped from protecting himself by knowledge of the very facts which warrant him in seeking pro-

an assignment or by the confession of a judgment, is not fraudulent, notwithstanding the fraudulent purpose and intent of the

tection; Switz v. Bruce, 16 Neb. 463, 20 N. W. 639; Grainger v. Erwin, 3 Neb. (Unoff.) 204, 91 N. W. 592.

N. H.—Dole v. Farwell, 72 N. H. 183, 55 Atl. 553; Fradd v. Charon, 69 N. H. 189, 44 Atl. 910; Blake v. White, 13 N. H. 267.

N. J.—Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869; Roe v. Moore, 35 N. J. Eq. 526; Schmidt v. Opie, 33 N. J. Eq. 138; Goodwin v. Hamill, 26 N. J. Eq. 24.

N. C.—Beasley v. Bray, 98 N. C. 266, 3 S. E. 497; Rose v. Cohle, 61 N. C. 517. See, however, Wolf v. Arthur, 118 N. C. 890, 24 S. E. 671.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60, where property fraudulently conveyed to hinder or delay creditors, with the understanding that the grantee is to reconvey on request, is reconveyed by such grantee with the intent to hinder, delay and defraud his creditors, the conveyance will not be avoided, although the original grantor has knowledge of the fraudulent intent, he having requested the reconveyance to protect and preserve his property.

Ohio.—Walker v. Walker, 6 Ohio S. & C. Pl. Dec. 355, 4 Ohio N. P. 324.

Pa.—Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065; Hopkins v. Beehe, 26 Pa. St. 85; Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Benson v. Maxwell, 10 Pa. Cas. 380, 14 Atl. 161. *Compare* In re Bear, 60 Pa. St. 430.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Monaghan Bay Co. v. Dickinson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; McIntyre v. Legon, 38 S. C. 457, 17 S. E. 253.

Tenn.—Phillips v. Cunningham (Ch. App. 1899), 58 S. W. 463; Wilson v. Eifler, 47 Tenn. 31.

Tex.—Owens v. Clark, 78 Tex. 547, 15 S. W. 101; Smith v. Whitfield, 67 Tex. 124, 2 S. W. 822; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; Lewy v. Fischl, 65 Tex. 311; Inglehart v. Willis, 58 Tex. 306; Watts v. Dubois (Civ. App. 1902), 66 S. W. 698; Head v. Bracht (Civ. App. 1897), 40 S. W. 630; Wood v. Castlebury (Civ. App. 1896), 34 S. W. 653; Rock Island Plow Co. v. Hill (Civ. App. 1895), 32 S. W. 242; Byrd v. Perry, 7 Tex. Civ. App. 378, 26 S. W. 749; Kraus v. Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025; Rider v. Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314; Hamilton-Brown Shoe Co. v. Cameron (Civ. App. 1893), 23 S. W. 525; Hamilton-Brown Shoe Co. v. Kellum (Civ. App. 1893), 23 S. W. 524; Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520. *Compare* Frost v. Mason, 17 Tex. Civ. App. 465, 44 S. W. 53.

Wis.—German-American Bank v. Magill, 102 Wis. 582, 78 N. W. 782; H. B. Claflin Co. v. Grashorn, 99 Wis. 356, 74 N. W. 783; Carey v. Dyer, 97 Wis. 554, 73 N. W. 29; Koch v. Peters, 97 Wis. 492, 73 N. W. 25; Bleiler v. Moore, 94 Wis. 385, 69 N. W. 164; Barr v. Church, 82 Wis. 382, 52 N. W. 591; Sterling v. Ripley, 3 Pinn. 155, 3 Chandl. 166.

Can.—Allan v. McTavish, 8 Ont. App. 440.

Contra.—Bigby v. Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A.

debtor, in the absence of knowledge of such intent, or some participation in the fraudulent scheme by the assignee or judgment creditor.[62] But where a creditor takes no affirmative or independent action to collect his claim, but simply accepts the advantage which the fraudulent debtor voluntarily gives him for the debtor's own purposes, and as part of the fraudulent scheme, he puts himself under the debtor's protection and into his hands and allows the fraudulent debtor to represent him in procuring the judgment, and the fraudulent purpose of the debtor is imputed by him and vitiates the judgment.[63] A transfer of property which is not worth materially more than the amount of his debt and is no more than sufficient to satisfy it, taken by a *bona fide* creditor only for the purpose of securing his debt, and not for the purpose or with the intent of shielding his debtor and assisting him to hinder or delay his other creditors, is not fraudulent.[64] A creditor has a right to

754; Couley v. Buck, 100 Ga. 187, 28 L. Ed. 97; Claflin v. Ballance, 91 Ga. 411, 11 S. E. 309; Palmour v. Johnson, 84 Ga. 91, 10 S. E. 500; Phinizy v. Clark, 62 Ga. 823.

The rule does not apply to a purchaser who, by direction of the debtor, pays the price to a preferred creditor. Pope v. Kingman & Co., 2 Neb. (Unoff.) 184, 96 N. W. 519.

Application of rule.—Where defendant procured goods fraudulently and transferred them to secure a *bona fide* debt to a bank, and the goods so transferred were not excessive security, the fact that the bank knew of such fraud, and had represented defendant to be in good financial standing, is not sufficient to avoid the trust deed, at the suit of a creditor who did not seek to disaffirm his sale of goods to defendant. Banks Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923.

62. Galle v. Tode, 148 N. Y. 270, 42 N. E. 673, *aff'g* 74 Hun, 542, 26 N. Y. Supp. 633, and *overruling* Illinois Watch Co. v. Payne, 39 App. Div. 521, 11 N. Y. Supp. 408, and Simmons v. Goldbach, 56 Hun, 204, 9 N. Y. Supp. 359; Slessinger v. Topkis, 1 Marv. (Del.) 140; Page v. Simpson, 188 Pa. 393; Unangst v. Goodyear India Rubber Glove Mfg. Co., 141 Pa. St. 127, 21 Atl. 499; Bell v. Throop, 140 Pa. St. 641, 21 Atl. 408; Hutchinson v. McClure, 20 Pa. St. 63; Dailey's Estate, 13 Pa. Super. Ct. 506.

63. Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67, 35 App. Div. 596, 55 N. Y. Supp. 179; Barker v. Franklin, 37 Misc. Rep. 292, 75 N. Y. Supp. 305.

64. *N. Y.*—New York County Nat. Bank v. American Surety Co., 69 App. Div. 153, 74 N. Y. Supp. 692; Sommers v. Cottentin, 26 App. Div. 241, 49 N. Y. Supp. 652; Hall v. Arnold, 15 Barb. 599, the transfer is not affected by an undisclosed fraudulent intent in the part of the debtor.

obtain a preference from his debtor, and if he has no other object in view than to secure himself, his rights as a preferred creditor are not affected by the fact that he has knowledge or notice of the debtor's indebtedness to others or of his insolvency,[65] or that the

U. S.—Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

Ala.—Cooper v. Berney Nat. Bank, 99 Ala. 119, 11 So. 760; Howell v. Bowman, 99 Ala. 100, 10 So. 640.

Ark.—Hempstead v. Johnson, 18 Ark. 123, 65 Am. Dec. 458.

Ind.—Fleming v. Yost, 137 Ind. 95, 36 N. E. 705.

Iowa.—Ruthven v. Clarke, 109 Iowa, 25, 79 N. W. 454; Gaar v. Klein, 93 Iowa, 313, 61 N. W. 918; Des Moines Ins. Co. v. Lent, 75 Iowa, 522, 39 N. W. 826.

Kan.—Standard Implement Co. v. Parlin, etc., Co., 51 Kan. 632, 33 Pac. 362.

Ky.—McFerran v. Jones, 2 Litt. 219.

Md. — Commonwealth Bank v. Kearns, 100 Md. 202, 59 Atl. 1010.

Miss.—Farmers' Bank v. Douglass, 11 Sm. & M. 469.

Mo.—Schawacker v. Ludington, 77 Mo. App. 415.

Neb.—Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811; H. T. Clarke Drug Co. v. Boardman, 50 Neb. (Unoff.) 687, 70 N. W. 248.

N. C.—Nadal v. Britton, 112 N. C. 180, 16 S. E. 914.

Pa.—Damon v. Bache, 55 Pa. St. 67, 93 Am. Dec. 730.

Tenn.—Wilson v. Eifler, 47 Tenn. 31; Phillips v. Cunningham (Ch. App. 1899), 58 S. W. 463.

Tex.—Brown v. Lessing, 70 Tex. 544, 7 S. W. 783; Garrity v. Rankin (Civ. App. 1900), 55 S. W. 367.

Utah.—Ogden State Bank v. Barker, 12 Utah, 27, 40 Pac. 769.

Vt.—Gregory v. Harrington, 33 Vt. 241.

Wis.—Ritzinger v. Eau Claire Nat. Bank, 103 Wis. 346, 79 N. W. 410.

Can.—Mulcahey v. Archibald, 28 Can. Sup. Ct. 523.

See also Preferences; knowledge and intent of parties, chap. XI, § 21, *supra*.

When property greatly exceeds the debt.—Where a debtor conveys all his property in payment of a debt, and the value of the property greatly exceeds the amount of the debt, the conveyance is fraudulent as against the other creditors of the debtor, though the grantee is not charged with knowledge of the debtor's fraud. Clark v. Bell (Tex. Civ. App. 1905), 89 S. W. 38.

65. *Ala.*—Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704.

Ill.—Kiehn v. Bestor, 30 Ill. App. 458; Axtell v. Cullen, 3 Ill. App. 527.

Ind.—Staight v. Roberts, 126 Ind. 383, 26 N. E. 73.

Iowa.—Rockford Boot & Shoe Mfg. Co. v. Mastin, 75 Iowa, 112, 39 N. W. 219; Citizens Bank v. Rhutasel, 68 Iowa, 597, 27 N. W. 774.

Mich.—Oshkosh Nat. Bank v. First Nat. Bank, 100 Mich. 485, 59 N. W. 231.

Mo.—Sevier v. Allen, 80 Mo. App. 187.

Or.—Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676.

Pa.—Harmon v. Reese, 1 Browne, 11.

debtor is actuated solely by a desire to defraud his other creditors,[66] or that the conveyance secures the debts of more than one creditor,[67] or that the debtor transferred all of his property, if the transfer is in actual payment or discharge of a *bona fide* pre-existing debt.[68] But, although the form of a transaction is that of payment or security for a debt, if the transfer is not in reality a preference of an actual debt, but its real object and design is to place the property of the debtor beyond the reach of his creditors or to so encumber it by an apparent lien as to mislead creditors and enable the debtor to possess and enjoy its beneficial fruits, or if the transaction, in addition to the purpose of paying or securing a valid debt, is also made for the further purpose, and with the intent, of securing to the debtor some benefit or advantage, or hindering, delaying, or defrauding his other creditors, and such purpose and intent is understood, entered into, and participated in by both parties, the transfer is fraudulent, even though a full and adequate consideration be received for the same through an actual indebtedness discharged or secured.[69] If the debt is fictitious in whole or

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86.

Tex.—Frazer v. Thatcher, 49 Tex. 26.

Va.—Shields v. Mahoney, 94 Va. 487, 27 S. E. 23.

Wash.—Furth v. Snell, 6 Wash. 542, 33 Pac. 830.

Contra.—Where a debtor transfers certain of his property to a creditor, resulting in preference to the latter over other creditors, and the creditor so favored knew of the insolvency or embarrassed condition of the debtor, the contract will be set aside as fraudulent. Johnson v. Levy, 109 La. 1036, 34 So. 68; Stone v. Kidder, 6 La. Ann. 552; Gillespie v. Cammack, 3 La. Ann. 248; DeBlanc v. Martin, 2 Rob. (La.) 38; Henderson v. Morgan, 4 Mart. N. S. (La.) 649; Hodge v. Morgan, 2 Mart. N. S. (La.) 61.

66. Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60. See Preference not invalidated by mere fraudulent intent, chap. XI, § 23, *supra*.

67. Anderson v. Hooks, 9 Ala. 704; Rosenheim v. Flanders, 114 Iowa, 291, 86 N. W. 293.

68. Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137; Turner Hardware Co. v. Reynolds (I. T.), 47 S. W. 307; Goldsmith v. Erickson, 48 Neb. 48, 66 N. W. 1029; Beaubien v. Perrault, 17 Quebec Super. Ct. 410. See Transfer of all the debtor's property, chap. VI, § 8, *supra;* Preferences, what property may be transferred, chap. XI, § 11, *supra*.

69. *N. Y.*—Billings v. Russell, 101 N. Y. 226, 4 N. E. 531, *rev'g* 31 Hun, 65; Davis v. Leopold, 87 N. Y. 620; New York County Nat. Bank v. American Surety Co., 60 App. Div.

in part; if there is a scheme, plan, or purpose to secure the property for the benefit of the debtor to the exclusion of the creditors; if there is a purpose to cover up, secrete, remove, or dispose of the

153, 74 N. Y. Supp. 692; Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67, 35 App. Div. 596, 55 N. Y. Supp. 179; Vilas Nat. Bank v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009; New York Ice Co. v. Cousins, 23 App. Div. 560, 48 N. Y. Supp. 799; Howe v. Sommers, 22 App. Div. 417, 48 N. Y. Supp. 162; Woods v. Van Brunt, 6 App. Div. 220, 39 N. Y. Supp. 896; Victor v. Levy, 72 Hun, 263, 25 N. Y. Supp. 644, *aff'd* 148 N. Y. 739, 42 N. E. 726; King v. Munzer, 28 N. Y. Supp. 587; Loeschigk v. Addison, 19 Abb. Pr. 169.

U. S.—Drury v. Milwaukee, etc., R. Co., 7 Wall. 299, 19 L. Ed. 40; Fechheimer v. Sloman, 33 Fed. 787, 2 L. R. A. 153; Smith v. Croft, 12 Fed. 856; 11 Biss. 340, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267.

Ala.—Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56; First Nat. Bank v. Acme White Lead, etc., Co., 123 Ala. 344, 26 So. 354; Ziegler v. Carter, 94 Ala. 291, 10 So. 260; Harris v. Russell, 93 Ala. 59, 9 So. 541; McDowell v. Steele, 87 Ala. 493, 6 So. 288; Leinkauff v. Frenkle, 80 Ala. 136; Levy v. Williams, 79 Ala. 171; Tatum v. Hunter, 14 Ala. 557.

Colo.—Colorado Trading, etc., Co. v. Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954; Shideler v. Fisher, 13 Colo. App. 106, 57 Pac. 864.

Conn.—Starr v. Plant, 28 Conn. 377.

Ill.—Comstock-Castle Stove Co. v. Baldwin, 169 Ill. 636, 48 N. E. 723, *rev'g* 63 Ill. App. 255; Slattery v. Stewart, 45 Ill. 293; Merry v. Bostwick, 13 Ill. 398, 54 Am. Dec. 434; McNeil, etc., Co. v. Plows, 83 Ill. App. 186; Ley v. Reitz, 25 Ill. App. 615.

Ind.—Bunch v. Hart, 138 Ind. 1, 37 N. E. 537; Roberts v. Farmers', etc., Bank, 136 Ind. 154, 36 N. E. 128, 137 Ind. 697, 36 N. E. 1091.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

Iowa.—Bryant v. Fink, 75 Iowa, 516, 39 N. W. 820.

Ky.—Foster v. Grigsby, 64 Ky. 86; Ward v. Trotter, 19 Ky. 1; Buckler v. Brewer, 9 Ky. L. Rep. 1013.

Me.—Hartshorn v. Eames, 31 Me. 93.

Miss.—Mangum v. Finucane, 38 Miss. 354.

Mo.—Gutta Percha Rubber Mfg. Co. v. Kansas City Fire Dept. Supply Co., 149 Mo. 538, 50 S. W. 912; McDonald v. Hoover, 142 Mo. 484, 44 S. W. 334; Martin v. Estes, 132 Mo. 402, 28 S. W. 65, 34 S. W. 53; Alberger v. White, 117 Mo. 347, 23 S. W. 92; Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212; Hungerford v. Greengard, 95 Mo. App. 653, 69 S. W. 602; Farwell v. Meyer, 67 Mo. App. 566; McKinney v. Wade, 43 Mo. App. 152; Hanna v. Finley, 33 Mo. App. 645; Gaff v. Stern, 12 Mo. App. 115; Cordes v. Straszer, 8 Mo. App. 61.

Neb.—Columbia Nat. Bank v. Baldwin, 64 Neb. 732, 90 N. W. 890; Ellis v. Musselman, 61 Neb. 262, 85 N. W. 75; Landauer v. Mack, 43 Neb. 430, 61 N. W. 597; Marcus v. Leake, 4 Neb. (Unoff.) 354, 94 N. W. 100.

property so as to prevent its coming to the hands of the creditors; or if there is an attempt to so hinder and delay them as to force them to accept a compromise for less than that which is actually due and owing them, then and in all such cases the transaction is fraudulent and void; and if a creditor participates in such scheme and has knowledge of such purpose, or in any manner aids and abets the accomplishment of such purpose, he becomes a party to the fraud, and is liable to have any lien that he may have procured postponed to that of other creditors, even though the debt is actually due and owing to him from the debtor.[70] If the purpose of the creditor in obtaining or taking a transfer to himself of the property of his insolvent debtor is not to collect or secure the payment of his own debt, but to aid the debtor in covering up his prop-

N. J.—Richey v. Carpenter (Ch. 1895), 33 Atl. 472; Folk v. Fonda (Ch. 1894), 29 Atl. 676; Moore v. Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; Metropolis Nat. Bank v. Sprague, 21 N. J. Eq. 530.

N. C.—Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59; Hafner v. Irwin, 23 N. C. 490.

N. D.—Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

Ohio.—Fassett v. Traber, 20 Ohio, 540; Brooks v. Todd, 1 Handy, 169.

Pa.—Thornburn v. Thompson, 192 Pa. St. 298, 43 Atl. 992; Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639; Jaroslawski v. Simon, 3 Brewst. 37. But see Whitman v. O'Brien, 29 Pa. Super Ct. 208.

S. C.—Pickett v. Pickett, 2 Hill Eq. 470; Fryer v. Bryan, 2 Hill Eq. 56.

Tex.—Edrington v. Rogers, 15 Tex. 188; Louisiana Sugar Refining Co. v. Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; Mixon v. Symonds, 2 Tex. Civ. App. 629, 21 S. W. 772.

Va.—National Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933.

Wis.—Zimmerman v. Bannon, 101 Wis. 407, 77 N. W. 735.

Eng.—Twyne's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1.

See also Retention of possession or apparent title, chap. XII, *supra;* Reservations and trusts for grantor, chap. X, *supra.*

Liable as garnishee for excess.—A mortgage creditor who surrenders his mortgage and takes back a bill of sale for the purpose of hindering, delaying and defrauding other creditors of the mortgagor, cannot complain because he is held liable in garnishment proceedings by a creditor of the mortgagor for the proceeds of the sale in his hands in excess of the debt due him. Carter, R. & H. Co. v. McDonald, 94 Wis. 186, 68 N. W. 655.

70. Galle v. Tode, 148 N. Y. 270, 42 N. E. 673; Maase v. Falk, 146 N. Y. 34; Manning v. Beck, 129 N. Y. 1, 14 L. R. A. 198; Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639.

erty and defeating other creditors, or to help the debtor by securing to him a secret interest or benefit therein, or any reservation of the property for the debtor's own use and benefit, he participates in the fraudulent intent of the debtor and will not be protected as a preferred creditor, though it be shown that his debt was *bona fide* and of an amount equal to the fair value of the property.[71] The same rule applies where the transferee knows that the debtor has made false statements in regard to, or has purposely concealed, his financial condition in order to obtain credit on purchases from another creditor, or knows that the purchases were made from the latter for the purpose of obtaining goods to secure the transferee's claim.[72] Payment of a valuable consideration upon the transfer of property, whether by the satisfaction of a valid existing indebtedness or in any other manner, is not inconsistent with the exist-

71. Smith v. Schwed, 9 Fed. 483; Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; Johnson v. Whitwell, 24 Mass. 71; McDonald v. Hoover, 142 Mo. 484, 44 S. W. 334; Sunday Creek Coal Co. v. Burnham, 52 Neb. 364, 72 N. W. 487.

But a mortgage given to secure a previously existing valid indebtedness is valid against other creditors, though made and secured with intent to place the mortgagor's property beyond the reach of such other creditors, and, at the same time, secure him in the use of it. A debtor has the right to prefer one creditor over another, even though the effect be to prevent the other from collecting his debt. Hastings v. Claflin, 14 N. Y. Supp. 757; Billings v. Billings, 31 Hun (N. H.), 65; Jewett v. Noteware, 30 Hun (N. Y.) 192.

It is not fraudulent to give or receive a pledge for the payment of an honest debt, especially if the pledge does not exceed in value the amount of the debt; but it is otherwise if done collusively and the real object is to delay or defeat other creditors. Reynolds v. Wilkins, 14 Me. 104.

Giving the debtor authority to sell goods transferred to the creditor to sell and apply to payment of his debt does not show that the creditor participated in the fraud. Marsalis v. Brown, 1 Tex. App. Civ. Cas., § 453.

A conveyance to a creditor to prevent attachment of the property by other creditors and to secure its continued use in the business of the debtor is fraudulent, where its object is not to secure his debt or to raise money for the payment of other debts. Bernard v. Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887.

72. Hill v. Mallory, 112 Mich. 387, 70 N. W. 1016.

ence of an intent to defraud, but is simply a circumstance to be considered in determining the question of intent.[73] A creditor has a right to protect his own interests, but in so doing he must not lend himself to any scheme whereby others may be defrauded; and he does this whenever he knowingly accepts the benefits of an arrangement by which others are deceived or misled and the interests of the debtor thereby improperly protected from the lawful demands of his creditors.[74] It is necessary that good faith should be observed toward the rights of other creditors and that both the debtor and the preferred creditor should act solely for the purpose of securing the debt preferred, without interposing any barrier to the rights of others or hindering or delaying the other creditors, except such as may be incidental to the preference or necessary to effect that object.[75]

§ 10. **Participation by creditor in fraudulent intent where debt is only part of consideration.**—Where a creditor purchases or receives from his debtor more goods or property than are necessary to pay his debts, although he pays a consideration for the

73. Billings v. Russell, 101 N. Y. 226, 4 N. E. 531. See also Effect of consideration, chap. XIII, § 30, *infra*.

74. Thompson v. Furr, 57 Miss. 478.

Participation by a creditor in the debtor's fraudulent purpose is not sufficiently shown by his knowledge that the debtor desires to and does prefer him to other creditors. Bank of Commerce v. Schlotfeldt, 40 Neb. 212, 58 N. W. 727. Nor can it be inferred from his failure to point out to an officer holding an attachment writ the goods of the debtor. Steinberg v. Buffum, 61 Neb. 778, 86 N. W. 491.

Failure of a creditor to give notice to other creditors of judgment notes given him by an insolvent debtor does not show participation in the debtor's intention to defraud his creditors. Field v. Ridgely, 116 Ill. 424, 6 N. E. 156. Or of a check given by him to the debtor in payment for the goods purchased, after learning of the fraud and while the check was still in the debtor's hands. Keet-Roundtree Shoe Co. v. Lisman, 149 Mo. 85, 50 S. W. 276.

75. Harris v. Russell, 93 Ala. 59, 9 So. 541, the purchasing creditor cannot go beyond the legitimate purpose of obtaining payment of his debt; Foster v. Grigsby, 1 Bush. (Ky.) 86; Hafner v. Irwin, 23 N. C. 490; Walker v. Walker, 6 Ohio S. & C. P. Dec. 355, 4 Ohio N. P. 324; Brooks v. Todd, 1 Handy (Ohio), 169, 12 Ohio Dec. (Reprint), 84; Fassett v. Traber, 20 Ohio, 540.

remainder, he thereby puts it in the power of his debtor to hinder, delay and defraud other creditors, and the transfer is fraudulent as to other creditors, if he has knowledge of the seller's fraudulent intention, or grounds for reasonable suspicion that his act will aid the debtor in perpetrating a fraud on his other creditors.[76] A

76. *N. Y.*—Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. Supp. 159; Hyde v. Bloomingdale, 23 Misc. Rep. 728, 51 N. Y. Supp. 725.

U. S.—Dorrance v. McAlister, 91 Fed. 614, 34 C. C. A. 28, 63 U. S. App. 614.

Ala.—Guyton v. Terrell, 132 Ala. 66, 31 So. 83; Montgomery v. Bayliss, 96 Ala. 342, 11 So. 198; Brinson v. Edwards, 94 Ala. 447, 10 So. 219, but a sale of the whole property of an insolvent debtor, partly for cash which is applied in payment of debts, and partly for the purchaser's notes, which are retained by the debtor as representing that portion of the property which is exempt, is not fraudulent as to creditors; Harris v. Russell, 93 Ala. 59, 9 So. 541;; Owens v. Hobbie, 82 Ala. 467, 3 So. 145; Carter v. Coleman, 82 Ala. 177, 2 So. 354; Levy v. Williams, 79 Ala. 171; Wiley v. Knight, 27 Ala. 336. See Chipman v. Glennon, 98 Ala. 263, 13 So. 822.

Ark.—Carl, etc., Co. v. Beal, etc., Grocery Co., 64 Ark. 373, 42 S. W. 664, constructive notice is sufficient to put the purchaser on inquiry.

Fla.—Walling v. Christian, etc., Grocery Co., 41 Fla. 479, 27 So. 46, 47 L. R. A. 608.

Ga.—Conley v. Buck, 100 Ga. 187, 28 S. E. 98; Phinizy v. Clark, 62 Ga. 623.

Ill.—Strohm v. Hayes, 70 Ill. 41; Hanchett v. Goetz, 25 Ill. App. 445.

Ind.—Bray v. Hussey, 24 Ind. 228.

Ind. T.—Daugherty v. Bogy, 3 Ind. T. 197, 53 S. W. 542.

Iowa.—Rosenheim v. Flanders, 114 Iowa, 291, 86 N. Y. 293.

Kan.—Davis v. McCarthy, 40 Kan. 18, 19 Pac. 356; McDonald v. Gaunt, 30 Kan. 693, 2 Pac. 871.

Ky.—Foster v. Grigsby, 1 Bush, 86; Thompson v. Drake, 3 B. Mon. 565.

Mich.—Allen v. Stingel, 95 Mich. 195, 54 N. W. 880.

Mo.—Imhoff v. McArthur, 146 Mo. 371, 48 S. W. 456; Riley v. Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586; State v. Durant, 53 Mo. App. 493; Meyberg v. Jacobs, 40 Mo. App. 128.

Neb.—Chamberlain Banking House v. Turner-Frazier Mercantile Co., 66 Neb. 48, 92 N. W. 172; Henney Buggy Co. v. Ashenfelter, 60 Neb. 1, 82 N. W. 118, 83 Am. St. Rep. 503; Smith v. Logan, 52 Neb. 585, 72 N. W. 842; Switz v. Bruce, 16 Neb. 463, 20 N. W. 639.

N. J.—Perrine v. Perrine (Ch. 1901), 50 Atl. 694.

Pa.—Heiney v. Anderson, 9 Lanc. Bar, 13.

Tenn.—Darwin v. Handley, 3 Yerg. 502.

Tex.—Oppenheimer v. Halff, 68 Tex. 409; Allen v. Carpenter, 66 Tex. 138, 18 S. W. 347; McKinnon v. Reliance Lumber Co., 63 Tex. 30; Willis v. Yates (Sup. 1889), 12 S. W. 232; Halff v. Goldfrank (Civ. App. 1899),

creditor purchasing goods from his debtor at a price in excess of the debt is a participant in the debtor's fraud, where he knows that the excess so paid is to be placed by the latter beyond the reach of his other creditors, although there was no purpose to aid him in his design.[77] A transfer of property by a debtor to a creditor will be held fraudulent where the latter at the same time endeavors to hold property for the debtor, to keep it for him from his creditors, or to aid the debtor in covering up his property and defeating his other creditors.[78] But the purchaser from an insolvent debtor who

49 S. W. 1095; Proetzel v. Buck Stove, etc., Co. (Civ. App. 1894), 26 S. W. 1110; Stuart v. Smith (Civ. App. 1893), 21 S. W. 1026. But see Haas v. Kraus, 75 Tex. 106, 12 S. W. 394.

Vt.—Prout v. Vaughn, 52 Vt. 451.

Va.—Wright v. Hancock, 3 Munf. 521.

W. Va.—Murdoch v. Baker, 46 W. Va. 78, 32 S. E. 1009; Hart v. Sandy, 39 W. Va. 644.

Can.—Merritt v. Niles, 28 Grant Ch. (U. C.) 346.

Where necessity compels larger purchase.—A purchasing creditor from an insolvent must have a *bona fide* debt, and purchase at a fair price, and to the extent only of satisfying his debt, unless necessity compels a larger purchase, in which event the buyer's notice of the seller's fraudulent intent is not sufficient to invalidate the sale unless participated in by the buyer. Fly v. Screeton, 64 Ark. 184, 41 S. W. 764; Wood v. Keith, 60 Ark. 425, 30 S. W. 756. Such necessity must be a reasonable necessity arising from the natural situation or condition of the property. Levy v. Williams, 79 Ala. 171; Maddox v. Reynolds, 69 Ark. 541, 64 S. W. 266.

77. McVeagh v. Baxter, 82 Mo. 518; Murdoch v. Baker, 46 W. Va. 78, 32 S. E. 1009; Hart v. Sandy, 39 W. Va. 644, 20 S. E. 665; Gillespie v. Allen, 37 W. Va. 675, 17 S. E. 184. Transfers of the property of an insolvent with the intent to hinder and defraud his creditors, known to the purchaser, are void as against creditors, although a full consideration is paid. Herman v. McKenney, 47 Fed. 758.

78. Blumenthal v. Michel, 33 App. Div. (N. Y.) 636, 54 N. Y. Supp. 81; Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; Hadley v. Adsit, 3 Kan. App. 122, 42 Pac. 836; Thompson v. Furr, 57 Miss. 478; Holt v. Creamer, 34 N. J. Eq. 181; Sweet's petition, 20 R. I. 557, 40 Atl. 502. The rule applies to a judgment by confession. Gale v. Tode, 148 N. Y. 270; Sowles v. Witters, 55 Fed. 159. See also Confession of judgment, chap. II, § 11, *supra*.

Putting purchase price into homestead.—A scheme by an insolvent debtor and a preferred creditor to dispose of the entire stock of such debtor, to put the purchase price into a homestead for the benefit of the debtor, and fraudulently apply the balance to pay the creditor, is illegal in so far, at least, as the preferred creditor is concerned. Carson

pays him a sum of money as the purchase price, or a creditor who receives in payment goods exceeding in value his debt, cannot be held to a fraudulent intent, where by agreement the purchaser or seller applies the cash or notes constituting the purchase price, or the excess, in payment of other debts of the seller, the sale being otherwise fair.[79] And the fact that the property transferred by a debtor, or the security given to a creditor, is largely in excess of the debt, is not conclusive of fraud, particularly if the creditor act in good faith and a fair sum is paid for the difference between value of the property and the amount of the debt;[80] it is but a badge of fraud, and only becomes a fraud in law when the purpose is to protect the debtor's interest from other creditors.[81] This is held to be the rule even though all the property of the debtor is included in the transfer.[82]

§ 11. **Recital of false consideration.**—Recital of a false consideration in an absolute conveyance intended as a mortgage to

v. Hawley, 82 Minn. 204, 84 N. W. 746. See Powell v. Jeffries, 5 Ill. 387. See also Purchase of homestead and payment of liens, chap. IV, § 45, *supra*.

79. Fargerson v. Hall, 99 Ala. 209, 13 So. 302; Murphy v. Murphy, 74 Conn. 198, 50 Atl. 394; Troustine v. Lask, 4 Baxt. (Tenn.) 162; Tennant, etc., Shoe Co. v. Partridge, 82 Tex. 329, 18 S. W. 310.

If the purchaser is justified in believing that the money paid by him for goods in excess of the amount of his debt is to be devoted to the payment of a *bona fide* indebtedness of the seller, such purchase is not necessarily fraudulent. St. Louis Coffin Co. v. Rubelman, 15 Mo. App. 280.

80. Nathan v. Sands, 52 Neb. 660, 72 N. W. 1030; Goldsmith v. Erickson, 48 Neb. 48, 66 N. W. 1029; Smith v. Pbelan, 40 Neb. 765, 50 N. W. 562.

81. Farmers', etc., Bank v. Orme, 5 Ariz. 304, 52 Pac. 473; Richards v. Schreiber, etc., Co., 98 Iowa, 422, 67 N. W. 569; Lycoming Rubber Co. v. King, 90 Iowa, 343, 57 N. W. 864. See also Badges of fraud; excess of security, chap. VI, § 5, *supra*.

A confession of judgment in excess of the amount due the creditor does not show fraud on the part of the creditor, where she was inexperienced and relied on the statement of the judgment debtor, who was her brother, as to the amount due her. Merchants' Bldg., etc., Assoc. v. Barber (N. J. Ch. 1894), 30 Atl. 865.

82. Richards v. Schreiber, etc., Co., 98 Iowa, 422, 67 N. W. 569. See also Transfer of all the debtor's property, chap. VI, § 8, *supra*.

secure a smaller sum than that recited is strong evidence of participation in the grantor's fraudulent intent.[83] A mortgage executed to hinder and delay the mortgagee's creditors, and which purposely exaggerates the mortgagee's demand, and the object of which is known to the mortgagee at the time of its execution, is void as against such creditors.[84] If a creditor knowing the insolvency of his debtor, takes from him a deed of trust to secure the entire amount of his debt without disclosing the fact that he is indebted to the grantor on another transaction, not noticed in the deed, this would be a strong circumstance against him, and would probably be conclusive if the indemnity provided was fully adequate to the secured debt; but if the mortgaged property was insufficient to pay the secured debts by an amount exceeding the creditor's indebtedness to the grantor, or if there were other debts or liabilities, not provided for by the deed, exceeding the creditor's said indebtedness, this would be sufficient to rebut every inference of fraud or dishonesty.[85]

§ 12. **When creditor's intent is immaterial.**—The fraudulent intent of one or both parties to a sale by an insolvent debtor will not invalidate it as to his other creditors, if it was made in payment of a *bona fide* debt, not less than the fair value of the property, and was without reservation of any benefit to the debtor.[86] A conveyance made by a debtor to secure his debt, if also made to hinder, delay, or defraud other creditors, is void as to them; and a deed, containing provisions to hinder, delay, or defraud creditors, will be void as to them, though taken by a creditor with the sole motive of securing his debts, and accepted by him with such provisions, because the debtor would give no other. In such case

83. Bailey v. Cheatham, 4 Ky. L. Rep. 351.

84. Stinson v. Hawkins, 13 Fed. 833, 4 McCrary, 500, 16 Fed. 850, 5 McCrary, 284; Taylor v. Wood (N. J. Ch.), 5 Atl. 818; Wallis v. Adoue, 76 Tex. 118, 13 S. W. 63.

85. Alabama L. Ins., etc., Co. v. Pettway, 24 Ala. 544. See also Fictitiousness of consideration, chap. VI, § 3, *supra;* False statements as to consideration, chap. VI, § 2, *supra;* Fictitious consideration, chap. VIII, § 4, *supra.*

86. Morrow v. Campbell, 118 Ala. 330, 24 So. 852.

the necessary effect of the transfer would seem to control the intent of the creditor or render it immaterial.[87] But it had been held that if a creditor takes a judgment, or conveyance, or payment in any form, to secure an actual debt, the transaction will be valid against other creditors, although he knew that the effect would be to postpone the others, that the debtor intended it to have that effect, and although he took it to aid that intent as well as to protect himself. The criterion is not the effect but the fraudulent intent.[88]

§ 13. **Participation of trustee imputable to beneficiary.**—If the trustee in a deed of trust given to secure creditors is privy to, or has knowledge of, a fraudulent intent on the part of the grantor in executing the instrument, such knowledge will invalidate the instrument as to the beneficiaries, and generally he is the agent of the *cestui que trust* in all matters pertaining to the management of the trust property; and if he has any active duties to perform with respect thereto, and is not merely the repository of the title, having no previous connection with the property, whatever knowledge or notice impairs his legal title also impairs the equitable title of the beneficiaries.[89] In some jurisdictions it is held that the participation of the trustee in the fraud is not imputable to an innocent beneficiary where the trustee was not the agent of the beneficiary in procuring the execution of the instrument.[90] A mortgage given by a firm to one of its members, as nominal mortgagee, to secure to a bank a *bona fide* indebtedness, is not void as to subsequent attaching creditors, although made by the firm and received by the nominal mortgagee with intent to hinder and de-

87. Garland v. Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756. See also Intent of grantor in general, chap. XIII, § 1, *supra*.

88. Whitman v. O'Brien, 29 Pa. Super. Ct. 208.

89. Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310; State Grimm v. Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321, 10 Am. & Eng. Corp. Cas. N. S. 338; Woodson v. Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Crow v. Beardsley, 68 Mo. 435; Ross v. Ashton, 73 Mo. App. 254. *Compare* Hughes v. Kelley (Va.), 30 S. E. 387.

90. Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873; Sutton v. Simon, 91 Tex. 638, 45 S. W. 559; Wade v. Odle, 21 Tex. Civ. App. 656, 54 S. W. 786.

fraud the creditors of the firm, where the bank neither knew nor participated in the fraudulent intent.[91]

§ 14. **Participation of one creditor imputable to all.**—Where the transfer or security given by a debtor is to two or more persons in payment of a distinct indebtedness owing to each of them, it is not invalidated as to the valid claim of an innocent creditor by title failing in the other or others through participation in some fraud of the debtor, for inadequacy of consideration, or for other reasons.[92] But where the creditor who participated in the fraudulent intent of the debtor acted as agent for the others in procuring the transfer or security,[93] or is a partner of the others,[94] the latter are bound by the knowledge which their agent or partner had of the fraudulent intent of the debtor to hinder, delay, or defraud his creditors.

§ 15. **Time when knowledge or notice is acquired.**—Knowledge or notice that a conveyance is fraudulent as to creditors acquired by the grantee subsequently to the transfer does not impair the grantee's title or affect his rights, as against other creditors,[95] unless the grantee had such knowledge or notice be-

91. First Nat. Bank v. Ridenour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167

92. *N. Y.*—Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834.

U. S.—Tefft v. Stern, 73 Fed. 591, 21 C. C. A. 67.

Mass.—Prince v. Shepard, 9 Pick. 176.

Tenn.—Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873; Troustine v. Lask, 4 Baxt. 162.

Tex.—Sullivan v. Thurmond (Civ. App.), 45 S. W. 393; Sonnentheil v. Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945; Willis v. Murphy (Civ. App.), 28 S. W. 362; Kraus v. Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025. But see Simon v. Ash, 1 Tex. Civ. App. 202, 20 S. W. 719. *Compare* Wise v. Tripp, 13 Me. 9; Thompson v. Johnson, 55 Minn. 515, 57 N. W. 223.

93. Morris v. Lindauer, 54 Fed. 23, 4 C. C. A. 162; Rownd v. State, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395; Jaffray v. Wolf, 4 Okla. 303, 47 Pac. 496.

94. Gowing v. Warner, 30 Misc. Rep. (N. Y.) 593, 62 N. Y. Supp. 797.

95. *U. S.*—Yardley v. Sibbs, 84 Fed. 531.

Ark.—Massie v. Enyart, 32 Ark. 251.

fore paying the consideration.[96] A person who pays the purchase money after knowledge of his grantor's fraudulent intent or purpose is not a *bona fide* purchaser.[97] The giving of a check or promissory note for the purchase price not being of itself a payment, in the absence of an express agreement, payment of a check,[98] or note,[99] given for the purchase price, while it remains

Iowa.—Payne v. Wilson, 76 Iowa, 377, 41 N. W. 45; Jones v. Hetherington, 45 Iowa, 681.

Mass.—Bliss v. Crosier, 159 Mass. 498, 34 N. E. 1075.

Va.—Clay v. Walter, 79 Va. 92.

Wash.—Prignon v. Daussat, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. Rep. 914.

96. *U. S.*—Parish v. Danford, 18 Fed. Cas. No. 10,770, 1 Bond, 345.

Ga.—Colquitt v. Thomas, 8 Ga. 258.

Ill.—Hulman v. McBryde, 80 Ill. App. 592.

Ind.—Parkinson v. Hanna, 7 Blackf. 400.

Mo.—Young v. Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; Dougherty v. Cooper, 77 Mo. 528; Arnholt v. Hartwig, 73 Mo. 485; Cheek v. Waldron, 39 Mo. App. 21; McNichols v. Richter, 13 Mo. App. 515.

Neb.—Savage v. Hazard, 11 Neb. 323, 9 N. W. 83.

N. D.—Halloran v. Holmes, 101 N. W. 310.

Eng.—Story v. Windsor, 2 Atk. 630, 26 Eng. Reprint, 776.

But where a purchase is made in good faith, without notice or knowledge of the grantor's fraudulent intent, it may be completed and the consideration paid over after notice. Fisher v. Hall, 44 Mich. 493, 7 N. W. 72.

Bond for title given as part of consideration for a fraudulent transfer of property, after the purchaser knew of the intended fraud, does not constitute payment which can give him any right as against defrauded creditors. Cleveland v. Butts, 13 Tex. Civ. App. 272, 35 S. W. 804.

97. Hunsinger v. Hoffer, 110 Ind. 390, 11 N. E. 463; Pierson v. Slifer, 52 Mo. App. 273; Stein v. Burnett, 43 Mo. App. 477; Halloran v. Holmes (N. D. 1904), 101 N. W. 310.

98. Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397, notice of the seller's fraudulent intent before transfer of the check requires the buyer to stop payment of it; Weil v. Reiss, 167 Mo. 125, 66 S. W. 946, but a summons as garnishee by unpreferred creditors of the vendor does not charge the buyer with notice of fraud in the sale to him so as to require him to stop payment of the check; Arnholt v. Hartwig, 73 Mo. 485, where, however, after notice that creditors of the vendor had attached the property for fraud in the transfer, the payee orders a check, given with the understanding that it is not to be paid immediately, to be paid, and it is paid, he is not entitled to be considered a *bona fide* purchaser.

When a draft constitutes a payment.—Where a draft drawn by one bank upon another to the buyer's order and endorsed by him is given for the purchase price, it constitutes a payment so that the buyer has no

in the hands of the seller and before its transfer to an innocent holder, after notice of the fraudulent intention of the seller, will not protect the buyer; since he is not a purchaser for a valuable consideration. So the execution of a deed conveying real estate as part of the purchase price, after actual notice of the fraudulent intent of the seller in disposing of his property, will not protect the purchaser or entitle him to reimbursement.[1] Knowledge or notice of the fraud acquired after payment of a part of the purchase money renders any subsequent payment made by the purchaser a payment in his own wrong. He is only entitled to reimbursement for the money paid, or the security or property actually appropriated by the seller as payment before notice, and is not to be regarded as a purchaser for a valuable consideration as to the purchase money not paid.[2] To constitute one an innocent purchaser of property sold to defraud the vendor's creditors, the whole consideration must be paid before the purchaser has notice of the fraudulent intent.[3] The rule that a purchaser of a fraudulent vendor will only be protected to the extent of payments made before notice of the fraud

power to stop the payment of the draft. Keet-Roundtree Shoe Co. v. Lisman, 149 Mo. 85, 50 S. W. 276.

99. Powell v. Jeffries, 5 Ill. 387; Work v. Coverdale, 47 Kan. 307, 27 Pac. 984, he is not protected by the fact that the note was held by and the payment made to the seller's son, where the note had been endorsed to tne son for collection only. Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641; Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642. *Contra*, Shealy v. Edwards, 78 Ala. 176; Nicol v. Crittenden, 55 Ga. 497, it not appearing that the buyer alone could control the note without the cooperation of the seller or that the latter could have been induced to cancel or surrender the note, which was negotiable.

1. Dodson v. Cooper, 37 Kan. 346, 15 Pac. 200.

2. *Ala.*—Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 211; Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704.

Ind.—Rhodes v. Green, 36 Ind. 7.

Kan.—Bush v. Collins, 35 Kan. 535, 11 Pac. 425.

Minn.—Riddell v. Munro, 49 Minn. 532, 52 N. W. 141.

Miss.—Perkins v. Swank, 43 Miss. 349.

Neb.—Bender v. Kingman (1902), 90 N. W. 886; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

Ohio.—Stinson v. Racer, 13 Ohio Dec. 421, 2 Ohio N. P. 316.

3. Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221; Hedrick v. Straus, 42 Neb. 485, 60 N. W. 928.

does not apply where such purchaser assumes debts of the vendor to the full amount of the property, and the creditors are notified of the arrangement and assent thereto, before any lien is acquired by other creditors.[4]

§ 16. **Duty to see to application of proceeds of property.**—Even though the purchaser knows that the seller is largely indebted and is pressed by his creditors,[5] or has knowledge of the seller's actual insolvency,[6] he is not required, as against the creditors of the seller, to see to the application of the purchase price or proceeds of the property transferred to the payment of the debts of the seller.[7] No such duty or obligation rests upon the purchaser unless, by reason of other facts, he is chargeable with complicity in the fraud.[8] Knowledge on the part of the purchaser that his payment is to be applied to create a preference does not render the sale fraudulent.[9]

§ 17. **Constructive or implied notice as equivalent to actual knowledge.**—Actual knowledge on the part of a purchaser or grantee of the fraudulent purpose of the grantor is not necessary to avoid a conveyance as in fraud of creditors. It is sufficient

4. Tennent-Stribling Shoe Co. v. Ruty, 53 Mo. App. 196.

5. Gist v. Barrow, 42 Ark. 521; Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758.

6. Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Meyer Bros. Drug Co. v. Durham, 35 Tex. Civ. App. 71, 79 S. W. 860; Ligon v. Tilman (Tex. Civ. App. 1897), 43 S. W. 1069. *Contra*, Armstrong v. Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635; Proetzel v. Buck Stove, etc., Co. (Tex. Civ. App. 1894), 26 S. W. 1110.

7. Priest v. Brown, 100 Cal. 626, 35 Pac. 323, where the purchaser believed at the time that the purchase money notes were to be used in a valid preference of certain creditors, he was not bound to see that they were in fact so applied, and was not guilty of any fraud because they were not applied in payment of such creditors, or were subsequently used for a fraudulent or invalid purpose.

8. Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758; Avery v. Johann, 27 Wis. 246, where the purchaser knew that the vendor had, a short time before the sale to him, declared his intention not to pay his creditors.

9. Metropolitan Bank v. Aarons-Mendelshon Co., 50 La. Ann. 1047, 24 So. 125.

if he had constructive notice.[10] It is the general rule that a purchaser or grantee is bound by such knowledge of facts and circumstances as would have been sufficient to excite the suspicion of a reasonably or ordinarily prudent or cautious man and put him on inquiry, which, if duly prosecuted, would have disclosed the fraudulent intent, and is chargeable with knowledge of all the facts which due inquiry would have developed. Such knowledge amounts to notice and is equivalent to actual knowledge.[11] In New York the statutes provide that the title to property transferred to a purchaser or incumbrancer for a valuable

10. Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360; Holladay Case, 27 Fed. 830; Singer, Baer & Co. v. Jacobs, 11 Fed. 559; Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772. See also cases cited in next note.

11. *U. S.*—Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; Brittian v. Crowther, 54 Fed. 295, 4 C. C. A. 341, 12 U. S. App. 148; Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642, 4 U. S. App. 406; Partles v. Gibson, 17 Fed. 293. Where a creditor of a bankrupt at the time he received a preference had reasonable cause to believe that a preference was intended, neither actual knowledge or belief is required to be shown, but only such circumstances as would lead an ordinarily prudent man to conclude that this would be the outcome. In re Hines, 16 Am. B. R. 495, 144 Fed. 543; Sundheim v. Ridge Avenue Bank, 15 Am. B. R. 132, 138 Fed. 951.

Ala.—Norwood v. Washington, 136 Ala. 657, 33 So. 869; Jordan v. Collins, 107 Ala. 572, 18 So. 137; Lehman v. Kelly, 68 Ala. 192.

Ark.—Dyer v. Taylor, 50 Ark. 314, 7 S. W. 258.

Cal.—Salisbury v. Burr, 114 Cal. 451, 46 Pac. 270.

Fla.—Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

Ga.—Clarke v. Ingram, 107 Ga. 565, 33 S. E. 802; Livingston v. Wright, 88 Ga. 33, 13 S. E. 832; Park v. Battey, 80 Ga. 353, 5 S. E. 492; Smith v. Wellborn, 75 Ga. 799.

Ill.—Boies v. Henney, 32 Ill. 130; Cowling v. Estes, 15 Ill. App. 255.

Ind.—Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

Ind. T.—Dorrance v. McAlester, 1 Ind. T. 473, 45 S. W. 141.

Iowa. — Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317; Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Rosenheim v. Flanders, 114 Iowa, 291, 86 N. W. 293; J. S. Brittain Dry Goods Co. v. Plowman, 113 Iowa, 624, 85 N. W. 810; Gamet v. Simmons, 103 Iowa, 163, 72 N. W. 444; Kelley v. Flory, 84 Iowa, 671, 51 N. W. 181; Redhead v. Pratt, 72 Iowa, 99, 33 N. W. 382; Lyons v. Hamilton, 69 Iowa, 47, 28 N. W. 429, 72 Iowa, 759, 33 N. W. 655; Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302; Gordon v. Worthley, 48 Iowa, 429; Kellogg v. Aherin, 48 Iowa, 299.

Kan.—Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772; Martin v.

consideration, with intent to defraud creditors, is not affected or impaired, unless it shall appear that such purchaser or incumbrancer "had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of

Marshall, 54 Kan. 147, 37 Pac. 977; Gollober v. Martin, 33 Kan. 252, 6 Pac. 267; Hood v. Gibson, 8 Kan. App. 588, 56 Pac. 148; Haskett v. Auhl, 3 Kan. App. 744, 45 Pac. 608.

Ky.—Lain v. Morton, 23 Ky. L. Rep. 438, 63 S. W. 286; Meyer v. Specker, 10 Ky. L. Rep. 116; Wiseman v. McAlpin, 6 Ky. L. Rep. 660; Ferguson v. May, 4 Ky. L. Rep. 989.

La. — Breaux-Renoudet Cypress-Lumber Co. v. Shadel, 52 La. Ann. 2094, 28 So. 292.

Md.—Smith v. Pattison, 84 Md. 241, 35 Atl. 963. *Compare* Cole v. Albers, 1 Gill, 412.

Mich.—Gumberg v. Treusch, 110 Mich. 451, 68 N. W. 236; Redford v. Penny, 58 Mich. 424, 25 N. W. 381.

Minn.—Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1; Thompson v. Johnson, 55 Minn. 515, 57 N. W. 223; Dow v. Sutphin, 47 Minn. 479, 50 N. W. 604.

Miss.—Pruitt v. Tennent-Stribling Shoe Co., 75 Miss. 447, 23 So. 188.

Neb.—Grainger v. Edwin (1902), 91 N. W. 592; Brown v. Sloan, 61 Neb. 237, 85 N. W. 37; Edwards v. Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Bollman v. Lucas, 22 Neb. 796, 36 N. W. 465.

Nev.—Greenwell v. Nash, 13 Nev. 286.

N. J.—Moore v. Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; New York F. Ins. Co. v. Tooker, 35 N. J. Eq. 408; Holt v. Creamer, 34 N. J. Eq. 181; Tantum v. Green, 21 N. J. Eq. 364, *aff'g* 19 N. J. Eq. 574; Atwood v. Impson, 20 N. J. Eq. 150.

N. C.—Wolf v. Arthur, 118 N. C. 890, 24 S. E. 671.

N. D.—Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Okla.—Kansas Moline Plow Co. v. Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33.

Pa.—Keichline v. Keichline, 54 Pa. St. 75.

Tex.—Ullman v. Crenshaw (1891), 16 S. W. 1012; Traylor v. Townsend, 61 Tex. 144; Humphries v. Freeman, 22 Tex. 45; Garahy v. Bayley, 25 Tex. Suppl. 294; Scheuber v. Wheeler (App. 1891), 15 S. W. 503; Davis v. Culp, (Civ. App. 1903), 78 S. W. 554; Holloway Seed Co. v. City Nat. Bank (Civ. App. 1898), 47 S. W. 77; Louisiana Sugar Refining Co. v. Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; McConnell v. Bruggerhoff, 1 Tex. App. Civ. Cas., § 1004.

Va.—Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854; Newberry v. Princeton Bank, 98 Va. 471, 36 S. E. 515; Ferguson v. Daughtrey, 94 Va. 308, 26 S. E. 822.

W. Va.—Wilson v. Carrico, 50 W. Va. 336, 40 S. E. 439; Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. 773; Dent v. Pickens, 46 W. Va. 378, 33 S. E. 303; Bowyer v. Martin, 27 W. Va. 442.

Wis.—Rindskopf v. Myers, 87 Wis. 80, 57 N. W. 967; Hooser v. Hunt, 65 Wis. 71, 26 N. W. 442.

such grantor."[12] Under these statutes it is held that actual notice must be given of the fraudulent intent, or in the absence of actual notice, that it is necessary that the facts and circumstances relied upon to charge the purchaser with knowledge should be of a character equivalent to such notice. If the facts within the knowledge of the purchaser are of such a nature as, in reason, to excite the suspicion of an ordinarily prudent person and put him upon inquiry, and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed. But, as well under these statutes as under the common law, circumstances to put the purchaser who pays full value on inquiry, must be equivalent to actual notice.[13] In some of the states it is held that the doctrine of constructive notice has no application, but that, while the existence of the facts to put the purchaser on inquiry raises a presumption of knowledge of all facts which such inquiry, if reasonably pursued, would have disclosed, it is not a conclusive badge of fraud, and simply raises a question of fact for the consideration of the jury as to whether the purchaser had actual notice.[14]

12. Real Property Law, chap. 547, Laws 1896, § 230; Personal Property Law, chap. 417, Laws 1897, § 29.

13. Greenwald v. Wales, 174 N. Y. 140, 66 N. E. 665, if the purchaser has knowledge that the effect of the sale is to deprive the vendor's creditors of the means of collecting their debts, it is a question of fact for the jury whether such knowledge does not give him notice of the fraudulent intent of the vendor; First Nat. Bank of Amsterdam v. Miller, 163 N. Y. 164, 57 N. E. 308; Anderson v. Blood, 152 N. Y. 285, 46 N. E. 493, 57 Am. St. Rep. 515; Wilson v. Marion, 147 N. Y. 589, 42 N. E. 190; Jacobs v. Morrison, 136 N. Y. 101, 32 N. E. 552; Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; Starin v. Kelly, 88 N. Y. 418; Stearns v. Gage, 79 N. Y. 102; Bailey v. Fransiolo, 101 App. Div. 140, 91 N. Y. Supp. 852; Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. Supp. 689; Peetsch v. Sommers, 31 App. Div. 255, 53 N. Y. Supp. 438, 28 Civ. Proc. R. 124; King v. Holland Trust Co., 8 App. Div. 112, 40 N. Y. Supp. 480; Wilmerding v. Jarmulowsky, 85 Hun, 285, 32 N. Y. Supp. 983; Farley v. Carpenter, 27 Hun, 359. *Compare* Vilas Nat. Bank v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009. *Contra*, Salomon v. Moral, 53 How. Pr. 342.

14. *U. S.*—Batavia v. Wallace, 102

§ 18. **Knowledge of facts to put on inquiry.**—No duty of inquiry as to the fraudulent intent of the grantor or as to his motives in making the sale devolves on the grantee or purchaser, unless he has actual knowledge of some suspicious fact or circumstances; but knowledge, on the part of the grantee, of such suspicious facts and circumstances as would put a prudent man on inquiry, is equivalent to knowledge of all facts which would be developed by a reasonable pursuit of such inquiry.[15] By reasonable pursuit is meant that implied where there is reason to awaken inquiry and direct diligence in a channel in which

Fed. 240, 42 C. C. A. 310, under rule in Missouri.

Colo.—Riethmann v. Godsman, 23 Colo. 202, 46 Pac. 684.

Conn.—Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Mass.—Carroll v. Hayward, 124 Mass. 120, an instruction is erroneous which disregards the distinction between means of knowledge and actual knowledge.

Mo.—John Deere Plow Co. v. Sullivan, 158 Mo. 440, 59 S. W. 1005; Van Raalte v. Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424; State v. Purcell, 131 Mo. 312, 33 S. W. 13; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Eck v. Hatcher, 58 Mo. 235; Looney v. Bartlett, 106 Mo. App. 619, 81 S. W. 481; White v. Million, 102 Mo. App. 437, 76 S. W. 733; Hearn v. Due, 79 Mo. App. 322; Simon-Gregory Dry Goods Co. v. Schooley, 66 Mo. App. 406. But see State v. Estel, 6 Mo. App. 6.

Neb.—Bender v. Kingman (1902), 90 N. W. 886.

Or.—Coolidge v. Heneky, 11 Or. 327, 8 Pac. 281. See Garnier v. Wheeler, 40 Or. 198, 66 Pac. 812; Philbrick v. O'Connor, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139; Lyons v. Leahy, 15 Or. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

15. *N. Y.*—Baker v. Bliss, 39 N. Y. 70.

U. S.—Holladay's Case, 27 Fed. 830.

Ark.—Dyer v. Taylor, 50 Ark. 314.

Ill.—Hanchett v. Kimbark, 118 Ill. 121.

Iowa.—Jones v. Hetherington, 45 Iowa, 681.

Ky.—Ferguson v. May, 4 Ky. L. Rep. 989.

Mich.—Eureka Iron & S. Works v. Bresnahan, 66 Mich. 489.

Miss.—Tuteur v. Chase, 66 Miss. 476, 4 L. R. A. 832.

Mo.—State, Pierce v. Merritt, 70 Mo. 276.

N. D.—Fluegal v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Okla.—Jackson v. Glaze, 3 Okla. 143, 41 Pac. 79.

Pa.—Kemmerer v. Tool, 78 Pa. 147.

Tex.—Dodd v. Gaines, 82 Tex. 429.

Wis.—Rindskopf v. Myers, 87 Wis. 80.

Facts sufficient to put on inquiry.—The fact that land given in exchange was deeded to the seller's wife. Summers v. Taylor, 4 Ky. L.

it would be successful.[16] There need not be "good and substantial evidence of the vendor's fraudulent intent such as sends conviction home to the mind and establishes a well founded belief" to charge the vendee with notice thereof. A less degree than this will charge the vendee with the duty of inquiry.[17] Actual notice of facts which to the mind of a prudent man indicate notice is proof of notice.[18] The known fact or facts must be of an unusual or suspicious nature, must have reference to the transaction sought to be impeached, and must so relate to it that, if faithfully pursued and inquired into, they will lead to a knowledge of the fraud committed.[19] A purchaser having knowledge of any fact sufficient to put him on inquiry is presumed either to have made the proper investigation or to have been guilty of negligence fatal to his claim as a *bona fide* purchaser.[20]

§ 19. **Mere suspicion.**—Knowledge of circumstances amounting to mere suspicion of the seller's fraud or bad faith respecting his creditors is not equivalent to notice to the purchaser of the seller's intended fraud,[21] or sufficient to put the purchaser on inquiry as to the existence of such fraudulent purpose.[22]

Rep. 290. A direct statement to a purchaser of the existence and nature of an adverse claim or title, whether made by or on behalf of the holder of the adverse title or by a mere stranger. Martel v. Somers, 26 Tex. 551.

Facts not sufficient to put on inquiry.—Access to invoice which shows that the stock was purchased on credit. Smith v. Kaufman, 94 Ala. 364, 10 So. 229. The fact that the purchaser was told by the seller that he was not indebted except as to those debts assumed by the purchaser, and that the purchaser discovered a small claim against the seller. B. C. Evans Co. v. Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219. Hearing reports as to an encumbrance on the land about to be purchased. Colquitt v. Thomas, 8 Ga. 258.

16. Cambridge Valley Bank v. Delano, 48 N. Y. 326; Maul v. Rider, 50 Pa. St. 167.

17. Hopkins v. Langton, 30 Wis. 379.

18. Knapp v. Bailey, 79 Me. 195; 3 Wash. Real Prop. (3d Ed.) 335.

19. Simons v. Morse, 2 Fed. 325; Hodges v. Coleman, 76 Ala. 103; Maul v. Rider, 59 Pa. St. 167; Wilson v. Hunter, 30 Ind. 466.

20. Cambridge Valley Bank v. Delano, 48 N. Y. 326; Williamson v. Brown, 15 N. Y. 354; Farmer's Loan, etc., Co. v. Walworth, 1 N. Y. 433.

21. *N. Y.*—Pohalski v. Ertheiler, 18 Misc. Rep. 33, 41 N. Y. Supp. 10.

§ 20. **Matters of common or general knowledge.**—Where the issue is as to whether or not a sale of a stock of goods was fraudulent as to creditors of the seller, general knowledge in the community of the fact is evidence tending to show notice of such fact to the purchaser; but general rumor that such sale was fraudulent does not amount to general knowledge or notoriety, and does not tend to show notice to the vendee of the fraud, nor is a general statement that the sale was fradulent sufficient to put the purchaser upon inquiry.[23] That a prospective wife had notice that the intention of a prospective husband in transferring all his property to her was to defeat the claim of another woman against him for breach of promise of marriage may be inferred from the surrounding circumstances, in connection with her failure to testify as a witness and deny such knowledge.[24]

§ 21. **Knowledge or notice of indebtedness or insolvency of grantor.**—Mere knowledge by the vendee or mortgagee that his vendor is largely indebted will not avoid the sale to him, and put him on inquiry, though it was made with fraudulent intent by the vendor.[25] Knowledge by the purchaser or mort-

U. S.—Wilson v. Welsh, 41 Fed. 570; Simms v. Morse, 2 Fed. 325, 4 Hughes, 579.

Ark.—Erb v. Cole, 31 Ark. 554.

Iowa.—Urdangen v. Doner, 122 Iowa, 533, 98 N. W. 317.

Tex.—Hooks v. Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991.

22. Tuteur v. Chase, 66 Miss. 476, 6 So. 241, 14 Am. St. Rep. 577, 4 L. R. A. 832.

23. Hodges v. Coleman, 76 Ala. 103.

24. Dent v. Pickens, 46 W. Va. 378, 33 S. E. 303.

25. *N. Y.*—Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

U. S.—Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360.

Ala.—Simmons v. Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39.

Ark.—Riggan v. Wolf, 53 Ark. 537, 14 S. W. 922.

D. C.—Davis v. Harper, 14 App. Cas. 463.

Kan.—Baughman v. Penn, 33 Kan. 504, 6 Pac. 890.

Ky.—Wood v. Elliott, 9 Ky. L. Rep. 952, 7 S. W. 624.

Mo.—Durkee v. Chambers, 57 Mo. 575.

N. C.—Eigenbrum v. Smith, 98 N. C. 207, 4 S. E. 122.

Or.—Spalding v. Brown, 36 Or. 160, 59 Pac. 185.

gagee of the insolvency of the grantor does not put him on inquiry or render the conveyance fraudulent, even if the object of the grantor was to defraud his creditors, unless such fraudulent purpose or intent was known to the purchaser or mortgagee.[26] But the purchaser or mortgagee may be charged with such notice

Pa.—Platt v. McQuown, 20 Pa. Co. Ct. 401.

Tex.—Armstrong Co. v. Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139.

Knowledge that the sale was of all his property subject to execution by one who refused to pay his debts, does not necessarily make the conveyance fraudulent as a matter of law. Kuhn v. Gustafson, 73 Iowa, 633, 35 N. W. 660; Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137.

26. *N. Y.*—Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Loeschigk v. Bridge, 42 N. Y. 421, if the price agreed to be paid is the full and fair value, and there were no other circumstances tending to impeach it, the sale may be evidence of good faith and an honest desire on the part of the seller to discharge his debts; New York County Nat. Bank v. American Surety, 69 App. Div. 153, 74 N. Y. Supp. 692, *aff'd* 174 N. Y. 544, 67 N. E. 1086; Walsh v. Kelly, 42 Barb. 98. A payment made by an insolvent to a creditor within four months prior to the debtor's bankruptcy is a voidable preference under the Bankruptcy Act, if the creditor had reasonable cause to believe a preference was intended; and such reasonable cause exists if the creditor had knowledge of the insolvency or of facts which reasonably charge him with such knowledge. Parker v. Black, 16 Am. B. R. 202, 143 Fed. 560; Pirie v. Chicago Title & Trust Co., 182 U. S. 438; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999; In re Andrews, 14 Am. B. R. 247, 135 Fed. 599; Upson v. Mt. Morris Bank, 14 Am. B. R. 6, 103 App. Div. 367, 92 N. Y. Supp. 1101; In re Eggert, 4 Am. B. R. 449, 102 Fed. 735, 43 C. C. A. 1.

Ala.—Buford v. Shannon, 95 Ala. 205, 10 So. 263; Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Dubose v. Young, 14 Ala. 139.

Conn.—Sisson v. Roath, 30 Conn. 15.

Ill.—Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85; Bentley v. Wells, 61 Ill. 59, 14 Am. Rep. 53; Frey v. Harris, 29 Ill. App. 243.

Ind.—Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

Iowa.—Darland v. Rosencranes, 56 Iowa, 122, 8 N. W. 776; Hughes v. Monty, 24 Iowa, 499.

Kan.—Vickers v. Buck Stove, etc., Co., 60 Kan. 598, 57 Pac. 517.

La.—Hayes v. Crockett, 7 La. Ann. 645, especially where the sale is in the usual course of business and for an adequate price.

Mo.—Schroeder v. Mason, 25 Mo. App. 190.

N. J.—Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58; Atwood v. Impson, 20 N. J. Eq. 150.

Tex.—Traders' Nat. Bank v. Clare, 76 Tex. 47, 13 S. W. 183.

Wis.—Erdall v. Atwood, 79 Wis. 1, 47 N. W. 1124.

as should put him upon inquiry as to the grantor's fraudulent intent, where he knows or should have known the grantor to be unable to pay his debts in the ordinary course of business and the conveyance amounts to an unlawful preference,[27] or where he pays an inadequate consideration,[28] or where the sale is made in great haste,[29] without any inventory,[30] or where an inventory was taken at night and a bill of sale hastily prepared,[31] or where the insolvent conveyed all of his property,[32] or the consideration is in the form of promissory notes,[33] or where he knew, or should have known, of the grantor's insolvency and of the effect which the conveyance would have on the interest of creditors,[34] or where there are other suspicious circumstances attending the transaction.[35]

§ 22. **Inadequacy of consideration.**—Inadequacy of consideration, or the fact that the purchaser of property did not pay its full value, is not alone sufficient to put the purchaser on inquiry or to constitute notice of fraud and render the purchase fraudulent;[36] but it is a fact which may be considered in deter-

Can.—Hickerson v. Parrington, 18 Ont. App. 635.

27. Hastings Malting Co. v. Heller, 47 Minn. 71, 49 N. W. 400.

28. Gollober v. Martin, 33 Kan. 252, 6 Pac. 267; Monessen Nat. Bank v. Lichtenstein, 207 Pa. St. 187, 56 Atl. 405. See also Inadequacy of consideration, chap. VI, § 4, *supra;* chap. VIII, § 37, *supra.*

29. Gollober v. Martin, *supra* See also Secrecy or haste, chap. VI, § 17, *supra.*

30. Gollober v. Martin, *supra.* Blum v. Simpson, 66 Tex. 84, 17 S. W. 402.

31. Ross v. Caywood, 16 App. Div. (N. Y.) 591, 44 N. Y. Supp. 958; Temple v. Smith, 13 Neb. 513, 14 N. W. 527. See also Secrecy or haste, chap. VI, § 17, *supra.*

32. Reid v. Loney, 22 Wash. 433, 61 Pac. 41.

33. Savage v. Hazard, 11 Neb. 323, 9 N. W. 83; Keyser v. Angle, 40 N. J. Eq. 481, 4 Atl. 641; Blum v. Simpson, 66 Tex. 84, 17 S. W. 402.

34. Paddock v. Jackson, 16 Tex. Civ. App. 655, 41 S. W. 700.

35. Slattery v. Stewart, 45 Ill. 293.

36. Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231; De Prato v. Jester (Ark. 1892), 20 S. W. 807; Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405; Zick v. Guebert, 142 Ill. 154, 31 N. E. 601, *aff'g* 41 Ill. App. 603; Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; State v. Mason, 112 Mo. 374; Blum v. Simpson, 66 Tex. 84, 17 S. W. 402, 71 Tex. 628, 9 S. W. 662; Copis v. Middleton,

mining the purchaser's good faith.[37] A conveyance of property, however, at a grossly inadequate price,[38] or where there are other suspicious facts and circumstances in addition to the fact that the price is inadequate,[39] is sufficient to put the purchaser on

2 Madd. 410, 17 Rev. Rep. 226, 56 Eng. Reprint, 386; In re Cranston, 9 Morr. Bankr. Cas. 160.

37. Urdanger & Greenburg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317.

38. *N. Y.*—Moyer v. Bloomingdale, 39 App. Div. 227, 56 N. Y. Supp. 991, gross inadequacy of price at which one in possession of goods offers to sell them is of itself evidence to the purchaser of an infirmity in the vendor's title; Ross v. Caywood, 16 App. Div. 591, 44 N. Y. Supp. 985; Wood v. Hunt, 38 Barb. 302.

U. S.—Wilson v. Jones, 76 Fed. 484.

Ark.—Adler-Goldman Commission Co. v. Hathcock, 55 Ark. 579, 18 S. W. 1048, purchase of an insolvent merchant's entire stock at fifty per cent. of its invoice price.

Cal.—Argenti v. San Francisco, 6 Cal. 677.

Ind.—First Nat. Bank v. Smith, 149 Ind. 443, 49 N. E. 376, a conveyance of land worth $8,000 in consideration of a debt of $650. See also Jameson v. Dilley, 27 Ind. App. 429, 61 N. E. 601.

Ky.—Adams v. Branch, 3 Ky. L. Rep. 178.

Mich.—Bendetson v. Moody, 100 Mich. 553, 59 N. W. 252.

Miss.—Pollock v. Butler (1898), 23 So. 577, purchase of property at thirty-five cents on the dollar.

Pa.—Monessen Nat. Bank v. Lichtenstein, 207 Pa. St. 187, 56 Atl. 405, one-fourth the face value of a mortgage.

Utah.—Gustin v. Matthews, 25 Utah, 168, 70 Pac. 402, nominal consideration.

39. *N. Y.*—Union Nat. Bank v. Warner, 12 Hun, 306, where the grantee knew of the grantor's intent to defeat his creditors; Ross v. Caywood, 16 App. Div. 591, 44 N. Y. Supp. 985.

Ala.—Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

Ill.—Hulman v. McBryde, 80 Ill. App. 592, where the purchaser intended to aid in the fraudulent design, and the one to whom he transferred the goods knew of the rights of the creditors.

Iowa.—Mertens v. Welsing, 85 Iowa, 508, 52 N. W. 362, where the grantee could not satisfactorily show where he obtained the money to pay for the property and the grantor continued to exercise acts of ownership over it; Dunn v. Wolf, 81 Iowa, 688, 47 N. W. 887; Peterson v. Rome, 76 Iowa, 447, 41 N. W. 68.

Ky.—Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397, where the property was sold for fifty per cent. of its value and the seller demanded cash, and immediately after the sale left the place at night.

Miss.—Pollock v. Butler (1898), 23 So. 577.

N. J.—Kinmouth v. White (Ch. 1900), 47 Atl. 1, where the transfer was hurried through without an examination of title and the purchaser admitted notice of the debtor's financial condition.

inquiry and to charge him with notice of fraud, rendering the conveyance fraudulent as to creditors. In New York, where the doctrine of constructive notice does not apply, a creditor of a seller of goods or real property cannot invalidate a sale for fraud without implicating the purchaser; inadequacy of price alone does not furnish proof of his fraud, but tangible facts must be proved from which a legitimate inference that the grantee had notice of the grantor's fraudulent intent can be drawn.[40] Inadequacy of price, to show fraud in a conveyance, must be so great as to shock the moral sense and create the suspicion of fraud at once upon its being mentioned.[41] Whether the price paid is so inadequate as to necessarily create a suspicion of fraud depends upon the circumstances and conditions attending the transaction.[42]

§ 23. **Sale of business and entire stock of goods.**—Knowledge that the debtor sold his business and all his stock of merchandise does not put the purchaser on inquiry or charge him with knowledge or notice of the debtor's fraudulent purpose, where there are no other suspicious circumstances charging the purchaser with notice of debtor's fraudulent intent.[43] But if the debtor be insolvent,[44] or the price paid is so grossly disproportion-

Tex.—Yerbe v. Martin (Civ. App. 1897), 38 S. W. 541.

Wyo.—Stirling v. Wagner, 31 Pac. 1032.

40. Jaeger v. Kelley, 52 N. Y. 274; Greenough v. Greenough, 21 Misc. Rep. 727, 47 N. Y. Supp. 1096, 32 App. Div. 631, 53 N. Y. Supp. 1104. See also Constructive or implied notice as equivalent to actual knowledge, chap. XIII, § 17, *infra*.

41. Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804. See also Effect of inadequacy of consideration, chap. VIII, § 37, *supra*.

42. Jackson v. Glaze, 3 Okla. 143, 41 Pac. 79.

43. Barker v. Boyd, 24 Ky. L. Rep. 1389, 71 S. W. 528; Butt v. King, 24 Ky. L. Rep. 1389, 71 S. W. 528; Spratlin v. Colson, 80 Miss. 278, 31 So. 814.

Knowledge acquired by the purchaser of book accounts in a lump that the seller contemplated winding up his business would not affect the buyer with knowledge of either fraud or insolvency on the part of the seller. Doxsee v. Waddiok, 122 Iowa, 599, 98 N. W. 483.

44. LeGierse v. Whitehurst, 66 Tex. 244.

ate to the value of the goods as to raise a presumption of fraud,[45] or the purchaser has notice of other suspicious facts or circumstances, such as the pendency of suits against the debtor,[46] the character of the sale is such as to necessarily put him on inquiry. The sale by a retail merchant of his entire stock is a transaction out of the ordinary course of business, which puts the purchaser on inquiry to ascertain the true condition of the seller's business and circumstances, and where the seller was insolvent, and within four months thereafter was adjudged a bankrupt, and the sale was in fact made to hinder, delay, or defraud creditors, in order to sustain his title, the burden rests on the purchaser to show that he took all reasonable and proper steps to ascertain the seller's financial condition and bought in good faith and for a present consideration.[47]

§ 24. **Knowledge or notice of the pendency of suits against the grantor.**—The fact that an action is pending against a grantor who conveys property is not sufficient in itself to show that the grantee knew of a fraudulent intent on the part of the grantor to defraud his creditors.[48] But a conveyance by a person against whom suits are pending, of substantially all of his property,[49] or to his attorney or some one holding intimate relations,[50] or to a person who has knowledge of the grantor's liability to another for an injury done,[51] may be sufficient to show knowledge on the part of the grantee of the grantor's fraudulent intent.[52]

45. Chipman v. Glennon, 98 Ala. 263, 13 So. 822; Beels v. Flynn, 28 Neb. 575, 44 N. W. 732, 26 Am. St. Rep. 351.

46. Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302. See also Transfer of all the debtor's property chap. VI, § 8, *supra*.

47. In re Knopf, 16 Am. B. R. 432, 144 Fed. 245. See also Walbrun v. Babbitt, 16 Wall. 581, 21 L. Ed. 489.

48. Stewart v. English, 6 Ind. 176; Graham v. Morgan, 83 Miss. 601, 35 So. 874.

Notice of an attachment is not sufficient as notice of an intent to defraud. Moxley v. Haskin, 39 Kan. 653, 18 Pac. 820; Mannen v. Stebbins, 1 Kan. App. 261, 40 Pac. 1085.

49. Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302.

50. Summers v. Taylor, 80 Ky. 429.

51. Philbrick v. O'Connor, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139.

52. See Transfer in anticipation of pending suit, chap. VI, § 7, *supra*.

§ 25. **Knowledge that debtor is about to abscond.**—Where a party purchases property from a debtor whom he knows is about to abscond, it is presumed that he must have known that his vendor's object in selling his property was to deprive his creditors of their recourse to it and thus defraud them.[53] The purchaser is affected by his knowledge of the circumstances with constructive notice of the vendor's fraudulent intent.[54]

§ 26. **What inquiry is sufficient.**—Reasonable inquiry, in view of the circumstances, respecting the debtor's condition, which are brought home to the purchaser, is required, and the exercise of due diligence and good faith in making the inquiry.[55] The purchaser need not exhaust all sources of information,[56] and mere opinions not based on a knowledge of the facts such as one could testify to, are of no value.[57] When the facts and circumstances are such as to put a reasonable man on inquiry, that obligation is not satisfied by an inquiry of the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and reliable sources of information are available.[58] But a purchaser is not required to inquire of the parties defrauded.[59] When a mortgage loan is made in good faith a search of the record title is sufficient, without inquiring who is in possession.[60]

§ 27. **Examination of books and papers.**—A purchaser of a debtor's stock in trade who at the time particularly inquires as to

53. Danjean v. Blacketer, 13 La. Ann. 595. *Contra*, Hall v. Kissock, 11 U. C. Q. B. 9.

54. Tillinghast v. Champlain, 4 R. I. 173.

55. Williamson v. Brown, 15 N. Y. 354; Hoyt v. Shelden, 16 N. Y. Super. Ct. (3 Bosw.) 267; Hodges v. Coleman, 76 Ala. 103; Sanger v. Thomasson (Tex. Civ. App. 1898), 44 S. W. 408; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98.

56. Stewart v. Cockrell, 2 Lea (Tenn.) 369.

57. Hodges v. Coleman, 76 Ala. 103, but if the purchaser is reasonably convinced that the transaction is fair and honest, it is not necessary for his protection that his informant should know "all the facts in evidence tending to show fraud."

58. Singer v. Jacobs, 11 Fed. 559, 3 McCrary, 638.

59. Hodges v. Coleman, 76 Ala. 103.

60. Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608.

the existence of outstanding claims against the debtor, and is assured by him that specified claims are the only ones against him, cannot be charged with notice of any fraud on the part of the debtor in concealing the existence of other claims, although the purchaser did not demand an inspection of the debtor's books.[61] A purchaser of a stock of goods is not, as a matter of law, chargeable with knowledge of all the facts which he might have ascertained by an inspection of the books and papers received as part of the purchase, although their contents are competent evidence on the question of fraud in making the sale.[62]

§ 28. **Knowledge of, or notice to, agent.**—Knowledge of, or notice to, an agent, of fraud on the part of a grantor or mortgagor, is to be imputed to the beneficiary for whom such agent act, where he knowingly acts as agent and the principal accepts the benefits.[63] But one buying property for full value of one who is his agent is not chargeable with constructive notice of the grantor's undisclosed purpose to hinder and delay his creditors.[64] And if the agent has no authority to act in the matter, his knowledge is not imputable to his principal.[65] The same rules apply where a husband acts as

61. Kelly v. Smith, 102 Ala. 336, 14 So. 764.

62 Richolson v. Freeman, 56 Kan. 463, 42 Pac. 772.

63. *U. S.*—Morris v. Lindauer, 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510.

Conn.—Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 492; Clark v. Fuller, 39 Conn. 238.

Md.—O'Connell v. Kilpatrick, 64 Md. 122, 21 Atl. 98.

N. H.—Clark v. Marshall, 62 N. H. 498.

N. J.—Lund v. Equitable Life Assur. Soc., N. J. Eq. 355.

Okla.—Jaffray v. Wolf, 4 Okla. 303, 47 Pac. 496, knowledge of fraud in the execution of a chattel mortgage on the part of the mortgagee to whom it is executed for himself and other persons, is chargeable to such other persons, and the mortgage will be held entirely fraudulent. See also Morris v. Lindauer, 54 Fed. 23.

See also Participation of trustee imputable to beneficiary, chap. XIII, § 13, *supra*.

64. Clark v. Marshall, 62 N. H. 498. See also Lindsey v. Lambert Bldg., etc., Assoc., 4 Fed. 48, where a corporation was held not chargeable with the treasurer's knowledge of his insolvency.

65. Bruen v. Dunn, 87 Iowa, 483, 54 S. W. 468; Cowell v. Daggett, 97 Mass. 434; Hargardine McKittrick, etc., Co. v. Krug, 2 Neb. (Unoff.) 52, 96 N. W. 286; Cooper v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

agent for his wife, and knowledge of, or notice to, the husband is imputable to the wife,[66] and where an attorney represents his client, knowledge of, or notice to, the attorney is imputable to his client.[67]

§ 29. **Knowledge or notice implied from relation of parties.**—Knowledge or notice of fraudulent intent will not be inferred or implied from the mere fact of the intimacy or relationship of the parties to the alleged fraudulent transfer.[68] But knowledge or notice of the financial embarrassment of the debtor and of his intent to defraud his creditors is often implied or presumed from the relationship of the parties when taken in connection with other facts and circumstances,[69] as for example, where they are husband and wife,[70] parent and child,[71] brothers,[72] attorney and client,[73] or a corporation and one of its directors or trustees.[74]

66. *N. Y.*—Sommers v. Cottentin, 26 App. Div. 241, 49 N. Y. Supp. 652.

Conn.—See cases cited in note 63 to this section.

Ill.—Jeffery v. J. W. Butler Paper Co., 37 Ill. App. 96.

Ind.—Phillips v. Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 417.

Mo.—Monarch Rubber Co. v. Bunn, 78 Mo. App. 55.

W. Va.—Hart v. Sandy, 39 W. Va. 644, 20 S. E. 665.

67. Shideler v. Fisher, 13 Colo. App. 106, 57 Pac. 864; Morrell v. Miller, 28 Or. 354, 43 Pac. 490, 45 Pac. 246. But see Burns v. Wilson, 28 Can. Sup. Ct. 207; Gibbons v. Wilson, 17 Ont. App. 1; Cameron v. Hutchison, 16 Grant Ch. (U. C.) 526.

68. *U. S.*—Evans v. Mansur, etc., Implement Co., 87 Fed. 275, 30 C. C. A. 640.

Colo.—Johnson v. Jones, 16 Colo. 138, 26 Pac. 584, an insolvent debtor and his preferred creditor.

Neb.—Jones v. Dunbar, 52 Neb. 151, 71 N. W. 976, where the alleged fraudulent vendee was a clerk in the vendor's store.

N. D.—Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

Tex.—Cleveland v. Sims, 69 Tex. 153, 6 S. W. 634, where the parties were brothers.

Wis.—Mehlhof v. Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

69. *Ill.*—Beidler v. Crane, 22 Ill. App. 538, *aff'd* 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

Ind.—Phillips v. Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

Mo.—Roan v. Winn, 93 Mo. 503, 4 S. W. 736.

Neb.—Dorrington v. Minnick, 15 Neb. 397, 19 N. W. 456, where an embarrassed merchant sold his stock to one of his clerks and another person.

N. C.—Nadal v. Britton, 112 N. C. 180, 16 S. E. 914.

70. Leich v. Dee, 86 Iowa, 709, 47 N. W. 881, 52 N. W. 209; Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277.

§ 30. **Transactions founded on consideration.**—Any conveyance or transfer, or any sale, contract, or arrangement, whether founded on good consideration or not, if made or entered into by the parties thereto with the intent to hinder, delay, or defraud creditors, is void as to them. Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claim of creditors, even though a valuable and adequate consideration be received for the same.[75]

See also Husband and wife, chap. IX, § 4, *supra*.

71. Dickerman v. Farrell, 59 Iowa, 759, 13 N. W. 422; Caudill v. Goeble, 6 Ky. L. Rep. 515; Dunlap v. Haynes, 51 Tenn. 476. See also Parent and child, chap. IX, § 8, *supra*.

72. Pope v. Andrews, 9 Miss. 135.

73. Summers v. Taylor, 4 Ky. L. Rep. 290. See also Transfers between persons not relatives, chap. IX, § 1, *supra*.

74. Roan v. Minn, 93 Mo. 503, 4 S. W. 736.

75. *N. Y.*—Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Davis v. Leopold, 87 N. Y. 620; Woods v. Van Brunt, 6 App. Div. 220, 39 N. Y. Supp. 896; Mohawk Bank v. Atwater, 2 Paige, 54.

U. S.—Chandler v. Van Roeder, 24 How. 224, 16 L. Ed. 633; Potts v. Hahn, 38 Fed. 682; Moline Wagon Co. v. Rummell, 12 Fed. 658, 2 McCrary, 307; Alexander v. Todd, 1 Fed. Cas. No. 175, 1 Bond, 175; Gilmore v. North American Land Co., 10 Fed. Cas. No. 5,448, Pet. C. C. 460; Parrish v. Danforth, 18 Fed. Cas. No. 10,770, 1 Bond, 345.

Ala.—Lehman v. Kelly, 68 Ala. 192; Bozman v. Draughan, 3 Stew. 243.

Ark.—May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

Cal.—Swinford v. Rogers, 23 Cal. 233.

Ga.—Cothran v. Forsyth, 68 Ga. 560.

Ill.—Beidler v. Crane, 135 Ill. 99, 25 N. E. 655, 25 Am. St. Rep. 349; Weber v. Mick, 131 Ill. 520, 23 N. E. 646; Boies v. Henney, 32 Ill. 130; Salzenstein v. Hettrick, 105 Ill. App. 99; Rahn v. Kniess, 74 Ill. App. 367; Oakford v. Dunlap, 63 Ill. App. 498; Hupp v. Hupp, 61 Ill. App. 445.

Ind.—Slagel v. Hoover, 137 Ind. 314, 36 N. E. 1099; Buck v. Voreis, 89 Ind. 116; Flannagan v. Donaldson, 85 Ind. 517; Ruffing v. Tilton, 12 Ind. 259.

Ky.—Lyne v. Commonwealth Bank, 28 Ky. 545; Mason v. Baker, 8 Ky. 208, 10 Am. Dec. 724.

Me.—Hartshorn v. Eames, 31 Me. 93; Pullen v. Hutchinson, 25 Me. 249; Clark v. French, 23 Me. 221, 39 Am. Dec. 618.

Md.—Spuck v. Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; Chatterton v. Mason, 86 Md. 236, 37 Atl. 960; Zimmer v. Miller, 64 Md. 296, 1 Atl. 858; Gebhart v. Merfeld, 51 Md. 322; Cooke v. Cooke, 43 Md. 522; Glenn v. Grover, 3 Md. Ch. 29.

Mass.—Crowninshield v. Kittridge, 43 Mass. 520.

Minn.—Braley v. Byrnes, 20 Minn. 435.

In order to support a conveyance or transfer as against creditors it is not sufficient that it be upon good consideration; it must also be *bona fide*.[76] Where the transfer is prompted by a motive on the part of both parties to hinder, delay, or defraud creditors, or the grantee has knowledge that the grantor intends by the conveyance to defraud his creditors, the question whether consideration was paid is not material.[77] A fraudulent conveyance to a person taking

Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Pope v. Pope, 40 Miss. 516; Reed v. Carl, 3 Sm. & M. 74.

Mo.—McDonald v. Hoover, 142 Mo. 484, 44 S. W. 334; National Tube-Works Co. v. Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; Murray v. Cason, 15 Mo. 378; Frankenthal v. Goldstein, 44 Mo. App. 189; Fink v. Algermissen, 25 Mo. App. 186; Stewart v. Cabanne, 16 Mo. App. 517.

Neb.—Foley v. Doyle, 1 Neb. (Unoff.) 643, 95 N. W. 1067.

N. H.—True v. Congdon, 44 N. H. 48; Kendall v. Fitts, 22 N. H. 1; McConihe v. Sawyer, 12 N. H. 396; Carlisle v. Rich, 8 N. H. 44.

N. J.—Smith v. Muirheid, 34 N. J. Eq. 4; Randall v. Vroom, 30 N. J. Eq. 353; Sayre v. Fredericks, 16 N. J. Eq. 205; Doughten v. Gray, 10 N. J. Eq. 323.

N. C.—Devries v. Phillips, 63 N. C. 53.

N. D.—Daisy Roller Mills Co. v. Ward, 6 N. D. 317, 70 N. W. 271.

Pa.—Clark v. Douglass, 62 Pa. St. 408; Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

S. C.—Beattie v. Pool, 13 S. C. 379; Jones v. Crawford, 1 McMull, 373; Hamilton v. Greenwood, 1 Bay, 173, 1 Am. Dec. 607.

Tenn.—Churchill v. Wells, 47 Tenn. 364; Phillips v. Cunningham (Ch. App. 1899), 58 S. W. 463.

Tex.—Tuttle v. Turner, 28 Tex. 759; Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331.

Va.—Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756.

W. Va.—Frank v. Zeigler, 46 W. Va. 614, 33 S. E. 761; Lockhard v. Beckley, 10 W. Va. 87.

Wis.—Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681.

Can.—Smith v. Moffatt, 28 U. C. Q. B. 486.

Eng.—Bott v. Smith, 21 Beav. 511, 52 Eng. Reprint, 957; Harman v. Richards, 10 Hare, 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78; Corlett v. Radcliffe, 14 Moore P. C. 121, 4 L. T. Rep. N. S. 1, 15 Eng. Reprint, 251; Twyne's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1.

See also Knowledge or notice equivalent to intent, chap. XIII, § 5, *supra;* Rights and liabilities of grantees as to creditors as to property and proceeds, chap. XIV, § 24, *infra.*

76. Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Blennerhassett v. Sherman, 105 U. S. 117, 26 L. Ed. 1080; Schmidt v. Opie, 33 N. J. Eq. 141.

77. Wiggington v. Winter, 28 Ky. L. Rep. 79, 88 S. W. 1082; McDonald v. Hoover, 142 Mo. 484, 44 S. W. 334.

with notice is actually void as against creditors, though a full consideration was paid.[78] But a mere fraudulent purpose on the part of a grantor to hinder, delay, or defraud creditors will not invalidate a conveyance or transfer, which has been accepted by the purchaser in good faith and for a valuable consideration.[79]

78. Russell & Erwin Mfg. Co. v. E. C. Faitoute Hardware Co. (N. J. Ch. 1905), 62 Atl. 421.

79. Birdsall v. Welch, 6 D. C. 316; Chandler v. Fleeman, 50 Mo. 239; Haas v. Kraus, 86 Tex. 687; 28 S. W. 256. See also Effect of want of knowledge where transfer is for valuable consideration, chap. XIII, § 4, *supra*.

CHAPTER XIV.

RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Section 1. Validity of transaction as between original parties.
2. Right to impeach or rescind transaction as fraudulent.
3. Where parties are not in pari delicto.
4. Mutual rights and liabilities; effect of transaction as to property rights in general.
5. As to title subsequently acquired.
6. Adverse possession as between grantor and grantee.
7. Effect of setting aside conveyance.
8. Right to recover property fraudulently conveyed.
9. Effect of voluntary reconveyance.
10. Right to redeem property transferred as security.
11. Enforcement of fraudulent contract or conveyance in general.
12. Enforcement of fraudulent mortgage.
13. Enforcement of trust for grantor in general.
14. Purchase at execution sale for benefit of debtor.
15. Right to proceeds or profits.
16. Right to enforce payment of consideration.
17. Enforcement of note given as consideration.
18. Recovery by grantee of consideration paid.
19. Rights and liabilities of several grantees inter se.
20. Contribution between several grantees.
21. Rights and liabilities as to third persons in general.
22. Rights of maker of note fraudulently transferred.
23. As to creditors of grantee.
24. Rights and liabilities of grantees as to creditors and subsequent purchasers; as to creditors; as to property and proceeds thereof.
25. Right to require resort to other property.
26. Intermingled goods.
27. Increase or product of property generally.
28. Right to growing crops.
29. Several fraudulent transactions.
30. Possession of grantee adverse to creditors.
31. Right of grantee to attack execution sale.
32. Right of grantee to pay creditor's claim and retain property.
33. Personal liability of grantee in general.
34. Conveyances in name of third person.
35. Liability as to property never in possession.
36. Liability as garnishee.
37. Extent of liability in general.
38. Rents, issues and profits.

Section 39. Interest.
40. Reimbursement of consideration and expenditures, indemnity and subrogation, in case of constructive fraud.
41. Where conveyance is actually fraudulent.
42. Care of property and expenses in general.
43. Compensation for improvements.
44. Purchase of judgment against grantor.
45. Title subsequently acquired by grantee.
46. Rights of grantees as bona fide purchasers.
47. Nature and extent of consideration in general.
48. Rights and liabilities of grantees as to subsequent purchasers.
49. Rights and liabilities of purchasers from grantee generally.
50. Rights and liabilities as to original grantor.
51. Rights and liabilities as to original grantee.
52. Rights and liabilities as to creditors of original grantor.
53. Mortgage or conveyance to creditors of grantor.
54. Rights and liabilities of bona fide purchasers from grantee generally.
55. Notice.
56. Consideration.
57. Rights and liabilities as to original parties.
58. Rights and liabilities as to creditors of original grantor generally.
59. Protection according to nature and extent of consideration.
60. Mortgagees and pledgees.
61. Creditors of grantee.
62. Purchaser from bona fide grantee.
63. Original grantor claiming under bona fide purchaser from grantee.
64. Rights and liabilities as to purchasers from original grantor.

Section 1. **Validity of transaction as between original parties.**—The statutes of 13 and 27 Elizabeth and statutes based thereon under which fraudulent and voluntary conveyances may be set aside, as a general rule, have no application to the parties to such instruments, or their representatives. As between the parties and their representatives such conveyances are expressly excluded from the operation of the statutes, which avoid transfers for the protection of creditors and *bona fide* purchasers only, and are left as they stood at the common law. The ancient and well known maxims that a right of action cannot arise out of fraud (*Ex dolo malo non oritur actio*), and that where both parties are equally in fault or in the wrong, the condition of the defendant and possessor is preferable (*In pari delicto potior est conditio defendentis et possidentis*), are the basis of the familiar rule that the parties to a

transaction tainted with fraud shall be left by the courts in the situation in which they have placed themselves, without aid from the courts. Hence, the general rule that a conveyance or transfer of property made to defraud creditors, though void as to creditors, is valid and binding on the parties thereto, their privies, assigns, and persons claiming under them, and conveys title as against all parties except the creditors of the grantor,[1] or any one not affected

1. *N. Y.*—Moore v. Livingston, 14 How. Pr. 1; Jackson v. Cadwell, 1 Cow. 622; Osborne v. Moss, 7 Johns. 161, 5 Am. Dec. 252.

U. S.—Collinson v. Jackson, 14 Fed. 305, 8 Sawy. 357; Randall v. Phillips, 19 Fed. Cas. 11,555, 3 Mason, 378.

Ala.—Kirby v. Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; Means v. Hoks, 65 Ala. 241; Pickett v. Pipkin, 64 Ala. 520; King v. King, 61 Ala. 479; Greenwood v. Coleman, 34 Ala. 150; McGuire v. Miller, 15 Ala. 394; Dearman v. Dearman, 4 Ala. 521.

Ark.—Bell v. Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370; Millington v. Hill, 47 Ark. 301, 1 S. W. 547.

Cal.—Montgomery v. Hunt, 5 Cal. 366.

Conn.—Bouton v. Beers, 78 Conn. 414, 62 Atl. 619; Owen v. Dixon, 17 Conn. 492; Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56; Stores v. Snow, 1 Root, 181.

Fla.—Bellamy v. Bellamy, 6 Fla. 62.

Ga.—Moore v. Mobley, 123 Ga. 424, 51 S. E. 351; McDowell v. McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068; Fouche v. Brower, 74 Ga. 251; Tufts v. DuBignon, 61 Ga. 322; Jones v. Dougherty, 10 Ga. 273.

Ill.—Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073, conveyance to defeat wife's right of dower; Cochonour v. Ratcliff, 223 Ill. 274, 79 N. E. 83; Moore v. Horsley, 156 Ill. 36, 40 N. E. 323; Springfield Homestead Assoc. v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Harmon v. Harmon, 63 Ill. 512; Horner v. Zimmerman, 45 Ill. 14; DeWolf v. Pratt, 42 Ill. 198; Ward v. Enders, 29 Ill. 519; Davis v. Ransom, 26 Ill. 100.

Ind.—Phenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. 270; Henry v. Stevens, 108 Ind. 281, 9 N. E. 356; Stout v. Stout, 77 Ind. 537; Garner v. Graves, 54 Ind. 188; Edwards v. Haverstick, 53 Ind. 348; O'Neil v. Chandler, 42 Ind. 471; Welby v. Armstrong, 21 Ind. 489; Moore v. Meek, 20 Ind. 484; Scott v. Purcell, 7 Blackf. 66, 39 Am. Dec. 453; Findley v. Cooley, 1 Blackf. 262.

Iowa.—McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925; Fordyce v. Hicks, 76 Iowa, 41, 40 N. W. 79; Mellen v. Ames, 39 Iowa, 238; Stephens v. Harrow, 26 Iowa, 458. See Cloud v. Malvin, 108 Iowa, 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209, grantees of real property cannot, to sustain the conveyance against an attack upon it as fraudulent by creditors of the grantor, assert that the property was originally purchased and paid for by them, and the title conveyed to the grantor merely for

by the fraud,[2] and is voidable only as against those who might be

the purpose of preventing their creditors from reaching it; Mercer v. Mercer, 29 Iowa, 557.

Kan.—Weatherbee v. Cockrell, 44 Kan. 380, 24 Pac. 417; Crawford v. Lehr, 20 Kan. 509.

Ky.—Wickliffes v. Lyon, 28 Ky. 84; Tobin v. Helm, 27 Ky. 288; Adkins v. Adkins, 7 Ky. L. Rep. 686.

Me.—Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713.

Md.—Stewart v. Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202; Atkinson v. Phillips, 1 Md. Ch. 507.

Mass.—Stillings v. Turner, 153 Mass. 534, 27 N. E. 671; Harvey v. Varney, 98 Mass. 118; Inhabitants of Canton v. Inhabitants of Dorchester, 62 Mass. 525. See Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886, where a husband conveys property to his wife in trust for himself, and she conveys to third parties, her creditors cannot attack the conveyance; Lerow v. Wilmarth, 91 Mass. 382.

Mich.—Wheeler v. Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836; Cool v. Snover, 38 Mich. 562; Millar v. Babcock, 29 Mich. 526.

Minn.—Piper v. Johnston, 12 Minn. 60; Lemay v. Bibeau, 2 Minn. 291.

Miss.—Brett v. Brett (1888), 5 So. 105; Walton v. Tusten, 49 Miss. 569; Ellis v. McBride, 27 Miss. 155. See Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412, if the grantor made an agreement for future advances and then conveyed, and then got the advances, the conveyance is void as against the person making the advances.

Mo.—Whitaker v. Whitaker, 157 Mo. 342, 58 S. W. 5; Mulock v. Mulock, 156 Mo. 431, 57 S. W. 122; Larimore v. Tyler, 88 Mo. 661; Van Winkle v. McKee, 7 Mo. 435.

Neb.—Martin v. Shears (1907), 110 N. W. 1010; Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890.

Nev.—Allison v. Hagan, 12 Nev. 38.

N. J.—Hildebrand v. Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Schwalber v. Ehman, 62 N. J. Eq. 314, 49 Atl. 1085; Doughty v. Miller, 50 N. J. Eq. 529, 25 Atl. 153; Schenck v. Hart, 32 N. J. Eq. 774; Ruckman v. Ruckman, 32 N. J. Eq. 259; Garretson v. Kane, 27 N. J. L. 208; Osborne v. Tunis, 25 N. J. L. 633; Robinson v. Monjoy, 7 N. J. L. 173; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623.

N. C.—McManus v. Tarleton, 126 N. C. 790, 36 S. E. 338; Boyd v. Turpin, 94 N. C. 137, 55 Am. Rep. 597; Powell v. Inman, 53 N. C. 436, 82 Am. Dec. 426.

Ohio.—Brown v. Webb, 20 Ohio, 389; Tremper v. Barton, 18 Ohio, 418; Barton v. Morris, 15 Ohio, 408; Douglass v. Dunlap, 10 Ohio, 162; Burgett v. Burgett, 1 Ohio, 469, 13 Am. Dec. 634.

Or.—Bradtfeldt v. Cooke, 27 Or. 194, 40 Pac. 1, 50 Am. St. Rep. 701, when there is a consideration to support it.

Pa.—Bonesteel v. Sullivan, 104 Pa. St. 9; French v. Mehan, 56 Pa. St. 286; Huey's Appeal, 29 Pa. St. 219; Drum v. Painter, 27 Pa. St. 148; Stoner v. Commonwealth, 16 Pa. St. 387; Sherk v. Endress, 3 Watts & S. 255; McGee v. Campbell, 7 Watts, 545, 32 Am. Dec. 783; Telford v. Adams, 6 Watts, 429; Hartley v. Mc-

defrauded thereby.[3] That a conveyance is fraudulent as to creditors is an issue that can only be raised by the creditors.[4] An assignment of property by a judgment debtor to defraud creditors is good as against a receiver of the debtor's estate in supplementary proceedings, in so far as the receiver is the representative of the debtor.[5] That an alleged contract transferring an interest in an estate did not contain a list of the property affected by it, and was not recorded in the registry of deeds, would not affect its validity as between the original parties, as such requirements are only for the protection of creditors.[6] Where lands are exchanged, and one of the deeds is adjudged void as to the grantor's creditors,

Anulty, 4 Yeates, 95, 2 Am. Dec. 396. See Haak's Appeal, 100 Pa. St. 59.

R. I.—Hazard v. Coyle, 22 R. I. 435, 48 Atl. 442.

S. C. — Mitchell v. Cleveland (1907), 57 S. E. 33; Broughton v. Broughton, 4 Rich. 491; Sumner v. Murphy, 2 Hill, 488, 27 Am. Dec. 397; Kid v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tenn.—Nichol v. Nichol, 63 Tenn. 145, a vendor cannot, for the purpose of conveying to his purchaser a good title, charge that a prior deed given by himself was in fraud of creditors and void; Jacobi v. Schloss, 47 Tenn. 385; Williams v. Lowe, 23 Tenn. 62.

Tex.—Stephens v. Adair, 82 Tex. 214, 18 S. W. 102; Lewis v. Castleman, 27 Tex. 407.

Vt.—Martin v. Martin, 1 Vt. 91, 18 Am. Dec. 675.

Va.—Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007; Law v. Law, 76 Va. 527; Harris v. Harris, 23 Gratt. 737; Owen v. Sharp, 12 Leigh, 427; Terrell v. Imboden, 10 Leigh, 321; James v. Bird, 8 Leigh, 510, 31 Am. Dec. 668; Stark v. Littlepage, 4 Rand. 368.

Wash.—Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50.

W. Va.—Poling v. Williams, 55 W. Va. 69, 46 S. E. 704; Thornburg v. Bowen, 37 W. Va. 538, 16 S. E. 825; Farmers' Bank v. Corder, 32 W. Va. 232, 9 S. E. 220; Love v. Tinsley, 32 W. Va. 25, 9 S. E. 44; Core v. Cunningham, 27 W. Va. 206. See Linsey v. McGannon, 9 W. Va. 154.

Wis.—Gross v. Gross, 94 Wis. 14, 68 N. W. 469; Davy v. Kelley, 66 Wis. 452, 29 N. W. 232; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520; La Crosse, etc., R. Co. v. Seeger, 4 Wis. 268.

Eng.—Ex parte Bell, 1 Glyn. & J. 282; Shaw v. Jeffery, 3 L. T. Rep. N. S. 1, 13 Moore P. C. 432, 15 Eng. Reprint, 162; Curtis v. Price, 12 Ves. Jr. 89, 8 Rev. Rep. 303, 33 Eng. Reprint, 35.

2. Moore v. Mobley, 123 Ga. 424, 51 S. E. 351.

3. Bouton v. Beers, 78 Conn. 414, 62 Atl. 619.

4. Mitchell v. Cleveland (S. C. 1907), 57 S. E. 33.

5. Bostwick v. Menck, 40 N. Y. 383.

6. Walker v. Walker, 175 Mass. 349, 56 N. E. 601.

this does not affect the validity of the other deed.[7] A transfer of property made to defraud creditors is valid as between the parties and their heirs,[8] or personal representatives.[9] A gift in fraud of a pursuing creditor is good against the administrator of a deceased donor, except to the extent necessary to pay the debts of the decedent.[10] Neither the grantor nor his heirs can set aside a convey-

7. Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. 553.

8. *N. Y.*—Dwelly v. Van Houghton, 4 N. Y. Leg. Obs. 101.

U. S.—Lefmann v. Brill, 124 Fed. 44; Lenox v. Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251.

Ark.—Jordan v. Fenno, 13 Ark. 593.

Cal.—Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204.

Del.—Jackson v. Dutton, 3 Harr. 98.

Ill.—Mehan v. Mehan, 203 Ill. 180, 67 N. E. 770; McElroy v. Hiner, 133 Ill. 156, 24 N. E. 435; Finley v. McConnell, 60 Ill. 259; Horner v. Zimmermann, 45 Ill. 14; Getzler v. Saroni, 18 Ill. 511.

Ind.—Edwards v. Haverstick, 53 Ind. 348; Laney v. Laney, 2 Ind. 196.

Iowa.—Stephens v. Harrow, 26 Iowa, 458.

Ky.—Southwood v. Southwood (1906), 98 S. W. 304; Gillespie v. Gillespie, 2 Bibb. 89.

Mass.—Drinkwater v. Drinkwater, 4 Mass. 354.

Miss.—Shaw v. Millsaps, 50 Miss. 380; Ellis v. McBride, 27 Miss. 155; Foules v. Foules (1903), 33 So. 972.

Mo.—George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203; McLaughlin v. McLaughlin, 16 Mo. 242.

N. H.—Jewell v. Porter, 31 N. H. 34.

N. J.—Hildebrand v. Willig, 64 N. J. Eq. 249, 53 Atl. 1035; Lokerson v. Stillwell, 13 N. J. Eq. 357.

N. C.—Coltraine v. Causey, 38 N. C. 246, 42 Am. Dec. 168.

Ohio.—White v. Brocaw, 14 Ohio St. 339; Tremper v. Barton, 18 Ohio, 418; Barton v. Morris, 15 Ohio, 408.

Pa.—Buehler v. Gloninger, 2 Watts, 226; Reichart v. Castator, 5 Bin. 109, 6 Am. Dec. 402.

Tenn.—Battle v. Street, 85 Tenn. 282, 2 S. W. 384; Dunbar v. McFall, 28 Tenn. 505; Lassiter v. Cole, 27 Tenn. 621; Neely v. Wood, 18 Tenn. 486.

Tex.—Davis v. Davis (Civ. App. (1906), 98 S. W. 198; Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Epperson v. Young, 8 Tex. 135; Danzey v. Smith, 4 Tex. 411.

Wis.—Dietrich v. Koch, 35 Wis. 618; Fargo v. Ladd, 6 Wis. 109; La Crosse, etc., R. Co. v. Seeger, 4 Wis. 268.

9. Kinnemon v. Miller, 2 Md. Ch. 407; Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. See also cases cited in preceding notes to this section.

10. Schwalber v. Ehman, 62 N. J. Eq. 314, 49 Atl. 1085.

But where plaintiff's intestate bailed certain funds with defendant for the purpose of fraudulently preventing a creditor from enforcing his claim, but intestate never actually divested himself of title to the funds, his fraudulent intent was no defence to an action by his adminis-

ance on the ground that it was executed with intent to defraud creditors.[11] A voluntary conveyance, though fraudulent as to existing creditors, is valid as between the parties and their privies.[12] A conveyance of personal property, though fraudulent as to creditors because of the want of change of possession, is valid as between the parties.[13] The rule that a fraudulent conveyance is valid as between the parties, though void as to creditors, is not affected by statutes making it a penal or criminal offense for any person to be a party to such a transaction,[14] or by statutes providing for the

trator to recover the fund from the bailee. Knapp v. Knapp (Mo. App. 1906), 96 S. W. 295.

11. Helton v. Cunnagim (Ky.), 54 S. W. 851.

12. *N. Y.*—Jackson v. Garnsey, 16 Johns. 189; Bunn v. Winthrop, 1 Johns. Ch. 329, although the deed be retained by the grantor until his death.

Ala.—Means v. Hicks, 65 Ala. 241; Strange v. Graham, 56 Ala. 614; Greenwood v. Coleman, 34 Ala. 150.

Ark.—Anderson v. Dunn, 19 Ark. 650.

Ill.—Moore v. Horsley, 156 Ill. 36, 40 N. E. 323; Fitzgerald v. Forristal, 48 Ill. 228; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460.

Ind.—Anderson v. Etter, 102 Ind. 115, 26 N. E. 218; Sharpe v. Davis, 76 Ind. 17.

Ky.—Stewart v. Dailey, 16 Ky. 212.

Mich.—Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266.

Miss.—Newall v. Newell, 34 Miss. 385.

N. H.—Jewell v. Porter, 31 N. H. 34; Abbott v. Tenney, 18 N. H. 109.

N. J.—Gardner v. Short, 19 N. J. Eq. 341; Tantum v. Miller, 11 N. J. Eq. 551.

Pa.—Thomson v. Dougherty, 12 Serg. & R. 448.

Tex.—Herndon v. Reed, 82 Tex. 647, 18 S. W. 665.

Va.—Chamberlayne v. Temple, 2 Rand. 384, 14 Am. Dec. 786.

A voluntary bond, though fraudulent as to creditors, is, as between the parties, both in law and equity, a gift of the money secured by it. Handy v. Philadelphia, etc., R. Co., 1 Phila. (Pa.) 31.

13. *Conn.*—Meade v. Smith, 16 Conn. 346.

Ill.—Tuttle v. Robinson, 78 Ill. 332; Cruikshank v. Cogswell, 26 Ill. 366.

Md.—Gough v. Edelen, 5 Gill, 101.

Mass.—Shumway v. Rutter, 24 Mass. 56.

Pa.—Ditman v. Raule, 124 Pa. St. 225, 16 Atl. 819; Yocum v. Kehler, 1 Walk. 84, 28 Leg. Int. 68. See McCullough v. Willey, 192 Pa. St. 176, 4 Atl. 999.

Tex.—Robinson v. Martell, 11 Tex. 149; Danzey v. Smith, 4 Tex. 411. See Hoeser v. Kraeke, 29 Tex. 450.

Va.—Thomas v. Soper, 5 Munf. 28.

14. Anderson v. Etter, 102 Ind. 115, 26 N. E. 218; Galpin v. Galpin, 75 Iowa, 454, 38 N. W. 156; Andrews v. Marshall, 48 Me. 46; Ellis

equitable distribution of insolvents' estates among their creditors.[15] Though a conveyance may be fraudulent as against creditors, it is good as against the grantor and tort feasors not claiming as creditors.[16] Thus, one to whom a debtor transfers all his stock, store fixtures and accounts by bill of sale, in consideration whereof the transferee agrees to pay the debts due specified creditors, and orally agrees with the debtor and certain of such creditors to accept and take possession of the property, to sell it and apply the proceeds to the debts specified in the agreement, thereby becomes a trustee for the benefit of the creditors, and the trust thereby created, which relates solely to personal property, is good as between the parties to it, although partly in writing and partly oral, and cannot, in an action by the creditors to enforce it, be questioned by the trustee on the ground that it is illegal as made for the purpose of defrauding creditors.[17] A deed or other transfer of property from parent to child, though fraudulent as to creditors, is good between the parties.[18] A transfer from husband to wife is valid, as between the parties, though made in fraud of the husband's creditors.[19] So, a conveyance to a wife from a third person, though

v. Higgins, 32 Me. 34; Davy v. Kelley, 66 Wis. 452, 29 N. W. 232.

15. Lassiter v. Cole, 27 Tenn. 621.

16. Worth v. Northam, 26 N. C. 102.

17. Neresheimer v. Smyth, 167 N. Y. 202, 60 N. E. 449, *aff'g* 35 App. Div. (N. Y.) 632, 55 N. Y. Supp. 1144.

18. Robinson v. Stewart, 10 N. Y. 189; Thweatt v. McCollough, 84 Ala. 517, 4 So. 399, 5 Am. St. Rep. 391; Dearman v. Radcliffe, 5 Ala. 192; Burtch v. Elliott, 3 Ind. 99; Murphy v. Hubert, 16 Pa. St. 50; Eyrick v. Hetrick, 13 Pa. St. 488; Geiger v. Welsh, 1 Rawle (Pa.), 349; Smith v. Gibson, 1 Yeates (Pa.), 291; and other cases cited in preceding notes to this section.

19. *Ill.*—Grosse v. Sweet, 188 Ill. 555, 59 N. E. 432, *aff'g* 89 Ill. App. 418, fraudulent assignment by an employee of claims against his employer to his wife; Moore v. Horsley, 156 Ill. 36, 40 N. E. 323.

Iowa.—Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604; King v. Tharp, 26 Iowa, 283.

Mass.—Pierce v. LeMonier, 172 Mass. 508, 53 N. E. 125.

Miss.—Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317; Dulion v. Harkness, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 563.

N. J.—Stillwell v. Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408.

Tex.—Herndon v. Reed, 82 Tex. 647, 18 S. W. 665; Wilson v. Trawick, 10 Tex. 428; B. C. Evans & Co. v. Guipel (Civ. App. 1896), 35 S. W.

fraudulent as to the creditors of the husband, who furnished the purchase money, is nevertheless valid and binding on the grantor and the husband.[20] Not only deeds generally, but also all instruments of transfer or conveyance made for the purpose of cheating and defrauding creditors, as, for example, an executed contract,[21] a promissory note,[22] an instrument creating a lien in favor of one creditor,[23] an agreement to hold property in secret trust,[24] bonds,[25] mortgages and deeds of trust,[26] and bills of sale,[27] are valid and obligatory upon the parties and only voidable at the instance of creditors. A confession of judgment, though void as to creditors,

940; Frank v. Frank (Civ. App. 1894), 25 S. W. 819.

Vt.—Roberts v. Lund, 45 Vt. 82.

20. *Ark.*—Knight v. Glasscock, 51 Ark. 390, 11 S. W. 580.

Ga.—Flannery v. Coleman, 112 Ga. 648, 37 S. E. 878.

Ill.—Dobbins v. Cruger, 108 Ill. 188.

Mont.—Fredericks v. Davis, 3 Mont. 251.

Pa.—Moore v. Moore, 165 Pa. St. 464, 30 Atl. 932.

Va.—Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007.

W. Va.—Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

21. Welby v. Armstrong, 21 Ind. 489; Harvin v. Weeks, 11 Rich. (S. C.) 601.

22. Van Wy v. Clark, 50 Ind. 259.

23. Steele v. Moore, 54 Ind. 52.

24. Gillum v. Kirksey, 29 Ky. L. Rep. 422, 93 S. W. 591; Everett v. Winn, 1 Sm. & M. Ch. (Miss.) 67.

25. Hummel's Estate, 161 Pa. St. 215, 28 Atl. 1113. But see Powell v. Inman, 53 N. C. 436, 82 Am. Dec. 436, bonds to convey are absolutely void.

26. *U. S.*—Lefmann v. Brill, 142 Fed. 44, 77 C. C. A. 230.

Ill.—Upton v. Craig, 57 Ill. 257; Fitzgerald v. Forristal, 48 Ill. 228.

Ind.—Van Wy v. Clark, 50 Ind. 259.

Mass.—Pierce v. LeMonier, 172 Mass. 508, 53 N. E. 125.

Mich.—Hess v. Final, 32 Mich. 515.

Miss.—Barwick v. Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512; Parkhurst v. McGraw, 24 Miss. 134.

N. H.—Blake v. Williams, 36 N. H. 39.

N. J.—Risley v. Parker, 50 N. J. Eq. 284, 23 Atl. 424; Campbell v. Tompkins, 32 N. J. Eq. 170.

Or.—U. S. Mortgage Co. v. Marquam, 41 Or. 391, 69 Pac. 37, 41.

Pa.—Bonesteel v. Sullivan, 104 Pa. St. 9; Gill v. Henry, 95 Pa. St. 388; Murphy v. Hubert, 16 Pa. St. 50.

27. *Fla.*—Kahn v. Wilkins, 36 Fla. 428, 18 So. 584.

Ky.—Mason v. Baker, 8 Ky. 208, 10 Am. Dec. 724.

N. J.—Evans v. Herring, 27 N. J. L. 243.

Pa.—Jones v. Shaw, 8 Pa. Super. Ct. 487, 43 Wkly. Notes Cas. 168.

Tex.—McClenny v. Floyd, 10 Tex. 159.

Vt.—Boutwell v. McClure, 30 Vt. 674.

is valid between the parties.[28] A conveyance of a debtor's property by assignment, although void as against creditors in general, is nevertheless valid between the parties and binding upon the assignor, upon his representatives after his death, and upon any of his creditors who have given assent to it.[29] A chattel mortgage may be good as between the parties, although void as to creditors by reason of its not complying with certain requirements of the statute.[30]

§ 2. **Right to impeach or rescind transaction as fraudulent.**—The law will not lend its aid to a party seeking to set aside his own fraudulent conveyance. Neither law nor equity will relieve either of the parties to a fraudulent transfer from the consequences of their own acts, as against the other, nor aid them against their own wrong, nor will the courts allow such a transfer to be attacked and impeached, or rescinded, at the instance of either of the parties, his privies, or assigns, whether the relief is sought as a direct cause of action or by way of defense, when none of the creditors seek the

28. Seaving v. Brinkerhoff, 5 Johns. Ch. (N. Y.) 329; Franklin v. Stagg, 22 Mo. 193; Shallcross v. Deats, 43 N. J. L. 177; Harbaugh v. Butner, 148 Pa. St. 273, 23 Atl. 983; Blystone v. Blystone, 51 Pa. St. 273; Clarkson v. Thom, 2 Pennyp. (Pa.) 491; Garrett v. Longnecker, 2 Leg. Rec. (Pa.) 174; Becker v. Hammes, 2 Kulp (Pa.), 404.

29. *N. Y.*—Averill v. Loucks, 6 Barb. 470; Brownell v. Curtis, 10 Paige, 210; Mills v. Argell, 6 Paige, 577; Osborne v. Moss, 7 Johns. 161.

Ill.—Grosse v. Sweet, 188 Ill. 555, 59 N. E. 432, *aff'g* 89 Ill. App. 418.

Kan.—Robinson v. Blood, 64 Kan. 290, 67 Pac. 842.

Minn.—Jones v. Rahilly, 16 Minn. 320.

Mo.—Looney v. Bartlett, 106 Mo. App. 619, 81 S. W. 481, assignment of certificate of deposit.

N. J.—Pillsbury v. Kingon, 31 N. J. Eq. 609.

Pa.—Ahl's Appeal, 129 Pa. St. 49, 18 Atl. 471.

R. I.—Gardner v. Commercial Nat. Bank, 13 R. I. 155.

Eng.—Bessey v. Windham, 6 Q. B. 166, 14 L. J. Q. B. 7, 51 E. C. L. 166; Robinson v. McDonnell, 2 B. & Ald. 134; Steel v. Brown, 1 Taunt. 381, 9 Rev. Rep. 795.

30. Lane v. Lutz, 23 Wend. (N. Y.) 653; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Lloyd v. Foley, 11 Fed. 410, 6 Sawy. (U. S.) 424; Adlard v. Rodgers, 105 Cal. 327, 38 Pac. 889; Harms v. Silva, 91 Cal. 636, 27 Pac. 1088; Hackett v. Manlove, 14 Cal. 85; Davis v. Ransom, 26 Ill. 100.

aid of the court.[31] Where an owner executed a conveyance for the purpose of preventing another from collecting a judgment that

31. *N. Y.*—Freelove v. Cole, 41 Barb. 318, *aff'd* 41 N. Y. 619. Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will relieve either of them, as against the other, from the consequences of their own misconduct. Morgan v. Chamberlain, 26 Barb. 163; Chamberlain v. Barnes, 26 Barb. 160; Gale v. Gale, 19 Barb. 249; Bolt v. Rogers, 3 Paige, 154.

U. S.—Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Greenbank v. Ferguson, 58 Fed. 18; Beadle v. Beadle, 40 Fed. 315, 2 McCrary, 586.

Ala.—Kirby v. Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; Glover v. Walker, 107 Ala. 540, 18 So. 251; Williams v. Higgins, 69 Ala. 517; Roden v. Murphy, 10 Ala. 804.

Ark.—Noble v. Noble, 26 Ark. 317; Payne v. Bruton, 10 Ark. 53.

Cal.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

S. C.—Rider v. White, 3 Mackey, 305; Fletcher v. Fletcher, 2 MacArthur, 38.

Fla.—Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068; Beale v. Hall, 22 Ga. 431; Goodwyn v. Goodwyn, 20 Ga. 600; McCleskey v. Leadbetter, 1 Ga. 551.

Ill.—Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Dobbins v. Cruger, 108 Ill. 188; Fast v. McPherson, 98 Ill. 496; Perisho v. Perisho, 95 Ill. App. 644, *aff'g* 71 Ill. App. 222.

Iowa.—Holliday v. Holliday, 10 Iowa, 200. See Gebhard v. Satler, 40 Iowa, 152.

Kan.—Durand v. Higgins, 67 Kan. 110, 72 Pac. 567, a fraudulent grantor cannot have his title quieted as against such a conveyance.

Ky.—Gillum v. Kirksey, 29 Ky. L. Rep. 422, 93 S. W. 591; Helton v. Cunnagim, 21 Ky. L. Rep. 1244, 54 S. W. 851; Warden v. Field, 5 Ky. L. Rep. 855.

La.—Kerwin v. Hibernia Ins. Co., 35 L. Ann. 33.

Me.—Rich v. Hayes, 99 Me. 51, 58 Atl. 62; Bryant v. Mansfield, 22 Me. 360, relief that a note given by the grantee might be cancelled upon reconveyance of the property denied.

Md.—Watts v. Vansant, 99 Md. 577, 58 Atl. 433; Snyder v. Snyder, 51 Md. 77; Schuman v. Peddicord, 50 Md. 560; Cushwa v. Cushwa, 5 Md. 44.

Mich.—Hess v. Final, 32 Mich. 515.

Minn.—Jones v. Rahilly, 16 Minn. 320.

Miss.—Martin v. Tillman, 70 Miss. 614, 13 So. 251; Moore v. Jordan, 65 Miss. 229, 3 So. 737, 7 Am. St. Rep. 641; Walton v. Tusten, 49 Miss. 569.

Mo.—Whitaker v. Whitaker, 157 Mo. 342, 58 S. W. 5.

Mont.—Fredericks v. Davis, 3 Mont. 251.

Neb.—Parker v. Parker, 4 Neb. (Unoff.) 692, 96 N. W. 208.

Nev.—Allison v. Hagan, 12 Nev. 38.

N. H.—Blake v. Williams, 36 N. H. 39; Costello v. Portsmouth Brew. Co., 69 N. H. 405, 43 Atl. 640.

N. J.—Shallcross v. Deats, 43 N. J.

might be recovered in an action pending, neither he nor his heirs could obtain relief in equity.[32] Where a husband, for the purpose of defeating his wife's right of dower and placing the property beyond her reach, in view of anticipated divorce, conveys certain land, equity will not lend its aid to cancel the deed.[33] A wife who joins her husband in a conveyance in fraud of creditors cannot, after obtaining a divorce, have the conveyance set aside and the land subjected to a judgment for alimony in her favor.[34] A party

L. 177; Evans v. Herring, 27 N. J. L. 243; Anderson v. Tuttle, 26 N. J. Eq. 144; Eyre v. Eyre, 19 N. J. Eq. 42; Servis v. Nelson, 14 N. J. Eq. 94; Hantum v. Miller, 11 N. J. Eq. 551.

N. C.—Hart v. Hart, 109 N. C. 368, 13 S. E. 1020; Ellington v. Currie, 40 N. C. 21.

Ohio.—Pride v. Andrew, 51 Ohio St. 405, 38 N. E. 84; White v. Brocaw, 14 Ohio St. 339.

Or.—U. S. Mortgage Co. v. Marquam, 41 Oreg. 391, 69 Pac. 37, 41.

Pa.—Gill v. Henry, 95 Pa. St. 388; French v. Mehan, 56 Pa. St. 286; Blystone v. Blystone, 51 Pa. St. 373; Hershey v. Weiting, 50 Pa. St. 240; Sickman v. Lapsley, 13 Serg. & R. 224, 15 Am. Dec. 596; Reichart v. Castator, 5 Binn. 109, 6 Am. Dec. 402; Simon's Estate, 20 Pa. Super. Ct. 450; Becker v. Hammes, 2 Kelp, 404.

R. I.—Hudson v. White, 17 R. I. 519, 23 Atl. 57.

S. C.—See Latimer v. Latimer, 53 S. C. 483, 31 S. E. 304, a release of a valid legal claim by an insolvent debtor, in consideration of a conveyance of land in trust for him, exempt from the claims of his creditors, and for his children is fraudulent as to his creditors, and neither the grantor nor his executors can avail themselves of the deed as a release of the claim.

Tex.—Stephens v. Adair, 82 Tex. 214, 18 S. W. 102; Cuney v. Dupree, 21 Tex. 211; Hunter v. Magee, 31 Tex. Civ. App. 304, 72 S. W. 230; Leach v. Devereux (Civ. App. 1895), 32 S. W. 837.

Utah.—Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512.

Va.—Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007; Smith v. Chilton, 84 Va. 840, 6 S. E. 142; Turner v. Campbell, 3 Gratt. 77; James v. Bird, 8 Leigh, 510, 31 Am. Dec. 668; Smith v. Elliott, 1 Patt. & H. 307.

W. Va.—Poling v. Williams, 55 W. Va. 69, 46 S. E. 704; Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402; Billingsley v. Menear, 44 W. Va. 651, 30 S. E. 61; McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Wis.—Kronskop v. Kronskop, 95 Wis. 296, 70 N. W. 475; Sommers v. Hamberger, 91 Wis. 107, 64 N. W. 880.

Eng.—Smith v. Garland, 2 Meriv. 123, 16 Rev. Rep. 154, 35 Eng. Reprint, 887.

32. Jones v. Jones (S. D. 1906), 108 N. W. 23.

33. Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073.

34. Barrow v. Barrow, 108 Ind. 345, 9 N. E. 371.

to a conveyance, made with intent to hinder, delay, and defraud creditors, cannot plead the fraud to avoid his own action.[35] A creditor giving a receipt in full for a debt as part of a scheme to defraud the debtor's other creditors cannot show that it was not intended as a discharge.[36] The maxim, "*In pari delicto melior est conditio defendentis,*" applies to all cases where both parties being of legal capacity, freely enter into a contract or agreement in fraud of others, neither party being influenced or persuaded thereto by the other. A court of equity cannot grant relief merely on the ground of difference, however great, in intellect, provided both parties were *capax fraudis.*[37] The heirs or distributees of a fraudulent grantor stand in no better position than the grantor and a conveyance of their ancestor cannot be impeached by them, as being fraudulent as against his creditors.[38] This can only be done

35. Cuney v. Dupree, 21 Tex. 211.

36. Aborn v. Rathbone, 54 Conn. 444, 8 Atl. 677.

37. Smith v. Elliott, 1 Patt. & H. (Va.) 307.

38. *U. S.*—Gridley v. Wynant, 64 U. S. 500, 16 L. Ed. 411.

Ala.—Dearman v. Radcliffe, 5 Ala. 192.

Colo.—Lathrop v. Pollard, 6 Colo. 424.

Ga.—Anderson v. Brown, 72 Ga. 713.

Ill.—Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; White v. Russell, 79 Ill. 155; Ellis v. Petty, 51 Ill. App. 636.

Ind.—Kitts v. Wilson, 130 Ind. 492, 29 N. E. 401.

Ky.—Warren v. Hall, 36 Ky. 450; Neal v. Neal, 26 Ky. L. Rep. 962, 82 S. W. 981; Helton v. Cunnagim, 21 Ky. L. Rep. 1244, 54 S. W. 851; Tinsley v. Tinsley, 7 Ky. L. Rep. 295.

La.—Guidry v. Grivot, 2 Mart. N. S. 13, 14 Am. Dec. 193, a legatee. See also Kerwin v. Hibernia Ins. Co., 35 La. Ann. 33; Dupuy v. Dupont, 11 La. Ann. 226.

Miss.—Foules v. Foules (1903), 33 So. 972; Winn v. Barnett, 31 Miss. 653; Gully v. Hull, 31 Miss. 20; Snodgrass v. Andrews, 30 Miss. 472, 60 Am. Dec. 169; Ellis v. McBride, 27 Miss. 155, a distributee cannot impeach the conveyance of his intestate.

Mo.—Sell v. West, 125 Mo. 621, 28 S. W. 969, 46 Am. St. Rep. 508; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; Hall v. Callahan, 66 Mo. 316; McLaughlin v. McLaughlin, 16 Mo. 242; Ober v. Howard, 11 Mo. 425.

N. J.—Hildebrand v. Willig, 64 N. J. Eq. 249, 53 Atl. 1035.

Pa.—In re Hummel's Estate, 161 Pa. St. 215, 28 Atl. 1113.

S. C.—Anderson v. Rhodus, 12 Rich. Eq. 104.

Tex.—Wilson v. Demander, 71 Tex. 603, 9 S. W. 678; Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Danzy v. Smith, 4 Tex. 11.

Vt.—Peaslee v. Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

by the creditors or purchasers who have been defrauded and those in privity with them.[39] A court of equity will interpose to restrain proceedings at law for the recovery of property conveyed in fraud of creditors.[40] It is not necessary that it should appear that some particular creditors were intended to be defrauded, and that some particular creditors, were in fact, defrauded, but if the intent of the parties was to defraud creditors, the court will not interfere to aid the parties to the fraudulent transaction.[41] The parties to a fraudulent transaction may, however, rescind it by mutual agreement.[42] A grantor who conveys his property to another with intent to hinder, delay, or defraud his creditors, cannot afterwards have such conveyance set aside, although the grantee had no knowledge of the fraudulent intent,[43] or even though he has not yet parted with possession of the property, or the purchase price still remains unpaid.[44] If the conveyance be made with a secret agreement to reconvey, neither the grantor nor his fraudulent creditor can successfully assail it in a court of equity.[45] The fraudulent character of the transaction cannot be set up by one of the parties thereto to defeat an action of ejectment,[46] an action to dispossess,[47] an

39. *Ill.*—Fitzgerald v. Forristal, 48 Ill. 228.

Ind.—Springer v. Drosch, 32 Ind. 486, 2 Am. Rep. 356.

Mass.—Harvey v. Varney, 98 Mass. 118; Fairbanks v. Blackington, 26 Mass. 23.

R. I.—Gardner v. Commercial Nat. Bank, 13 R. I. 155.

Wis.—Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520. And see cases cited in preceding notes to this section.

40. Gridley v. Wynant, 23 How. (U. S.) 500, 16 L. Ed. 411.

41. Blount v. Costen, 47 Ga. 534.

42. Goetter v. Smith, 104 Ala. 481, 16 So. 534.

43. Wier v. Day, 57 Iowa, 84, 10 N. W. 304.

44. Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068.

45. Jones v. Farris, 70 Iowa, 739, 29 N. W. 812.

46. *N. Y.*—Moseley v. Moseley, 15 N. Y. 334.

Ga.—Bush v. Rogan, 65 Ga. 320, 38 Am. St. Rep. 785. But see Harrison v. Thatcher, 44 Ga. 638.

Nev.—Peterson v. Brown, 17 Nev. 172, 30 Pac. 697, 45 Am. Rep. 437.

Pa.—Murphy v. Hubert, 16 Pa. St. 50.

Vt.—Norton v. Perkins, 67 Vt. 203, 31 Atl. 148.

Contra.—Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511, in such case the law will not aid either party.

47. Tufts v. Du Bignon, 61 Ga. 322. See Bibb v. Barker, 56 Ky. 292.

action of replevin,[48] or to defeat an action to establish equitable rights in certain lands,[49] or to defeat an action on a note, regular upon its face, but given to the payee for a fraudulent purpose,[50] or to defeat a bill to set aside a contract as unconscionable, for inadequacy of price and undue influence.[51] But it is competent for the grantee or those claiming under him to set up the fraudulent character of the transaction and that therefore it was binding as between the parties, for the purpose of showing a good title as against the grantor, his privies, and those claiming under him.[52] Equity will grant relief to the grantee of property fraudulently conveyed where the property is taken from him, after he has acquired title, by fraudulent contrivance on the part of the grantor.[53]

§ 3. **Where parties are not in pari delicto.**—The well settled rule of equity already stated denying relief to one party against another when both have been engaged in a fraudulent transaction,[54] is, however, subject to another equally well settled rule that, where the transfer is between persons occupying confidential relations, wherein one party may naturally exercise an influence over the conduct of the other, or where the transfer is procured or induced by the grantee under circumstances of oppression, imposition, or undue influence, or where the grantor was at a great disadvantage with the grantee, under such circumstances the voluntary act of the party in making the transfer is not a defense to its being set aside, as the parties are not *in pari delicto* in such act, and courts of equity will interpose with their aid to grant relief to the

48. Dannels v. Fitch, 8 Pa. St. 495.

49. Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520.

50. Murphy v. Murphy, 74 Conn. 198, 50 Atl. 394, where the transferee did not participate in the fraud; Butler v. Moore, 73 Me. 151, 40 Am. Rep. 348; Moore v. Thompson, 6 Mo. 353; Winton v. Freeman, 102 Pa. St. 366.

51. Ferguson v. Dent, 24 Fed. 412.

52. Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56.

53. Stillwell v. Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408.

54. Robertson v. Sayre, 134 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627; see last preceding section and cases there cited.

grantor, or his heirs, or persons claiming under him,[55] by setting aside and cancelling the instrument of transfer or conveyance and ordering the property conveyed to be restored to the grantor.[56] But the fact that the grantee of a conveyance to defraud creditors induces the conveyance by reason of his intimacy with and influence over the grantor will not, where the grantor is not of a weak mind and the relation of attorney and client does not exist, enable the

55. *N. Y.*—Place v. Hayward, 117 N. Y. 487, 23 N. E. 25.

D. C.—Fletcher v. Fletcher, 2 McArthur, 38.

Ill.—Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221, *aff'g* 49 Ill. App. 657.

Iowa.—Wiley v. Carter, 77 Iowa, 751, 42 N. W. 566, recovery of amount paid on fraudulent note; Davidson v. Carter, 55 Iowa, 117, 7 N. W. 466.

Ky.—Sanford v. Reed, 27 Ky. L. Rep. 431, 85 S. W. 213.

Md.—Roman v. Mali, 42 Md. 513; Stewart v. Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202.

Mich.—Eldridge v. Sherman, 79 Mich. 484, 44 N. W. 948, recovery of property taken in foreclosure proceedings upon a mortgage procured by the fraud of the mortgagee.

Miss.—O'Conner v. Ward, 60 Miss. 1025; Pewett v. Coopwood, 30 Miss. 369.

N. C.—Pinckston v. Brown, 56 N. C. 494.

Va.—Austin v. Winston, 1 Hen. & M. 33, 3 Am. Dec. 583, where the grantor is not so culpable as the grantee, it would seem that a court of equity ought not to altogether refuse relief to the grantor, but to apportion the relief granted to the degree of criminality in both parties so as on the one hand to avoid the encouragment of fraud, and on the other hand to prevent extortion and oppression.

A grantor's wife who has no knowledge of the intended fraud may impeach a conveyance by her husband, although she joined therein. Kitts v. Willson, 130 Ind. 492, 29 N. E. 401.

56. *N. Y.*—Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Wood v. Rahe, 96 N. Y. 414, 48 Am. Rep. 640; Ingersoll v. Weld, 103 App. Div. 554, 93 N. Y. Supp. 291; Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. Supp. 917; Watkins v. Jones, 78 Hun, 496, 29 N. Y. Supp. 557; Goodenough v. Spencer, 2 Thomp. & C. 508, 15 Abb. Prac. N. S. 248.

Ark.—Hutchinson v. Park (1904), 82 S. W. 843.

Cal.—Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433.

Iowa.—Kervick v. Mitchell, 68 Iowa, 273, 24 N. W. 151, 26 N. W. 434.

Ky.—Harper v. Harper, 85 Ky. 160, 8 Ky. L. Rep. 820, 3 S. W. 5, 7 Am. St. Rep. 583; Sanford v. Reed, 27 Ky. L. Rep. 431, 85 S. W. 213.

Mo.—Holliway v. Holliway, 77 Mo. 342; Poston v. Balch, 69 Mo. 115.

Wash.—Melbye v. Melbye, 15 Wash. 648, 47 Pac. 16; Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. 270.

Wis.—Kronskop v. Kronskop, 95 Wis. 296, 70 N. W. 475.

grantor to have such conveyance set aside as a fraud upon him.[57] And the rule that a conveyance in fraud of creditors is valid and binding as against the fraudulent grantor does not prevent the avoidance of a fraudulent conveyance on the ground of the grantor's mental incapacity.[58] Since the conveyance of his homestead by a grantor cannot be fraudulent as to his creditors, rescission of a deed thereto, executed with intent to defraud the creditors of the grantor, should not be denied on the ground that the parties were *in pari delicto*.[59]

§ 4. **Mutual rights and liabilities — Effect of transaction as to property rights in general.**—An absolute conveyance or transfer of property, although made to defraud creditors, will convey the legal and equitable title to the grantee as between the parties, and as against all other persons except the creditors defrauded, and can be avoided only by creditors.[60] Though both parties to a con-

57. Renfrew v. McDonald, 11 Hun (N. Y.), 254.

58. Tatum v. Tatum, 101 Va. 77, 43 S. E. 184.

59. Sallee v. Sallee, 18 Ky. L. Rep. 74, 35 S. W. 437. See Homesteads, chap. IV, § 42, *supra*.

60. *N. Y.*—Davis v. Graves, 29 Barb. 480; Paddon v. Williams, 1 Rob. 240, 2 Abb. Pr. N. S. 88.

U. S.—Claflin v. Lisso, 27 Fed. 420; Atwater v. Seeley, 2 Fed. 133, 1 McCrary, 264; Backhouse v. Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

Ala.—Pond v. Wadsworth, 24 Ala. 531; Dearman v. Radcliffe, 5 Ala. 192; Rochelle v. Harrison, 8 Port. 351.

Ark.—Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274.

Cal.—Goad v. Moulton, 67 Cal. 536, 8 Pac. 63.

Conn.—Wolfe v. Beecher Mfg. Co. 47 Conn. 231, an action by a grantor for damages to a freehold occupied by him, the title which had been conveyed to another in fraud of his creditors, cannot be maintained; Owen v. Dixon, 17 Conn. 492.

Ill.—Moore v. Horsley, 156 Ill. 36, 40 N. E. 323; Lane v. Union Nat. Bank, 75 Ill. App. 299, *aff'd* 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216.

Ind.—Henry v. Stevens, 108 Ind. 281, 9 N. E. 356; Jones v. Reeder, 22 Ind. 111; Doe v. Hurd, 7 Blackf. 510.

Iowa.—Fordyce v. Hicks, 76 Iowa, 41, 40 N. W. 79; Parker v. Parker, 56 Iowa, 111, 8 N. W. 806.

Ky.—Lynch v. Sanders, 39 Ky. 59.

Mass.—Leonard v. Bryant, 56 Mass. 32.

Minn.—Brasie v. Minneapolis Brew. Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

veyance, fraudulent as to the grantor's creditors, are privy to the fraud, yet if the deed is absolute and creates title in the grantee, he may recover possession as against the grantor, the fraud in the transaction not being an available defense to the latter.[61] The grantee may maintain an action for the value of the property against his grantor where he has lost title by the acts of the

Miss.—Walton v. Tusten, 49 Miss. 569.

Mont.—Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

N. H.—Jones v. Bryant, 13 N. H. 53, title passes to the grantee until some creditor defeats it by the levy of an execution, and, when defeated, it is rendered void only from the time of the levy.

N. J.—Guest v. Barton, 32 N. J. Eq. 120, a debtor who has conveyed his property in order to defraud his creditors has no standing in the chancery court to question the fairness or adequacy of price obtained at a public sale of such premises under a creditor's bill to reach such property.

N. C.—York v. Merritt, 80 N. C. 285.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.—Douglass v. Dunlap, 10 Ohio, 162.

Pa.—Murphy v. Hubert, 16 Pa. St. 50; Patrick v. Smith, 2 Pa. Super. Ct. 13.

S. C.—Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. 184, 92 Am. St. Rep. 809.

Tenn.—Jacobi v. Schloss, 47 Tenn. 385; Williams v. Love, 23 Tenn. 62.

Tex.—Biering v. Flett (1888), 7 S. W. 229; Robb v. Robb (Civ. App. 1897), 41 S. W. 92; Frank v. Frank (Civ. App. 1894), 25 S. W. 819. See Claybrooks v. Kelly, 61 Tex. 634.

Wash.—Preston-Parton Milling Co. v. Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928; Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50.

W. Va.—Poling v. Williams, 55 W. Va. 69, 46 S. E. 704.

61. *N. Y.*—Padden v. Williams, 2 Abb. Pr. N. S. 88.

Ala.—Greenwood v. Coleman, 34 Ala. 150.

Ga.—Goodwyn v. Goodwyn, 20 Ga. 600, if he has paid a consideration therefor.

Ky.—Elmore v. Elmore, 20 Ky. L. Rep. 856, 58 S. W. 980; Jones v. Jenkins, 7 Ky. L. Rep. 408.

N. C.—York v. Merritt, 80 N. C. 285.

S. C.—Broughton v. Broughton, 4 Rich. 491.

Va.—Starke v. Littlepage, 4 Rand. 368, the fraudulent grantee may enforce such conveyance in a court of law and the debtor will not be allowed to defeat the claim by proving the fraud.

If the grantor regains possession of the property, the grantee may recover possession from him, in the absence of proof that the grantor acquired such possession under a contract with the grantee. Pond v. Wadsworth, 24 Ala. 531; Bibb v. Barker, 56 Ky. 292.

grantor,[62] unless the grantor was not *in pari delicto* with the grantee.[63] Where a conveyance is made to defraud creditors, a resulting trust does not arise in favor of the grantor, and neither he nor his heirs have any interest in the property or its proceeds which can be asserted either in law or equity.[64] A deed of trust in fraud of creditors entitles the grantee to hold as against the grantor and the beneficiaries, whether the trust is voluntary and without consideration or for a valuable consideration, whether it is by parol or in writing, and whether the grantee is in possession or not.[65] An executory contract of the sale of chattels, made to defraud creditors, does not pass the title of the property as between the parties.[66] The execution and recording of a conveyance of land by a debtor with intent to defraud creditors, made without consent of the grantee, who at once repudiated it, does not pass title.[67]

§ 5. **As to the title subsequently acquired.**—It is held in some states that where a fraudulent grantor subsequently acquires title to the property conveyed by purchase at an execution or mortgage foreclosure sale of such property, under an execution issued under a judgment, or a mortgage made, prior to the conveyance, or by conveyance to him by the purchaser at such sale, the title so acquired does not inure to the benefit of the fraudulent grantee under the covenants of warranty in the deed to him, as the vendor

62. Nichols v. Patten, 18 Me. 231, 35 Am. Dec. 713; Hoeser v. Kraeka, 29 Tex. 450, where the grantor has kept possession and disposed of the property.

63. Hays v. Windsor, 130 Cal. 230, 62 Pac. 395.

64. *N. Y.*—Robertson v. Sayre, 124 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627, *aff'g* 53 Hun, 490, 6 N. Y. Supp. 649, and it is immaterial that the grantee was not a participant in the fraud.

Ala.—Heinz v. White, 105 Ala. 670, 17 So. 185.

Iowa.—Howland v. Knox, 59 Iowa, 46, 12 N. W. 777.

Wash.—Preston-Parton Milling Co. v. Horton, 22 Wash. 236, 60 Pac. 412, 77 Am. St. Rep. 928, no interest remains upon which a judgment subsequently acquired can attach.

W. Va.—Poling v. Williams, 55 W. Va. 69, 46 S. E. 704.

65. Murphy v. Hubert, 16 Pa. St. 50.

66. Rochelle v. Harrison, 8 Port. (Ala.) 351.

67. Witz v. Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874.

is not remitted to his former title.[68] But, in other states, it is held that, as the debtor's fraudulent conveyance was valid as to the grantee despite its invalidity as to creditors, the judgment debtor cannot defeat it by a subsequently acquired title, but that he and all claiming the title under him with notice will be estopped by his former and fraudulent deed, and the title so acquired will inure to the former fraudulent grantee.[69]

§ 6. **Adverse possession as between grantor and grantee.**— If a debtor causes land, to a conveyance of which he is entitled, to be conveyed to a third person for the purpose of defrauding his creditors, he nevertheless may acquire, as against his fraudulent grantee, a title by adverse possession sufficiently long continued;[70] but where his possession is intended to be in subordination to his grantee's title, it cannot be adverse.[71] The possession of land by a fraudulent purchaser has been held not to be adverse to the vendor, but in trust for him.[72] But it has also been held that in an action by the purchaser of land at an execution sale, seeking to make a third party, who had previously purchased the land of the execution defendant, a trustee thereof against his will, his possession must be treated as adverse to that of his vendor from the time possession is taken under the purchase sought to be avoided.[73] A deed purporting to convey an estate in fee simple, though fraudulent in law or fact, is such an assurance of title as, coupled with seven years' uninterrupted adverse possession under and by virtue thereof, will vest in the possessor an indefeasible title to the land

68. Thompson v. Hammond, 1 Edw. Ch. (N. Y.) 497; Gilliland v. Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413.

69. Spindler v. Atkinson, 3 Md. 409, 56 Am. Dec. 755; Perry v. Calvert, 22 Mo. 361; Heileman v. Eisner, 52 N. J. L. 378, 20 Atl. 46; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877.

70. Elwell v. Hinckley, 138 Mass. 225.

71. Williams v. Higgins, 69 Ala. 517.

72. Daniel v. McHenry, 67 Ky. 277.

Possession by grantee under bond for title, where no consideration has been paid, is not sufficient adverse possession as against the grantor. Brandenburgh v. Louisville Tin, etc., Co., 18 Ky. L. Rep. 297, 36 S. W. 7.

73. Bobb v. Woodward, 50 Mo. 95.

therein described, as against every person except creditors of the vendor.[74]

§ 7. **The effect of setting aside conveyance.**—Where a conveyance is set aside by creditors of the grantor as fraudulent as against creditors, it is set aside only as to such creditors, and does not operate to revest title in the grantor, his heirs, or one claiming under him,[75] and the heirs of a grantor in a fraudulent conveyance cannot claim the property as against the grantee where the creditors' claims have afterwards been satisfied by the grantee.[76] Any surplus resulting from the property after the payment of the claims of creditors belongs to the grantee.[77]

§ 8. **Right to recover property fraudulently conveyed.**—A court of equity will afford no relief to a debtor who has transferred his property for the purpose of defrauding his creditors, and subsequently seeks, as against the transferee to reclaim or recover back the same, or its proceeds, nor will the law aid his heirs, assignees, privies, etc., to recover it back.[78] A reconveyance thereof will not

74. Blantin v. Whitaker, 30 Tenn. 313.

Where a gift of slaves is made, either by deed or parol, with a view to defraud creditors, and the donee holds them as his own for three years, the absolute title to such slaves is vested in the donee, as against the donor and his creditors. Marr v. Rucker, 20 Tenn. 348.

75. Claflin v. Lisso, 27 Fed. 420; Bohn v. Weeks, 50 Ill. App. 236; Phoenix Ins. Co. v. Fidder, 133 Ind. 557, 33 N. E. 270; Smith v. Hutchcraft, 2 Ky. L. Rep. 65. *Compare* Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031, as to effect of setting aside a fraudulent conveyance of a homestead.

76. Keeton v. Bandy, 25 Ky. L. Rep. 233, 74 S. W. 1047.

77. See Right to proceeds and profits, chap. XIV, § 15, *infra*.

78. *N. Y.*—Solinger v. Earl, 82 N. Y. 393, money secretly paid to induce certain creditors to unite with other creditors in a composition of debts cannot be recovered.

U. S.—Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Schemerhorn v. DeChambrun, 64 Fed. 195, 12 C. C. A. 81.

Ark.—Britt v. Aylett, 11 Ark. 475, 52 Am. Dec. 282.

Colo.—Lathrop v. Pollard, 6 Colo. 424.

Conn.—Nichols v. McCarthy, 53 Conn. 299, 23 Atl. 95, 55 Am. Rep. 105; Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56.

Del.—Jackson v. Duton, 3 Harr. 98; Hollis v. Morris, 2 Harr. 128.

be enforced though provided for by an agreement entered into at the time of the conveyance or subsequently.[79] But, although a

Ga.—Edwards v. Kilpatrick, 70 Ga. 328; Galt v. Jackson, 9 Ga. 151.

Ill.—Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Springfield Homestead Assoc. v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Songer v. Partridge, 107 Ill. 529; Dunaway v. Robertson, 95 Ill. 419; Kassing v. Durand, 41 Ill. App. 93.

Kan.—Robinson v. Blood, 64 Kan. 290, 67 Pac. 842, or the value of the property; Weatherbee v. Cockrell, 44 Kan. 380, 24 Pac. 417.

Ky.—Carson v. Beliles, 28 Ky. L. Rep. 272, 89 S. W. 208, 1 L. R. A. 1007.

La.—Ackerman v. Peters, 113 La. 156, 36 So. 923; Hood v. Frellsen, 31 La. Ann. 577; Denton v. Willcox, 2 La. Ann. 60.

Me.—Rich v. Hayes, 99 Me. 51, 58 Atl. 62; Andrews v. Marshall, 43 Me. 272.

Md.—Roman v. Mali, 42 Md. 513.

Mass.—Gibbs v. Chase, 10 Mass. 125.

Mich.—Poppe v. Poppe, 114 Mich. 649, 72 N. W. 612, 68 Am. St. Rep. 503.

Minn.—Jones v. Rahilly, 16 Minn. 320.

Mo.—Scudder v. Atwood, 55 Mo. App. 512.

N. J.—Hildebrand v. Willig, 34 N. J. Eq. 249, 53 Atl. 1035; Ruckman v. Conover, 37 N. J. Eq. 583; Eyre v. Eyre, 19 N. J. Eq. 42.

Ohio.—Kihlken v. Kihlken, 59 Ohio St. 106, 51 N. E. 969; Pride v. Andrew, 51 Ohio St. 405, 38 N. E. 84; Emrie v. Gilbert, Wright, 764, fraudulent transfer of share in a partnership business; O'Connor v. Ryan, 9 Ohio Dec. 575, 15 Wkly. Law Bul. 152.

Pa.—Dieffenderfer v. Fisher, 3 Grant, 30, a conveyance or transfer of property in fraud of creditors estops the debtor from demanding a portion of it or its proceeds; Stewart v. Kearney, 6 Watts, 453, 31 Am. Dec. 482; Jones v. Shaw, 8 Pa. Super. Ct. 487, 43 Wkly. Notes Cas. 168.

Wash.—Chantler v. Hubbell, 34 Wash. 211, 75 Pac. 802.

79. *N. Y.*—Sweet v. Tinslar, 52 Barb. 271; St. John v. Benedict, 6 Johns. Ch. 111.

U. S.—Randall v. Howard, 2 Black, 585, 17 L. Ed. 269.

Colo.—Lathrop v. Pollard, 6 Colo. 424.

Ga.—Cronic v. Smith, 96 Ga. 794, 22 S. E. 915, suit cannot be maintained against the fraudulent vendee for a breach of the bond given to reconvey the land at the vendor's request; Parrot v. Baker, 82 Ga. 364, 9 S. E. 1068; Edwards v. Kilpatrick, 70 Ga. 328.

Ill.—Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642, *rev'g* 25 Ill. App. 333; Ryan v. Ryan, 97 Ill. 38.

Ind.—Kitts v. Wilson, 130 Ind. 492, 29 N. E. 401.

Iowa.—Briggs v. Coffin, 91 Iowa, 329, 59 N. W. 259; Jones v. Farris, 70 Iowa, 739, 29 N. W. 812; Stephens v. Harrow, 26 Iowa, 458.

Ky.—Ford v. Lewis, 49 Ky. 127, no obligation to reconvey, growing out of the fraudulent transaction or forming a part of it, can either be itself enforced or form the considera-

conveyance in fraud of creditors is valid between the parties, and the fraudulent grantor is estopped by his own act, yet, if the grantee has executed and delivered a reconveyance to him, he has a right to the benefit of it, and if the deed of reconveyance is taken from him, and withheld by the alienee, he may have a judgment for its redelivery, and for an account of the rents and profits.[80] One who has collusively suffered a judgment and an extent of an execution upon his land, cannot maintain an action to recover back the land, upon the ground that the judgment was fraudulent as against his creditors.[81] Where an owner, in view of a possible judgment being rendered against him, conveys his property to another with intent to defeat the satisfaction of the same, he cannot after judgment in his favor have the aid of a court of equity to compel the grantee to reconvey to him the property, although the grantee agreed to do so upon request.[82] But where the grantor in a

tion of an enforceable promise or covenant, written or parol; Jones v. Read, 33 Ky. 540, secret bond for reconveyance on payment of a certain sum.

Md.—Freeman v. Sedwick, 6 Gill, 28, 46 Am. Dec. 650.

Mass.—Canton v. Dorchester, 8 Cush. 525.

Mich.—Poppe v. Poppe, 114 Mich. 649.

Mo.—Mitchell v. Henley, 110 Mo. 598, 19 S. W. 993, the grantee may plead the fraud in defense of an action on a contract to reconvey, where it lies yet in contract and is merely executory.

N. H.—Stockwell v. Stockwell, 72 N. H. 69, 54 Atl. 701.

N. J.—Eyre v. Eyre, 19 N. J. Eq. 42.

N. C.—York v. Merritt, 77 N. C. 213; Jackson v. Marshall, 5 N. C. 323, 3 Am. Dec. 695; Vick v. Flowers, 5 N. C. 321. See Smith v. Bowen, 3 N. C. 483, 2 Hayw. 296; Smith v. ———, 3 N. C. 408, 2 Hayw. 229.

Pa.—Guggenheimer's Appeal, 1 Pa. Cas. 526, 4 Atl. 46. See Reynolds v. Boland, 202 Pa. St. 642, 52 Atl. 19.

Tex.—Farrell v. Duffy, 5 Tex. Civ. App. 435, 27 S. W. 20.

Can.—Emes v. Barber, 15 Grant Ch. (U. C.) 679.

Compare Greffin's Ex'r v. Lopez, 5 Mart. (La.) 145.

80. Moore v. Livingston, 14 How. Pr. (N. Y). 1.

81. Franklin v. Stagg, 22 Mo. 193.

82. Carson v. Beliles, 28 Ky. L. Rep. 272, 89 S. W. 208, 1 L. R. A. 1007; Pride v. Andrew, 51 Ohio St. 405, 38 N. E. 84. But see Rivera v. White (Tex. 1901), 63 S. W. 125, where a husband, fearing that alimony would be decreed against him in a divorce suit, conveyed land on the understanding that the grantee would sell the land for his benefit, or reconvey it when he desired, a recovery of the land by the husband would not be denied because of the intent with which it was conveyed, it not appearing that any alimony was decreed.

fraudulent conveyance was not, owing to the relations of the parties, *in pari delicto* with the grantee,[83] or where the owner merely leased the property and no title was thereby acquired by the grantee,[84] or the transfer was a bailment, the bailee merely receiving the possession of the property from the debtor to aid him in defrauding his creditors,[85] or where the grantor can show a right of recovery without disclosing the fraud,[86] the rule that equity will not lend its aid to the grantor, when he seeks to recover back the property thus transferred in fraud of creditors, does not apply. And where the debtor abandons his fraudulent purpose and notifies the grantee of his intention to apply the property to the payment of his debts, he may, upon demand and refusal of the restoration of his property, recover the same for the benefit of his creditors.[87] A subsequent agreement on the part of the grantee to reconvey, independent of the former transaction or after the transfer has been purged of the fraud, may be enforced by the grantor.[88] A married woman who includes her separate property in a bill of sale by her husband, under the mistaken idea that it is necessary to thus protect it from her husband's creditors, may recover it back.[89] An infant who joins in a bill of sale by his father of property owned by himself and his father to protect it from his father's creditors

83. Boyd v. De la Montaignie, 73 N. Y. 498, 29 Am. Rep. 197; Ingersoll v. Weld, 103 App. Div. (N. Y.) 554, 93 N. Y. Supp. 291; Freelove v. Cole, 41 Barb. (N. Y.) 318, *aff'd* 41 N. Y. 619; Vitoneno v. Corea, 92 Cal. 69, 28 Pac. 95; Beale v. Hall, 22 Ga. 431; Anbic v. Gil, 2 La. Ann. 342; Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. 691; Fraser v. Rodney, 12 Grant Ch. (U. C.) 154, *aff'g* 11 Grant Ch. 426. See also § 3, *supra*, and cases there cited.

84. Perkins v. McCullough, 31 Or. 69, 49 Pac. 861.

85. Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476; Brown v. Thayer, 78 Mass. 1; Watson v. Harmon, 85 Mo. 43, if the bailee wrongfully converts the property to his own use he will be liable therefor; Gowan v. Gowan, 30 Mo. 472; Allgear v. Walsh, 24 Mo. App. 134.

86. Day v. Day, 17 Ont. App. 157; Haigh v. Kaye, L. R. 7 Ch. 469, 41 L. J. Ch. 567, 26 L. T. Rep. N. S. 675, 20 Wkly. Rep. 597.

87. Carll v. Emery, 148 Mass. 32, 18 N. E. 574, 12 Am. St. Rep. 515, 1 L. R. A. 618.

88. Songer v. Partridge, 107 Ill. 529; Taylor v. McMillan, 123 N. C. 390, 31 S. E. 730.

89. Bloomingdale v. Chittenden, 75 Mich. 305, 42 N. W. 836.

may recover it from the vendee, since it is not subject to his father's debts and hence there is no fraud on his part.[90] And the fact that property once held by parties jointly was voluntarily conveyed by the complainant to defendant for the purpose of hindering and delaying complainant's creditors does not prevent a court of equity from favoring its return to the original owner.[91]

§ 9. **Effect of voluntary reconveyance.**—The moral obligation of a fraudulent grantee of land to reconvey the same to the grantor, in compliance with a verbal agreement made at the time of the conveyance, is a sufficient consideration to support a deed of reconveyance, as against creditors of such fraudulent grantee who had obtained no lien on the land before the reconveyance,[92] and subsequent acts done by the fraudulent grantee, in execution of the moral duty to restore the property, should be favorably considered in equity.[93] Where the grantee in a fraudulent conveyance voluntarily reconveys to the grantor, in fulfillment of his moral obligation to reconvey, although he could not have been compelled to reconvey, his voluntary reconveyance revests the title both in law and equity in the grantor, if the rights of no innocent third person have intervened,[94] and

90. Bloomingdale v. Chittenden, 74 Mich. 698, 42 N. W. 166.

91. Buttlar v. Buttlar, 67 N. J. Eq. 136, 56 Atl. 722.

92. Davis v. Graves, 29 Barb. (N. Y.) 480; Lafayette Second Nat. Bank v. Brady, 96 Ind. 498; Clark v. Rucker, 46 Ky. 583; Thomas v. Goodwin, 12 Mass. 140; Hutchins v. Sprague, 4 N. H. 469, 17 Am. Dec. 439; Powell v. Ivey, 88 N. C. 256; Mullanphy Sav. Bank v. Lyle, 75 Tenn. 431; Stanton v. Shaw, 62 Tenn. 12; Biccochi v. Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

93. White v. Brocaw, 14 Ohio St. 339.

94. Moore v. Livingston, 14 How. Pr. (N. Y.) 1; Cartledge v. McCoy, 98 Ga. 560, 25 S. E. 588; Springfield Homestead Assoc. v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; Lafayette Second Nat. Bank v. Brady, 96 Ind. 498; Biccochi v. Casey-Swasey Co., 91 Tex. 259, the fraudulent grantor is not estopped, after such reconveyance by the grantee, to deny the rights of creditors of the latter on the ground that the title was permitted to remain in such grantee's name several years and he obtained credit on the faith of his ownership. See Reconveyance by fraudulent grantee, chap. IV, § 34, *supra*.

the grantee cannot afterwards set up a valid claim to the property on the ground of the original fraudulent conveyance.[95] A party to whom land was conveyed without negotiation or consideration, and who afterwards conveyed it back to the original grantor, is not in a position to question the motive of such grantor in making the original conveyance.[96]

§ 10. **Right to redeem property transferred as security.**—Equity will not interfere to declare a contract or conveyance, which on its face is absolute, to be a trust or mortgage, on the ground that it was in fact intended as a mortgage,[97] or collateral security for a debt,[98] and thus allow the grantor to redeem or

95. Fargo v. Ladd, 6 Wis. 106.

96. Knight v. Dalton (Kan. 1905), 83 Pac. 124.

97. *N. Y.*—Harris v. Osnowitz, 35 App. Div. 594, 55 N. Y. Supp. 172, a conveyance of property by an insolvent firm to one of its creditors in satisfaction of his debt, with a secret understanding to reconvey it to the wives of the grantors, being fraudulent as to creditors, cannot be upheld as a mortgage.

Ala.—Brantley v. West, 27 Ala. 542.

Cal.—Ybarra v. Lorenzana, 53 Cal. 197.

Ill.—Halloran v. Halloran, 137 Ill. 100, 27 N. E. 82, the grantor cannot have a deed absolute on its face declared a satisfied mortgage and canceled.

Ind.—Kitts v. Willson, 130 Ind. 492, 29 N. E. 401.

Ky.—Thomas v. McCormack, 39 Ky. 108; Wright v. Wright, 12 Ky. 8.

Md.—Brown v. Reilly, 72 Md. 489, 20 Atl. 239.

Mass.—Hassam v. Barrett, 115 Mass. 256. *Compare* Taylor v. Weld, 5 Mass. 109.

Mich.—Patnode v. Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095, but a conveyance of a debtor's homestead, which is not subject to the claims of creditors, for the purpose of placing it beyond their reach, does not preclude him from having the deed declared a mortgage, if the circumstances justify such relief. *Compare* Crawford v. Osmun, 70 Mich. 561, 38 N. W. 573, where a woman, in order to shield her property from her husband's debts, conveys it to another, to whom he owes a debt secured by a lien on the same property, she will not be estopped from maintaining a bill to redeem, the parties being in collusion.

R. I.—Apponang Bleaching, etc., Co. v. Rawson, 22 R. I. 123, 46 Atl. 455.

S. C.—Anderson v. Rhodus, 12 Rich. Eq. 104.

Can.—Mundell v. Tinkis, 6 Ont. 625.

Eng.—Baldwin v. Cawthorne, 19 Ves. Jr. 166, 34 Eng. Reprint, 480.

98. Moore v. Tarlton, 3 Ala. 444, 37 Am. Dec. 701, such a deed being void at law for fraud in fact, is void

become entitled to a reconveyance on payment of the debt, where the evidence shows that the transaction was intended to defraud the grantor's creditors, unless the parties were not *in pari delicto*,[99] although a fraudulent mortgagor may be permitted to redeem from the mortgage.[1] But where the property was transferred in pledge or as collateral security only,[2] or where the deed though absolute in form is in fact a mortgage, as security for a debt, and also to cover the property to prevent other creditors from attaching,[3] or where a fraudulent conveyance absolute in form, but in fact a mortgage, was declared to be an absolute sale for the purpose of delaying creditors,[4] such relief may be granted.

§ 11. **Enforcement of fraudulent contract or conveyance in general.**—A party to an executory agreement, made to defraud creditors, can, in most jurisdictions, maintain no suit to coerce its execution. The law will not interfere to enforce, as between the parties, a fraudulent contract which is executory.[5] Although the law will not aid either party in the execution of a contract of sale made in fraud of creditors, it will not relieve either party

in toto, and cannot be enforced in equity to any extent; York v. Merritt, 77 N. C. 213.

99. Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221, *aff'g* 49 Ill. App. 657; O'Connor v. Ward, 60 Mo. 1025.

1. Pierce v. LeMonier, 172 Mass. 508, 53 N. E. 125, it is not necessary in order to redeem from a fraudulent mortgage to show that the transaction has been purged of the fraud.

2. Jones v. Rahilly, 16 Minn. 320, and the assignor of personal property may redeem it.

3. Still v. Buzzell, 60 Vt. 478, 12 Atl. 209, a grantor held entitled to reconveyance on payment of the debt, though, as against other creditors, the deed was fraudulent and void.

4. Ballard v. Jones, 25 Tenn. 455, this did not preclude the mortgagor from redeeming and claiming an account in chancery as against the mortgagee, but would as against a purchaser.

5. *U. S.*—Randall v. Howard, 2 Black, 585, 17 L. Ed. 269.

Ala.—Dearman v. Dearman, 4 Ala. 521.

Atk.—Payne v. Bruton, 10 Atk. 53.

Ga.—Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068; Hill v. Taylor, 81 Ga. 516, 8 S. E. 879; Goodwyn v. Goodwyn, 20 Ga. 600.

Ill.—McElroy v. Hiner, 133 Ill. 156, 24 N. E. 435; Ryan v. Ryan, 97 Ill. 38.

Ky.—Norris v. Norris, 39 Ky. 317, 35 Am. Dec. 138; Kingsbury v. Haswell, 6 Ky. L. Rep. 591.

after it has been executed.[6] Where the vendor has a right to sell and his agreement to convey is fair, his insolvency and the rights of his creditors cannot be urged in defense of an action for specific performance.[7] And the fact that the original conveyance was in fraud of creditors is no defense to an action for the specific performance of an agreement entered into subsequent to the fraudulent conveyance.[8]

§ 12. **Enforcement of fraudulent mortgage.**—The holder of a note and mortgage given to and received by him for the purpose of defrauding the mortgagor's creditors cannot enforce or foreclose the same, whether executed for a valuable consideration or not, since the law will not aid either party to the transaction.[9]

La.—Ackerman v. Peters, 113 La. 156, 36 So. 923.

Me.—Rich v. Hayes, 99 Me. 51, 58 Atl. 62.

Neb.—Bradt v. Harston, 4 Neb. (Unoff.) 889, 96 N. W. 1008.

N. J.—Marlatt v. Warwick, 19 N. J. Eq. 439.

N. C.—McManus v. Tarleton, 126 N. C. 790, 36 S. E. 338; York v. Merritt, 77 N. C. 213.

S. C.—Harvin v. Weeks, 11 Rich. 601.

Tenn.—Mulloy v. Young, 29 Tenn. 298.

Tex.—Davis v. Sittig, 65 Tex. 497, the fact that the contract may have been fully executed by one party furnishes no reason why the other should be compelled to execute his part, yet remaining executory.

W. Va.—Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

Eng.—Leicester v. Rose, 4 East, 371, 1 Smith K. B. 41.

Compare Springer v. Drosch, 32 Ind. 486, 2 Am. Rep. 356, *overruling* Welby v. Armstrong, 21 Ind. 489; Moore v. Meek, 20 Ind. 484, especially in favor of a third person to whom a promise, growing out of such transaction, had been made; Telford v. Adams, 6 Watts (Pa.), 429; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520.

6. Payne v. Bruton, 10 Ark. 53.

7. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665.

8. Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Lynn v. Lyerle, 113 Ill. 128.

9. *Ill.*—Cook v. Meyers, 166 Ill. 282, 46 N. E. 765; Miller v. Marckle, 21 Ill. 152; Ellwood v. Walter, 103 Ill. App. 219.

Ind.—O'Kane v. Terrell, 144 Ind. 599, 43 N. E. 869.

Iowa.—Baldwin v. Davis, 118 Iowa, 36, 91 N. W. 778; Galpin v. Galpin, 74 Iowa, 454, 38 N. W. 156.

Ky.—Jones v. Jenkins, 83 Ky. 391, 7 Ky. L. Rep. 408.

La.—Bowman v. McKleroy, 14 La. Ann. 587.

Md.—Snyder v. Snyder, 51 Md. 77.

But the same may be enforced if the mortgagee can make out a *prima facie* case without disclosing any fraud, as the mortgagor will not be allowed to show his own fraud to defeat the instrument.[10] It has been held, however, that the maker of a chattel mortgage made for the real purpose of defrauding his creditors, but ostensibly to secure a promissory note, may, when the mortgagee attempts to take the property from him, show the fraudulent character of such mortgage, and thereby defeat a seizure thereunder.[11] A grantor cannot enforce a purchase money mortgage given to him for property conveyed in fraud of his creditors.[12] Where a debtor, for the purpose of defrauding possible creditors, gives a note and mortgage to a creditor for an amount greater than his indebtedness, such creditor will not be prevented from bringing action on the note for the amount of his debt by the debtor's fraud, in which he did not participate.[13]

§ 13. **Enforcement of trust for grantor in general.**—Where a conveyance absolute in form is made to defraud creditors no

Mass.—Wearse v. Peirce, 41 Mass. 141.

Mich.—Williams v. Clink, 90 Mich. 297, 51 N. W. 453, 30 Am. St. Rep. 443. See Judge v. Vogel, 38 Mich. 569.

Minn.—Moffett v. Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319.

N. C.—Bank of New Hanover v. Adrian, 116 N. C. 537, 21 S. E. 972.

Ohio.—McQuade v. Rosecrans, 36 Ohio St. 442.

Utah.—Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512.

Va.—Jones v. Comer, 5 Leigh, 350.

Wash.—Puget Sound Hotaling Co. v. Clancy, 21 Wash. 1, 56 Pac. 929.

Compare Blake v. Williams, 36 N. H. 39.

Contra.—Bradtfeldt v. Cooke, 27 Or. 194, 40 Pac. 1, 50 Am. St. Rep. 701, a mortgage given to secure a fictitious consideration for land conveyed by the mortgagee to the mortgagor in fraud of the former's creditors may be enforced against the mortgagor.

10. Barwick v. Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. Rep. 512; Millican v. Headon, 8 Ont. 503, in an action on a covenant contained in a mortgage defendant cannot set up that the mortgage was to defraud creditors; Scoble v. Henson, 12 U. C. C. P. 65.

11. Galpin v. Galpin, 74 Iowa, 454, 38 N. W. 156.

12. Rowland v. Martin, 3 Pa. Cas. 162, 6 Atl. 223. See Bowman v. McKleroy, 14 La. Ann. 587.

13. Murphy v. Murphy, 74 Conn. 198, 50 Atl. 394.

resulting trust arises in favor of the fraudulent grantor or his heirs as against the grantee and they have no interest which can be asserted or enforced in law or equity.[14] A secret trust will not be enforced in favor of a fraudulent grantor or his heirs, and in pursuance of the rule that parties to a conveyance in fraud of creditors will be left in the position in which they have placed themselves, equity will not grant relief to a fraudulent grantor or his heirs, etc., on the theory that the grantee holds the property thus conveyed in trust for his benefit, and no such trust will be recognized or implied in equity,[15] unless the grantor

14. Robertson v. Sayre, 134 N. Y. 97, 31 N. E. 250, 30 Am. St. Rep. 627, *aff'g* 53 Hun (N. Y.), 490, 6 N. Y. Supp. 649; Heinz v. White, 105 Ala. 670, 17 So. 185; Burleigh v. White, 64 Me. 23; Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60; Broughton v. Broughton, 4 Rich. (S. C.) 491.

15. *U. S.*—Kinney v. Consolidated Va. Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382; Hunter v. Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168.

Ala.—Glover v. Walker, 107 Ala. 540, 18 So. 251; Smith v. Hall, 103 Ala. 235, 15 So. 525; Kelly v. Karsner, 72 Ala. 106; Patton v. Beecher, 62 Ala. 579; King v. King, 61 Ala. 479; Barntley v. West, 27 Ala. 542.

Ill.—Brady v. Huber, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161; Springfield Homestead Assoc. v. Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358; McElroy v. Hiner, 133 Ill. 156, 24 N. E. 435; Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L. R. A. 511; Kassing v. Durand, 41 Ill. App. 93.

Iowa.—Hayes v. March, 123 Iowa, 81, 98 N. W. 604.

Ky.—Grider v. Graham, 4 Bibb. 70; Bailey v. Cheatham, 4 Ky. L. Rep. 351.

Me.—Burleigh v. White, 64 Me. 23.

Miss.—Hemphill v. Hemphill, 34 Miss. 68.

Neb.—Bartlett v. Bartlett, 13 Neb. 456, 14 N. W. 385.

N. J.—Conover v. Beckett, 38 N. J. Eq. 384; Servis v. Nelson, 14 N. J. Eq. 94.

N. C.—Guthrie v. Bacon, 107 N. C. 337, 12 S. E. 204. But see Smith v. ———, 3 N. C. 229.

Ohio.—Robinson v. Robinson, 17 Ohio St. 480, although the property may have been acquired by the grantor after his insolvency or from resources which creditors might have been unable to make available.

Pa.—Simons' Estate, 20 Pa. Super. Ct. 450.

Va.—Owen v. Sharp, 12 Leigh, 427.

Wash.—Chandler v. Hubbell, 34 Wash. 211, 75 Pac. 802.

W. Va.—McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816.

Wis.—Fargo v. Ladd, 6 Wis. 106.

Can.—Rosenburgher v. Thomas, 3 Grant Ch. (U. C.) 635.

is not *in pari delicto* with the grantee,[16] as for example, where the transfer is made between parties in confidential relations similar to attorney and client.[17] But it has been held that where a voluntary settlement in trust is executed, the *cestui que trust* is entitled to the aid of a court of equity to enforce the trust, but not to raise a trust upon an executory agreement without consideration.[18] Where two owners in common have united in transferring property to be held in trust for them, and there were reasons for the transfer which would have satisfactorily accounted for it as to both, and it did not appear that the actual effect of the transfer was to delay the creditors of one of them, the fact that one of them thereby intended to defraud his creditors does not prevent the other from enforcing the trust as between him and the trustee, in the absence of satisfactory evidence that he intended to aid the other in carrying out his fraudulent intention.[19] The fraudulent trust cannot be set up by the grantor to defeat an action on notes given in fraud of creditors and to enforce a lien on land for the amount of the notes.[20] A surety of the grantor, at whose instance the conveyance was made, and who holds a declaration of trust subsequently made for his benefit, cannot set up the fraud to prevent the grantor or his heirs from asserting an equity in the premises.[21] If the grantee voluntarily executes the trust he is bound by that execution.[22]

§ 14. **Purchase at execution sale for the benefit of debtor.**—Where a secret agreement or arrangement is entered into, between

16. Williams v. Williams, 180 Ill. 361, 54 N. E. 229. And see cases cited § 3, *supra*.

17. De Chambrun v. Schermerhorn, 59 Fed. 504, although the contract was given to prevent third parties from reaching the fund by means of inequitable and improvident contracts previously made with them.

18. Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329.

19. Bolton v. Pitney, 46 N. J. Eq. 610, 22 Atl. 56; Pitney v. Bolton, 45 N. J. Eq. 639, 18 Atl. 211.

20. Burke v. Burks, 12 Ky. L. Rep. 552, 14 S. W. 686, 953.

21. Irwin v. Longworth, 20 Ohio, 581.

22. Fargo v. Ladd, 6 Wis. 106.

a defendant in execution and a third person, that the latter shall purchase the property of the former at the execution sale and hold it upon a trust for the benefit of the defendant, the object being to remove the property from the reach of creditors and prevent their subjecting it to their claims, it is fraudulent under the statutes relating to fraudulent conveyances, and a court of equity will not grant relief upon the agreement by compelling the purchaser to convey to the defendant in execution,[23] except where a creditor has made use of his power over the debtor and by misrepresentation induced him to enter into such a transaction in fraud of other creditors.[24] Such an agreement when made with the plaintiff in execution will be enforced where, upon all the circumstances of the case, there is no reason to impute fraud, and it seems to be to the advantage of all the creditors.[25] Where a person purchased land at sheriff's sale, under a parol agreement to hold it for the benefit of the debtor, which was made known to the sheriff, the agreement being void under the statutes of fraud, its existence would not be recognized, and the statement of the agreement at the sale would be deemed fraudulent, so as to give the debtor the benefit of the purchase.[26]

§ 15. **Right to proceeds or profits.**—The surplus of proceeds remaining or profits arising from the sale of property conveyed in fraud of creditors, after satisfying the claims of such creditors, belongs to the grantee or his heirs or representatives,[27] and a judgment setting aside the conveyance should provide that, on satisfy-

23. Randall v. Howard, 2 Black (U. S.), 585, 17 L. Ed. 269; Walker v. Hill, 22 N. J. Eq. 513; Smith v. Bouquet, 27 Tex. 507.

In an action to recover the proceeds of property purchased under such an agreement, a general denial will not admit the defense that the agreement was void because of plaintiff's insolvency, nor can defendant avail himself of the testimony on cross-examination. Gibson v. Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

24. Austin v. Winston, 1 Hen. & M. (Va.) 33, 3 Am. Dec. 583.

25. Marlatt v. Warnick, 19 N. J. Eq. 439.

26. McDonald v. May, 1 Rich. Eq. (S. C.) 91.

27. Burtch v. Elliott, 3 Ind. 99; Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; Wheeler v. Wallace, 53 Mich. 355, 364, 19 N. W. 33, 37.

ing the creditors, the property be returned or the surplus of proceeds be paid to the grantee.[28] A judgment providing for the return of the surplus to the grantor is erroneous.[29] The grantor in a fraudulent conveyance, or one claiming under him, has no standing to maintain a bill in equity against the grantee for an account of such proceeds or profits,[30] although there was an agreement between the parties to that effect.[31] But where a conveyance was made by a debtor for the purpose of defrauding creditors, the grantee, after having reconveyed the property to the grantor and agreed to pay him a certain amount for profits received, while in possession, cannot escape liability under the contract on the ground of the fraud in the conveyance.[32]

§ 16. **Right to enforce payment of consideration.**—It is held by some authorities that, a sale fraudulent as to creditors being valid between the parties, it is no defense to an action against the purchaser for the price of the property sold and delivered that the sale was in fraud of the grantor's creditors.[33] But other authorities

28. Metcalf v. Moses, 35 App. Div. (N. Y.) 596, 55 N. Y. Supp. 179; Comyns v. Riker, 83 Hun (N. Y.), 471, 31 N. Y. Supp. 1042.

29. Looney v. Bartlett, 106 Mo. App. 619, 81 S. W. 481; Maze v. Griffin, 65 Mo. App. 377.

30. Kahn v. Wilkins, 36 Fla. 428, 18 So. 584; Crowninshield v. Kittridge, 48 Mass. 520.

But where a bill of sale which was in fact a mortgage was declared by the mortgagor to be a sale for the purpose of delaying his creditors, it will not prevent the mortgagor from asserting in chancery his claim for an account as against the mortgagee, though it is otherwise as against a purchaser from the mortgagee without notice of the facts. Ballard v. Jones, 25 Tenn. 455.

31. Kahn v. Wilkins, 36 Fla. 428, 18 So. 584; Cornell v. Pierson, 8 N. J. Eq. 478. And see cases cited in notes to § 13, *supra*.

32. Stillings v. Turner, 153 Mass. 534, 27 N. E. 671.

33. Allen v. Merriwether, 10 Ky. L. Rep. 600, 9 S. W. 807; Gary v. Jacobson, 55 Miss. 204, 30 Am. Rep. 514; Stanton v. Green, 34 Miss. 576. See Hall v. Richardson, 22 Hun (N. Y.), 444, where plaintiff released her claim to an interest as tenant of a farm belonging to an estate upon the executor orally promising to pay her a certain sum, the agreement was founded on a sufficient consideration and was binding, and it was no defense to an action on the agreement that the plaintiff took the title to the property in her own name to prevent her husband's creditors from seizing it.

hold that it is competent to allege and prove the fraud in defense of the action.[34] A grantee cannot set up the fact that a conveyance was originally made to defraud creditors as a defense to a bill by his grantor seeking the specific performance of an agreement to purchase.[35] Where one conveys his property to another for the purpose of delaying and defrauding creditors, and takes in return a purchase money note, which it is agreed shall never be paid, no vendor's lien enforceable in equity can arise from the transaction.[36]

§ 17. **Enforcement of note given as consideration.**—In some jurisdictions where a debtor conveys property in fraud of creditors in consideration of the grantee's promissory notes, he cannot enforce the collection of such notes against his grantee, if the grantee sets up the defense of fraud.[37] In other jurisdictions, as between the parties, the maker of a note given as consideration for property conveyed in fraud of the grantor's creditors cannot set up the alleged fraud as a defense to the note.[38] A sale fraudulent as to creditors is valid between the parties, and therefore the vendor

34. Heineman v. Newman, 55 Ga. 262, 21 Am. Rep. 279; Smith v. Hubbs, 10 Me. 71; McConaughy v. Farney (Neb. 1902), 89 N. W. 812, where the transferee participated in the fraud; Schroeder v. Kisselbach, 5 Ohio Dec. 158, 3 Am. L. Rec. 295.

35. Lynn v. Lyerle, 113 Ill. 128.

36. Glover v. Walker, 107 Ala. 540, 18 So. 251.

37. *N. Y.*—Starin v. Kelly, 36 N. Y. Super. Ct. 366; Nellis v. Clark, 4 Hill, 424, *rev'g* 20 Wend. 24.

Mo.—Fenton v. Ham, 35 Mo. 409; Hamilton v. Scull, 25 Mo. 165, 69 Am. Dec. 460; Clay County Bank v. Keith, 85 Mo. App. 409. But see Moore v. Thompson, 6 Mo. 353.

N. J.—Church v. Muir, 33 N. J. L. 318; Servis v. Nelson, 14 N. J. Eq. 94.

N. C.—Powell v. Inman, 52 N. C. 28, 53 N. C. 436, 82 Am. Dec. 426, such a note is void in the hands of one to whom it was indorsed for collection.

Ohio.—Goudy v. Gebhard, 1 Ohio St. 262.

S. C.—Harvin v. Weeks, 11 Rich. 601; Balke v. Lowe, 3 Desauss. 263.

Tex.—Arnold v. Peoples, 13 Tex. Civ. App. 26, 34 S. W. 755.

A note given to a creditor to induce him to consent to a composition of debts cannot be enforced. Cockshott v. Bennett, 2 T. R. 763, 1 Rev. Rep. 617.

38. *Ala.*—Giddens v. Bolling, 93 Ala. 92, 9 So. 427, note for rent executed for the purpose of hindering and delaying creditors of the tenant.

Cal.—Smith v. 49 & 56 Quartz Min. Co., 14 Cal. 242.

must pay his notes given for the price, though the property be taken from him by the grantor's creditors.[39] Upon the principle that the courts will not aid either party to an executory contract tainted with fraud to enforce it, it may be shown by the maker or his representatives that a note given in payment was made without consideration, for the sole purpose of protecting his property from his creditors, and that it was agreed between the maker and the payee at the time of its execution that it should be cancelled whenever so desired.[40]

§ 18. **Recovery by grantee of consideration paid.**—Where there is actual fraud on the part of both the grantee and grantor,[41] or the property conveyed is seized and sold on execution against the fraudulent grantor,[42] or the grantee's title has been avoided by the creditors of the grantor,[43] the grantee is not entitled to be reimbursed on account of any payments made by him in the transaction. But if he received the conveyance in good faith, without any

Ind.—Stevens v. Songer, 14 Ind. 342; Findley v. Cooley, 1 Blackf. 262.

Ky.—Allen v. Meriwether, 10 Ky. L. Rep. 600, 9 S. W. 807; Drane v. Underwood, 1 Ky. L. Rep. 317.

La.—Landwirth v. Shaphran, 47 La. Ann. 336, 16 So. 839; Freeman v. Savage, 2 La. Ann. 269.

Me.—Butler v. Moore, 73 Me. 151, 40 Am. Rep. 348.

Mass.—Dyer v. Homer, 39 Mass. 253; Payson v. Whitcomb, 32 Mass. 212. But *compare* Gordon v. Clapp, 113 Mass. 335, as to note given for services rendered in carrying out the fraudulent transaction.

Miss.—Gary v. Jacobson, 55 Miss. 204, 30 Am. Rep. 514; Stanton v. Green, 34 Miss. 576.

Nev.—McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781.

Pa.—Harbaugh v. Butner, 148 Pa. St. 273, 23 Atl. 983, note given in consideration of a confession of judgment.

Tenn.—Hamilton v. Gilbert, 49 Tenn. 680. *Compare* Walker v. McConnico, 18 Tenn. 228, a note given without consideration cannot be enforced by the payee against the maker.

Vt.—Carpenter v. McClure, 39 Vt. 9, 91 Am. Dec. 370.

Wis.—Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520.

39. Stanton v. Greene, 34 Miss. 576.

40. McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781.

41. Tissier v. Wailes (Ala. 1905), 39 So. 924; Tickner v. Wiswall, 9 Ala. 305; Leach v. Tilton, 40 N. H. 473; Potter v. Stevens, 40 Mo. 229.

42. Surlott v. Beddow, 19 Ky. 109.

43. Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Bartlett v. Decreet, 70 Mass. 111.

fraudulent intent, and without any knowledge or belief that the grantor had any fraudulent intent, he may recover back money paid as part of the consideration.[44] Where the conveyance is vacated at the instance of the grantor, because of its having been obtained from him by fraud and undue influence, the grantee is entitled to reimbursement for taxes paid on the land, as a condition to the vacation of the conveyance.[45] Where a vendor has in fraud of creditors given a bill of sale of his personal property, but kept possession and subsequently disposed of the property, the vendee may recover the value thereof, especially if the bill of sale was recorded.[46]

§ 19. **Rights and liabilities of several grantees inter se.**— Where fraudulent grantees of personal property accepted it with an assurance to the grantor that it should not affect his rights, one of them, receiving the property to manage for the grantor, incurred no responsibility to the other grantees by permitting the grantor to dispose of any part of the property conveyed.[47] Where the heirs of an insolvent intestate agreed with his widow, who held a judgment against him, that the land comprising the estate should be sold to satisfy the judgment, and that one of the heirs should buy it for the others, without, however, paying any of the price bid, in trust to support the widow, and upon her death to distribute it among the heirs, and, in pursuance of such an agreement, an heir bought the land, and by representing that he was acting for the intestate's family, secured it at much less than its market value, and took possession, upon the widow's death, the heir in possession could not be compelled to perform the agreement to convey, it being in fraud of the intestate's creditors.[48]

44. Leach v. Tilton, 40 N. H. 473; Haven v. Low, 2 N. H. 473.

Notes previously held by the grantee against the grantor and given up to the grantor as part of the consideration for the deed, or the amount thereof, may be recovered from the grantor. Leach v. Tilton, 40 N. H. 473.

45. Hutchinson v. Park (Ark. 1904), 82 S. W. 843.

46. Hoeser v. Kraeka, 29 Tex. 450.

47. Riddle v. Lewis, 70 Ky. 193.

48. Milhous v. Sally, 43 S. C. 318, 21 S. E. 268.

§ 20. **Contribution between several grantees.**—There may be contribution among fraudulent grantees of land, where the land conveyed to one of them is taken to pay the grantor's debts, such contribution to be adjusted according to the equities between the several grantees,[49] except where the grantor retained sufficient property to satisfy the debt paid and to which the execution creditor might have been compelled to resort.[50] A decree in favor of a creditor against several voluntary grantees of the debtor should apportion the debt sued for among such grantees in proportion to the property by them respectively received, holding them severally liable, however, to the extent of the property received by them, until all of them have paid their proportion.[51] But contribution among volunteers will not be compelled to remove a general lien upon property conveyed to them unless there was an inevitable necessity that the property should pay the lien and there cannot be such necessity where the grantor is solvent.[52]

§ 21. **Rights and liabilities as to third persons in general.**—The general rule is that third persons who are neither creditors nor subsequent purchasers for a valuable consideration cannot take advantage of a conveyance as fraudulent as against creditors and have no standing to question or impeach its validity.[53] A creditor

49. Janvrin v. Curtis, 63 N. H. 312.

50. Thompson v. Perry, 2 Hill Eq. (S. C.) 204, 29 Am. Dec. 68.

51. Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

52. Thompson v. Perry, 2 Hill Eq. (S. C.) 204.

53. *Ala.*—Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

Ind.—Edwards v. Haverstick, 53 Ind. 348; O'Neil v. Chandler, 42 Ind. 471.

La.—Long v. Klein, 35 La. Ann. 384.

Minn.—Piper v. Johnston, 12 Minn. 60.

Mo.—Amy v. Ramsey, 4 Mo. 505. See White v. Willson, 102 Mo. App. 437, 76 S. W. 733.

N. H.—Cutting v. Pike, 21 N. H. 347.

N. J.—Osborne v. Tunis, 25 N. J. L. 633; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623.

Ohio.—Burgett v. Burgett, 1 Ohio, 469, 13 Am. Dec. 634.

Pa.—Drum v. Painter, 27 Pa. St. 148.

S. C.—Kid v. Mitchell, 1 Nott. & M. 334, 9 Am. Dec. 702.

Tex.—Seligman v. Wilson, 1 Tex. App. Civ. Cas., § 895.

Vt.—Gibbs v. Linsley, 13 Vt. 208.

Wis.—La Crosse, etc., R. Co. v. Seeger, 4 Wis. 268.

of one obtaining possession from a fraudulent grantee cannot avoid the original conveyance which is fraudulent and void as against the creditors of the parties to the fraud.[54] The seller of goods on rescinding the sale, on the ground that it was procured by fraud of the purchaser, cannot retake them from one to whom they have been transferred with intent to hinder and delay creditors, for the latter transfer is good as against all persons save those claiming as creditors.[55] Where an assignment of a debt is made to defraud creditors, the debtor cannot set up the fraud as a defense to a suit by the assignee.[56] The assignee in bankruptcy, or the grantee of such assignee, is not estopped to claim property conveyed by the debtor in secret trust to defraud creditors.[57] The grantee in a conveyance alleged to be fraudulent is entitled to recover for the use and possession of the land against trespassers who have attorned to other persons claiming title, for their occupation previous to their attornment.[58] Where a debtor's grantee sues to recover possession of property, the defendant, in order to impeach plaintiff's title on the ground that the conveyance was in fraud of creditors, must show, not only such fraud and that the creditors have by some act avoided the conveyance, but also that he duly represents the creditors' title, and is therefore entitled to set it up against that of the grantee.[59] A mortgage executed by a judgment debtor subsequently to the rendition of the judgment confers on the mortgagee a title on which he may maintain an action against any one who does not connect himself with the judgment.[60] A bank with which a note is deposited by the payee for collection cannot refuse to return it, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank itself is one of those creditors.[61] Where money was deposited in the

54. Puryear v. Beard, 14 Ala. 121.

55. Engel v. Salomon, 41 Ill. App. 411.

56. Morey v. Forsyth, Walk. (Mich.) 465.

57. Guthrie v. Bacon, 107 N. C. 337, 12 S. E. 204.

58. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590.

59. Delesdernier v. Mowry, 20 Me. 150.

60. Strut v. McClerkin, 77 Ala. 580.

61. First Nat. Bank v. Leppel, 9 Colo. 594, 13 Pac. 776.

hands of defendant for the credit of the plaintiff, the purpose of the deposit being to place the fund beyond the reach of the depositor's creditors, the defendant cannot take advantage of the fraudulent intent in an action by the plaintiff to recover the money so deposited.[62]

§ 22. **Rights of maker of note fraudulently transferred.**—The maker of a promissory note, in an action thereon by a transferee, cannot assail the plaintiff's title on the ground that the transfer was made in fraud of the creditors of the payee; the transfer can only be assailed on that account by the creditors or some one representing them.[63] It is no defense to an action on a bill or note payable to bearer, that the real title is in another person than the plaintiff, unless the possession of the plaintiff is *mala fides* and may prejudice the defendant.[64] Where the holder of a note assigns the debt to another, and for that purpose gives up the note to the maker, causing him to execute and deliver another to the assignee, the maker is no longer liable to the holder of the first note, nor to his creditors, although the assignment and subsequent transaction was for the purpose of defrauding and delaying the creditors of the first holder, the maker of the note being innocent of such design.[65]

§ 23. **As to creditors of grantee.**—A conveyance made in fraud of the grantor's creditors being valid as between the parties and as to all others creditors, the legal title is in the grantee, and while he holds the property it is subject to the claims of his creditors by attachment or levy and sale under execution, the same as any other

62. Brown v. Thayer, 78 Mass. 1.

63. *N. Y.*—Sullivan v. Bonesteel, 79 N. Y. 631.

Mass.—Hading v. Colon, 123 Mass. 299.

Minn.—Rohrer v. Turrill, 4 Minn. 407.

Mo.—Sauter v. Leveridge, 103 Mo. 615, 15 S. W. 981. *Compare* Steele v. Parsons, 9 Mo. 823.

N. C.—Newsom v. Russell, 77 N. C. 277.

Tenn.—Wells v. Schoonover, 56 Tenn. 805.

64. Wells v. Schoonover, 56 Tenn. 805.

65. Paterson v. Whittier, 19 N. H. 192.

property of his, and neither he nor his fraudulent grantor will be permitted by the courts to set up their own fraud and to be heard in avoidance of the fraudulent transfer as against such creditors.[66] A subsequent conveyance thereof, made by the grantor, after levy and sale under execution against the grantee, passes no title as against creditors of the grantee.[67] The grantee's violation of a promise not to record the deed cannot affect his creditor who knew nothing of the promise.[68] Where the owner of lands allows the apparent title to remain in another who obtains credit on such appearance, the land is liable to the claims of the creditor after its conveyance to the owner, although such owner did not have actual knowledge of the obtaining of the credit.[69] But until the creditors of the grantee of property fraudulently conveyed obtain a lien upon the property, they have no rights thereto superior to the equities of the grantor's creditors, and it is not a fraud upon the grantee's creditors for him to reconvey it to the grantor.[70] But creditors of a fraudulent grantor have no superior equities to the

66. *N. Y.*—Davis v. Graves, 29 Barb. 480.

Ill.—Oliver v. Wilhite, 201 Ill. 552, 66 N. E. 837.

Ind.—Edwards v. Haverstick, 53 Ind. 348.

Ky.—Berry v. Frantz, 113 Ky. 888, 24 Ky. L. Rep. 689, 69 S. W. 801; Clark v. Rucker, 46 Ky. 583.

Mass.—Gibbs v. Chase, 10 Mass. 125.

Nev.—Maher v. Swift, 14 Neb. 324; Allison v. Hagan, 12 Nev. 38.

S. C.—Davidson v. Graves, Riley Eq. 232.

Tenn.—Stanton v. Shaw, 62 Tenn. 12.

67. Edwards v. Haverstick, 53 Ind. 348.

68. Oliver v. Wilhite, 201 Ill. 552, 66 N. E. 837.

69. Singer Mfg. Co. v. Stephens, 169 Mo. 1, 68 S. W. 903; Susong v. Williams, 48 Tenn. 625.

70. *N. Y.*—Davis v. Graves, 29 Barb. 480.

Ark.—Bell v. Greenwood, 21 Ark. 249, after reconveyance the original grantor may maintain a bill in equity against subsequent attaching creditors of the grantee.

Ind. — Edwards v. Haverstick, *supra.*

Ky.—See cases cited in note 1, *supra.*

N. J.—Budd v. Atkinson, 30 N. J. Eq. 530.

N. C.—Powell v. Ivy, 88 N. C. 256.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60.

Tenn.—Stanton v. Shaw, 62 Tenn. 12.

But see Maher v. Swift, 14 Nev. 324. See also Reconveyance by fraudulent grantee, chap. IV, § 34, *supra.*

innocent creditors of the fraudulent grantee which entitles them to priority as to the property fraudulently conveyed, where such creditors of the grantee have acquired the first lien.[71] The moral obligation resting upon the grantee holding under a fraudulent transfer is sufficient to support a reconveyance as against his creditors.[72]

§ 24. **Rights and liabilities of grantees as to creditors and subsequent purchasers — As to creditors — As to property and proceeds thereof.**—The title acquired by a fraudulent grantee although good as against the grantor, will not prevail against the grantor's creditors, but the latter may impeach it as fraudulent and the property or its proceeds is subject to be taken by such creditors,[73] to the extent that it is necessary for the satisfaction

71. Parker v. Freeman, 2 Tenn. Ch. 612.

72. Berg v. Frantz, 113 Ky. 888, 69 S. W. 801, 24 Ky. L. Rep. 689; Lockren v. Rustan, 9 N. D. 43; Bicocchi v. Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

73. *N. Y.*—Boessneck v. Edelson, 45 App. Div. 631, 57 N. Y. Supp. 1029; McCaffrey v. Hickey, 66 Barb. 489; Nicholson v. Leavitt, 4 Sandf. 252. See Durand v. Hankerson, 39 N. Y. 287.

U. S.—Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264, heirs of the grantee; Fisher v. Moog, 39 Fed. 665, the fraudulent grantee is estopped to deny the grantor's title and to allege that creditors were not injured by the conveyance.

Ala.—Bryant v. Young, 21 Ala. 264; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Cal.—Swartz v. Hazlett, 8 Cal. 118.

Ill.—Union Nat. Bank v. Lane, 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216, *aff'g* 75 Ill. App. 299; Hall v. Stronfe, 52 Ill. 421; Steere v. Hoagland, 39 Ill. 264.

Iowa.—Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Knorr v. Lohr, 108 Iowa, 181, 78 N. W. 904; Cloud v. Malvin, 108 Iowa, 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; Risser v. Rathburn, 71 Iowa, 113, 32 N. W. 198.

Mass.—Pierce v. Le Monier, 172 Mass. 508, 53 N. E. 125.

Miss.—Chapman v. White Sewing Mach. Co., 76 Miss. 821, 25 So. 868; Ames v. Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522.

Mo.—Antram v. Burch, 84 Mo. App. 256.

Mont.—Davis v. Morgan, 19 Mont. 141, 47 Pac. 793.

N. C.—Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737.

Okla.—McFayden v. Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Pa.—Haymaker's Appeal, 53 Pa. St. 306.

Tenn.—Citizens Bank, etc., Co. v.

of their claims;[74] and this notwithstanding the grantee paid a valuable consideration for the property.[75] In the latter case, if the creditor makes an excessive levy, he is liable to the grantee for damages.[76] That the property was originally purchased and paid for by the grantee and the title transferred to his grantor for the purpose of defrauding his creditors, will not sustain the subsequent conveyance to him against an attack upon it by creditors of his grantor.[77] A reconveyance to the fraudulent grantee from a *bona fide* purchaser to whom he had sold the property places him in no better position than he occupied originally, and he holds the property subject to the right of those who were creditors of the fraudulent grantor at the time of the original conveyance.[78] A court of equity will not enjoin an execution creditor of a husband from proceeding against the wife's real estate where she claimed under a deed executed by the husband to a third person for the purpose of passing title to her, which deed the creditor of the husband alleges to have been fraudulently executed,[79] nor will the court order a sale of the property at the instance of the fraudulent grantee, against the interests of the defrauded creditors, although such creditors have taken no steps to ascertain their rights.[80] A fraudulent grantee stands in the grantor's place in respect to cred-

Bradt (Ch. App. 1898), 50 S. W. 778, lien to secure grantee's interests inferior to grantor's creditors.

Tex.—Choate v. McIlhenny Co., 71 Tex. 119, 9 S. W. 83.

Va.—Fowes v. Rice, 9 Gratt. 568; Graysons v. Richards, 10 Leigh, 57.

Can.—King v. Keating, 12 Grant Ch. (U. C.) 29.

74. Rousseau v. Blow, 56 Hun (N. Y.), 639, 8 N. Y. Supp. 823; Campbell v. Whitson, 68 Ill. 240, 18 Am. Rep. 553; Eaves v. Williams, 10 Tex. Civ. App. 423, 31 S. W. 86.

More than is sufficient to satisfy the plaintiff's claim should not be directed to be paid by the transferee to the receiver, in an action by a judgment creditor to set aside as fraudulent a transfer of property by the judgment debtor, although there are other creditors. Kaupe v. Bridge, 25 N. Y. Super. Ct. 459.

75. Bigby v. Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302.

76. Eaves v. Williams, 10 Tex. Civ. App. 423.

77. Cloud v. Malvin, 108 Iowa, 52.

78. Schultz v. Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

79. Mahle v. Kurtz, 9 Pa. Co. Ct. 280.

80. Hayden v. Denslow, 27 Conn. 335.

itors of the grantor and has no equities or rights superior to those possessed by the grantor as against such creditors.[81] Property or its proceeds acquired by means of a judgment collusively confessed and entered for the purpose of defrauding creditors and execution issued thereon, may be reached in equity by such creditors,[82] although the creditors' judgments were not obtained until after the property seized under the fraudulent judgment had been sold by the sheriff, where by the issuance of executions on their judgments they have acquired a lien on the proceeds of such sale in the hands of the sheriff.[83] The fact that the debts for which the judgments were confessed were just ones, owing from the judgment debtor to the judgment creditors, will not exonerate them from refunding any sums acquired by them in the attempt to place the debtor's property beyond the reach of other creditors, for the benefit of the failing debtor.[84] Where property has been conveyed by a debtor in fraud of creditors, the latter may subject the property to the payment of their debts but they cannot take both the property and the consideration therefor.[85] In jurisdictions where the conveyance is voidable only, the legal title to property transferred with intent to defraud creditors is in the fraudulent grantee, the intent not appearing on the face of the deed, and the title continues in the grantee, notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed and the transfer set aside.[86] But the proceeds of the sale in the hands of

81. Kline v. McGuckin, 24 N. J. Eq. 411.

82. Taggart v. Phillips, 5 Del. Ch. 237, the proceeds of sale under such an execution will be applied to satisfy a judgment subsequently obtained by a *bona fide* creditor; French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252, *aff'g* 97 Ill. App. 533; Phelps v. Smith, 116 Ill. 387, 17 N. E. 602, 19 N. E. 156.

83. Kohl v. Sullivan, 140 Pa. St. 35, 21 Atl. 247.

84. Hardt v. Schwab, 72 Hun (N. Y.), 109, 25 N. Y. Supp. 402.

85. Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Allen v. White, 17 Vt. 69; Allen v. Mower, 17 Vt. 61, where a fraudulent grantee has paid a full consideration for the property a court of equity will not require him to pay the value of the property a second time for the benefit of creditors. See also Change of character of property and following proceeds, chap. IV, § 48, *supra*.

86. Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

Trover may be maintained by

the fraudulent grantee may be subjected, and, so far as any portion of the same can be traced into other property purchased or exchanged by him, a court of equity will fasten a trust upon it in favor of the creditors.[87] A fraudulent grantee's title is valid, however, even as against a creditor of the grantor, to the extent that he may contest the validity of a creditor's claim,[88] and that he may defend an action against him by showing defects in the proceedings therein.[89]

§ 25. **Right to require resort to other property.**—A fraudulent donee or vendee of personalty taken on execution against his vendor cannot object that the sheriff should have resorted to real property of the debtor before taking the personal, since the transfer to him is deemed void as against the creditors of his vendor.[90] But, in a suit by a creditor to set aside an innocent voluntary conveyance, the grantee may set up a subsequent conveyance of other property, made with the express purpose of defrauding creditors, and have that set aside before the creditor is permitted to resort to the property first conveyed, especially in view of a statute providing that creditors may levy executions on property fraudulently conveyed, or sue to subject it.[91]

the fraudulent grantee against a creditor who takes the property from him without judicial process. Stockbridge v. Crockett, 15 Tex. Civ. App. 69, 38 S. W. 401.

87. Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Bryant v. Young, 21 Ala. 264; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491, 10 S. W. 816. See also Change in character of property and following proceeds, chap. IV, § 48, *supra*.

88. Toop v. Smith, 181 N. Y. 283, 73 N. E. 1113, *aff'g* 87 App. Div. (N. Y.) 241, 84 N. Y. Supp. 326, a fraudulent grantee may contest the validity of a mechanic's lien against the grantor, notice of which had not been given in the manner prescribed by statute; Rousseau v. Bleau, 8 N. Y. Supp. 823, the judgment against the fraudulent grantee should provide that he be allowed full opportunity to contest all claims not determined in the action.

89. Leonard v. Bryant, 56 Mass. 32, where a creditor of the grantor brings a writ of entry against the grantee, the latter may defend by showing that the levy was void for defects therein.

90. Flanders v. Batten, 50 Hun (N. Y.), 542, 3 N. Y. Supp. 728, *aff'd* 123 N. Y. 627, 25 N. E. 952.

91. Walker v. Bank of Manchester, 25 Ky. L. Rep. 1950, 79 S. W. 222.

§ 26. **Intermingled goods.**—Where a vendee fraudulently intermingles the goods purchased by him with his own, with intent to frustrate an attachment or execution by the vendor's creditors, and so intermingles them that the creditors cannot separate them, he must shoulder the consequences of his own wrong and must distinguish his own property so intermingled, or lose it, and the creditors may justify the taking of the whole.[92] But if the intermingling was done innocently but in such manner that the vendee only can distinguish them, and the attaching creditor request the vendee to select his goods, which he refuses to do, this alone will not justify such creditor in taking the vendee's goods with those of the vendor.[93] Where the vendee has sold some of the goods, and with the proceeds purchased others, which he mingled in stock, on proof of fraud, the creditor was entitled to the original goods, and the burden was on the vendee to distinguish them or prove their value, and if he refused to do so, the whole is subject to the creditor's claim.[94] But where the new goods have been innocently mingled inseparably with the stock, the fact that the original purchase was constructively fraudulent does not render the newly purchased goods subject to attachment for a debt of the original vendor.[95]

§ 27. **Increase or product of property generally.**—The creditors of the vendor may claim from the vendee the natural in-

92. Treat v. Barber, 7 Conn. 275; McDowell v. Rissell, 37 Pa. St. 164; 21 Pick. (Mass.) 298.

93. Treat v. Barber, 7 Conn. 275.

94. French v. Reel, 61 Iowa, 143, 12 N. W. 573, 16 N. W. 55.

95. Capron v. Porter, 43 Conn. 383.

The rule which should govern the master in taking the account must be to charge the defendant the actual value of the goods at the time of the transfer, with interest to the time when the purchaser had paid some of the debts of his vendor according to an understanding between them at the time of the sale, and upon any balance remaining in the purchaser's hands until the final decree; and that he should receive credit, as if he had already paid the money, for his own notes and acceptances given to other *bona fide* creditors of his vendor and received in full payment of their debts, previously to his being notified of the filing of the creditor's bill. Steere v. Hoagland, 50 Ill. 377.

crease for a reasonable time of the property, such as live stock, fraudulently conveyed by their debtor,[96] but the privilege will not be extended for an unreasonable length of time, where a portion of the increase, at least, is produced by the labor and at the expense of the purchaser.[97] The subsequently manufactured product of a factory forming no part of the original property transferred in fraud of creditors is not liable to levy and sale under execution against the debtor.[98]

§ 28. **Right to growing crops.**—Growing crops on land fraudulently conveyed have been held to be subject to execution in favor of the grantor's creditors to satisfy the debts of the grantor, at least to the extent of the grantor's interest therein,[99] and the fact that such crops had not been sown at the time of the fraudulent conveyance will not deprive a creditor of the right to resort to such crops.[1] On the contrary it has been held that, since the creditor of a fraudulent grantor can reach only such property as had belonged to such grantor, if the grantee of land takes possession, and raises a crop thereon, such crop cannot be attached by the creditor of the grantor.[2] A fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the convey-

96. Backhouse v. Jett, 2 Fed. Cas. No. 710, 1 Brock. 500; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33. Though the sale of a cow is not accompanied by sufficient change of possession to be valid as against creditors, yet her subsequent progeny, raised on the farm on which both vendor and vendee reside, never having been the property of the vendor, belong to the vendee as against the vendor's creditors. Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. 39.

97. Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33. See also Crops and other products, chap. IV, § 25, *supra*.

98. McDonald v. Cohen, 5 App. Div. (N. Y.) 161, 38 N. Y. Supp. 1110.

99. Dodd v. Adams, 125 Mass. 398, hay cut on such land is subject to execution to satisfy a debt of the grantor contracted subsequent to the conveyance; Fury v. Strohecker, 44 Mich. 337, 6 N. W. 834; Stehman v. Huber, 21 Pa. St. 260.

1. Fury v. Strohecker, 44 Mich. 337, 6 N. W. 834.

2. Jones v. Bryant, 13 N. H. 53. See also Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. 39.

ance is unimpeached,[3] unless it be shown that he manages the farm, and raises the crops, for the benefit of the grantor.[4]

§ 29. **Several fraudulent transactions.**—Where voluntary conveyances, fraudulent as to creditors, are made to several different persons, property so conveyed in the hands of one volunteer is liable to its whole extent, if required to pay the debts of the creditors, and not merely to the proportion thereof which it bears to the property conveyed to others.[5] Where by an active fraudulent combination property has been obtained and transferred from one person to another by a system of leases, mortgages, and deeds, all of which are fictitious, all the guilty parties are answerable for the whole of the property.[6]

§ 30. **Possession of grantee adverse to creditors.**—It is held in some jurisdictions that a grantee, under a fraudulent conveyance, cannot be deemed to be in adverse possession, so as to acquire a title by possession which will bar the creditors of the fraudulent grantor or a purchaser at a sale under execution issued on a judgment in favor of such creditors,[7] in the absence of proof

3. Cain v. Mead, 66 Minn. 195, 68 N. W. 840. Hartman v. Weiland, 36 Minn. 223, 30 N. W. 815.

4. Hartman v. Weiland, *supra*. See also Crops and other products, chap. IV, § 25, *supra*.

5. Hopkirk v. Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132; Adams v. Holcombe, Harp. Eq. (S. C.) 202, 14 Am. Dec. 719. See Contribution between grantees, § 20, *supra*.

6. Bruce v. Kelly, 39 N. Y. Super. Ct. 27.

7. *U. S.*—Farrar v. Bernheim, 74 Fed. 435, 20 C. C. A. 496, the fraudulent conveyance affords no beginning point for the running of the statute of limitations in favor of the grantee or his heirs as against the defrauded creditors or one claiming as purpurchaser at an execution sale in favor of such creditors.

Ala.—High v. Nelms, 14 Ala. 350, 48 Am. Dec. 103; McCaskle v. Amarine, 12 Ala. 17.

Conn.—Beach v. Catlin, 4 Day, 284, 4 Am. Dec. 221.

La.—Decuir v. Veazy, 8 La. Ann. 453.

N. C.—Hoke v. Henderson, 14 N. C. 12; Pickett v. Pickett, 14 N. C. 6.

S. C.—Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79; Suber v. Chandler, 36 S. C. 344, 15 S. E. 426; Aikin v. Ballard, Rice Eq. 13.

Va.—Snoddy v. Haskins, 12 Gratt. 363.

that the creditors were guilty of laches in proceeding against the property;[8] but after a sale under a creditor's execution, a fraudulent deed is color of title against the purchaser.[9] In other jurisdictions a grantee in possession under a deed from a judgment debtor, alleged to be fraudulent as against creditors, holds adversely to the creditors of the grantor and a purchaser under the creditor's execution from the time when possession was taken under the fraudulent deed, and such possession for the statutory period vests in the vendee the legal title, and the conveyance cannot be attacked for fraud,[10] unless the creditors could not, by reasonable diligence, have discovered the fraud within the statutory period before the levy of execution,[11] or unless the grantee holds the property as trustee in recognition of a secret trust for the grantor and disclaims any personal interest therein.[12]

§ 31. **Right of grantee to attack execution sale.**—A fraudulent vendee of personalty taken in execution against his vendor cannot object that the sheriff should have resorted to the real property of the debtor before taking the personalty.[13] It has

8. Farrar v. Bernheim, 74 Fed. 435, 20 C. C. A. 496; Garvin v. Garvin, 40 S. C. 435, 19 S. E. 79.

9. Beach v. Catlin, 4 Day (Conn.), 284; Hoke v. Henderson, 14 N. C. 12; Pickett v. Pickett, 14 N. C. 6.

10. *Ala.*—Peter v. Kahn, 93 Ala. 201, 9 So. 729; Lockard v. Nash, 64 Ala. 385; Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

Ill.—Cook v. Norton, 48 Ill. 20.

Md.—Baxter v. Sewell, 3 Md. 334.

Minn.—Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

Miss.—Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Mo.—Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478; Walker v. Bacon, 32 Mo. 144.

Tenn.—Welcker v. Staples, 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869; McBee v. Bearden, 75 Tenn. 731; Ramsay v. Quillen, 73 Tenn. 184; Knight v. Jordan, 25 Tenn. 101; Reeves v. Dougherty, 15 Tenn. 222, 27 Am. Dec. 496; Mulloy v. Paul, 2 Tenn. Ch. 156. But see Marr v. Rucker, 20 Tenn. 348; Jones v. Read, 20 Tenn. 335.

Tex.—Reynolds v. Lansford, 16 Tex. 286; B. C. Evans Co. v. Guipel (Civ. App. 1896), 35 S. W. 940.

11. Lockard v. Nash, 64 Ala. 385; Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Belt v. Raguet, 27 Tex. 471.

12. Smith v. Hall, 103 Ala. 235, 13 So. 525.

13. Flanders v. Batten, 50 Hun (N. Y.), 542, 3 N. Y. Supp. 728, *aff'd* 123 N. Y. 627, 25 N. E. 952.

been held that a fraudulent vendee cannot dispute and contest the regularity of the title of a purchaser at an execution sale of the property under a judgment obtained by a creditor of the vendor,[14] and that evidence that the price was inadequate is inadmissible, because the deficiency of the price might have arisen from the circumstance of the fraudulent deed.[15] On the other hand it is held that a fraudulent grantee of property is not precluded from having a sheriff's sale of the property, under an execution against his grantor, set aside, on showing irregularities in the proceedings, and that the property was sold for a grossly inadequate price.[16]

§ 32. **Right of grantee to pay creditor's claim and retain property.**—Where, in suit by a judgment creditor to set aside a sale of the debtor's land for value, as in fraud of his judgment, the court decrees the sale "void as to the judgment," and renders judgment for the creditor for the amount due, the grantee, by paying such amount, frees his title as against the decree.[17] In proceedings to set aside a fraudulent conveyance, after the issues at the trial are found in the judgment creditor's favor, it is too late for the fraudulent transferee to ask the court to fix a short time within which he could pay off the creditor's judgment, and take the land freed from its lien, and it is proper to enter judgment canceling the fraudulent conveyance.[18] Where a conveyance by a debtor to a grantee, who has in good faith paid a part of the consideration for the property transferred, is set aside as fraudulent towards creditors, the grantee will be given the alternative of paying the vendor's debts, or of having the property sold and the proceeds applied, first to his reimbursement, and second to the claims of the existing creditors of the grantor.[19]

14. Floyd v. Goodwin, 16 Tenn. 484, 29 Am. Dec. 130.

15. Laurence v. Lippencott, 6 N. J. L. 473.

16. Miller v. Koertge, 70 Tex. 162 7 S. W. 691, 8 Am. St. Rep. 587.

17. Kitts v. Willson, 140 Ind. 604, 39 N. E. 313. See also Assent or confirmation by creditors, chap. III, § 8, *supra*.

18. Pickens v. Taylor, 47 Kan. 294, 27 Pac. 986.

19. Adams' Assignee v. Branch, 3 Ky. L. Rep. 178.

§ 33. **Personal liability of grantee in general.**—A voluntary grantee, under a conveyance of property made with intent to defraud creditors of the grantor, is held to be a trustee by operation of law for the benefit of the existing creditors of the grantor, or a trustee *ex maleficio,* and liable to account therefor as a trustee for such creditors.[20] Where a conveyance is not fraudulent, but part of the consideration is invalid as against creditors of the grantor, the grantee will be considered to hold such interest in the granted property as represents the invalid part of the consideration, as a trust fund for the use of the creditors of the grantor.[21] Where land has been purchased with the money of a husband and conveyed to his wife, the wife will be declared a trustee for the creditors of the husband.[22] A judgment representing the property, recovered against an attaching

20. *N. Y.*—Dewey v. Moyer, 72 N. Y. 70; Fox v. Erbe, 100 App. Div. 343, 91 N. Y. Supp. 832; Hillyer v. Leroy, 84 App. Div. 129, 82 N. Y. Supp. 80, trustee *ex maleficio.*

Ala.—Lockard v. Nash, 64 Ala. 385; Bryant v. Young, 21 Ala. 264.

Ark.—Miller v. Fraley, 21 Ark. 22.

Ind.—Doherty v. Holiday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Buck v Voreis, 89 Ind. 116; Stout v. Stont, 77 Ind. 537.

Mass.—Cheney v. Gleason, 117 Mass. 557.

Mich.—Thayer v. Swift, Harr. 430.

Mo.—Ryland v. Callison, 54 Mo. 513; Aspinall v. Jones, 17 Mo. 209.

Neb.—Selz v. Hocknell, 63 Neb. 503, 88 N. W. 767, 62 Neb. 101, 86 N. W. 905.

Ohio.—Starr v. Wright, 20 Ohio St. 97.

Or.—Bremer v. Fleckenstein, 9 Or. 266, where a fraudulent mortgagee, to defeat a subsequent attachment, procures a foreclosure decree, and takes the proceeds of the sale thereunder, equity will make him trustee for the attaching creditor.

Wis.—Mason v. Pierron, 69 Wis. 585, 34 N. W. 921; Ferguson v. Hillman, 55 Wis. 181, 12 N. W. 389.

Effect of proceedings in another state.—The liability of a creditor to whom goods were delivered by a debtor in fraud of other creditors is not affected by judicial proceedings thereafter taken in another state, to which the goods have since been carried, whereby the creditor attaches the goods as property of the debtor. Rothschild v. Knight, 184 U. S. 334, 22 Sup. Ct. 391, 46 L. Ed. 573, *aff'g* 176 Mass. 48, 67 N. E. 337.

21. Columbia Sav. Bank v. Winn, 132 Mo. 80, 33 S. W. 457; Lininger v. Herron, 18 Neb. 450, 25 N. W. 578; Sutherlin v. March, 75 Va. 223.

22. Johnson v. Ingram (Miss. 1891), 9 So. 822; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; Belford v. Crane, 16 N. J. Eq. 255, 84 Am. Dec. 155.

creditor by the fraudulent grantee, is held in trust for the benefit of creditors.[23] A fraudulent grantee holds the property in trust for the creditors of the fraudulent grantor, and, like any other trustee, he must preserve it intact for such creditors.[24] The property while in his possession may be pursued and subjected to the claims of creditors of the grantor, but a personal judgment in their favor is not authorized.[25] If the grantee lessens the value of the property by mortgaging it to a *bona fide* mortgagee, he is guilty of a breach of duty for which he must answer to the creditors in damages, and the measure of damages is the amount of the incumbrance.[26] The grantee will be held to account to the creditor for the money received on the mortgage without regard to the use made of it,[27] where the creditor's judgment was recovered before the mortgage was made by the grantee,[28] unless its use inured to the benefit of the creditors of the fraudulent grantor.[29] If the fraudulent grantee mortgages the property to an innocent person, it is not necessary in a suit by a creditor of the grantor to order a sale of the land before holding the fraudulent grantee personally liable for the creditor's claim.[30] If the fraudulent grantee subsequently disposes of the property or otherwise places it beyond the reach of the creditors of the grantor,

23. Hollister v. Lefevre, 35 Conn. 456.

24. Mason v. Pierron, 69 Wis. 585, 34 N. W. 921.

25. McLean v. Cary, 88 N. Y. 391, the ordinary and usual course of proceeding for the court, upon setting aside the fraudulent transfer, would be to appoint a receiver to dispose of the property and satisfy the creditor's demand; Aspinall v. Jones, 17 Mo. 209; LeGierse v. Kellum, 66 Tex. 242, 18 S. W. 509; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553.

26. Mason v. Pierron, 69 Wis. 585, 34 N. W. 921, that the mortgage given also covered the fraudulent grantee's homestead is immaterial.

27. Coale v. Moline Plow Co., 134 Ill. 350, 25 N. E. 1016; Hubbell v. Currier, 92 Mass. 333; Mason v. Pierron, *supra*. Where such a mortgage is transferred to a *bona fide* purchaser for value, both the mortgagor and the mortgagee who had notice of the fraud are liable for the amount of the mortgage to the grantor's creditors. Hubbell v. Currier, *supra*.

28. Salt Springs Nat. Bank v. Fancher, 92 Hun (N. Y.), 327, 36 N. Y. Supp. 742.

29. Coale v. Moline Plow Co., 134 Ill. 350, 25 N. E. 1016; Mason v. Pierron, *supra*.

30. Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861, *aff'g* 38 Ill. App. 93.

he is directly liable for the property so conveyed and equity will compel him to account for the proceeds thereof,[31] or hold him liable to the creditors of the debtor for the value of the property.[32] Where the fraudulent grantee is the debtor's wife she will be treated as an involuntary trustee for the existing creditors, and if she conveys the same away to innocent purchasers and retains the proceeds or her separate estate has the benefit thereof, she may be proceeded against personally for the value thereof.[33] A

31. Warner v. Blakeman, 4 Abb. Dec. (N. Y.) 530, 4 Keyes, 487; Doherty v. Holiday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Blair v. Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Jones v. Reeder, 22 Ind. 211; Williamson v. Williams, 79 Tenn. 355; Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148. But see Simpson v. Simpson, 26 Tenn. 275.

32. *N. Y.*—Murtha v. Curley, 90 N. Y. 372; Talcott v. Levy, 29 Abb. N. C. 3, 20 N. Y. Supp. 440, *aff'd* 3 Misc. Rep. 615, 23 N. Y. Supp. 1162, *aff'd* 143 N. Y. 636, 37 N. E. 826.

Ala.—Cottingham v. Greely Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Muskegon Valley Furniture Co. v. Phillips, 113 Ala. 314, 21 So. 822, taking property beyond jurisdiction of the court.

Cal.—Swinford v. Rogers, 23 Cal. 233.

Ill.—Coale v. Moline Plow Co., 134 Ill. 350, 25 N. E. 1016.

Ind.—Doherty v. Holiday, 137 Ind. 282; Chamberlin v. Jones, 114 Ind. 458, 16 N. E. 178; Jenison v. Graves, 2 Blackf. 440.

Mich.—Reeg v. Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; Robinson v. Boyd, 17 Mich. 128, whether he succeeds or not in collecting the price from his vendee.

Miss.—Ames v. Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Redfield v. Hewes, 67 Miss. 479, 6 So. 776.

Nev.—Hulley v. Chedic, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729, where the fraudulent grantee has converted the property into money.

Or.—Morrell v. Miller, 28 Or. 354, 43 Pac. 490, 45 Pac. 246.

Va.—Williamson v. Goodwyn, 9 Gratt. 503; Greer v. Wright, 6 Gratt. 154, 52 Am. Dec. 111.

W. Va.—Hinton v. Ellis, 27 W. Va. 422.

33. Bigby v. Warnock, 115 Ga. 385, 41 S. E. 622, 59 L. R. A. 754; Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447; Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015. But see United States Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed. 954, *aff'g* Phipps v. Sedgwick, 95 U. S. 3, 24 L. Ed. 591, a judgment *in personam* for the value of the property cannot be taken against the wife or her executors, her estate not having received any actual benefit from the conveyance.

Other real estate owned by the wife in her own right long before the transaction took place cannot be subjected to her husband's debts, where property is conveyed to her in fraud of creditors. McKinney v. Ward, 39 Kan. 279, 18 Pac. 196.

fraudulent assignee of accounts is chargeable, at the suit of the assignor's creditors, for all money collected by him on such accounts, for all accounts which he might have collected by the use of reasonable diligence, and for those accounts which he fails to produce or account for.[34] Where choses in action have been transferred, the fraudulent vendee must account for the amount thereof, less responsible costs of collection.[35] But the creditors of the grantor cannot hold liable the fraudulent grantee, who received property of the debtor, but who has in good faith restored it to the debtor,[36] or loaned it to him,[37] or used it in paying the *bona fide* debts of the debtor,[38] before the creditors have recovered a judgment against the debtor and fixed their rights by the filing of a bill in equity.

§ 34. **Conveyances in name of third person.**—If a conveyance of property is made to one person, and the purchase money is paid by another, a resulting trust is thereby created, and the person who has the legal title will hold the same for the use and benefit of the person paying the money; and, if the transaction was had with the intent of defrauding creditors, the property will be held subject to be taken by the creditors of the person

34. Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861.

35. Muskegon Valley Furniture Co. v. Phillips, 113 Ala. 314, 21 So. 822.

36. *N. Y.*—Cramer v. Blood, 48 N. Y. 684. See Henderson v. Brooks, 3 Thomp. & C. 445.

Mass.—Rayner v. Whicher, 88 Mass. 292.

N. H.—Gutterson v. Moorse, 58 N. H. 529.

Ohio.—White v. Brocaw, 14 Ohio St. 339; Swift v. Holdridge, 10 Ohio, 230, 36 Am. Dec. 85.

Va.—Norris v. Jones, 93 Va. 176, 24 S. E. 911.

Can.—Tennant v. Gallow, 25 Ont. 56; Masuret v. Stewart, 22 Ont. 290.

37. Norris v. Jones, 93 Va. 176, 24 S. E. 911.

38. *Ala.*—Cottingham v. Greeley Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58, although he is forced to pay the proceeds of the property by means of the process of attachment.

Mass.—Thomas v. Goodwin, 12 Mass. 140.

S. D.—Sprague v. Ryan, 11 S. D. 54, 75 N. W. 390.

Wis.—Ferguson v. Hillman, 55 Wis. 181, 12 N. W. 389.

who paid for the property.[39] In some jurisdictions it is provided by statute that a grant to one person, the consideration for which is paid by another, shall be presumed fraudulent as against existing creditors of the person paying the consideration, and unless a fraudulent intent is disproved, a trust results in favor of such creditors.[40] Under the New York statute of uses and trusts no resulting trust arises in such case, unless the consideration was paid at or before the execution of the conveyance, by the person procuring the conveyance.[41] If the grantor makes a purchase with his own money or credit, no subsequent transaction, whether of payment or reinbursement by another, can produce such a trust.[42] But where a note is given for the consideration upon such a conveyance, although it was not delivered until the day after the delivery of the deed, if it appears that the deed was delivered in expectation of receiving the note, and the note was delivered to close the transaction, the two may be regarded as contemporaneous, for the purpose of creating a resulting trust allowed by statute in favor of creditors of a person paying the consideration for a grant to another.[43] Where the purchaser of land causes a conveyance to be made to his wife,

39. Gardiner Bank v. Wheaton, 8 Me. 373; Bobb v. Woodward, 50 Mo. 95; Bridges v. Bidwell, 20 Neb. 185, 29 N. W. 302; Dewey v. Long, 25 Vt. 564. See Purchase of property in name of third person, chap. II, § 5, *supra*.

40. *N. Y.*—Niver v. Crane, 98 N. Y. 40 (1 Rev. St., p. 728, §§ 51, 52); McCartney v. Bostwick, 32 N. Y. 53, *aff'g* 31 Barb. 390; Wood v. Robinson, 22 N. Y. 564; Garfield v. Hatmaker, 15 N. Y. 475; Donovan v. Sheridan, 37 N. Y. Super. Ct. 256; Jackson v. Forrest, 2 Barb. Ch. 576.

Mich.—Fairbairn v. Middlemiss, 47 Mich. 372, 11 N. W. 203.

Minn.—Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660 (Gen. St. 1878, §§ 7, 8); Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; Leonard v. Green, 30 Minn. 496, 16 N. W. 399, 34 Minn. 137, 24 N. W. 915; Foster v. Berkey, 8 Minn. 351.

41. Niver v. Crane, 98 N. Y. 40.

42. Niver v. Crane, 98 N. Y. 40.

43. Kline v. McDonnell, 63 Hun (N. Y.), 177, 16 N. Y. Supp. 649, and where a note is given for the consideration, although it is not paid by the maker, and only a part of it is paid by his personal representative, a trust results as to a creditor of the maker, existing at the time of giving the note, but only in respect of so much of the land as is represented by the amount paid.

with an intent to defraud his creditors or to place the property beyond the reach of his then existing creditors, a trust will result in their favor.[44] Where an insolvent invests in the name of his wife, or expends in advancing the value of her separate estate, money which he has acquired by his labor, a resulting trust may arise in her property in favor of his creditors to the extent of the money so invested or expended.[45] But where he is at the same time indebted to the wife, and she is not guilty of actual fraud in the transaction, she cannot be compelled to account to his creditors for the money so advanced until her claim against her husband is satisfied.[46] If the husband agrees to pay off a mortgage on the premises as a part of the consideration, the fact that he does not pay it off until after the conveyance does not apportion the trust or make it a trust *pro tanto* only.[47] If the wife conveys away property impressed with such a trust to innocent purchasers she may, at the election of the receiver, be proceeded against personally for the value thereof.[48] Where a grantee, who holds land impressed with a trust in favor of the creditors of

44. *N. Y.*—Kline v. McDonnell, *supra;* Jencks v. Alexander, 11 Paige, 619.

Ark.—Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707. See Hershy v. Latham, 42 Ark. 305.

Ind.—Hanna v. Aebker, 84 Ind. 411, under Rev. St. 1881, §§ 752, 2974, 2975.

Ky.—Adam v. Orear, 3 Ky. L. Rep. 605, under Gen. St., chap. 63, art. 1, § 20. See Hinkle v. Gale, 11 Ky. L. Rep. 126, 11 S. W. 664.

Minn.—Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447. See also Minnesota cases cited in note 2, *supra.*

N. J.—Belford v. Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

N. C.—Thurber v. LeRoque, 105 N. C. 301, 11 S. E. 460, where the consideration is furnished in part by the husband and in part by the wife, the wife holds a share of the land, in proportion to the amount paid by the husband, in trust for his creditors, subject to his claim to a homestead, and the balance for herself absolutely; and it is immaterial what amounts are furnished by each for subsequent improvements.

Ohio.—Jaffray v. Weatherby, 12 Ohio Cir. Ct. 205, 5 Ohio Cir Dec. 201; Woodrow v. Sargent, 5 Ohio Dec. 209, 3 Am. L. Rec. 522.

45. Whedon v. Champlin, 59 Barb. (N. Y.) 61.

46. Oliver v. Moore, 26 Ohio St. 298.

47. Leonard v. Green, 34 Minn. 137, 24 N. W. 915.

48. Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447.

the person who advanced the consideration therefor, subsequently conveys it to the latter's wife in pursuance of an arrangement when the first deed was made, the wife also takes the land impressed with the same trust.[49] Where the person who pays the consideration for the real estate conveyed to another is under an existing moral obligation to pay the money to or for the grantee, and he pays the consideration solely with intent to discharge that obligation, no trust in favor of his creditors arises under a statute creating a resulting trust in favor of the creditors of a person paying the consideration for a grant to another.[50]

§ 35. **Liability as to property never in possession.**—A fraudulent grantee cannot be charged as trustee or with the value of property which has never been in his possession or under his control,[51] even though he holds a fraudulent bill of sale therefor.[52] But a person who has allowed his name to be used as party to a fraudulent assignment will be liable to account for the property to those entitled, though no part of the property has come to his hands.[53] One who is sued by his grantor's creditors because of a fraudulent conveyance of personalty made to him cannot defend on the ground that possession has continued in the grantor, and this fact will not prevent a judgment requiring the fraudulent assignee to account for such property.[54] Such fraudulent assignee is a trustee *ex maleficio* for the benefit of the assignor's creditors and may be compelled to account as such.[55]

49. Donovan v. Sheridan, 37 N. Y. Super. Ct. 256.

50. Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528.

51. Putzel v. Shulhof, 59 N. Y. Super. Ct. 88, 13 N. Y. Supp. 231; Nicholson v. Leavitt, 6 N. Y. Super. Ct. 252; Gutterson v. Morse, 58 N. H. 529; Greenleaf v. Perin, 8 N. H. 273; Bolling v. Harrison, 2 Patt. & H. (Va.) 532.

52. Gutterson v. Morse, 58 N. H. 529.

53. Hughes v. Bloomer, 9 Paige (N. Y.), 269.

54. James Goold Co. v. Maheady, 38 Hun (N. Y.), 294.

55. James Goold Co. v. Maheady, *supra*, *citing* Dewey v. Moyer, 72 N. Y. 70, and *distinguishing* Nicholson v. Leavitt, *supra*.

§ 36. **Liability as garnishee.**—In many jurisdictions a fraudulent grantee is liable to his grantor's creditors in garnishment for the property so conveyed, or the proceeds thereof if he has disposed of the same, while in other jurisdictions he is not. This subject is fully treated in another chapter.[56]

§ 37. **Extent of liability in general.**—The grantee in a transfer of property which is fraudulent as to creditors of the grantor is liable to those creditors, to the extent necessary to satisfy their claims, to the extent and for the full value of the property fraudulently transferred to him remaining in his hands and the proceeds of such as he has sold or exchanged, regardless of what he may have paid for it.[57] The criterion in determining the value of the property is its value at the time and place of the con-

56. See Garnishment, chap. XV, § 9, *infra*.

57. *N. Y.*—Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Leonard v. Clinton, 26 Hun, 288, creditors are entitled to recover the surrender value of the life insurance policy at the time of the fraudulent transfer.

U. S.—Klien v. Hoffheimer, 132 U. S. 367, 10 Sup. Ct. 130, 33 L. Ed. 373; Backhouse v. Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

Ill.—Powell v. Jeffries, 5 Ill. 387.

Ky.—Jones v. Henry, 13 Ky. 427.

Mo.—St. Louis Brewing Assoc. v. Steimke, 68 Mo. App. 52.

Neb.—Meyer v. Stone, 21 Neb. 717, 33 N. W. 420; Smith v. Sands, 17 Neb. 498, 23 N. W. 356.

Pa.—Penrod v. Mitchell, 8 Serg. & R. 522.

S. C.—McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123, the grantee must account for the value of the land included therein and alienated by him after taking possession and before commencement of the action to set aside the deed; Watson v. Kennedy, 3 Strob. Eq. 1.

Tex.—Simon v. Ash, 1 Tex. Civ. App. 202, 20 S. W. 719, a trustee who is garnished for the property and who afterwards disposes thereof, without an order of court, is liable to the garnishing creditors for the value of the goods in his hands at the date of the notice that they will contest the deed.

Wis.—Bank of Commerce v. Fowler, 93 Wis. 241, 67 N. W. 423; Sutton v. Hasey, 58 Wis. 556, 17 N. W. 416, the assignee of a creditor may, under Rev. St., § 2322, recover the full amount of the debt assigned from the grantees.

Where, in an action by a divorced wife to collect an allowance made to her in the decree of divorce for the support of a child, a conveyance of property made by her husband is adjudged void as to her, she cannot complain that it is adjudged valid as between him and the grantee, subject to her claims.

veyance.[58] A sum exceeding the value of the property cannot be awarded against the grantee, in order to punish him for his wrong-doing, however scandalous the fraud may be.[59] Where the fraudulent transferee of a patent has taken, in exchange therefor, stock in a corporation, the incidental advantage resulting from appreciation of its value by the corporate management accrues to the grantor's creditors.[60] Where the property advances in value beyond the legal rate of interest the creditors, in subjecting the property, will be restricted to the purchase price, with legal interest thereon.[61] Where the grantee or a privy to a fraudulent conveyance sells or exchanges the property at an advanced price to a *bona fide* purchaser, he may be held liable for the increased value.[62] Where the fraudulent transferee sells the property for less than its value, the recovery in a creditors' suit is not to be limited to the proceeds, but he may be charged with the full value at the time of the transfer.[63] And he should be charged with the value thereof, though he transfers it to another without receiving value therefor.[64] But it has been held that where the creditors with a knowledge of all the facts delayed for several years to assert their rights, the grantee was properly

Schultze v. Schultze (Tex. Civ. App. 1901), 66 S. W. 56.

58. Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 639; Cottingham v. Greeley Barnham Grocery Co., 129 Ala. 200, 30 So. 560, 87 Am. St. Rep. 58; Muskegon Valley Furniture Co. v. Phillips, 113 Ala. 314, 21 So. 822; Oppenheimer v. Halff, 68 Tex. 409, 4 S. W. 562.

59. Hamilton Nat. Bank v. Halsted, 134 N. Y. 520.

60. Gillett v. Bate, 86 N. Y. 87, 10 Abb. N. C. 88.

61. Hart v. Dogge, 27 Neb. 256, 42 N. W. 1035.

62. Warner v. Blakeman, 4 Abb. Dec. (N. Y.) 530, 4 Keyes, 487; Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652, where a husband transferred to his wife certain shares of bank stock for $2,500 less than she realized several months afterwards, the wife was personally liable to his creditors for the sum which she received from the sale; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46.

63. Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693, *modifying* 56 Hun, 530, 9 N. Y. Supp. 852; Hargreaves v. Tennis, 63 Neb. 356, 88 N. W. 486; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553.

64. Victor v. Levy, 72 Hun (N. Y.), 263, 25 N. Y. Supp. 644.

chargeable only with what he had actually received for the property, and not with its estimated value.[65] The fraudulent grantee of notes and accounts will be chargeable at the instance of creditors with the sums actually collected and received thereon, and the actual value of those remaining in his hands,[66] over and above his just demands, where part of the consideration for the transfer was a legal claim against the grantor.[67] One to whom certificates of stock are transferred without consideration, and in fraud of creditors, and who pays a loan for which they were previously pledged, is liable to the creditors of his assignor, for the full value of the stock at the time of the transfer less the amount of the loan.[68] So, a fraudulent grantee of property upon which there are prior liens or incumbrances, is liable to the creditors of the grantor only for the value of the property, less any valid liens existing against it when the alleged transfer was made.[69] But where the fraudulent grantee conveys the property as security for a loan to himself, he cannot, in an action by a judgment creditor of the grantor to enforce his personal liability as such fraudulent grantee, plead in set off a debt due him by the grantor.[70]

§ 38. **Rents, issues, and profits.**—The fraudulent grantee of property is personally chargeable with and accountable for the rents, issues, and profits thereof from the commencement of his possession, or from the time it was unjustly withheld from the

65. Cutcheon v. Corbitt, 99 Mich. 578, 58 N. W. 479, *modifying* 88 Mich. 594, 50 N. W. 756.

66. Klein v. Hoffheimer, 132 U. S. 367, 10 Sup. Ct. 130, 33 L. Ed. 373; Bouton v. Smith, 113 Ill. 481.

The proper decree in favor of a creditor against the fraudulent holder is for an account for the amounts received, and for the proceeds of the notes, and not for the nominal amount of the notes. Bozman v. Draughan, 3 Stew. (Ala.) 243.

67. Bouton v. Smith, 113 Ill. 481.

68. Hamilton Nat. Bank v. Halsted, 134 N. Y. 520.

69. Powell v. Jeffries, 5 Ill. 387; Wells v. White, 142 Mass. 518, 8 N. E. 442; Meyer v. Stone, 21 Neb. 717, 33 N. W. 420; Smith v. Sands, 17 Neb. 498, 23 N. W. 356.

70. Bighy v. Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Hargreaves v. Tennis, 63 Neb. 356, 88 N. W. 486.

creditors.[71] The fraudulent grantee is accountable, however, only to judgment creditors of the grantor,[72] and is not accountable to the creditors at large, for the rents and profits prior to the time when a receiver is appointed.[73] Where the grantor becomes bankrupt after the fraudulent conveyance, the grantee is accountable for the rents and profits subsequent to the act of bank-

71. *N. Y.*—Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250, 51 Hun, 74, 5 N. Y. Supp. 250; Popfinger v. Yutte, 49 N. Y. Super. Ct. 312; Farnham v. Campbell, 10 Paige, 598; Salt Springs Nat. Bank v. Fancher, 92 Hun, 327, 36 N. Y. Supp. 742, where the grantee had the use of the land, he was chargeable with its rental value, though he received no rent. But see Warner v. Blakeman, 43 N. Y. (4 Keyes) 487, 4 Abb. Dec. 530.

U. S.—Backhouse v. Jett, 2 Fed. Cas. No. 710, 1 Brock. 500.

Ala.—Kitchell v. Jackson, 71 Ala. 556, *overruling* Marshall v. Croom, 60 Ala. 121, the fraudulent grantee is chargeable with rents from the time of the commencement of the action; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748.

Ga.—Jones v. McLeod, 61 Ga. 602.

Ill.—Booth v. Wiley, 102 Ill. 84, the fraudulent grantee is chargeable with rents from the time of demand and refusal to surrender the land; Hadley v. Morrison, 39 Ill. 392, the bill must be so framed as to admit of an account of the rents and profits being decreed.

Ky.—Bartram v. Burns, 19 Ky. L. Rep. 1295, 43 S. W. 248.

Md.—Strike v. McDonald, 2 Har. & G. 191; Strike's Case, 1 Bland. 57; Kipp v. Hanna, 2 Bland. 26.

Mo.—Allen v. Berry, 50 Mo. 90.

Neb.—First Nat. Bank v. Gibson (1906), 105 N. W. 1081.

N. J.—Lee v. Cole, 44 N. J. Eq. 318, 15 Atl. 531; Mead v. Combs, 19 N. J. Eq. 112. See Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415, the wife of an insolvent member of a firm, who is a fraudulent grantor, is not entitled to rents from the firm while firm debts remain unpaid.

Pa.—Lynch v. Welsh, 3 Pa. St. 294.

S. C.—McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123, and possession will be presumed where it is shown that land fraudulently conveyed was actually turned over to the grantee.

W. Va.—Stout v. Phillippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; Flaherty v. Stephenson, 56 W. Va. 192, 49 S. E. 131, the fraudulent grantee is not liable for rents and profits until they have been sequestered.

Under the Louisiana Code the fraudulent vendee is not liable for rents and profits pending the suit; the property or its value is alone to be applied to the claims of the creditors. Cecile v. St. Denis, 9 Rob. (La.) 231.

72. Loos v. Wilkinson, *supra;* Columb v. Read, 24 N. Y. 505; Robinson v. Stewart, 10 N. Y. 189; Parr v. Saunders (Va.), 11 S. E. 979.

73. Loos v. Wilkinson, *supra;* Blow v. Maynard, 2 Leigh (Va.), 29, or prior to the decree setting aside the conveyance.

ruptcy, and from the time when the right of the creditors to call him to account accrued.[74] A grantee of land by conveyance from an insolvent, void as constituting an assignment with preference, need account only for the rents and profits received, instead of the actual value of the rents and profits.[75] Where the property is conveyed to a wife in fraud of her husband's creditors, a judgment *in personam* cannot be rendered against her for rents, issues and profits, and the use and occupation of the premises;[76] or the profits of a business, made by her while conducting it, subjected by creditors.[77] But where a wife knowingly takes a grant of property conveyed in fraud of the grantor's creditors, thus becoming a trustee for their benefit, and makes a profit by dealing with the property, the profit enures to the benefit of the creditors.[78] And where a wife's realty has been improved by her husband, with intent to defraud his creditors, she acquiescing therein, a part of the rents and profits proportionate to the increase in value from such improvements may be subjected to pay his debts.[79] Where a member of an insolvent partnership conveyed property to his wife which was rented to the firm, and the conveyance was in fraud of creditors, the wife was a mere trustee in equity, the title in respect to his creditors remaining in him, and she was not entitled to payment of rent while firm debts remained unpaid.[80]

§ 39. **Interest.**—The fraudulent grantee is chargeable with interest upon the value of the property or its proceeds from the

74. Sands v. Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

75. McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123.

76. Clark v. Beecher, 154 U. S. 631, 14 S. Ct. 1184, 24 L. Ed. 705; United States Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed. 954; Phipps v. Sedgwick, 95 U. S. 3, 24 L. Ed. 591.

77. Morel v. Haller, 7 Ky. L. Rep. 122; In re Karstorp's Estate, 158 Pa. St. 30, 27 Atl. 739, 34 Wkly. Notes Cas. 9, in the absence of fraud on the part of the wife.

78. Popfinger v. Yutte, 49 N. Y. Super. Ct. 312, *citing* Davis v. Leopold, 87 N. Y. 620; Ten Eyck v. Craig, 62 N. Y. 420; Penman v. Slocum, 41 N. Y. 59; Van Epps v. Van Epps, 9 Paige, 237; Flagg v. Mann, 1 Summ. (U. S.) 486.

79. Heck v. Fisher, 78 Ky. 643.

80. Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415.

time he took possession or appropriated it to his own use,[81] and where the property consists of book accounts he is liable for interest on the amounts collected by him on such accounts from the dates of collection.[82] Interest may be allowed upon the rents and profits received by the grantee.[83] The grantee should not, however, be charged with interest on the proceeds of land which he has sold, where a conveyance is set aside as being constructively fraudulent because made without consideration.[84]

§ 40. **Reimbursement of consideration and expenditures, indemnity, and subrogation, in case of constructive fraud.**—Where a conveyance is not actually, but only constructively, fraudulent, or where there is no proof that the grantee participated in or is chargeable with knowledge of the fraud of the grantor, such grantee is entitled to reimbursement to the extent of the actual consideration paid, or the conveyance may be allowed in equity to stand as security for the consideration actually paid or advanced, in money or property, by the grantee.[85] Equity will

81. *U. S.*—Backhouse v. Jett, 2 Fed. Cas. No. 710, 1 Brock. 500, he is liable for interest on the price of property he has sold only from the time of demand by creditors.

Ala.—Muskegon Valley Furniture Co. v. Phillips, 113 Ala. 314, 21 So. 822.

Iowa.—Risser v. Rathburn, 71 Iowa, 113, 32 N. W. 198; Wilson v. Horr, 15 Iowa, 489.

Neb.—Hargreaves v. Tennis, 63 Neb. 356, 88 N. W. 486.

W. Va.—Hinton v. Ellis, 27 W. Va. 422.

82. Armour Packing Co. v. London, 53 S. C. 539, 31 S. E. 500.

83. Loos v. Wilkinson, 51 Hun (N. Y.), 74, 5 N. Y. Supp. 410; Cowing v. Howard, 46 Barb. (N. Y.) 579.

84. Priest v. Conklin, 38 Ill. App 180.

85. *N. Y.*—Robinson v. Stewart, 10 N. Y. 189; Pond v. Comstock, 20 Hun, 492; Van Wyke v. Baker, 16 Hun, 168; Bigelow v. Ayrault, 46 Barb. 143; Varmun v. Bolton Shoe Co., 84 N. Y. Supp. 967, where creditors recovered property, or the value thereof, fraudulently transferred by their debtor, the grantee was entitled to a return of the consideration which he had paid for the property; Warren v. Wilder, 12 St. Rep. 757.

U. S.—United States v. Griswold, 8 Fed. 496, 7 Sawy. 296.

Ala.—Campbell v. Davis, 85 Ala. 56, 4 So. 140; Caldwell v. King, 76 Ala. 149; Gordon v. Tweedy, 71 Ala. 202. But see Wiley v. Knight, 27 Ala. 336.

Ga.—Park v. Snyder, 78 Ga. 571, 3 S. E. 557, the grantee, under Code, § 1955, defining a mortgage, has a lien

treat a sale of personalty without a transfer of possession as other cases of constructive fraud, and hold it good to the amount of the

in the nature of a mortgage; Scott v. Winship, 20 Ga. 429.

Ill.—Lobstein v. Lehn, 120 Ill. 549, 12 N. E. 68, *aff'g* 20 Ill. App. 254; Phelps v. Curts, 80 Ill. 109.

Ind.—Marmon v. White, 151 Ind. 445, 51 N. E. 930.

Iowa.—Clarke v. Sherman (1905), 103 N. W. 982; Stamy v. Laning, 58 Iowa, 662, 12 N. W. 628.

Ky.—Wood v. Goffs' Curatir, 70 Ky. 59; Short v. Tinsley, 58 Ky. 397, 71 Am. Dec. 482; Botts v. Botts, 25 Ky. L. Rep. 300, 74 S. W. 1093; Chinn v. Curtis, 24 Ky. L. Rep. 1563, 71 S. W. 923; Smiser v. Stevens-Wolford Co., 20 Ky. L. Rep. 501, 45 S. W. 357; Neighbors v. Holt, 14 Ky. L. Rep. 237, while a wife could not be compelled to perform her agreement to pay her husband's indebtedness, which was the consideration of the sale and conveyance to her of all his property, still, after she had performed it in part, the property could not be taken from her without reimbursing her. *Compare* Bradley v. Buford, 2 Ky. 12, 2 Am. Dec. 703.

Me.—Gardiner Bank v. Wheatin, 8 Me. 373.

Md.—Cone v. Cross, 72 Md. 102, 19 Atl. 391; Hinkle v. Wilson, 53 Md. 287; Williams v. Savage Mfg. Co., 3 Md. Ch. 418, it may stand as security to the grantee for the sum really due him.

Mass.—Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004, the grantee is entitled to receive back the price paid with interest from the time of payment.

Mich.—Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; Joslin v. Goebel, 90 Mich. 71, 51 N. W. 354, where a conveyance was made by a husband to his wife in pursuance of a post-nuptial agreement, and for moneys loaned and advanced by the wife to the husband, she should be charged with the difference between her loans and advances, with interest, and the value of the property, and with moneys paid by her husband for her appearing on his books as part of the same account, and the total amount decreed against her should be made a lien on the land conveyed; Cutcheon v. Buchanan, 88 Mich. 594, 50 N. W. 756; Herschfeldt v. George, 6 Mich. 456.

Minn.—Thompson v. Bickford, 19 Minn. 17.

Neb.—Farmer's, etc., Nat. Bank v. Mosher (1903), 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552; Connecticut River Sav. Bank v. Barrett, 33 Neb. 709, 50 N. W. 1134.

N. J.—O'Connor v. Williams (Ch. 1902), 53 Atl. 550; Kinmouth v. White (Ch. 1900), 47 Atl. 1; Withdrow v. Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501.

Or.—Wright v. Craig, 40 Or. 191, 66 Pac. 807; Scoggin v. Schloath, 15 Or. 380, 15 Pac. 635, consideration should be repaid with interest.

S. C.—Anderson v. Fuller, McMul. Eq. 27, 36 Am. Dec. 290; Parker v. Holmes, 2 Hill Eq. 95; Brown v. McDonald, 1 Hill Eq. 297; McMeekin v. Edmonds, 1 Hill Eq. 288, 26 Am. Dec. 203.

Tenn.—Hartfield v. Simmons, 59 Tenn. 253; Turbeville v. Gibson, 52 Tenn. 565; Alley v. Connell, 40 Tenn. 578; Rosenbaum v. Davis (Ch. App.

consideration.[86] Where a conveyance of property is merely constructively fraudulent as to creditors, the money paid by the grantee, in payment and satisfaction or in reduction of a valid pre-existing mortgage or other encumbrance on the property, should be allowed to him on setting aside the transfer,[87] and also such sums as he has paid or advanced to pay existing debts due by the grantor.[88] In the latter case the grantee is substituted in the place of the creditors whose debts he has paid and is subrogated to their rights.[89] Where one receives a conveyance from

1898), 48 S. W. 706; Carpenter v. Scales (Ch. App. 1897), 48 S. W. 249.

Vt.—Foster v. Foster, 56 Vt. 540.

Va.—Flynn v. Jackson, 93 Va. 341, 25 S. E. 1; Rixey v. Detrick, 85 Va. 42, 6 S. E. 615.

W. Va.—Burton v. Gibson, 32 W. Va. 406, 9 S. E. 255; Livesay v. Beard, 22 W. Va. 585.

Wis.—Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148.

Marriage settlements. — Where a settlement of his real estate by a husband on his wife, made prior to his marriage, was declared fraudulent and void as to the husband's creditors, a portion of his wife's fortune which had been suffered to go into his possession on the faith of the settlement should be paid to her, and the settled realty should stand charged with the payment. Davidson v. Graves, 1 Bailey Eq. (S. C.) 268. A post-nuptial settlement, void as against the husband's creditors, may stand as security for a portion of the wife's estate which had not been settled upon her. Davidson v. Graves, Riley Eq. (S. C.) 232.

86. Short v. Tinsley, 58 Ky. 397, 71 Am. Dec. 481.

87. *N. Y.*—Lore v. Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. C. 47.

Ala.—Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748.

Cal.—Ackerman v. Merle, 137 Cal. 169, 69 Pac. 983, a mortgage.

Iowa.—Garner v. Philips, 35 Iowa, 597, prior mortgage.

Minn.—Leque v. Stoppel, 64 Minn. 74, 66 N. W. 208, mortgage.

N. J.—Costello v. Prospect Brewing Co., 52 N. J. Eq. 557, 30 Atl. 682.

S. C.—Fulmore v. Burrows,, 2 Rich. Eq. 95; Anderson v. Fuller, McMul. Eq. 27, 26 Am. Dec. 290.

W. Va.—Kimble v. Wotring, 48 W. Va. 412, 37 S. E. 606; Herold v. Barlow, 47 W. Va. 750, 36 S. E. 8.

Wis.—Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148.

88. New York Public Library v. Tilden, 29 Misc. Rep. (N. Y.) 169, 79 N. Y. Supp. 161; Pond v. Comstock, 20 Hun (N. Y.), 492; Wood v. Hunt, 38 Barb. (N. Y.) 302; Clements v. Nicholson, 6 Wall. (U. S.) 299, 18 L. Ed. 786; Diamond Coal Co. v. Carter Dry Goods Co., 20 Ky. L. Rep. 1444, 49 S. W. 438; Leqve v. Stoppel, 64 Minn. 74, 66 N. W. 208; Ogle v. Lichteberger, 1 Am. L. Reg. (Pa.) 121.

89. Robinson v. Stewart, 10 N. Y. 189; Lillianthal v. Lesser, 102 App. Div. (N. Y.) 500, 92 N. Y. Supp. 619; Duke v. Pigman, 110 Ky. 756, 62 S.

an involvent without actually paying, securing, or becoming bound to pay any consideration therefor, the subsequent voluntary payment by the grantee of valid debts against the grantor, or the purchase of obligations against him, or even the subsequent payment of money to the grantor, will not create a presumption in favor of the grantee, or sustain the validity of the conveyance; neither will this bare fact present a case entitling the grantee to demand, as a condition to the declaring of the conveyance void, and directing a sale for the satisfaction of judgment creditors of the grantor, that provision should be made to idemnify him for such sums as he has voluntarily paid to parties having demands against the grantor.[90] The grantee can prove a purchased claim only for the amount which he paid for it.[91] The grantee of property under a conveyance constructively, but not actually, fraudulent, as against the creditors of the grantor, may hold the property as security for a debt honestly and jusly due him, to the extent of the indebtedness,[92] as, for example, a judgment recov-

W. 867, 23 Ky. L. Rep. 209; Arnold v. Haschiedt, 69 Minn. 101, 71 N. W. 829; Kimble v. Wotring, 48 W. Va. 750, 36 S. E. 8. And see cases cited in preceding notes to this section.

90. Wood v. Hunt, 38 Barb. (N. Y.) 302.

91. Armour Packing Co. v. London, 53 S. C. 539, 31 S. E. 500.

92. *N. Y.*—Brown v. Chubb, 135 N. Y. 174, 31 N. E. 1030, *rev'g* 8 N. Y. Supp. 61; Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353; Nichols v. Nichols, 40 Misc. Rep. 9, 81 N. Y. Supp. 156.

Ala.—Gilkey v. Pollock, 82 Ala. 503, 3 So. 99; Price v. Masterson, 35 Ala. 483, where a trust deed as fraudulent, the trustee can retain the property to satisfy a *bona fide* debt to himself, if he was ignorant of the fraud.

Ill.—Lobstein v. Lehn, 120 Ill. 549, 12 N. E. 68, *aff'g* 20 Ill. App. 254; Walker v. Matthews, 58 Ill. 196; Byrns v. Shaw, 45 Ill. App. 281.

Iowa.—Kerr v. Kennedy, 119 Iowa, 239, 93 N. W. 353, but the grantee cannot retain the property for debts due by the grantor's wife paid by the grantee; Fuller v. Griffith, 91 Iowa, 632, 60 N. W. 247.

Ky.—Swigert v. Bank of Kentucky, 56 Ky. 268, a court of equity will not divest a creditor of a fund which has been transferred to him by an insolvent debtor for the purpose of benefiting another creditor of the insolvent, when the equities are equal, until all his just claims against the insolvent are satisfied, unless such claims were created subsequent to notice of the equity of the creditor seeking to subject it.

ered against the grantor before those under which the attaching creditors claim, which has been purchased by the grantee,[93] but not for a debt due from the grantor as to which the grantee stood, before the conveyance, on the footing of creditors generally.[94] Where only a part of the indebtedness is legal the conveyance may be allowed to stand to the extent of the valid indebtedness.[95] Where the grantee procures the assignment of an outstanding mortgage, he is entitled to its payment out of the property, if the conveyance to him is set aside as fraudulent, but he is not entitled to hold the entire property under the mortgage, so assigned to him, if it be less than the value of the property.[96] Where an absolute deed received by a creditor in good faith is held to be a mortgage, the creditor should be adjudged to have a lien on the premises for the amount of the debt secured.[97] Where certain conveyances of a debtor are shown to be free from fraud, and to have been made as security, a decree for the sale of the lands thus pledged and for an account, when no redemption is sought, and no payment of the debt secured is offered, cannot be sustained.[98]

§ 41. **Where conveyance is actually fraudulent.**—Where a conveyance has been made with the actual intent to defraud creditors of the grantor and is fraudulent in fact, it will not be upheld as against creditors even to the extent of the con-

La.—Wang v. Finnerty, 32 La. Ann. 94.

Me.—Augusta Sav. Bank v. Crossman (1886), 7 Atl. 396.

N. J.—Merchants' Bldg., etc., Assoc. v. Barber (Ch. 1894), 30 Atl. 865.

S. C.—Anderson v. Fuller, 1 McMul. Eq. 27, 36 Am. Dec. 290, where grantee is entitled to a preference in payment as the oldest execution creditor.

93. Brown v. Chubb, 135 N. Y. 174.

94. Lore v. Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. C. 47.

95. Sanford v. Wheeler, 13 Conn. 165, 33 Am. Dec. 389; Byrns v. Shaw, 45 Ill. App. 281.

96. Wells v. White, 142 Mass. 518, 8 N. E. 442.

97. Popfinger v. Yutte, 102 N. Y. 38, 6 N. E. 259, *rev'g* 49 N. Y. Super. Ct. 312; Lazarus v. Rosenberg, 70 App. Div. (N. Y.) 105, 75 N. Y. Supp. 11.

98. Cole v. Lee, 45 N. J. Eq. 779, 18 Atl. 854.

sideration actually paid by the grantee. It is wholly void *ab initio* and cannot stand to any extent as security or indemnity. The grantee, as a general rule, is regarded as *particeps criminis,* or a guilty participant in the fraud, and is not entitled to reimbursement, either for purchase money or consideration, or for advances paid, or liabilities incurred, on account of it.[99] The con-

99. *N. Y.*—Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693, *aff'g* 56 Hun, 530, 9 N. Y. Supp. 852; Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928; Davis v. Leopold, 87 N. Y. 620, conveyance through third person to wife who had knowledge of the fraud; Weiser v. Kling, 38 App. Div. 266, 57 N. Y. Supp. 48, *aff'g* 5 N. Y. Annot. Cas. 196, 53 N. Y. Supp. 578; Union Nat. Bank v. Warner, 12 Hun, 306; Sands v. Codwise, 4 Johns. 536, 4 Am. Dec. 305.

U. S.—Milwaukee, etc., R. Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543; Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305; Burt v. Gotzian, 102 Fed. 937, 43 C. C. A. 59; Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason, 252.

Ala.—Pritchett v. Jones, 87 Ala. 317, 6 So. 75; Campbell v. Davis, 85 Ala. 56, 4 So. 140; Borland v. Walker, 7 Ala. 269.

Ark.—Millington v. Hill, 7 Ark. 301, 1 S. W. 547.

Cal.—Burke v. Koch, 75 Cal. 356, 17 Pac. 228; Swinford v. Rogers, 23 Cal. 233; Goodwin v. Hammond, 13 Cal. 168, 73 Am. Dec. 574.

Ill.—Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238; Head v. Harding, 166 Ill. 353, 46 N. W. 890, *aff'g* 62 Ill. App. 302, advances subsequently made to grantor; Beidler v. Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349; Lobstein v. Lehn, 120 Ill. 549, 12 N. E. 68, *aff'g* 20 Ill. App. 254.

Ind.—Bunch v. Hart, 138 Ind. 1, 37 N. E. 537; Seivers v. Dickover, 101 Ind. 495, even though the amount paid went to *bona fide* creditors.

Iowa.—Chapman v. Ransom, 44 Iowa, 377.

Ky.—Wood v. Goff, 70 Ky. 59; Willett v. Froelich, 28 Ky. L. Rep. 798, 90 S. W. 572; Lyons v. Lancaster, 14 S. W. 405.

La.—Chaffe v. Gill, 43 La. Ann. 1054, 10 So. 361, under Civ. Code, art. 1977, the purchaser in bad faith will not be entitled to a restitution of the consideration, unless he proves that it inured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts; Bank of Mobile v. Harris, 6 La. Ann. 811; Barker v. Phillips, 11 Rob. 199. See Metropolitan Bank v. Aarons-Mendelsohn Co., 50 La. Ann. 1047, 24 So. 125.

Md.—Chatterton v. Mason, 86 Md. 236, 37 Atl. 960, the grantee not entitled to credit for money paid the grantor for counsel fees, nor money paid for the living expenses of the grantor.

Mass.—Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320; Holland v. Cruft, 37 Mass. 321.

Mich.—Morley Bros. v. Stringer, 133 Mich. 690, 95 N. W. 978; How v. Camp, Walk. 427.

veyance will not, as a general rule, be allowed to stand, in such a case, as security even for a *bona fide* indebtedness of the grantor to the grantee.[1] A mortgage which is void as in fraud of creditors, because founded in part upon a pretended debt, will

Minn.—Leqve v. Stoppel, 64 Minn. 74, 66 N. W. 208; Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942; Thompson v. Bickford, 19 Minn. 17.

Miss.—McLean v. Letchford, 60 Miss. 169, where a conveyance at a sale under a deed of trust was set aside as fraudulent as to creditors, the fraudulent grantee was not entitled to reimbursement for the amount he paid to redeem from the trust deed, though that was a valid encumbrance on the debtor's property; Stovall v. Farmers', etc., Bank, 16 Miss. 305, 47 Am. Dec. 85.

Mo.—Allen v. Berry, 50 Mo. 90; Potter v. Stevens, 40 Mo. 229; Lampkin v. Peoples Nat. Bank, 98 Mo. App. 239, 244; McNichols v. Richter, 13 Mo. App. 515.

Neb.—Farmers', etc., Nat. Bank v. Mosher (1903), 94 N. W. 1003.

N. J.—McCanless v. Smith, 51 N. J. Eq. 505, 25 Atl. 211; Annin v. Annin, 24 N. J. Eq. 184, that a wife, as a voluntary grantee of her husband, has spent large sums of her own money in paying off mortgages on the land and improving it, does not entitle her to invoke the aid of the doctrine of estoppel against an antecedent creditor of the husband who was kept in entire ignorance of the conveyance. See Englebrecht v. Mayer (Ch. 1889), 17 Atl. 1081.

N. D.—Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

Or.—Sabin v. Anderson, 31 Or. 487, 49 Pac. 870.

Pa.—Kobl v. Sullivan, 140 Pa. St. 35, 21 Atl. 247, money paid to discharge prior liens.

S. C.—Pettus v. Smith, 4 Rich. Eq. 197, where a prior mortgage is paid by the grantee for the purpose of forwarding the fraud, it will not be reimbursed on setting aside the conveyance; Dickinson v. Way, 3 Rich. Eq. 412; Parker v. Holmes, 2 Hill Eq. 95; Miller v. Tollison, Harp. Eq. 145, 14 Am. Dec. 712.

Tenn.—Shepherd v. Woodfolk, 78 Tenn. 593; Alley v. Connell, 40 Tenn. 578; Books v. Caughran, 40 Tenn. 464; Brown v. Morristown Co-Operative Stove Co. (Ch. App. 1897), 42 S. W. 161.

Va.—Hazelwood v. Forrer, 94 Va. 703, 27 S. E. 507.

W. Va.—Timms v. Timms, 54 W. Va. 414, 46 S. E. 141; Webb v. Ingham, 29 W. Va. 389, 1 S. E. 816; Kanawha Valley Bank v. Wilson, 25 W. Va. 242; Livesay v. Beard, 22 W. Va. 585.

Wis.—Bank of Commerce v. Fowler, 93 Wis. 241, 67 N. W. 423; Sommermeyer v. Sommermeyer, 89 Wis. 66, 61 N. W. 311; Ferguson v. Hillman, 55 Wis. 181, 12 N. W. 389.

1. *N. Y.*—Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Woods v. Van Brunt, 6 App. Div. 220, 39 N. Y. Supp. 986; Baldwin v. June, 68 Hun, 284, 22 N. Y. Supp. 852.

Ala.—Hall v. Heydon, 41 Ala. 242; Price v. Masterson, 35 Ala. 483.

Iowa.—Rosenheim v. Flanders, 114 Iowa, 291, 86 N. W. 293.

not be sustained to the extent of the honest debt, as against creditors, although their claims may have been created since the filing of the mortgage, and with knowledge of its existence.[2] A conveyance fraudulent in part will not be allowed to stand as security for a valid claim existing against the grantor at the time of the conveyance and purchased or paid by the grantee,[3] or for expenditures made by the grantee to protect his title.[4] These rules are based upon the theory that the rights of the creditors would be impaired by the allowance of such payments.[5] But where all the rights which creditors would have had, had not the conveyance been made are preserved, the court may allow the conveyance to stand as security for the reimbursement of the grantee,[6] for example, for the value of property given in exchange for the property fraudulently conveyed,[7] or for the value of the separate estate of the wife given in part consideration for the conveyance to the debtor's wife,[8] or for money expended

N. H.—Bailey v. Ross, 20 N. H. 302.

Wis.—Sommermeyer v. Sommermeyer, 89 Wis. 66, 61 N. W. 311.

2. Levy v. Hamilton, 68 App. Div. (N. Y.) 277, 74 N. Y. Supp. 159.

3. Wood v. Hunt, 38 Barb. (N. Y.) 302; Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942; Thompson v. Bickford, 19 Minn. 17; Phillips v. Chamberlain, 61 Miss. 740; McLean v. Latchford, 60 Miss. 169; Armour Packing Co. v. London, 53 S. C. 539, 31 S. E. 500.

4. Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305.

5. See cases cited in preceding notes to this section.

6. Bates v. McConnell, 31 Fed. 558; Barrow v. Bailey, 5 Fla. 9; Keuren v. McLaughlin, 19 N. J. Eq. 187, where land is conveyed to secure a *bona fide* debt, and subsequently the grantor and grantee fraudulently agree that the conveyance shall be absolute, whereby other creditors would be defrauded, the grantee will be allowed to retain his priority to the amount of his bill, after which the property will be subject to the claims of creditors.

Where, in an action on a bond given for a larger sum than was due, in order to defraud creditors, such creditors defended as to the amount due under a plea of payment, although the bond was wholly void as to creditors, yet on such plea the obligee is entitled to a verdict for the sum due. Numan v. Kapp, 5 Bin. (Pa.) 73.

7. Baldwin v. June, 68 Hun (N. Y.), 284, 22 N. Y. Supp. 852; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

8. Harder v. Rohn, 43 Ill. App. 365; McKenzie v. Salyer, 19 Ky. L. Rep. 1414, 43 S. W. 450; Hull v. Deering, 80 Md. 424, 31 Atl. 416.

for the benefit of the property by paying off incumbrances on the property at the time of the conveyance,[9] or other debts against the grantor due at the time of the conveyance.[10] The grantee should be credited with the *pro rata* share to which creditors whom he has paid would be entitled, if the value of the property conveyed had been distributed among all the creditors.[11]

§ 42. **Care of property and expenses in general.**—Where a conveyance is set aside as fraudulent as to the grantor's creditors, the grantee, on accounting for the use and occupation of the property conveyed to him and the rents and profits thereof while in his possession, is entitled to credit for such sums as he may in good faith have paid for taxes,[12] interest on incumbrances,[13]

9. Hamilton Nat. Bank v. Halsted, 134 N. Y. 520, 31 N. E. 900, 30 Am. St. Rep. 693; Smith v. Grimes, 43 Iowa, 356; Leqve v. Stoppel, 64 Minn. 74, 66 N. W. 208; Costello v. Prospect Brewing Co., 52 N. J. Eq. 557.

10. *U. S.*—Voorhees v. Blanton, 83 Fed. 234.

Ill.—Steere v. Hoagland, 50 Ill. 377, he should receive credit for notes and acceptances given to *bona fide* creditors.

Ky.—Diamond Coal Co. v. Carter Dry Goods Co., 20 Ky. L. Rep. 1444, 49 S. W. 438.

Md.—Chatterton v. Mason, 86 Md. 236, 37 Atl. 960, payment of claim of attaching creditor.

Mass.—Ripley v. Severance, 23 Mass. 474, 17 Am. Dec. 397, where a surety receives property to indemnify him against his liabilities, and principal afterwards conveys to the surety all his right in said property for a consideration grossly inadequate, the transfer and settlement may be avoided by creditors, but the surety may deduct from value of the property the amount for which he is fairly liable, and the value of an annuity for which he is liable may be reduced to ready money, and so deducted.

Mich.—How v. Camp, Walk. 427.

Wis.—Croker v. Huntzicker, 113 Wis. 181, 88 N. W. 232.

11. Chatterton v. Mason, 86 Md. 236, 37 Atl. 960.

12. *N. Y.*—Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353, *rev'g* 51 Hun, 74, 55 N. Y. Supp. 410; Brown v. Townsend, 55 Hun, 605, 8 N. Y. Supp. 61.

Ala.—Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748, a voluntary conveyance not tainted with actual fraud.

Ky.—Bartram v. Burns, 19 Ky. L. Rep. 1295, 43 S. W. 248, 686.

Mass.—Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320.

Mich.—How v. Camp, Walk. 427.

N. J.—Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

Ohio.—Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

repairs made which were necessary for the preservation of the property and to keep it tenantable,[14] insurance,[15] except insurance effected for his own benefit,[16] and any other necessary expenses,[17] even though the grantee was a guilty participant in the fraud.[18] The property being large and valuable, and having been placed by the grantee in the hands of an agent, who managed it and collected the rents, such grantee should be allowed for the agent's commission.[19] The grantee should also be credited with expenditures made in collecting book accounts or other choses in action which were transferred to him.[20] Where the conveyance is only constructively fraudulent the grantee is entitled to reasonable compensation for his services in taking care of the property and selling it, whoever may be entitled to the net proceeds.[21] Where the assignment of a claim for personal injuries

13. Loos v. Wilkinson, *supra*, but not at a rate higher than the legal rate which the incumbrance could have demanded; Weiser v. Weisel, 53 N. Y. Supp. 578, 5 N. Y. Annot. Cas. 196, but interest paid on a senior mortgage after a decree declaring the grantee to be a fraudulent transferee of the property, cannot be recovered by him in a suit to foreclose a junior mortgage; Brown v. Townsend, *supra;* Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770. But see Musselman v. Kent, 33 Ind. 452; Cooper v. Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581, cases in which there was fraud in fact.

14. Loos v. Wilkinson, *supra;* Brown v. Townsend, *supra.*

15. Potter v. Gracie, 58 Ala. 303.

16. Loos v. Wilkinson, *supra.* See Cooper v. Friedman, *supra.*

17. Loos v. Wilkinson, *supra;* Brown v. Townsend, *supra;* Lore v. Dierkes, 51 N. Y. Super. Ct. 144, 16 Abb. N. C. 47; Gardner Bank v. Wheaton, 8 Me. 373; Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148. See Davis v. Davis, 20 Or. 140, 25 Pac. 140, under Hill's Code, § 2874, which makes the expenses of the family chargeable on the property of both husband and wife, where a voluntary conveyance to the wife is set aside as fraudulent as to creditors, she is entitled to have a sum which had accrued as family expenses before the conveyance to her and which had been paid by her, allowed to her out of the first proceeds of the sale.

18. Loos v. Wilkinson, *supra;* How v. Camp, Walk. (Mich.) 427. But see Burt v. Gotzian, 102 Fed. 937, 43 C. C. A. 59; In re Strike, 1 Bland (Md.), 57; Cooper v. Friedman, *supra.*

19. Loos v. Wilkinson, *supra.*

20. Saugerties Bank v. Mack, 35 App. Div. (N. Y.) 398, 54 N. Y. Supp. 950; Muskegon Valley Furniture Co. v. Phillips, 113 Ala. 314, 21 So. 822.

21. Noyes v. Brent, 18 Fed. Cas. No. 10,372, 5 Cranch C. C. 551.

to an attorney is constructively fraudulent as to the assignor's creditors, the attorney is entitled to reasonable compensation for his services in collecting the claim.[22] But a purchaser at a sheriff's sale under a fraudulent judgment entered for the purpose of defrauding creditors cannot claim compensation as trustee when required to account for the property so purchased.[23]

§ 43. **Compensation for improvements.**—A party coming into possession of property by a fraudulent conveyance, and participating in the fraud, is not entitled to any allowance or reimbursement, for permanent improvements made by him on the property,[24] after a bill has been filed against him by one claiming a superior title,[25] or where he receives his conveyance after the filing of a *lis pendens* in an action by a creditor of his grantor.[26] The tenant, with notice of the fraud, is not entitled to be allowed for improvements, under a statute, unless he files a claim therefor before verdict, in an action to recover the land as conveyed in fraud of creditors.[27] After a judgment creditor had docketed his judgment, grantees of the judgment debtor put improvements on the land at their peril,[28] and improvements made pending action are held not allowable.[29] A fraudulent transferee is not entitled to allowance for expense of preparing for market the property transferred after it came into his hands,[30] but a subsequent creditor is not entitled to the benefit of the improvements

22. Colgan v. Jones, 44 N. J. Eq. 274, 18 Atl. 55.

23. French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252, *aff'g* 97 Ill. App. 533.

24. Milwaukee, etc., R. Co. v. Souter, 13 Wall. (U. S.) 517, 20 L. Ed. 543; Strike v. McDonald, 2 Har. & G. (Md.) 191; In re Stike, 1 Bland (Md.), 57; Annin v. Annin, 24 N. J. Eq. 184; Sherazee v. Shoastry, 6 Moore Ind. App. 27 19 Eng. Reprint, 11, 8 Moore P. C. 90, 14 Eng. Reprint, 35.

25. Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

26. Shand v. Hanley, 71 N. Y. 319. But see How v. Camp, Walk. (Mich.) 427.

27. Livermore v. Bautelle, 77 Mass. 217, 71 Am. Dec. 708.

28. Flanary v. Kane, 102 Va. 547, 46 S. E. 312, 681.

29. Gordon v. Tweedy, 74 Ala. 232; Grandin v. First Nat. Bank (Neb. 1904), 98 N. W. 70.

Div. (N. Y.) 398, 54 N. Y. Supp. 950.

30. Saugerties Bank v. Mack, 35 App.

made by the fraudulent grantee nor to the increased rents and profits received by means of such improvements.[31] Where a trustee makes, with his own money, improvements on trust property, for the purpose of defrauding his creditors, equity will not interfere further than to protect the trust fund.[32] One in possession of land who is compelled to account with the creditors of the grantor, having the right to subject the land to the payment of their debts, is not chargeable with any increase of rent by reason of improvements made by him for which he is not allowed compensation.[33] But where the grantee under a fraudulent conveyance accepted and acted on the conveyance in good faith, in ignorance of the grantor's insolvency, and without any intention of participating in the fraud, and made the improvements in good faith, equity will declare and enforce an allowance for such expenditure, on setting aside the conveyance at the suit of creditors.[34] But no allowance for improvements made on the grantor's homestead could be made to the grantee, on the cancellation of a conveyance of lands of which the homestead was a part.[35]

§ 44. **Purchase of judgment against grantor.**—Where the grantee in a fraudulent conveyance subsequently purchases a

31. King v. Wilcox, 11 Paige (N. Y.), 589.

32. Lathrop v. Gilbert, 10 N. J. Eq. 344.

33. Phillips v. Chamberlain, 61 Miss. 740.

34. *U. S.*—Corwine v. Thompson Nat. Bank, 105 Fed. 196, 44 C. C. A. 442; Voorhees v. Blanton, 89 Fed. 885, 32 C. C. A. 384, *aff'g* 83 Fed. 234, improvements made by grantee's partner who had no connection with the fraud.

Ala.—Gordon v. Tweedy, 74 Ala. 232.

Ill.—Walker v. Matthews, 58 Ill. 196.

Ky.—Rucker v. Abell, 47 Ky. 566, 48 Am. Dec. 406; Bartram v. Burns, 19 Ky. L. Rep. 1295, 43 S. W. 248, 686.

Md.—Williams v. Snebly, 92 Md. 9, 48 Atl. 43; Strike v. McDonald, 2 Har. & G. 191.

N. J.—Borden v. Doughty, 42 N. J. Eq. 314, 3 Atl. 352.

Ohio.—Romberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Pa.—Skiles v. Houston, 110 Pa. St. 248, 20 Atl. 722; Skiles v. Nauman, 2 Lanc. L. Rev. 145.

Wis.—Evans v. Laughton, 69 Wis. 138, 33 N. W. 573.

35. McWilliams v. Thomas (Tex. Civ. App. 1903), 74 S. W. 596.

judgment against the grantor, a junior judgment creditor cannot disturb the grantee's title without paying, or offering to pay, such judgment.[36] The assignment to the grantee of a judgment and mortgage constituting a lien on the property entitles him to be subrogated to the rights of the assignor, notwithstanding the fraud in his conveyance.[37]

§ 45. **Title subsequently acquired by grantee.**—A fraudulent grantee of property may become the purchaser in a sale under an execution having a paramount lien, or acquire it from one purchasing at such sale, and thus acquire title which will prevail over subsequent creditors of the grantor asking to have set aside the conveyance in which he was grantee on the ground of fraud.[38] But a reconveyance to the fraudulent grantee by one to whom he had transferred the property for the purpose of carrying out the original fraudulent design does not strengthen his title as against the orginal grantor's creditors, whether their debts occurred prior or subsequent to the fraudulent conveyance.[39]

§ 46. **Rights of grantees as bona fide purchasers.**—The owner of property can sell it and give a good title to a *bona fide* purchaser without regard to creditors until they obtain some lien upon it.[40] A debtor may sell his property to pay his debts, and a

36. Brown v. Chubb, 135 N. Y. 174, 31 N. E. 1030, *rev'g* 55 Hun, 605, 8 N. Y. Supp. 61; Boggs v. Douglass, 100 Iowa, 385, 69 N. W. 689; Fordyce v. Hicks, 76 Iowa, 41, 40 N. W. 79; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

37. Phillips v. Chamberlain, 61 Miss. 740.

38. Seals v. Pheiffer, 77 Ala. 278; Dimock v. Ridgeway, 169 Mass. 526, 48 N. E. 338.

Where a father purchased land and paid part of the purchase money, and conveyed it to his sons in fraud of his creditors, and the creditors afterwards sold the land on execution as the property of the father, the sons, on paying the balance of the purchase price and securing a deed for the land, became substituted to the rights of the vendor; and the sheriff's vendees, who were substituted for the creditors, had no other right against the sons than they would have had against the vendor, and could not claim the entire land without tendering the balance of the purchase money and interest. Ogle v. Lichteberger, 1 Am. L. Reg. (Pa.) 121.

39. Brown v. Niles, 16 Ill. 385.

40. McMahan v. Morrison, 16 Ind.

bona fide creditor taking it in discharge of his debt for a fair consideration is entitled to hold it as against other creditors, although they lose their whole debts thereby.[41] Where a grantee is a purchaser for an adequate and valuable consideration, without notice of a fraudulent intent on the part of the grantor to place his property beyond the reach of his creditors, he is a *bona fide* purchaser and acquires a good title and will be protected as against the grantor's creditors, notwithstanding the grantor's fraudulent intent,[42] except to the extent that he has not paid the purchase money before notice of the grantor's fraudu-

172, 79 Am. Dec. 418; Gillet v. Phelps, 12 Wis. 392. See also Fraudulent knowledge and intent of grantee, chap. XIII, § 4, *supra;* Rights and liabilities of parties, chap. XIV, § 1, *supra.*

41. Wilson v. Fawkner, 38 Ill. App. 438; Windmiller v. Chapman, 38 Ill. App. 276. See Consideration, chap. VIII, *supra;* Preferences, chap. XI, *supra.*

42. *N. Y.*—Van Wyke v. Baker, 16 Hun, 168; Starin v. Kelly, 36 N. Y. Super. Ct. 366; Third Nat. Bank v. Carnes, 5 N. Y. Supp. 799.

Ala.—Taylor v. Branch Bank, 21 Ala. 581.

Ark.—Massie v. Enyart, 32 Ark. 251; Galbreath v. Cook, 30 Ark. 417; Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104.

Cal.—Priest v. Brown, 100 Cal. 626, 35 Pac. 323.

Colo.—Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447.

Ill.—Jewett v. Cook, 81 Ill. 260.

Ind.—Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105; Doe v. Horn, Smith, 242.

Iowa.—Deering v. Lawrence, 79 Iowa, 610, 44 N. W. 899; Aultman & Co. v. Witcik, 60 Iowa, 752, 14 N. W. 357, and it is immaterial that the grantee subsequently agrees to reconvey the land to the debtor's wife on repayment of the sum paid by him, with interest.

Kan.—Bush v. Collins, 35 Kan. 535, 11 Pac. 425.

La.—Shultz v. Morgan, 27 La. Ann. 616.

Mo.—Gleitz v. Schuster, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461; Forrester v. Moore, 77 Mo. 651; Rupe v. Alkire, 77 Mo. 641; Dougherty v. Cooper, 77 Mo. 528.

N. J.—Cole v. Lee, 45 N. J. Eq. 799, 18 Atl. 854.

Okla.—Jackson v. Glaze, 3 Okla. 143, 41 Pac. 79.

Pa.—Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533.

R. I.—Tiernay v. Cleflin, 15 R. I. 220, 2 Atl. 762.

Va.—Paul v. Baugh, 85 Va. 955, 9 S. E. 329; Rixey v. Deitrick, 85 Va. 42, 6 S. E. 615; Scott v. Rowland, 82 Va. 484, 4 S. E. 595.

W. Va.—Lockhard v. Beckley, 10 W. Va. 87.

See also Fraudulent knowledge and intent of grantee, chap. XIII, § 4, *supra.*

lent intent.[43] Such a purchaser is as much favored and protected by the law as a creditor.[44] The same rule applies where the grantee, although originally a fraudulent grantee, subsequently acquires title to the property through one who is a *bona fide* holder or purchaser, since it is a general rule of equity that a purchaser with notice may protect himself by buying the title of a *bona fide* purchaser without notice.[45] The fact that an insolvent debtor, who conveyed his land with the avowed intention of using the proceeds in payment of the claims of certain of his creditors, did not pay such creditors, will not affect the title of the purchaser, if the purchase was made in good faith.[46] The title as a purchaser of one who takes goods from debtors in payment of an honest debt is not affected by his knowledge of suspicious dealings by the debtors with their property among themselves, or by his knowledge that attachment proceedings are threatened, or that writs were issued, unless an actual levy was made.[47] A *bona fide* purchaser of a stock of goods fraudulently sold by an insolvent debtor is entitled to all the stock purchased and paid for, and his interest therein is not limited to the amount paid by him.[48] And where a portion of the stock has been wrongfully attached by an officer as the property of the vendor, such officer cannot defeat an action for damages by showing an adjudication of a state court that after the seizure the goods still retained by the purchaser were of sufficient value to reimburse him for the purchase price actually paid.[49] Whether a *bona fide* purchaser, who has paid only a portion of the purchase money before notice of the fraudulent intent of his immediate vendor, in an action of trespass against the sheriff who has levied in behalf of creditors, can recover more damages than the amount he has paid, will de-

43. See Nature and extent of consideration, § 47, *infra*.

44. Pierson v. Tom, 1 Tex. 577.

45. Funkhouser v. Lay, 78 Mo. 458, *aff'd* 9 Mo. App. 585.

46. Priest v. Brown, 100 Cal. 626, 35 Pac. 323.

47. Windmiller v. Chapman, 38 Ill. App. 276.

48. Walker v. Collins, 50 Fed. 737, 4 U. S. App. 406, 1 C. C. A. 642.

49. Walker v. Collins, *supra*.

pend, in each case, upon the extent of the liability over to his vendor under the contract of purchase.[50] Where a fraudulent conveyance is set aside at the suit of creditors, the creditors take only such interest as the debtor had fraudulently conveyed.[51] Where a mortgagor conveys absolutely to a mortgagee in payment of the mortgage debt, if the conveyance can be avoided by the creditors of the mortgagor as fraudulent, it leaves the mortgage in force as to such creditors.[52]

§ 47. **Nature and extent of consideration in general.**—To constitute the defense of a *bona fide* purchaser, without notice, of property sold with the intent to defraud the creditors of the vendor, the purchaser must have paid the purchase money or consideration in full before notice of the fraud of the vendor, since no one but a purchaser for a valuable consideration, actually passed before notice of the fraud, can, as against creditors, claim title to the property which has been fraudulently disposed of.[53] The purchaser is protected only as to the interest in the property actually paid for without knowledge of the fraud, and any payment made by him after notice is in his own wrong and will not protect him as a *bona fide* purchaser to that extent.[54] To the extent of pay-

50. Riddell v. Munro, 49 Minn. 532, 52 N. W. 141.

51. Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

52. Irish v. Clayes, 10 Vt. 81.

53. *Ala.*—Florence Sewing Mach. Co. v. Ziegler, 58 Ala. 221.

Ark.—Massie v. Enyart, 32 Ark. 251; Galbreath v. Cook, 30 Ark. 417.

Ind.—Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa.—Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302, where some cash was paid but no obligation taken for deferred payments.

Kan.—Bush v. Collins, 35 Kan. 535, 11 Pac. 425.

La.—Schultz v. Morgan, 27 La. Ann. 616.

Mich.—Dixon v. Hill, 5 Mich. 404.

Mo.—Dougherty v. Cooper, 77 Mo. 528; Arnholt v. Harting, 73 Mo. 485; Stein v. Burnett, 43 Mo. App. 477; Pribe v. Glenn, 31 Mo. App. 215.

Neb.—Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

Okla.—McFadyen v. Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Tex.—Tillman v. Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

54. *Ala.*—Florence Sewing Mach. Co. v. Zeigler, *supra*.

ments made, or security or property appropriated in payment thereof, before knowledge or notice of the fraud of his vendor, he acquires an equity and will be protected *pro tanto,*[55] but not as to any unpaid portion.[56] Where the title in such case is held to be in the purchaser, the unpaid purchase money should be subjected to the payment of the defrauded creditors.[57] Where payment is made partly in money and partly by note, the purchaser will be protected only to the extent of the payment actually made, unless the note is negotiable, and the burden of proof is upon him to show its negotiability.[58] The principle that, where the purchaser has paid only part of the purchase money, he can only be protected *pro tanto,* can only be invoked where it is determined that the seller sold with fraudulent intent, and that the purchaser was not aware of his intent.[59] The grantee has a preferred lien on the land, as against the grantor's creditors, for the money

Ark.—Massie v. Enyart, 32 Ark. 251.

Ind.—Parkinson v. Hanna, 7 Blackf. 400.

Or.—Goodale v. Wheeler, 41 Or. 190, 68 Pac. 753.

Tex.—Cleveland v. Butts, 13 Tex. Civ. App. 272, 35 S. W. 804, a bond for deed given after notice of the fraud is not a payment sufficient to protect the purchaser to that extent.

55. *Ala.*—Florence Sewing Machine Co. v. Zeigler, *supra.*

Kan.—Work v. Coverdale, 47 Kan. 307, 27 Pac. 894; Wafer v. Harvey County Bank, 46 Kan. 597, 26 Pac. 1032; Green v. Green, 41 Kan. 472, 21 Pac. 586; Moxley v. Haskin, 39 Kan. 653, 18 Pac. 820.

Mo.—Dougherty v. Cooper, 77 Mo. 528.

Neb.—Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

N. J.—Phelps v. Morrison, 24 N. J. Eq. 195.

Okla.—McFadyen v. Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059.

Tex.—Schuster v. Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; Cleveland v. Butts, *supra.*

56. *Ind.*—Rodes v. Green, 36 Ind. 7.

Kan.—Bush v. Collins, 35 Kan. 535.

Mich.—Ball v. Phenicie, 94 Mich. 355, 53 N. W. 1114, where land worth ten thousand dollars is transferred in payment of a debt of eight thousand, a court of equity will subject the land to a vendor's lien of two thousand and subrogate the husband's creditors to his rights as vendor.

Neb.—Hedrick v. Strauss, *supra.*

57. Lockhard v. Beckley, 10 W. Va. 87.

58. Tillman v. Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

59. Adam Roth Grocery Co. v. Ashton, 69 Mo. App. 463.

actually paid by him.[60] If the purchaser takes the conveyance without any consideration, or purchases at a grossly inadequate price, without notice, his title will not be protected against creditors of the grantor.[61] Marriage being a valuable consideration, the wife is considered in the light of a *bona fide* purchaser under a marriage settlement, and will be protected as such.[62]

§ 48. **Rights and liabilities of grantees as to subsequent purchasers.**—A fraudulent grantee holding under a conveyance made to defraud subsequent purchasers can derive no benefit from his conveyance, as against such a purchaser for full value from the original grantor,[63] unless he is both innocent and ignorant of the fraud, and then only to the extent that he has parted with value on the strength of the conveyance and before notice of the fraud.[64] The grantee, without consideration, of a fraudulent grantor of property will not occupy, in a controversy in a court of equity with *bona fide* purchasers, any better ground than his grantor.[65] Where a vendee admits that he acquired no title to property in his possession from the owner, but that the sale to him was simulated, and permits a creditor of his vendor to sell the property, at public sale, the purchaser will acquire a valid title without a suit to annul his sale.[66] Constructive notice will not affect the right of such subsequent purchaser,[67] and where a conveyance is actually fraudulent as to the grantor's creditors, it is void as to subsequent

60. Adams' Assignee v. Branch, 3 Ky. L. Rep. 178.

61. Galbreath v. Cook, 30 Ark. 417; Jewett v. Cook, 81 Ill. 260; Kuevan v. Specker, 74 Ky. 1, where there is doubt as to whether the grantee has paid any consideration he will not be favored in equity; Shultz v. Morgan, 27 La. Ann. 616; Preston v. Cutter, 64 N. H. 461, 13 Atl. 874.

62. Armfield v. Armfield, 1 Freem. Ch. (Miss.) 311. See Marriage as consideration, chap. VIII, § 25, *supra*.

63. Howe v. Waysman, 12 Mo. 169, 49 Am. Dec. 126; Mellick v. Mellick, 47 N. J. Eq. 86, 19 Atl. 870, *aff'd* 48 N. J. Eq. 613, 23 Atl. 582.

64. Mellick v. Mellick, *supra*, but he cannot be allowed for a past indebtedness against the grantor unless he has given up some security or has otherwise changed his position on the strength of the conveyance.

65. Searcy v. Carter, 36 Tenn. 271.

66. Harris v. Denison, 8 La. 543.

67. Mellick v. Mellick, *supra*. *Compare* Effect of notice as to subsequent purchasers, chap. V, § 25, *supra*.

purchasers for value, such purchasers not being affected by either actual or constructive notice of the conveyance.[68] But deeds, though fraudulent on the part of the grantor, if accepted *bona fide* by the grantee, and without knowledge of the fraud, give a color of title, under the statute of limitations,[69] and if a fraudulent or voluntary conveyance is permitted to stand without attack for the period within which it may be attacked, the grantee under it acquires a perfect title, which he can enforce by action against a subsequent purchaser.[70] The possession of a fraudulent vendee, however, cannot be deemed adverse as against purchasers from the vendor, where the subsequent purchase was made under judicial process, and the possession of the tenants of the fraudulent vendee must be considered as his possession.[71]

§ 49. **Rights and liabilities of purchasers from grantee generally.**—That a conveyance was made to defraud creditors does not, *per se,* and as to strangers, avoid the title of a purchaser or other transferee from the fraudulent grantee.[72] The title of one holding under a conveyance from the grantee in a conveyance fraudulent as to the grantor's creditors cannot, as a general rule, be defeated, in favor of the creditors of the original grantor, unless it be alleged and proved that he participated in or had knowledge of the fraudulent intent of the original grantor,[73] except

68. Brown v. Connell, 85 Ky. 403, 9 Ky. L. Rep. 27, 3 S. W. 794.

69. Gregg v. Sayre, 33 U. S. 244, 8 L. Ed. 932.

70. Brown v. Connell, *supra.*

71. McCaskle v. Amarine, 12 Ala. 17.

72. Gridley v. Wynant, 23 How. (U. S.) 500, 16 L. Ed. 411.

73. *U. S.*—Pratt v. Curtis, 19 Fed. Cas. No. 11,375, 2 Lowell, 87.

Ark.—Apperson v. Ford, 23 Ark. 746.

Ga.—Colquitt v. Thomas, 8 Ga. 258, and it is necessary for the plaintiff in an action to subject the land to prove such knowledge or participation.

Ill.—Boies v. Henney, 32 Ill. 130, evidence to be considered by the jury.

Iowa.—Burtis v. Humboldt County Bank, 77 Iowa, 103, 41 N. W. 585.

La.—Delacroix v. Lacaze, 14 La. Ann. 519.

Mass.—Mansfield v. Dyer, 131 Mass. 200, the fact that the purchaser took his title by quitclaim was not conclusive that he was not a purchaser in good faith and without notice of

where the consideration paid by the subsequent grantee was so inadequate as to show fraud.[74] A mortgage for value, not intended to defraud creditors, and executed by both the grantor and the grantee in a conveyance which was intended to defraud a particular creditor without judgment, is good as against him, though the mortgagee had notice of the fraudulent intent.[75] But unless a purchaser from a vendee of property fraudulently conveyed is a *bona fide* purchaser without notice, he is in no better position than his grantor.[76]

§ 50. **Rights and liabilities as to original grantor.**—A deed made to defraud creditors is void only as against creditors, and a purchaser from the grantee, whether with or without notice of the fraud, takes a good title as against the original and fraudulent grantor, and the latter cannot recover the property from him,[77] except where the grantee had reconveyed the property to the original grantor before conveying it to a purchaser who had acquired no rights as a purchaser for value and without notice.[78] The purchaser from the fraudulent grantee is entitled to redeem the property from the claim of judgment creditors against such grantor and to be subrogated to all their rights against the grantor, by an assignment to him of the judgment upon payment of it by him.[79] A purchaser of the premises at a sale on execution against the fraudulent grantee, with notice of the fraud, takes a good

the fraud; Morse v. Aldrich, 130 Mass. 578.

Mo.—White v. Million, 102 Mo. App. 437, 76 S. W. 733.

74. Burtis v. Humboldt County Bank, 77 Iowa, 103.

75. Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233.

76. Watson v. Dickens, 20 Miss. 608.

77. *N. Y.*—Cole v. Malcolm, 66 N. Y. 363, *rev'g* 7 Hun, 31.

Kan.—Weatherbee v. Cockrell, 44 Kan. 380, 24 Pac. 417.

La.—Bookout v. Anderson, 2 La. Ann. 246.

Or.—Alliance Trust Co. v. O'Brien, 32 Or. 333, 50 Pac. 801, 51 Pac. 640.

Va.—Terrell v. Imboden, 10 Leigh, 321.

78. Curtin v. Curtin, 58 Hun (N. Y.), 607, 11 N. Y. Supp. 937.

79. Cole v. Malcolm, 66 N. Y. 363, *rev'g* 7 Hun, 31.

title as against the fraudulent grantor.[80] Where a chattel mortgage is given without consideration for the purpose of being sold, the mortgagor is estopped as against a purchaser from claiming that it secured a real debt, but where it is shown that it was not intended to be sold, the mortgagor is not estopped to set up such claim, since such purchaser takes a security for what it is worth, as between the original parties, and if it secures no debt, he can collect nothing on it.[81] Where a conveyance was made by a husband to his wife to defraud his creditors, it is good as between the parties, and he cannot show a trust in her as against parties claiming under her.[82] But a purchaser claiming under a deed by a husband to his wife will not be aided in equity against the assignee of the heir of the husband, where the transaction was fraudulent as to the creditors of the husband.[83]

§ 51. **Rights and liabilities as to original grantee.**—A purchaser from the fraudulent grantee cannot prove, in defense to a suit for the purchase money, that the vendor acquired title by a conveyance fraudulent as to the creditors of the original owner, since only defrauded creditors or purchasers can impeach a fraudulent conveyance.[84] And this rule applies to one who buys goods at a shop which had been occupied by a person who owes him, under the supposition that he is dealing with his debtor, but is informed before leaving the shop that another person has become the owner of the stock of goods there, and is selling them on his own account, and makes no objections but retains the goods.[85] In an action to set aside a trust deed securing the claim of a bank against the grantor, as in fraud of creditors, a purchaser under the trust deed with knowledge of the fraud could not, at the instance of the bank, however, be charged with rents and profits

80. Douglass v. Dunlap, 10 Ohio, 162.

81. Judge v. Vogel, 38 Mich. 569.

82. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604.

83. Stickney v. Borman, 2 Pa. St. 67.

84. Campbell v. Erie R. Co., 46 Barb. (N. Y.) 540; Root v. Wood, 34 Ill. 283.

85. Mudge v. Oliver, 83 Mass. 74.

accruing during his possession pending the suit, since the bank was an active party to the fraud.[86]

§ 52. **Rights and liabilities as to creditors of original grantor.** —A purchaser or other transferee from a fraudulent grantee, with notice of the invalidity of his title, can acquire no better right than that held by such grantee, and a purchaser from the grantee stands on no better footing than such grantee, unless his purchase was for a valuable consideration and without notice of the fraud and wrongful possession of his vendor, but such purchaser or other transferee will hold the property subject to all the remedies that could be enforced against it in the hands of his vendor.[87] Where the fraudulent grantee assigns and transfers

86. Stout v. Phillippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

87. *N. Y.*—St. John Woodworking Co. v. Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025.

U. S.—Nickerson v. Meacham, 14 Fed. 881, 5 McCrary, 5; Rateau v. Bernard, 20 Fed. Cas. Co. 11,579, 3 Blatchf. 244; Dexter v. Smith, 7 Fed. Cas. No. 3,866, 2 Mason, 303.

Ala.—Smith v. Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Roden v. Ellis, 113 Ala. 642, 21 So. 71; Spencer v. Godwin, 30 Ala. 355.

Ark.—Miller v. Fraley, 21 Ark. 22.

Cal.—Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102, although such purchaser pays full value.

Colo.—Wilcoxsen v. Morgan, 2 Colo. 473; Rizer v. McCarthy, 3 Colo. App. 348, 33 Pac. 191.

Conn.—Walp v. Mooar, 76 Conn. 515, 57 Atl. 277; Curtis v. Lewis, 74 Conn. 367, 50 Atl. 878.

Fla.—Mayer v. Wilkins, 37 Fla. 244, 19 So. 632.

Ga.—Kelly v. Simmons, 73 Ga. 716; Cottle v. Harrold, 72 Ga. 830.

Ill.—Waggoner v. Cooley, 17 Ill. 339; Brown v. Niles, 16 Ill. 385; Hoff v. Larimore, 106 Ill. App. 589; Ringgold v. Leith, 73 Ill. App. 656; Wallace v. White, 12 Ill. App. 177.

Ind.—Corwin v. Reddington, 4 Ind. 198.

Iowa.—Joyce v. Perry, 111 Iowa, 567, 82 N. W. 941.

Ky.—Jones v. Read, 33 Ky. 540; Stern v. Sedden, 7 Ky. 178; Edgewood Distilling Co. v. Nowland, 19 Ky. L. Rep. 1740, 44 S. W. 364. See Sanders v. Alexander, 25 Ky. 301.

Md.—Green v. Early, 39 Md. 223.

Mass.—Carroll v. Hayward, 124 Mass. 120.

Minn.—Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876.

Mo.—Sloan v. Torry, 78 Mo. 623; Lesem v. Herriford, 44 Mo. 323.

N. J.—Newman v. Kirk, 45 N. J. Eq. 677, 18 Atl. 224; Mingus v. Condit, 23 N. J. Eq. 313.

N. C.—Wade v. Saunders, 70 N. C. 270.

the property for the payment of his own creditors, the assignees of the fraudulent grantee stand on no better footing than the grantee himself.[88] Land for which the land fraudulently conveyed has been exchanged is subject to the demands of the original grantor's creditors.[89] A corporation formed substantially out of a firm which it succeeded, in taking an assignment, apparently without consideration, of a mortgage held by the firm, to defraud the mortgagor's creditors, is subject to the same equities as the firm.[90] In the absence of fraud in the entry of a judgment by confession against the grantor, purchasers who are not *bona fide* purchasers for value cannot object that the statement on which the judgment was entered was insufficient.[91] Where a creditor of an intestate has no other resource for collecting his debt, he may call to account in equity one who has, since the debtor's death, taken the profits of land conveyed by the debtor to defraud creditors, being grantee with notice from the fraudulent grantee.[92] But in an action to set aside a conveyance as constructively fraudulent, a court of equity will protect a purchaser from the grantee, as well as the creditor, where both can be protected without injury to either.[93] A grantee in a fraudulent conveyance, who was a conscious participant in the fraud, on the setting aside of the conveyance is not entitled to recover expenditures made to protect his title; but one claiming through him in good faith, who did not participate in the fraud, although buying under such

Tex.—Cook v. Greenberg (Civ. App. 1896), 34 S. W. 687.

Va.—Commonwealth v. Ricks, 1 Gratt. 416.

W. Va.—Spence v. Smith, 34 W. Va. 697, 12 S. E. 828; Goshorn v. Snodgrass, 17 W. Va. 717.

Can.—Buchanan v. Dinsley, 11 Grant Ch. (U. C.) 132.

88. Jewett v. Tucker, 139 Mass. 566, 2 N. E. 680; Holland v. Cruft, 37 Mass. 321.

89. Sloan v. Torry, 78 Mo. 623. See Change in character of property, chap. IV, § 48, *supra*.

90. In re Sweet, 20 R. I. 557, 40 Atl. 502.

91. St. John Woodworking Co. v. Smith, 82 App. Div. (N. Y.) 348, 82 N. Y. Supp. 1025.

92. Jones v. McCleod, 61 Ga. 602.

93. Tompkins v. Sprout, 55 Cal. 31; Newman v. Kirk, 45 N. J. Eq. 677, 18 Atl. 224, the assignee of the purchaser at sheriff's sale might hold the title acquired from the sheriff as

circumstances as to be constructively chargeable with notice, is in equity entitled to be reimbursed for expenditures in the payment of taxes,[94] or prior liens.[95] On the other hand, although not a party to the suit, until shortly before the decree, such purchaser is chargeable as against his claim for reimbursement with the taxable costs incurred in the suit after the date when he became a party in interest.[96]

§ 53. **Mortgage or conveyance to creditors of grantor.**—A fraudulent grantee may lawfully dispose of the property in any manner in which the grantor might have disposed of it, had not the fraudulent sale occurred, may transfer it, for instance, to a creditor of the grantor.[97] If a fraudulent grantee transfers or mortgages the property to a *bona fide* creditor of the grantor, who had no connection with the fraud, and such creditor takes the transfer or mortgage in good faith, either in payment of or as security for his own just debt against the fraudulent grantor, before any other creditor has acquired a lien upon the property, such transfer or mortgage will be valid, to the extent of his claim, as against such other creditors, whether such creditor had notice or not of the prior fraudulent transaction, and such transfer or mortgage may be enforced by the transferee or mortgagee, no rights of creditors, purchasers, or incumbrancers having intervened.[98] Such mortgage or other conveyance requires no other

security for the amount actually paid to the sheriff.

94. Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305; Graves v. Winans (N. J. Ch. 1886), 4 Atl. 645.

95. Lynch v. Burt, *supra*. See Wolcott v. Tweddle, 133 Mich. 389, 95 N. W. 419, as against purchaser at execution sale.

96. Lynch v. Burt, *supra*.

97. Dolan v. Van Demark, 35 Kan. 304, 10 Pac. 848.

98. *N. Y.*—Munoz v. Wilson, 111 N. Y. 295, 18 N. E. 855; Murphy v. Briggs, 89 N. Y. 446, *aff'g* 23 Hun, 95; Mahoney v. McWalters, 3 App. Div. 248, 38 N. Y. Supp. 256.

U. S.—Johnson v. American Trust Co., 104 Fed. 174, 43 C. C. A. 458.

D. C.—Petingale v. Barker, 21 D. C. 156.

Ky.—Copenheaver v. Huffaker, 45 Ky. 18.

Mass.—Boyd v. Brown, 35 Mass. 453.

Minn.—Brown v. Scheffer, 72 Minn. 27, 74 N. W. 902; Butler v. White, 25 Minn. 432.

assent of the original grantor than that which is contained in the vesting of the grantee with all the grantor's rights in the property.[99] But such mortgage or conveyance is subject to the claims of creditors who had acquired a lien on the property prior thereto, since it is well settled that a grantee or incumbrancer, who does not advance anything at the time, takes the interest conveyed, subject to any prior equity attaching to the subject.[1] Where the creditor taking the mortgage or conveyance knowingly participates in a purpose to defraud other creditors,[2] or where with notice of the fraud his debt is created contemporaneously with or subsequently to the fraudulent conveyance,[3] or where subsequent to the mortgage he takes an absolute conveyance fraudulent as to other creditors,[4] such mortgage or conveyance is invalid as to other creditors of the grantor.

§ 54. **Rights and liabilities of bona fide purchasers from grantee generally.**—No one who has actual knowledge or notice

Neb.—Longfellow v. Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

N. J.—Thompson v. Williamson, 67 N. J. Eq. 212, 58 Atl. 602.

Ohio.—Webb v. Brown, 3 Ohio St. 246; Brown v. Webb, 20 Ohio, 389.

Pa.—Stark v. Ward, 3 Pa. St. 328.

Tenn.—Keith v. Proctor, 67 Tenn. 189, such a title is good as against a judgment creditor of the grantor to the amount of the transferee's debt, he being unaware of the fraud.

Compare Jewett v. Cook, 81 Ill. 260; Hoff v. Larimore, 106 Ill. App. 589.

Where a mortgage given to defraud creditors is assigned by the mortgagee, who is also the vendee of the property, as security to a *bona fide* creditor of the mortgagor, such transaction is in substance a restoration of the property to the owner and an execution by him of a mortgage thereon to secure the just claim of a creditor. The original mortgage is thereby purged of the fraud with which it was originally tainted and becomes a valid and enforceable security. Longfellow v. Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

99. Longfellow v. Barnard, *supra;* Webb v. Brown, 3 Ohio St. 246.

1. Wood v. Robinson, 22 N. Y. 564; Mahoney v. McWalters, 3 App. Div. (N. Y.) 248, 38 N. Y. Supp. 256. See also cases cited in last preceding note.

2. Thompson v. Furr, 57 Miss. 478; Webb v. Brown, 3 Ohio St. 246.

3. Rilling v. Schultze, 95 Tex. 352, 67 S. W. 401, *aff'g* (Civ. App. 1901) 66 S. W. 56.

4. Copenheaver v. Huffaker, 45 Ky. 18, both mortgage and conveyance are fraudulent in such a case.

of a fraudulent sale can become a subsequent *bona fide* purchaser of the property which is the subject thereof, in good faith, so as to avail himself of the advantage awarded to that class of purchasers,[5] except where he purchases from a *bona fide* grantee, without notice, actual or constructive, of the fraud.[6] To entitle him to the protection due to a purchaser without notice of the fraud, he must have purchased the property for a valuable consideration,[7] and must be innocent of any purpose to further the fraud, even to protect himself. Ignorance of the corrupt purpose, where such ignorance could only exist by design, will not protect him.[8]

§ 55. **Notice.**—While one who has actual notice of the fraud cannot be a purchaser in good faith from a fraudulent grantee,[9] actual notice or positive and legal proof of the fraud is not necessary, but it is sufficient if he has constructive notice thereof.[10] Where a purchaser of property has not actual notice of the fraudulent intent with which the property has been conveyed to his vendor, but the circumstances are such as would have put a prudent man upon inquiry, and, if prosecuted diligently, would have exposed the fraud, he is chargeable with constructive notice of the fraudulent intent of the original grantor and cannot be deemed a *bona fide* purchaser in good faith.[11] Ordinary diligence

5. Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707; Schwabacher v. Leibrook, 48 La. 821, 19 So. 758; Earle v. Burch, 21 Neb. 702, 33 N. W. 254; Miller v. Jamison, 26 N. J. Eq. 404. See also next section.

6. See § 62, *infra*.

7. See § 56, *infra*.

8. De Witt v. Van Sickle, 29 N. J. Eq. 209.

9. See last preceding section.

10. See cases cited in next note.

11. *N. Y.*—Stearns v. Gage, 79 N. Y. 102; Baker v. Bliss, 39 N. Y. 70, 6 Transc. App. 346; Roberts v. Anderson, 3 Johns. Ch. 371.

U. S.—Thompson Nat. Bank v. Corwine, 95 Fed. 54, 89 Fed. 774.

Ala.—Hodges v. Coleman, 76 Ala. 103.

Ark.—Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707.

Kan.—Meibergen v. Smith, 45 Kan. 405, 25 Pac. 881.

Minn.—Arnold v. Hoschildt, 69 Minn. 101, 71 N. W. 829.

Mo.—Reid, Murdock & Co. v. Lloyd, 52 Mo. App. 278, the fact that the purchaser did not take an inventory and knew that his seller was embarrassed and compelled to close up his business was sufficient to put him on inquiry.

is all that the purchaser can be charged with in determining whether he had notice of the fraud.[12] That the purchaser, an attorney, had defended in a former suit to set aside the fraudulent conveyance,[13] that he had formerly prosecuted an action in which the same fraud was directly charged in his complaint,[14] and that he had been present in court on the trial of an action to which his grantor was a party and heard evidence proving his grantor's title to be fraudulent,[15] has been held sufficient to charge the purchaser with notice of the fraud. On the other hand the fact that the property is sold for less than its value,[16] the record of a judgment against the grantor where at the time of the purchase the legal title was in the grantee,[17] and the filing of a writ of attachment against the original grantor,[18] has been held insufficient to charge the purchaser with notice of the fraud. Where the purchaser from a fraudulent grantee purchases with notice that proceedings are to be instituted or are pending to set aside the former conveyance as fraudulent and to subject the property to the payment of a judgment against the original grantor,[19] or is a party to an action for the purpose,[20] or purchases

Neb.—Lane v. Starkey, 15 Neb. 285, 18 N. W. 47.

N. J.—Dewitt v. Van Sickle, 29 N. J. Eq. 209.

Or.—Lyons v. Leahy, 15 Or. 8, 13 Pac. 643, 3 Am. St. Rep. 133.

W. Va.—McMasters v. Edgar, 22 W. Va. 673.

12. Sanger v. Thomason, (Tex. Civ. App. 1898), 44 S. W. 408.

13. Russell v. Russell, 34 Ky. 40.

14. Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503.

15. Wise v. Tripp, 13 Me. 9.

16. Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85.

17. Phelps v. Morrison, 24 N. J. Eq. 195; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

18. Morrow v. Graves, 77 Cal. 218, 19 Pac. 489; Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123; Ashland Sav. Bank v. Mead, 63 N. H. 435; Clerf v. Montgomery, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733.

19. *Ark.*—Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707.

Ky.—Copenheaver v. Huffaker, 45 Ky. 18.

La.—City of New Orleans v. Marchand, 35 La. Ann. 222.

Minn.—Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876.

Miss.—Willis v. Gattman, 53 Miss. 721.

W. Va.—Goshorn v. Snodgrass, 17 W. Va. 717.

Wis.—Hamlin v. Wright, 26 Wis. 50.

20. Henry v. Harrell, 57 Ark. 569, 22 S. W. 433.

after an execution sale of the property,[21] or where the conveyance to the fraudulent grantee is clearly fraudulent on its face,[22] or where the purchaser has notice that another claims the right to recover the property on the ground that it was conveyed in fraud of creditors,[23] he is chargeable with notice of the fraud and cannot claim to be a *bona fide* purchaser without notice. But, in the absence of actual fraud, a subsequent purchaser is not chargeable with notice of the fraud where the grantee's recorded title and possession give no indication of fraud or trust,[24] nor does mere knowledge on his part of the indebtedness of the original grantor constitute fraud either in fact or in law.[25] The record of a voluntary conveyance in consideration of love and affection is not sufficient to put a *bona fide* purchaser from a fraudulent grantee on inquiry and charge him with notice of the fraud.[26] The mere fact that a purchaser from the holder of a voluntary conveyance has notice that it was not founded upon a pecuniary

21. Stivers v. Horne, 62 Mo. 473. **The registry of a sheriff's deed** under a sale of execution levied on the land of the debtor, after he had conveyed it in fraud of his creditors, is notice of the fraud to a subsequent purchaser for value. Baxter v. Sewell, 3 Md. 334; McGregor v. White, 15 Tex. Civ. App. 299, 39 S. W. 1024. But a sheriff's deed, although recorded, is not notice of the fraud to one who had purchased from the fraudulent grantee prior to the sheriff's sale. Crockett v. Maguire, 10 Mo. 34.

22. Johnson v. Thweatt, 18 Ala. 741.

23. Walker v. Cady, 106 Mich. 21, 63 N. W. 1005.

24. Peck v. Dyer, 147 Ill. 592, 35 N. E. 479, *aff'g* 45 Ill. App. 184; Fox v. Peck, 45 Ill. App. 239; Leach v. Ansbacher, 55 Pa. St. 85, the purchaser is not required to make inquiry in such a case; Hart v. Bates, 17 S. C. 35.

Where a sheriff attaches real estate of a debtor in the hands of his fraudulent grantee, but makes no addition to his return, describing the property and stating the name of the person in whom the record title stands, as required by Gen. St., chap. 123, § 55, there is no notice to a third person afterwards purchasing for value and in good faith from the fraudulent grantee, and the attachment is invalid as to such purchaser. Morse v. Aldrich, 130 Mass. 578.

25. Davis v. Woods, 7 Ky. L. Rep. 308.

26. Yardley v. Torr, 67 Fed. 857; McKee v. West (Ala. 1904), 37 So. 740; Davis v. Woods, *supra*. *Contra.* —Milholland v. Tiffany, 64 Md. 455, 2 Atl. 831; New England L. & T. Co. v. Avery (Tex. Civ. App. 1897), 41 S. W. 673.

consideration is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent, unless some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance was intended to defraud some one.[27] Constructive notice is not sufficient, but actual notice of the fraud must be shown, where a valuable consideration has been paid by the purchaser to the fraudulent grantee,[28] or where he purchases from one who was a creditor of the original grantor and purchased from his debtor to assist him to hinder, delay, and defraud his creditors.[29]

§ 56. **Consideration.**— No one but a purchaser for a valuable consideration, which has actually passed, or who has parted with something of value, before notice of the fraud, can claim title as a *bona fide* purchaser from a fraudulent grantee.[30] The mere surrender of a pre-existing debt due from the grantee to such a purchaser, without the actual payment of money or other consideration,[31] the surrender of a valuable right,[32] or the assumption of an irrevocable obligation,[33] is not sufficient to constitute him a

27. Frazer v. Western, 1 Barb. Ch. (N. Y.) 220.

28. Stearns v. Gage, 79 N. Y. 102; Lyons v. Leahy, 15 Or. 8, 13 Pac. 643, 3 Am. St. Rep. 133. But see McMasters v. Edgar, 22 W. Va. 673.

29. White v. Million, 102 Mo. App. 437, 76 S. W. 733, such knowledge may be submitted as evidence tending to show actual knowledge.

30. *U. S.*—Thompson Nat. Bank v. Corwine, 95 Fed. 54, 89 Fed. 774.

Iowa.—Des Moines Ins. Co. v. Lent, 75 Iowa, 522, 39 N. W. 826.

Mich.—Dixon v. Hill, 5 Mich. 404.

Minn.—Hicks v. Stone, 13 Minn. 434.

Neb.—Lane v. Starkey, 15 Neb. 285, 18 N. W. 47.

N. J.—Dewitt v. Van Sickle, 29 N. J. Eq. 209.

R. I.—Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657.

Tex.—Miller v. Vernoy, 2 Tex. Civ. App. 675, 22 S. W. 64, the assumption by a surety on a note of one-half of the debt is not sufficient.

31. Victoria Paper Mills v. New York, etc., Co., 28 Misc. Rep. (N. Y.) 123, 58 N. Y. Supp. 1070, *aff'g* 27 Misc. Rep. 179, 57 N. Y. Supp. 397; Agricultural Bank v. Dorsey, Freem. Ch. (Miss.) 338; Case Plow Works v. Ross, 74 Mo. App. 437; Dewitt v. Van Sickle, 29 N. J. Eq. 209; Mingus v. Condit, 23 N. J. Eq. 313.

32. Case Plow Works v. Ross, 74 Mo. App. 437, surrender of securities; Dewitt v. Van Sickle, *supra.*

33. Dewitt v. Van Sickle, *supra;* Taylor's Appeal, 45 Pa. St. 71.

purchaser for value and to entitle him to the protection due a purchaser without notice of the fraud. The fact that a transferee of goods in payment of an antecedent debt from a fraudulent vendee paid the latter a small sum of money, as an additional consideration, on the advice of his lawyer, and for the sole purpose of making the sale valid, does not make him a *bona fide* purchaser for value.[34] One holding under a deed expressed to be for a small sum of money and for love and affection stands in the same condition as his grantor, to whom the property was conveyed in fraud of creditors of the next preceding grantor.[35] When a stranger pays a mortgage debt in whole or in part, he becomes, however, in the absence of evidence to the contrary, by implication a purchaser of the debt to the extent of his payment. If the mortgaged property is conveyed to such stranger, the payment of the mortgage is sufficient consideration to support the conveyance, and if the grantee takes the conveyance without knowledge of the intention of the grantor to defeat his creditors, he is entitled to hold the property.[36]

§ 57. **Rights and liabilities as to original parties.**—A *bona fide* purchaser for value and without notice from a fraudulent grantee takes a good title and, as against him, the original grantor and his heirs are estopped from setting up the fraudulent character of the original conveyance,[37] either for the purpose of recovering the property,[38] enforcing a trust or secret equity arising from the fraud perpetrated by the original grantor on his credi-

34. Victoria Paper Mills Co. v. New York, etc., Co., 28 Mich. Rep. (N. Y.) 123, 58 N. Y. Supp. 1070.

35. Harrison v. Hatcher, 44 Ga. 638.

36. Jennings v. Smith, 22 Pa. Co. Ct. 554.

37. Fury v. Kempin, 79 Mo. 477, *aff'g* 9 Mo. App. 30.

38. Somers v. Pumphrey, 24 Ind. 231; Fary v. Kempin, *supra*.

In Texas, under Act Jan. 18, 1840, § 2, a purchaser from one who has been in possession of goods, chattels, or slaves, for more than three years, cannot commit a fraud against one who asserts that he had loaned the property to the party in possession, without exhibiting any written contract of loan. Grumbles v. Sneed, 22 Tex. 565.

tor,[39] or defeating a right of action accruing to such purchaser to foreclose and enforce a fraudulent mortgage transferred to him by the mortgagee.[40] Such a purchaser, however, can enforce only such rights as he has acquired from the fraudulent grantee, and has no right of action to enforce a voluntary contract which existed between the original parties.[41] A fraudulent grantee will not be heard to assert that the transaction with his grantor was colorable, fraudulent, and for the accommodation of his grantor, as against one who, relying upon the record, and in good faith, has purchased the property from him.[42]

§ 58. **Rights and liabilities as to creditors of original grantor generally.**—A *bona fide* purchaser for value is protected, under the statutes of 13 and 27 Elizabeth and similar statutes adopted in this country, whether he purchases from the fraudulent grantor or the fraudulent grantee, and there is no difference in this respect between a conveyance made to defraud subsequent creditors, and one made to defraud subsequent purchasers, they both being voidable, and not void.[43] It has been held that a fraudulent conveyance is, as against creditors of the grantor, absolutely void under these statutes, and that a *bona fide* purchaser from the fraudulent grantee acquires no title, because his grantor's title is void,[44] but this doctrine is no longer maintained by the

39. Sorrells v. Sorrells, 4 Ark. 296; O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

40. Moffett v. Parker, 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319; Alliance Trust Co. v. O'Brien, 32 Or. 333, 50 Pac. 801, 51 Pac. 640, possession is not constructive notice to a mortgagee of a tenant's equitable interest in the mortgaged premises, where the loan was secured by one to whom the legal title had been transferred in fraud of creditors.

41. Quirk v. Thomas, 6 Mich. 76.

42. Silverman v. Bullock, 98 Ill. 11.

43. Anderson v. Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; Wright v. Howell, 35 Iowa, 288; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244; Boyer v. Weimer, 204 Pa. St. 295, 54 Atl. 21; Reynolds v. Vilas, 8 Wis. 471, 76 Am. Dec. 238. And see cases cited in notes 46 and 47, *infra*.

44. Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371, *rev'd* 18 Johns. 515,

courts.[45] It is now held, as a general rule, that a *bona fide* purchaser or incumbrancer of property from a previous grantee or vendee, to whom it had been conveyed for the purpose of defrauding creditors, before the creditors have taken any steps to subject the property or set aside the fraudulent conveyance, takes a good title,[46] and is entitled to protection as against the claims of the creditors of the original grantor who were intended to be defrauded by the first conveyance, who have not acquired a prior

9 Am. Dec. 235; McKee v. West, 141 Ala. 531, 37 So. 740, a voluntary conveyance is fraudulent *per se* as against the grantor's existing creditors; Preston v. Crofut, 1 Conn. 527, *disapproved* Parker v. Crittenden, 37 Conn. 148; Birdsall v. Welch, 6 D. C. 316; Read v. Staton, 4 Tenn. 159, 9 Am. Dec. 740. See Hoke v. Henderson, 14 N. C. 12.

45. Set cases cited in note 43, *supra*, and notes 46, 47 and 48, *infra*.

46. *U. S.*—Sedgwick v. Place, 21 Fed. Cas. No. 12,621, 12 Blatchf. 163, *rev'g* 21 Fed. Cas. No. 12,620, 5 Ben, 184; Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason, 252.

Ala.—Thames v. Rembert, 63 Ala. 561; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Cal.—Paige v. O'Neal, 12 Cal. 483.

Conn.—Lee v. Abbe, 2 Root, 359, 1 Am. Dec. 78.

Fla.—Neal v. Gregory, 19 Fla. 356.

Ill.—O'Neil v. Patterson, 52 Ill. App. 26.

Ind.—Hampson v. Fall, 64 Ind. 382; Scott v. Purcell, 7 Blackf. 66, 39 Am. Dec. 453; Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

La.—Hiriart v. Roger, 13 La. 126; Thomas v. Mead, 8 Mart. N. S. 341 19 Am. Dec. 187.

Me.—Sparrow v. Chesley, 19 Me. 79, which will be protected in a court of law; Neal v. Williams, 18 Me. 391; Trott v. Warren, 11 Me. 227.

Mass.—Green v. Tanner, 49 Mass. 411.

Miss.—Agricultural Bank v. Dorsey, Freem. Ch. 338.

Mo.—Craig v. Zimmerman, 87 Mo. 475, 56 Am. Rep. 466; Knox v. Hunt, 18 Mo. 174; Wineland v. Coonee, 5 Mo. 296, 32 Am. Dec. 320.

Mont.—Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

N. C.—King v. Trice, 38 N. C. 568; Martin v. Cowles, 18 N. C. 29.

Ohio.—Schultz v. Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Pa.—Sinclair v. Healy, 40 Pa. St. 417, 80 Am. Dec. 589, and such a purchaser may maintain trespass against a sheriff for wrongfully seizing the property.

Title by adverse possession.—Where personal property assigned by a recorded deed fraudulent on its face is subsequently purchased by a party for value and has remained in his actual, undisturbed and continued possession for five years, his title thereto is perfect, provided he was not a party to the fraudulent assignment, and has not in any way nor by any means, direct or indirect, obstructed the creditors of the fraudulent assignor in the prosecution of their rights. Thornburg v. Bowen, 37 W. Va. 538, 16 S. E. 825.

lien on the property,[47] or as against a subsequent purchaser at a sheriff's sale of the property on execution under a judgment

47. *N. Y.*—Zoeller v. Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157; Warner v. Blakeman, 4 Keyes, 487, 4 Abb. Dec. 530; Heroy v. Kerr, 2 Keyes, 582, 2 Abb. Dec. 359, *aff'g* 8 Bosw. 194, 21 How. Pr. 409; Reynolds v. Park, 5 Lans. 149; Frazer v. Western, 1 Barb. Ch. 220; Winchester v. Crandall, Clarke, 371.

U. S.—Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1,012; Simms v. Morse, 2 Fed. 325, 4 Hughes, 579.

Ala.—McKee v. West, 141 Ala. 531; Bryant v. Young, 21 Ala. 264; Dargan v. Waring, 11 Ala. 988, 46 Am. Dec. 234; Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

Ark.—Riggan v. Wolf, 53 Ark. 537, 14 S. W. 922.

Cal.—Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15, as against subsequently attaching creditor; Morrow v. Graves, 77 Cal. 218, 19 Pac. 489.

Conn.—Williamson v. Russell, 39 Conn. 406; Parker v. Crittenden, 37 Conn. 148.

Del.—Mears v. Waples, 3 Houst. 581.

Ga.—Sawyer v. Almand, 89 Ga. 314, 15 S. E. 315; Colquitt v. Thomas, 8 Ga. 258.

Ill.—Spicer v. Robinson, 73 Ill. 519, and such purchaser may reconvey to his grantor and take back a purchase money mortgage, which will be sustained as against creditors; Mason v. Trustees of Schools, 11 Ill. App. 454.

Ind.—Carnahan v. McCord, 116 Ind. 67, 18 N. E. 177; Studabaker v. Langard, 79 Ind. 320; Blair v. Bass, 4 Blackf. 539.

Iowa.—Halverson v. Brown, 75 Iowa, 702, 38 N. W. 123; McConnell v. Denham, 72 Iowa, 494, 34 N. W. 298.

Kan.—Wilson v. Fuller, 9 Kan. 176; Hildinger v. Tootle, 9 Kan. App. 582, 58 Pac. 226.

Ky.—Adams v. Branch, 3 Ky. L. Rep. 178.

Me.—Erskine v. Decker, 39 Me. 467.

Mich.—Quirk v. Thomas, 6 Mich. 76; Fox v. Clark, Walk. 535.

Mo.—Gordon v. Ritenour, 87 Mo. 54; Davis v. Briscoe, 81 Mo. 27.

Mont.—Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

Neb.—Hackney v. First Nat. Bank (1904), 98 N. W. 412 (1903), 94 N. W. 805.

N. H.—Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572; Preston v. Cutter, 64 N. H. 461, 13 Atl. 874; Comey v. Pickering, 63 N. H. 126; Gordon v. Haywood, 2 N. H. 402.

N. J.—Phelps v. Morrison, 25 N. J. Eq. 538, as against a subsequent judgment creditor of the original grantor.

N. C.—Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; McCorkle v. Earnhardt, 61 N. C. 300.

Ohio.—Holmes v. Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329.

Pa.—Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489; Thompson v. McKean, 1 Ashm. 129.

Tenn.—Friedenwald v. Mullan, 57 Tenn. 226; Richards v. Ewing, 30 Tenn. 327; Simpson v. Simpson, 26 Tenn. 275.

Tex.—Compton v. Perry, 23 Tex. 414.

against the fraudulent grantor.[48] A conveyance by a wife to a *bona fide* purchaser of land which her husband caused to be conveyed to her in fraud of his creditors is good as to his creditors, though they had no notice of it, by record or otherwise.[49] But a subsequent purchaser from the fraudulent grantee will be postponed to a prior purchaser at an execution sale under a judgment against the fraudulent grantor, although the fraudulent grantee was in possession at the time of the sale, and his vendee was a purchaser for value and without notice of the fraud.[50] The statute against fraudulent conveyances affords no protection to innocent purchasers of property from conditional vendees, although the conditional sale is not recorded as required by statute, unless such purchaser, or those under whom he claims, has had possession for the period prescribed by the statute.[51]

§ 59. **Protection according to nature and extent of consideration.**—A *bona fide* purchaser or incumbrancer from a fraudulent grantee of property conveyed in fraud of creditors, of which he had no knowledge, is entitled to protection to the extent of the

Va.—Coleman v. Cocke, 6 Rand. 618, 18 Am. Dec. 757.

Wash.—Sawtelle v. Weymouth, 14 Wash. 21, 43 Pac. 1101.

W. Va.—Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

Wyo.—Metz v. Blackburn, 9 Wyo. 481, 65 Pac. 857.

Can.—Dalglish v. McCarthy, 19 Grant Ch. (U. C.) 578.

Eng.—Halifax Joint Stock Banking Co. v. Gledhill (1891), 1 Ch. 31, 60 L. J. Ch. 181, 63 L. T. Rep. N. S. 623, 39 Wkly. Rep. 104.

A bona fide vendee of a purchaser at a tax sale may hold the title as against creditors, although the debtor permitted the sale to avoid creditors. Brooks v. Jones, 114 Iowa, 385, 82 N. W. 434, 86 N. W. 300.

48. *N. Y.*—Anderson v. Roberts, 18 Johns. 515, 9 Am. Dec. 235; Ledyard v. Butler, 9 Paige, 132, 37 Am. Dec. 379.

Ind.—Scott v. Purcell, 7 Blackf. 66, 39 Am. Dec. 453.

Iowa.—Clarke v. Allen, 34 Iowa, 190.

Mass.—Mansfield v. Dyer, 131 Mass. 200.

N. C.—Young v. Lathrop, 67 N. C. 63, 12 Am. Rep. 603.

Ohio.—Detwiler v. Louison, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Pa.—Boyer v. Weimer, 204 Pa. St. 295, 54 Atl. 21.

49. Chaffe v. Halpin, 62 Miss. 1.

50. Reed v. Smith, 14 Ala. 380.

51. Patton v. McCane, 54 Ky. 555.

money paid or advanced by him, on the faith of the title before notice of the fraud.[52] But he is not entitled to any protection for advances made after he has notice of the fraud in the conveyance to his grantor,[53] or as to purchase money paid by him after service of summons upon him in an action by a creditor of his vendor's grantor to set aside the conveyance.[54] A purchaser from the grantee in a conveyance to defraud creditors, without notice of the fraud, is nevertheless liable to any of such creditors for any portion of the purchase money remaining unpaid after notice of the fraud,[55] and a court of equity will give such a creditor a lien upon the premises for that amount.[56]

§ 60. **Mortgages and pledges.**—A *bona fide* holder of a mortgage or pledge from a fraudulent grantee, without notice of the fraud, is a *bona fide* purchaser to the extent of his interest in the mortgaged or pledged property, within the intent of the statutes of frauds, and to that extent his rights are paramount and superior to those of the fraudulent grantor's creditors, who had not acquired a prior lien.[57] Such a mortgage is valid as to a subse-

52. Paddock v. Fish, 10 Fed. 125; Thames v. Rembert, 63 Ala. 561; Graves v. Winans (N. J. Ch. 1886), 4 Atl. 645; Holmes v. Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329. See Dugan v. Vattier, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105.

53. Thames v. Rembert, *supra*.

54. Hamlin v. Wright, 26 Wis. 50.

55. Dowell v. Applegate, 7 Fed. 881; Tappan v. Harbison, 43 Ark. 84; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553.

56. Dowell v. Applegate, *supra*.

57. *N. Y.*—Murphy v. Moore, 23 Hun, 95; Ledyard v. Butler, 9 Paige, 132, 37 Am. Dec. 379.

U. S.—Freiburg v. Dreyfus, 135 U. S. 478, 10 Sup. Ct. 716, 34 L. Ed. 206.

Ill.—Bradley v. Luce, 99 Ill. 234; Fox v. Peck, 45 Ill. App. 239.

Mass.—Carroll v. Hayward, 124 Mass. 120; Hubbell v. Currier, 92 Mass. 333; Curtis v. Riddle, 89 Mass. 185.

Mich.—Farrand v. Caton, 69 Mich. 235, 37 N. W. 199.

Minn.—Noblet v. St. John, 29 Minn. 180, 12 N. W. 527.

Mo.—Block v. Chase, 15 Mo. 344; Lee v. Wilkins, 79 Mo. App. 159.

N. H.—Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572.

N. J.—Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244.

N. C.—Potts v. Blackwell, 56 N. C. 449.

Ohio.—Holmes v. Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329;

quent judgment creditor,[58] is a lien paramount to that of a subsequent judgment against the fraudulent grantor and a sheriff's deed issued thereunder,[59] and is valid as against attaching creditors of the original grantor, whose attachments issued subsequent to the execution and recording of the mortgage.[60] Such a mortgagee may purchase for his own benefit an outstanding title which is paramount to the fraudulent grantor's title.[61] Where a suit brought by creditors to have the pledge set aside attacks only the reality of the pledge, the fact that the pledgee pays the balance of the loan pending such suit, before it is amended so as to attack the original fraudulent conveyance, does not affect his rights.[62] The retention of possession by the grantor will not charge the mortgagee with notice of the fraud, nor will he be affected by notice of levies made upon the property subsequent to the conveyance.[63]

§ 61. **Creditors of grantee.**—A fraudulent conveyance being voidable only at the election of the grantor's creditors, and vesting in the grantee a leviable title, judgment creditors of a fraudulent grantee, who extended credit to the latter upon the strength of his ownership of the property, with no knowledge that any one

Shorten v. Drake, 38 Ohio St. 76, *rev'g* 8 Ohio Dec. 184, 6 Wkly. L. Bul. 202.

58. Quinnipiac Brewing Co. v. Fitzgibbons, 73 Conn. 191, 47 Atl. 128.

59. Clapp v. Saunders, 75 Iowa, 634, 36 N. W. 655.

60. McLeod v. O'Neill, 15 Ky. L. Rep. 152, 22 S. W. 220.

61. Gjeniess v. Fladeland, 27 Minn. 320, 7 N. W. 355.

62. Freiburg v. Dreyfus, 135 U. S. 478, 10 Sup. Ct. 716, 34 L. Ed. 205.

63. Shorten v. Drake, 38 Ohio St. 76.

A house built upon the land of another, with his consent, is personal property. If the owner of the house sells it to the owner of the land, it thereby becomes a part of the realty, and although such sale is made with fraudulent intent, yet a subsequent mortgage of the land by the owner to an innocent third person, with covenants of warranty, will prevent a creditor of the fraudulent vendor from establishing a title to the house as personal property, by an intervening attachment and a subsequent levy and sale upon execution, so as to enable him, after purchasing it at the sheriff's sale, to maintain an action of tort against the fraudulent vendee for the conversion of it. Curtis v. Riddle, 89 Mass. 185.

claimed that the conveyance to him was in fraud of creditors, and who subjected the property to the payment of their claims before proceedings by the creditors of the fraudulent grantor to rescind the conveyance, are entitled to priority over the latter, and the proceeds of the property obtained by the creditors of the fraudulent grantee on execution sale cannot be reached by the latter.[64] But creditors of the fraudulent grantor, who obtained judgments after the conveyance, gain a superior lien to that of a subsequent mortgagee of the grantee, whose mortgage is merely a further security, and who does not show that he took the mortgage without notice of the fraud.[65] Until the creditors of a fraudulent grantee, however, have acquired a lien upon the property, they have no right or claim to the property superior to that of the grantor's creditors.[66]

§ 62. **Purchaser from bona fide grantee.**—A debtor may dispose of his property with the intent to defraud his creditors, and yet give a good title to one who pays value, and has no knowledge of, and does not participate in, the fraud; and the latter may accordingly confer a good title even upon one who knew of the fraud, but did not participate in it.[67] The rule is well established that a purchaser from a *bona fide* grantee without notice takes a good title, as against the original grantor's creditors or execution

64. Standard Nat. Bank v. Garfield Nat. Bank, 70 App. Div. (N. Y.) 46, 75 N. Y. Supp. 28; Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34; Stockton v. Craddick, 4 La. Ann. 282; Giggs v. Chase, 10 Mass. 125; Parker v. Freeman, 2 Tenn. Ch. 612. *Compare* Winslow v. Stewart, 7 Ky. L. Rep. 368.

In New Jersey it is held, however, that a judgment creditor of a fraudulent grantee is not a purchaser within the statute of frauds (Revision, p. 447, § 15), and that he acquires no title or lien prior to that of the judgment creditors of the grantor whose debts existed at the time of the fraudulent conveyance. Richardson v. Gerli (N. J. Ch. 1903), 54 Atl. 438; Couse v. Columbia Powder Mfg. Co. (N. J. Ch. 1895), 33 Atl. 297.

65. Manhattan Co. v. Evertson, 6 Paige (N. Y.), 457.

66. Davis v. Graves, 29 Barb. (N. Y.) 480. See Haymaker's Appeal, 53 Pa. St. 306. See also Creditors of grantee, chap. XIV, § 23, *supra*.

67. *N. Y.*—Adelberg v. Horowitz, 32 App. Div. 408, 52 N. Y. Supp. 1125.

purchasers, whether or not he had notice that the conveyance to his grantor was for the purpose of defrauding the creditors of the original grantor.[68] This rule applies to the voluntary holder of a title from a *bona fide* grantee,[69] and also whether the purchaser had paid any or an inadequate consideration for the property,[70] or paid only a part in cash and gave his notes secured on the property for the balance,[71] and where the conveyance was intended as a mortgage between the parties.[72] The rule also applies to a purchaser from a *bona fide* mortgagee of the fraudulent grantee,[73] and a purchaser under the mortgage title is not affected by the pendency of a suit to set aside the conveyance for fraud.[74]

§ 63. **Original grantor claiming under bona fide purchaser from grantee.**—The principle that one without notice can convey to one with notice, as set forth in the preceding section, is subject to an exception, where the transfer is back to him who is found

68. *N. Y.*—Adelberg v. Horowitz, *supra.*

Conn.—Walp v. Mooar, 76 Conn. 515, 57 Atl. 277.

Dak.—Young v. Harris, 4 Dak. 367, 32 N. W. 97.

Ga.—Colquitt v. Thomas, 8 Ga. 258.

Ind.—Arnold v. Smith, 80 Ind. 417; Studabaker v. Langard, 79 Ind. 320; Evans v. Nealis, 69 Ind. 148; Hampson v. Fall, 64 Ind. 382.

Iowa.—Mast v. Henry, 65 Iowa, 193, 21 N. W. 559.

La.—Burg v. Rivera, 105 La. 144, 29 So. 482.

Me.—Davis v. Tibbetts, 39 Me. 279.

Minn.—Mix v. Ege, 67 Minn. 116, 69 N. W. 703.

Mo.—Craig v. Zimmerman, 87 Mo. 475, 56 Am. Rep. 466; Crow v. Andrews, 24 Mo. App. 159.

Nev.—Allison v. Hagan, 12 Nev. 38.

Tex.—Bergen v. Producers' Marble Co., 72 Tex. 53, 11 S. W. 1027; Sanger v. Thomasson (Civ. App. 1898), 44 S. W. 408, such a purchaser may recover for the conversion of the property, although he may know that the prior sale was made by the seller to defraud his creditors.

69. Savage v. Dowd, 54 Miss. 728. *Compare* Shaw v. Tracy, 83 Mo. 224, a voluntary deed with fraudulent intent is void as to the beneficiary in a subsequent trust deed with notice, though the first grantee had no knowledge of the grantor's fraudulent intent.

70. Casey v. Leggett, 125 Cal. 664, 58 Pac. 264.

71. Freeman v. Pullen, 130 Ala. 653, 31 So. 451; Burg v. Rivera, 105 La. 144, 29 So. 482.

72. Casey v. Leggett, *supra.*

73. Bradley v. Luce, 99 Ill. 234; Noblet v. St. John, 29 Minn. 180, 12 N. W. 527.

74. Bradley v. Luce, 99 Ill. 234.

guilty of the wrong in selling or permitting a sale to an innocent purchaser, so that, where the property again vests in such wrongdoer, the original equities reattach to it in his hands.[75] Where a debtor conveys property under circumstances which render the conveyance either actually or constructively fraudulent as to his creditors, and his grantee subsequently conveys the premises to a *bona fide* purchaser for value, and the latter reconveys to the original grantee, the latter occupies no better position than he did originally, and holds the property subject to the rights of those who were creditors of the fraudulent grantor at the time of the original conveyance.[76]

§ 64. **Rights and liabilities as to purchasers from original grantor.**—The title of a *bona fide* purchaser from a fraudulent grantee is good as against a subsequent grantee of the original grantor with notice,[77] or as against a prior pretended contract of sale between the fraudulent grantor and a third person, although he had notice of it.[78] A *bona fide* transferee of a fraudulent mortgage has a prior lien to that of a prior mortgagee whose mortgage was recorded after the record of the fraudulent mortgage, although prior to its transfer to him.[79] The title of a *bona fide* purchaser from a fraudulent grantee for value without notice of the fraud, after a creditor of the fraudulent grantor has obtained a judgment against him, but before the land was sold on an execution issued on such judgment, is to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor.[80]

75. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

76. *Conn.*—Birge v. Nock, 34 Conn. 156.

Nev.—Allison v. Hagan, 12 Nev. 38.

Ohio.—Schultz v. Brown, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Or.—Perkins v. McCullough, 31 Or. 69, 49 Pac. 861.

77. Aiken v. Bruen, 21 Ind. 137.

78. Poling v. Williams, 44 W. Va. 69, 46 S. E. 704.

79. Clark v. Forbes, 9 Neb. 476, 4 N. W. 58.

80. Young v. Lathrop, 67 N. C. 63, 12 Am. Rep. 603.

CHAPTER XV.

REMEDIES.

Section 1. Nature and form of remedy in general.
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Section 1. **Nature and form of remedy in general.**—Every remedy should be given by the courts to defeat any effort to defraud creditors of their just rights.[1] Courts of law and courts of equity have concurrent jurisdiction over alienations made in fraud of creditors.[2] An action by a creditor to recover the amount which the grantee in an alleged fraudulent conveyance from the debtor agreed to pay upon the creditor's claim, in consideration of the transfer, is not an action to set aside a fraudulent conveyance.[3] A bill filed by an attachment creditor asking that a conveyance be set aside as fraudulent, and that, if it be deemed not fraudulent, complainant's judgment should be declared an incumbrance on the property, is not a creditors' bill, as the benefits would inure to complainant alone.[4] If a transfer of property made in fraud of creditors is voidable in some form of judicial process, both by the law of the state where it was made and by that of the state where the remedy is sought, the question as to the form of such remedy is to be determined by the *lex fori*.[5]

§ 2. **Remedy by action at law.**—A conveyance fraudulent as to creditors may be set aside in an action of ejectment in a court of law as well as upon bill of complaint in a court of equity, the jurisdiction of law and equity courts being concurrent.[6] A

1. Banks v. McCandless, 119 Ga. 793, 47 S. E. 332.

2. *U. S.*—Orendorf v. Budlong, 12 Fed. 24.

Ga.—Lathrop v. McBurney, 71 Ga. 815; Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440.

Mich.—Cleland v. Taylor, 3 Mich. 201.

Mo.—Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

N. J.—Mulford v. Peterson, 35 N. J. L. 127; Moore v. Williamson, 44 N. J. Eq. 496, 14 Atl. 587, 1 L. R. A. 336; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881, *aff'd* 44 N. J. Eq. 603, 17 Atl. 1104; Cox v. Gruver, 40 N. J. Eq. 473, 3 Atl. 172.

Va.—Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756.

3. Goldman v. Biddle, 118 Ind. 492, 21 N. E. 43.

4. Voorhees v. Reford, 14 N. J. Eq. 155.

5. Drake v. Rice, 130 Mass. 410.

6. Cleland v. Taylor, 3 Mich. 201; Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478; Carroll v. Salisbury, 28 R. I. 16, 65 Atl. 274. *Compare* Pease v. Shirlock, 63 Vt. 622, 22 Atl. 661.

deed may be avoided in a court of law on the ground that it was made with intent to defraud the grantor's creditors.[7] An action by an administrator to recover money alleged to have been obtained under a lease assigned the defendant by the intestate in fraud of his creditors is cognizable at law.[8] The holder of the legal title to land may prosecute an action of trespass against one in possession, it not having been established that the latter has even an equitable right.[9] A chattel mortgage fraudulently contrived for the purpose of defeating creditors is void at law as well as in equity.[10] The remedies administered in a court of law are as a general rule based upon the theory that the conveyance alleged to be fraudulent is void or voidable as to creditors, and that a creditor may by legal proceedings seize the property conveyed or its equivalent in the hands of the fraudulent grantee, and show the fraudulent character of the conveyance, on the assertion of a claim to the property by the grantee, either in the proceedings in which the seizure is made, or in some other proceedings.[11] In many jurisdictions the word "void" as used in the statute of Elizabeth, and in the statutes of the different states of this country based upon the former statute, is held to mean that a conveyance fraudulent as to creditors is absolutely void as to them.[12] In other jurisdictions, however, such a conveyance is held not absolutely void, but only voidable at the election or instance of creditors proceeding in the mode prescribed by law and

7. Mulford v. Peterson, 35 N. J. L. 127.

8. Doe v. Clark, 42 Iowa, 123. Property which was transferred by gift by an intestate in his life time to defraud creditors cannot be reached in a court of law by his administrator. Anderson v. Belcher, 1 Hill (S. C.), 246, 26 Am. Dec. 174.

9. Cox v. Gruver, 40 N. J. Eq. 473, 3 Atl. 172.

10. Lobsenz v. Burton, 68 N. J. L. 566, 53 Atl. 546.

11. See §§ 3 to 22 following, and cases cited in following notes to this section.

12. Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Kimmel v. McRight, 2 Pa. St. 38; Patrick v. Smith, 2 Pa. Super. Ct. 113; Jacobi v. Schloss, 47 Tenn. 385.

taking active measures to subject the property involved to their debts,[13] and even then not as against a *bona fide* purchaser.[14] When a conveyance is said to be void as against creditors the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts.[15] An executed transfer of property passes the title, even if made with intent to hinder, delay, and defraud creditors, and the transferee has a good title until the same is impeached by a creditor in an action brought for that purpose.[16] Such a conveyance is not void *per se* even as between debtor and creditor. If the creditor condones the fraud and takes no steps to avoid the conveyance, it stands forever as a divestiture of the title of the debtor.[17] It has been held that where a debtor conveys property with intent to create a secret resulting trust or interest in the grantor and with the purpose of defrauding creditors, the transfer will give rise to a trust in favor of the creditors meant to be defrauded, which may be enforced through the medium of an action at common law.[18] In some states there are statutory provisions by virtue of which the creditor can have a *scire facias* against any person claiming under an alleged fraudulent conveyance.[19]

§ 3. **Remedies of creditors on ground of nullity of transfer generally.**—Under the statutes as to fraudulent conveyances a

13. In re Estes, 5 Fed. 60; Webb v. Brown, 3 Ohio St. 246; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

14. In re Estes, 5 Fed. 60.

15. Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 780. See Conditions precedent to suit in equity to set aside conveyance, chap. XV, § 31, *infra*.

16. Gibson v. National Park Bank, 98 N. Y. 97; Harding v. Elliott, 12 Misc. Rep. (N. Y.) 521, 33 N. Y. Supp. 1095; Rutherford v. Carr (Tex. Civ. App. 1905), 84 S. W. 659.

17. Parrott v. Crawford (Ind. T. 1904), 82 S. W. 688. See Assent or confirmation by creditors, chap. III, § 8, *supra;* Transactions between persons in confidential relations, chap. IX, *supra*.

18. Robinett v. Donnelly, 5 Phila. (Pa.) 361.

19. Morrison v. McNeill, 51 N. C. 450; Wintz v. Webb, 14 N. C. 27.

conveyance of property made by a debtor with intent to defraud his creditors to one participating in the fraudulent intent is either utterly null and void or voidable as to creditors, and they have the same right against the property embraced in the conveyance as though it had never been made, and may pursue legal process for satisfaction as though the title were unembarrassed by the fraudulent deed. As against the creditors the conveyance while the fraudulent grantee holds the title is a nullity.[20] A direct

20. *N. Y.*—Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen v. Carman, 79 N. Y. 153; Hall v. Frith, 51 Misc. Rep. 600, 101 N. Y. Supp. 31, a creditor, as against whom a sale is void for fraud, under Laws 1897, with p. 511, chap. 417, § 24, in relation to fraudulent conveyances of personal property, may levy on the goods sold without bringing any action to have the bill of sale set aside.

Ala.—See New v. Young (1906), 41 So. 523.

Ark.—Hershy v. Latham, 42 Ark. 365.

Conn.—Price v. Heubler, 63 Conn. 374, 28 Atl. 524; Owen v. Dixon, 17 Conn. 492.

D. C.—Hayes v. Johnson, 6 D. C. 174.

Ga.—Coleman, etc., Co. v. Rice, 115 Ga. 510, 42 S. E. 5, a transfer or assignment of his property by an insolvent debtor which is fraudulent and void under section 2695 of the Civil Code, may be attached by the person interested, either in direct or collateral proceedings, where it is sought to set up such transfer.

Ill.—Willard v. Masterson, 160 Ill. 443, 43 N. E. 771.

Iowa.—Brainard v. Van Kuren, 22 Iowa, 261.

Ky.—Scott v. Scott, 85 Ky. 385, 9 Ky. L. Rep. 363, 3 S. W. 598, 5 S. W. 423.

La.—Muse v. Yarborough, 11 La. 521.

Me.—Fletcher v. Tuttle, 97 Me. 491, 54 Atl. 1110.

Md.—Spindler v. Atkinson, 3 Md. 409, 56 Am. Dec. 755.

Mass.—Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950.

Mich.—Pierce v. Hill, 35 Mich. 194, 24 Am. Rep. 541; Trask v. Green, 9 Mich. 358.

Minn.—Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Campbell v. Jones, 25 Minn. 155; Arper v. Baze, 9 Minn. 108.

Miss.—Shaw v. Millsops, 50 Miss. 380; Thomason v. Neeley, 50 Miss. 310; Johnson v. Ingram (1891), 9 So. 822.

N. C.—Smitherman v. Allen, 59 N. C. 17.

Tex.—Lynn v. LeGierse, 48 Tex. 138.

A resulting trust in favor of his creditors is created, where one makes a conveyance of his land in order to hinder, delay, and defraud his creditors, and such property can be sold on an execution against him. Ryland v. Callison, 54 Mo. 513.

Where a post-nuptial marriage settlement is void as to creditors for want of registration, a

action to set aside the conveyance is not required. A judgment creditor may proceed to sale on execution against the land of the debtor fraudulently conveyed, without first bringing suit to set aside the conveyance.[21] A creditor of a fraudulent mortgagor, instead of proceeding in equity, may reach the property included in such mortgage by garnishing the mortgagee.[22] A levying officer may defend an action for possession, brought by a claimant under conveyance from the debtor, by showing fraud therein, without first instituting a direct proceeding to have the conveyance set aside.[23] The purchaser at an execution sale may impeach the conveyance in a suit at law to recover possession, or if he can gain possession defend the title thus acquired against the fraudulent grantee or those claiming under him.[24] A creditor of a fraudulent grantor, in obtaining satisfaction of his debt out of the property conveyed, must, however, pursue the course prescribed by law, and, if he seize the property and appropriate it without pursuing such course, the proceedings are wrongful and he thereby makes himself liable as a wrongdoer.[25] The property cannot be seized and disposed of by the creditors in any way other than by authority of law, and they can confer no greater power in this respect on an officer than they themselves possess.[26] Any departure from the course prescribed by law will disable the creditor from enforcing any supposed rights acquired under

creditor seeking satisfaction out of the property may proceed as if no such deed existed. Abrahams v. Cole, 5 Rich. Eq. (S. C.) 335.

Where a husband and wife owned land jointly, and the husband conveyed to the wife in fraud of creditors, and husband and wife then gave a mortgage to an innocent party for value, the husband's creditors might levy on the husband's equity to redeem an undivided half from the mortgage. Gilcreast v. Bartlett (N. H. 1906), 64 Atl. 767.

21. Smith v. Ried, 134 N. Y. 568, 31 N. E. 1082. See also other cases cited in last preceding note.

22. Brainard v. Van Kuran, 22 Iowa, 261.

23. Pierce v. Hill, 35 Mich. 194, 24 Am. Rep. 541.

24. Smith v. Reid, *supra;* Bergen v. Carman, *supra;* Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347.

25. Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; Owen v. Dixon, 17 Conn. 492; Williford v. Conner, 12 N. C. 379.

26. Andrews v. Marshall, 43 Me. 272.

the levy.[27] Where a debtor pays for property and procures the conveyance to be made to his wife, and where a conveyance is taken in the name of one person and the consideration thereof paid by another, the creditors of the person who pays the consideration must subject the property by bill in equity, and not by a levy of execution, the title never having been in their debtor.[28] So where property fraudulently transferred by a debtor has been converted into money by the transferee, or money so transferred has been converted into other property, which is claimed by the transferee to belong to him, before an attachment in an action by a creditor is issued, the avails are held by the fraudulent transferee as trustee for the creditors of the transferrer, and can be reached only by an action in the nature of a creditor's bill, and not by the attachment.[29] In Louisiana a judgment creditor may seize property in the possession of a third person under a simulated transfer from his debtor, without resorting to a revocatory action;[30] but he cannot disregard an actual transfer because fraudulent, and seize the property, but must sue to annul it. Only where the transfer is simulated, is purely fictitious, can he disregard it.[31] The distinction which is recognized between fraudulent and simulated contracts, limiting in the former case

27. Esten v. Jackson, 68 Me. 292.

28. Wright v. Douglass, 3 Barb. (N. Y.) 554; Webster v. Folsom, 58 Me. 230; Maynard v. Hoskins, 9 Mich. 485; Jimmerson v. Duncan, 48 N. C. 537. See Property purchased in name of third person, chap. II, § 5, *supra;* chap. IV, § 29, *supra.*

29. Lanning v. Streeter, 57 Barb. (N. Y.) 33.

30. Hoffman v. Ackerman, 110 La. 1070, 35 So. 293; Walsh v. Carrene, 36 La. Ann. 199; White v. Gaines, 29 La. Ann. 769; Gaidry v. Lyons, 29 La. Ann. 4; Brown v. Brown, 22 La. Ann. 475; Holmes v. Barbin, 15 La. Ann. 553; North v. Gordon, 15 La. Ann. 221; Scully v. Kearns, 14 La. Ann. 436; Simpson v. Mills, 12 La. Ann. 173; Weeks v. Flower, 9 La. 379.

31. Hicks Co. v. Thomas, 114 La. 219, 38 So. 148; Pochelu v. Catonnet, 40 La. Ann. 327, 4 So. 74; Johnson v. Kingsland, etc., Mfg. Co., 38 La. Ann. 248; Redwitz v. Waggaman, 33 La. Ann. 26; Theurer v. McGibbon, 28 La. Ann. 29; Hanna v. Pritchard, 6 La. Ann. 730. See Cochran v. Gilbert, 41 La. Ann. 735, 6 So. 731; Carter v. Farrell, 39 La. Ann. 102, 1 So. 279, as to distinction between fraudulent and simulated conveyances.

the creditor to a direct action in revocation, and in the other instance allowing the creditor to seize the property at once, obtains in regard to donations.[32]

§ 4. **Executions generally.**—If a conveyance is fraudulent and void as to creditors of the grantor, the rule in most jurisdictions is that a judgment creditor may levy an execution upon the property included in the fraudulent conveyance by his debtor, as if the conveyance did not exist, subject to the general provisions of the statutes with reference to executions.[33] This is

32. Johnson v. Alden, 15 La. Ann. 505.

33. *N. Y.*—Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen v. Carman, 79 N. Y. 146, *rev'g* 18 Hun, 355; Hall v. Frith, 51 Misc. Rep. 600, 101 N. Y. Supp. 31.

U. S.—Lynch v. Burt, 132 Fed. 117, 67 C. C. A. 305.

Ala.—Howard v. Corey, 126 Ala. 283, 28 So. 682; Gilliland v. Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Loeb v. Manasses, 78 Ala. 555; High v. Nelms, 14 Ala. 350, 48 Am. Dec. 103; Carville v. Stout, 10 Ala. 796.

Ariz.—Rountree v. Marshall (1899), 59 Pac. 109.

Conn.—Staples v. Bradley, 23 Conn. 167, 60 Am. Dec. 630.

Ga.—Gormerly v. Chapman, 51 Ga. 421.

Ill.—Gould v. Steinburg, 84 Ill. 170.

Ind.—Stevens v. Works, 81 Ind. 445; Frank v. Kessler, 30 Ind. 8.

Ky.—Worland v. Outten, 33 Ky. 477; Howard v. Duke, 19 Ky. L. Rep. 2008, 45 S. W. 69; Mt. Vernon Banking Co. v. Henderson Hominy Mills, 15 Ky. L. Rep. 333; Snapp v. Orr, 4 Ky. L. Rep. 355.

La.—Kimble v. Kimble, 1 Mart. N. S. 633.

Me.—Wyman v. Richardson, 62 Me. 293; Wyman v. Fox, 59 Me. 100; Brown v. Snell, 46 Me. 490.

Mass.—Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950; Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740, under the statute a creditor is given the right to levy upon property of his debtor fraudulently conveyed after the death of the debtor after having secured judgment against his personal representatives; Berry v. Gates, 175 Mass. 373, 56 N. E. 581; Sherman v. Davis, 137 Mass. 132.

Mich.—French v. Newberry, 124 Mich. 147, 82 N. W. 840.

Minn.—Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 59 L. R. A. 865.

Mo.—Welch v. Mann, 193 Mo. 304, 92 S. W. 98; Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308; Ryland v. Callison, 54 Mo. 513; Aspinall v. Jones, 17 Mo. 209; Kinealy v. Macklin, 2 Mo. App. 241.

N. C.—Burgin v. Burgin, 23 N. C. 160.

N. D.—Salemonson v. Thompson (1904), 101 N. W. 320.

true, not only of transfers directly from the debtor made with such fraudulent intent, but also of transfers whereby his title and ownership are passed to another for the like dishonest purpose through the agency of a judicial sale.[34] But the interest of the grantor in property transferred in fraud of creditors cannot be sold on execution subject to the interest of the grantee, as it is a mere intangible equity.[35] The fact that the debtor will gain an indirect advantage by having the property which he himself could not recover applied to the payment of his debt does not constitute such a favoring of a wrongdoer as will preclude his creditor from levying on the property, and applying it to the satisfaction of his debt, in defiance of the grantee's claim thereto.[36] A fraudulent conveyance does not take the title from the grantor as against creditors, and, at a subsequent sale under an execution against him, the legal title of the fraudulent grantor passes to the purchaser,[37] subject to prior liens, if any.[38] If possession is withheld from him, he may establish the character of the transfer and recover the property in ejectment or replevin.[39] An exe-

Ohio.—Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

Pa.—Drum v. Painter, 27 Pa. St. 148; Stewart v. Coder, 11 Pa. St. 90; Hayes v. Heidelberg, 9 Pa. St. 203; Irwin v. Hess, 12 Pa. Super. Ct. 163, levy after death of debtor.

R. I.—Tucker v. Denico, 26 R. I. 560, 59 Alt. 920.

S. C.—Paris v. Du Pre, 17 S. C. 282; Jones v. Crawford, 1 McMul. 373.

Tenn.—Russell v. Stinson, 3 Hayw. 1.

Tex.—Rutherford v. Carr (1905), 87 S. W. 815, *rev'g* 84 S. W. 659.

Va.—Wilson v. Buchanan, 7 Gratt. 334.

Wis.—Eastman v. Shettler, 13 Wis. 324.

See also cases cited in note 20, § 3 *supra.*

34. Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305. See also Collusive and fraudulent legal proceedings, chap. II, § 9, *supra.*

35. Stonebridge v. Perkins, 141 N. Y. 1, 35 N. E. 980, *aff'g* 2 Misc. Rep. 162, 21 N. Y. Supp. 628.

36. Feagan v. Carston, 19 Ga. 404.

37. Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Bull v. Ford, 66 Cal. 176, 4 Pac. 1175; Gould v. Steinberg, 84 Ill. 170; Spindler v. Atkinson, 3 Md. 409, 56 Am. Dec. 755; Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308; Rutherford v. Carr (Tex. 1905), 87 S. W. 815.

38. Niederhofer v. Bange, 12 Lanc. Bar (Pa.) 37.

39. Scoville v. Halladay, 16 Abb. N. C. (N. Y.) 43; Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92

cution creditor has a right to levy, in the first instance, on land or personal property which the debtor has fraudulently disposed of, before obtaining a return of *nulla bona* on the execution as to other assets of the debtor, the fraudulent disposition being treated as utterly void.[40] Where a judgment creditor seeks to reach property fraudulently conveyed by the debtor, the proper remedy is to first exhaust the legal process of the court, and then bring a suit in equity to avoid the conveyance.[41] A judgment creditor is not entitled to treat a prior fraudulent conveyance by the judgment debtor as void, and to sell the land conveyed under execution; and if he does, and bids it in at the sale he acquires no rights as against a subsequent judgment creditor who proceeded by creditors' suit to set the conveyance aside, and sold the land to satisfy his judgment, bidding it in himself.[42]

§ 5. **Where property has been disposed of by grantee or purchaser.**—Where the grantee in a fraudulent conveyance subsequently makes a similar conveyance of the property, reserving a trust for his own benefit, the creditor of the original grantor may extend his execution upon the property.[43] But where such grantee with that property purchases other property or sells it and converts it into money, such other property,[44] or the proceeds of the sale in the hands of the fraudulent grantee,[45] cannot be

N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865. See Ejectment, § 13, *infra*.

40. Gormerly v. Chapman, 51 Ga. 421; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Paris v. Du Pre, 17 S. C. 282.

41. Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 48 L. R. A. 334.

42. Preston-Parton Milling Co. v. Dexter Horton & Co., 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928, *citing* Smith v. Ried, 134 N. Y. 568, 31 N. E. 1082; Hager v. Shindler, 29 Cal. 48; Thompson v. Neeley, 50 Mass. 310; Stix v. Chaytor, 55 Ark. 116; Taylor v. Branscombe, 74 Iowa, 534.

43. Wyman v. Fox, 50 Me. 100.

44. Rutledge v. Evans, 11 Iowa, 287; Henderson v. Hoke, 21 N. C. 119. *Contra*.—Carville v. Stout, 10 Ala. 796.

45. Thurber v. Blanck, 50 N. Y. 80; Lanning v. Streeter, 57 Barb. (N. Y.) 33; Campbell v. Erie R. Co., 46 Barb. (N. Y.) 540; Post v. Bird, 28 Fla. 1, 9 So. 888; Richards v. Ewing, 30 Tenn. 327; Tubbs v. Williams, 26 Tenn. 367.

taken in execution as the property of the fraudulent grantor. Where a creditor extends his execution on real estate which his debtor has fraudulently conveyed and which the fraudulent grantee has in turn conveyed to an innocent purchaser, such creditor cannot reach the surplus remaining over and above the consideration paid by the innocent purchaser by a writ of entry.[46]

§ 6. **Where conveyance was made before rendition of judgment.**—A judgment creditor cannot be deprived of his legal right to enforce collection of his judgment against the property of his debtor by a fraudulent conveyance thereof prior to the entry of judgment, nor can he by such a conveyance be forced to pursue an equitable remedy for the collection of his debt instead of a legal one.[47] In some jurisdictions, however, it is held that, if the fraudulent conveyance was made before the rendition of the judgment to which it is sought to subject the property conveyed thereby, sale of the property under execution confers no rights, the conveyance not being void *per se* but only voidable and the judgment not being a lien upon the land which had been made the subject of such prior fraudulent conveyance.[48]

§ 7. **Attachment generally.**—Where property is conveyed for the purpose of hindering, delaying, or defrauding creditors, the property is subject in their favor to attachment at law, the same as if no such conveyance had been made.[49] The theory of the

46. Morse v. Aldrich, 130 Mass. 578.

47. Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082. See also other cases cited in note 33, § 4, *supra*.

48. Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Parrott v. Crawford (Ind. T. 1904), 82 S. W. 688; Preston-Parton Milling Co. v. Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928; Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. See also United States v. Eisenbeis, 88 Fed. 4; In re Estes, 3 Fed. 134, 6 Sawy. 459; Sawtelle v. Weymouth, 14 Wash. 21, 43 Pac. 1101. *Compare* Eastman v. Schettler, 13 Wis. 324.

49. *N. Y.*—Mechanics', etc., Bank v. Dakin, 51 N. Y. 519; Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How Pr. 75, 31 N. Y. 140.

U. S.—Thompson v. Baker, 141 U.

law is that a fraudulent deed passes nothing. For all purposes of attachment the subject of the conveyance is the property of the debtor, and by force of a subsequent levy of execution the title passes directly from the debtor to the execution creditor.[50] Under statutory provisions in some states, the creditor may pursue either the remedy by garnishment or by attachment.[51]

§ 8. **Property which may be seized.**—As a general rule the

S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889.

Ark.—Farris v. Gross (1905), 87 S. W. 815.

Colo.—Colorado Trading, etc., Co. v. Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

Conn.—Hawes v. Mooney, 39 Conn. 37; Enos v. Tuttle, 3 Conn. 27; Starr v. Tracy, 2 Root, 528; Pruden v. Leavenworth, 2 Root, 129.

Fla.—McClellan v. Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Ga.—Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Buckwalter v. Whipple, 115 Ga. 484, 41 S. E. 1010, reorganization of corporation for the purpose of defrauding creditors.

Ill.—McKinney v. Farmers' Nat. Bank, 104 Ill. 180; Getzler v. Saroni, 18 Ill. 511.

Ind.—Trent v. Edmonds, 32 Ind. App. 432, 70 N. E. 169.

Iowa.—Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797.

La.—North v. Gordon, 15 La. Ann. 221; Meeker v. Hays, 18 La. 19; Price v. Bradford, 4 La. 35; Peet v. Morgan, 6 Mart. N. S. 137.

Mass.—Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950.

Mich.—Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

Neb.—Westervelt v. Baker, 1 Neb. (Unoff.) 635, 95 N. W. 793.

N. J.—Curtis v. Steever, 36 N. J. L. 304; Williams v. Michenor, 11 N. J. Eq. 520.

R. I.—Tucker v. Denico, 26 R. I. 560, 59 Atl. 920.

Tenn.—Jacobi v. Schloss, 47 Tenn. 385; Adams v. Paletz (Ch. App. 1897), 43 S. W. 133; Hamburg v. Paletz (Ch. App. 1897), 42 S. W. 807.

Tex.—Horstman v. Little (Civ. App. 1905), 88 S. W. 286.

Utah.—McKibbin v. Brigham, 18 Utah, 78, 55 Pac. 66.

See also cases cited in note 20, § 3, *supra*.

In Montana, under statutory provisions, a sheriff cannot justify a seizure of the goods under a writ of attachment against the fraudulent debtor without first tendering to the transferee whatever amount is actually due to him. Wise v. Jefferis, 51 Fed. 641, 2 C. C. A. 432.

In New Mexico, under the attachment law, a general creditor may in that proceeding attack a conveyance of the debtor on the ground of fraud, either actual or constructive, without first reducing his demand to judgment. Meyer, etc., Co. v. Black, 4 N. M. 190, 16 Pac. 620.

50. Pratt v. Wheeler, 72 Mass. 520.

51. Jordan v. Crickett, 123 Iowa, 576, 99 N. W. 163.

right to attach property when fraudulently conveyed or transferred extends to any property which is liable to be taken and sold on execution, including real estate,[52] the interest of a debtor in real estate which is placed in the name of a third person in order to defraud creditors,[53] personal property,[54] and choses in action.[55] Promissory notes,[56] a life insurance policy,[57] a bond and mortgage,[58] and corporate stock,[59] when transferred with intent to defraud creditors, are subject to attachment. But in New York a levy of an attachment upon choses in action becomes a lien upon only such debts as at the time belong to the debtor by a legal title, and for the recovery of which he can maintain an action at law, and as a consequence, where, before levy of the attachment, he has parted with the legal title, even if with intent to defraud his creditors, there remains in him for their benefit only an equity which they cannot reach, and so the sheriff cannot assail the transfer as fraudulent.[60] And a stat-

52. *N. Y.*—Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140.

U. S.—Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889.

Fla.—McClellan v. Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Ill.—McKinney v. Farmers' Nat. Bank, 104 Ill. 180.

Ind.—Trent v. Edmonds, 32 Ind. App. 432, 70 N. E. 169.

Mich.—Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490.

53. *Minn.*—Arper v. Baze, 9 Minn. 108.

N. J.—Williams v. Michenor, 11 N. J. Eq. 520.

54. Bates v. Plonsky, 28 Hun (N. Y.), 112, 64 How. Pr. 232, 2 C.v. Proc. R. 389; Starr v. Tracy, 2 Root (Conn.), 528; Laflin v. Central Publishing House, 52 Ill. 432; Jacobi v. Schloss, 47 Tenn. 385. *Compare* Hamilton v. Cone, 99 Mass. 478, before St. 1844, chap. 170.

55. Wilson v. Beadle, 39 Tenn. 510.

56. Enos v. Tuttle, 3 Conn. 27; Wilson v. Beadle, 39 Tenn. 510. *Contra*, Anthony v. Wood, 96 N. Y. 180, 67 How. Pr. 424, *rev'g* 29 Hun, 239.

57. Coyne, Stone & Co. v. Jones, 51 Ill. App. 17.

58. Mechanics' & Traders' Bank v. Dakin, 51 N. Y. 519.

59. Curtis v. Steever, 36 N. J. L. 304. *Contra*, Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796.

60. Anthony v. Wood, 96 N. Y. 180, 67 How. Pr. 424, *rev'g* 29 Hun, 239; Castle v. Lewis, 78 N. Y. 137; Thurber v. Blanck, 50 N. Y. 80; Sterrett v. Buffalo Third Nat. Bank, 10 St. Rep. (N. Y.) 818.

ute providing that where the property sought to be attached is capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, the levy is to be made by taking the same into the sheriff's actual custody, does not change the rule. This provision changed merely the mode of making the levy but in no respect altered the inherent character of the property sought to be attached.[61] In some states, by statute, property in which the debtor has a mere equitable interest may be attached.[62] Where the property fraudulently transferred is converted into money or other property by the fraudulent grantee, which is claimed by the transferee as his own, the money or property held as the proceeds of that fraudulently transferred cannot be attached by creditors.[63] But moneys in the hands of a sheriff, raised by him in pursuance of a decree of foreclosure, are liable to seizure by virtue of a writ of attachment against the property of one to whom they belong, though the title thereto is fraudulently held by a third person.[64] In New York, under statutes authorizing actions to be brought by a sheriff in aid of attachment, a sheriff may levy an attachment upon property which has been fraudulently conveyed by the debtor and then sue to set aside the fraudulent transfer or conveyance.[65]

§ 9. **Garnishment generally.**—Where an assignment or conveyance of property is fraudulent towards creditors, garnishment is an appropriate remedy in many jurisdictions, and the fraudulent transferee or grantee may be held to the liability of a garnishee or trustee on account of the property so conveyed, or the

61. Anthony v. Wood, *supra.*

62. See Remedy where equitable interests in real estate are sought to be reached, § 18, *infra.*

63. Lanning v. Streeter, 57 Barb. (N. Y.) 33; Post v. Bird, 28 Fla. 1, 9 So. 888; Rutledge v. Evans, 11 Iowa, 287.

64. Conover v. Ruckman, 33 N. J. Eq. 303.

65. Harding v. Elliott, 91 Hun (N. Y.), 502, 36 N. Y. Supp. 648, 25 Civ. Proc. R. 294; Lanning v. Streeter, 57 Barb. (N. Y.) 33, but the identical property fraudulently conveyed must be attached, and where the property conveyed has been converted into money or other property before the attachment, the sheriff cannot sue and the remedy of the creditor is by creditors' bill.

proceeds thereof if he has disposed of the same.[66] Although a conveyance made to hinder, delay, or defraud creditors is not void between the parties thereto, and the garnishing creditor can, in general, avail himself only of the legal rights of the debtor against the garnishee, there is an exception where the garnishee holds the effects of the debtor under a fraudulent conveyance. In such case, although the conveyance is valid between the parties, the garnishee creditor may set up its invalidity.[67] A creditor may maintain a trustee process against the vendee of property which has been fraudulently purchased to keep it from being attached, and is not obliged to try the validity of the sale by attaching the property.[68] The effect of the garnishment is to confer upon the creditor a right to the payment of his claim by reason of the

66. *U. S.*—Perego v. Bonesteel, 19 Fed. Cas. No. 10,977, 5 Biss. 69; Treusch v. Ottenburg, 54 Fed. 867, 4 C. C. A. 629.

Ala.—Cottinghan v. Greeley Barnham Grocery Co., 129 Ala. 200, 30 So. 560.

Conn.—Hawes v. Mooney, 39 Conn. 37; Pruden v. Leavensworth, 2 Root, 129.

Ida.—Van Ness v. McLeod, 3 Ida. 439, 31 Pac. 798.

Ill.—Grassly v. Reinbach, 4 Ill. App. 341, assignment of mortgage.

Iowa.—Risser v. Rathburn, 71 Iowa, 113, 32 N. W. 198.

Mass.—Hastings v. Baldwin, 17 Mass. 552; Burlingame v. Bell, 16 Mass. 318.

Mich.—Gumberg v. Trensch, 103 Mich. 543, 61 N. W. 872; Crippen v. Fletcher, 56 Mich. 386, 23 N. W. 56.

Mo.—Dunlap v. Mitchell, 80 Mo. App. 293; Wells, etc., Grocery Co. v. Clark, 79 Mo. App. 401, the creditor, under the statute, may reach all moneys which the garnishee may have by reason of the sale of the property fraudulently conveyed.

N. H.—Procter v. Lane, 62 N. H. 457; Green v. Doughty, 6 N. H. 572.

Or.—Sabin v. Mitchell, 27 Or. 66, 39 Pac. 635, garnishment after ineffectual attempt to levy attachment.

Pa.—Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Tex.—Armstrong v. Elbert, 14 Tex. Civ. App. 141, 36 S. W. 139, the process creates a lien.

Wash.—Miller v. Plass, 11 Wash. 237, 39 Pac. 956.

Wis.—Sutton v. Chapman, 58 Wis. 556, 17 N. W. 416. See Mace v. Roberts, 97 Wis. 199; First Nat. Bank v. McDonald Mfg. Co., 67 Wis. 373; Healey v. Butler, 66 Wis. 9.

In some jurisdictions garnishment is regarded as an equitable proceeding. Mayor v. Hodge, etc., Co., 78 Ill. App. 556.

67. Cottingham v. Greeley Barnham Grocery Co., 129 Ala. 200; Peoples' Bank v. Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618; and other cases cited in preceding note.

68. Crane v. Stickles, 15 Vt. 252; and cases cited in note 1, *supra*.

indebtedness existing from the garnishee to the defendant or because of the garnishee having in his possession property of the defendant.[69] The rule that the garnishee's liability to the principal defendant is the measure of his liability to a creditor of the defendant has no application to a garnishee who holds property of the defendant under a fraudulent transfer from him.[70] Promissory notes, accounts due a mercantile firm, or other choses in action belonging to the defendant, but in the possession of the garnishee, cannot be reached and subjected by garnishment.[71] But notes taken from the grantee in payment of the price of the property are subject to the process of garnishment.[72] Although trust funds are not liable to garnishment,[73] yet where a conveyance being fraudulent as to creditors, is ineffectual to create a trust, the trustee is as to such creditors a mere stakeholder and liable as garnishee.[74] The transferee of property cannot be held as garnishee of property which has been returned to the custody of the principal debtor and is no longer in possession,[75] nor where he has paid to the vendor or seller the full value of the property.[76] The creditor cannot follow the property into the hands of a third

69. Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa, 618, 57 N. W. 444; and cases cited in note 66, *supra*.

70. *Ind.*—Jaseph v. Peoples' Sav. Bank, 132 Ind. 39, 31 N. E. 524, *overruling* Jaseph v. Kronenberger, 120 Ind. 495, 22 N. E. 301.

Iowa.—Citizens' State Bank v. Council Bluffs Fuel Co., *supra*, the creditor establishes a personal liability against the garnishee.

Pa.—Coble v. Nonemaker, 78 Pa. St. 501.

Wis.—Healey v. Butler, 66 Wis. 9, 27 N. W. 822.

Contra.—Chatroop v. Borgard, 40 Ill. App. 279.

71. Cottingham v. Greeley Barnham Grocery Co., *supra*. *Contra*, Kenosha Stove Co. v. Shedd, 82 Iowa, 540, 48 N. W. 933.

72. Enos v. Tuttle, 3 Conn. 27; Patton v. Gates, 67 Ill. 164.

73. Baltimore, etc., R. Co. v. Kensington Land Co., 175 Pa. St. 95, 34 Atl. 345.

74. Donk Cole, etc., Co. v. Kinealy, 81 Mo. App. 646. See also Miller v. Plass, 11 Wash. 327, 39 Pac. 956.

75. Gutterson v. Morse, 58 N. H. 529, although the debtor claims to be acting as agent of the garnishee; Bailey v. Ross, 20 N. H. 302.

76. Jaseph v. Kronenberger, 120 Ind. 495, 22 N. E. 301; Thomas v. Goodwin, 12 Mass. 140.

Otherwise, where the transferee pays the price after the service of the writ upon him. Potter v. Stevens, 40 Mo. 591.

person who has in good faith purchased the property from the fraudulent grantee or by garnishment or attachment reach money fraudulently transferred by a debtor in the hands of a bank, with which it has been deposited by the fraudulent grantee in his own name, as no debt is due from the bank to the debtor but to the depositor only.[77]

§ 10. **Where lands are subject of conveyance.**—Lands held by virtue of conveyance in fraud of creditors are not attachable by the trustee process or by garnishment,[78] except in jurisdictions where they are made so by express statutory provisions.[79] Unless he is indebted to the principal debtor for the price stipulated, a purchaser of real estate under a conveyance fraudulent and void as to creditors of the grantor cannot be held as trustee on account of the land held by him under such conveyance.[80] If the land has been sold by the fraudulent grantee the proceeds in his hands may be reached by garnishment. There is no difference in principle with respect to the right to garnish such proceeds, between the proceeds of the sale of goods and of the sale of lands.[81]

77. Greenleaf v. Mumford, 50 Barb. (N. Y.), 543, *aff'g* 30 How. Pr. 30; Himstedt v. German Bank, 46 Ark. 537, the remedy is by suit in equity.

78. *Mass.*—Chapman v. Williams, 79 Mass. 416; Sanford v. Bliss, 29 Mass. 116; Tucker v. Clisby, 29 Mass. 22; Guild v. Holbrook, 28 Mass. 101; Ripley v. Severance, 23 Mass. 474, 17 Am. Dec. 397; How v. Field, 5 Mass. 390.

Mo.—Green County Bank v. Epperson, 74 Mo. App. 10, a conveyance cannot be challenged as in fraud of creditors by a garnishment proceeding.

N. H.—Wright v. Bosworth, 7 N. H. 560, real estate is neither goods, money, chattels, rights, nor credits within the meaning of the statute regulating foreign attachments. *Compare* Heywood v. Brooks, 47 N. H. 231; Pittsfield Bank v. Clough, 43 N. H. 178.

Vt.—National Union Bank v. Brainerd, 65 Vt. 291, 26 Atl. 723; Hunter v. Case, 20 Vt. 195, the statute evidently applies to personal estate.

79. Webber v. Hayes, 117 Mich. 256, 75 N. W. 622. See Perego v. Bonesteel, 19 Fed. Cas. No. 10,977, 5 Biss. 69, under Wisconsin statute.

80. Stevens v. Kirk, 37 Vt. 204.

81. Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533.

§ 11. **Debtor's fraudulent transfer of claim due from garnishee.**—A fraudulent conveyance by a debtor to a third person of goods in the garnishee's hands which are sought to be reached by the process of garnishment,[82] or of a debt owing by the garnishee to the principal debtor,[83] will not protect him against *bona fide* creditors and defeat such process. That a trustee has no notice of the fraudulent character of an assignment of a claim owed by him does not justify him in paying the debt to the assignee after the service of trustee process upon him, the service being sufficient notice that the ownership of the fund is in question.[84] It is competent for the creditor to investigate and have settled the issue as to the fraudulent character of a transfer of the claim or property which he seeks to reach in the garnishment proceeding.[85] Not to allow him to do so would enable the debtor in many cases to defeat his creditors.[86]

§ 12. **Statutory provisions.**—The statutes in some of the states provide that one who is in possession of property, real or personal, which he holds by virtue of a conveyance or transfer which is fraudulent and void as to creditors of the grantor or transferrer, may be adjudged liable as a garnishee on account of such property in proceedings instituted by such creditors.[87] In

82. Franklin v. Larabee, 1 Root (Conn.), 488; Allen v. Erie City Bank, 57 Pa. St. 129; Sinnickson v. Painter, 32 Pa. St. 384.

83. North Star Boot, etc., Co. v. Ladd, 32 Minn. 381, 20 N. W. 334, a creditor garnishing in the hands of an insurer insurance money which is claimed in the garnishment proceedings by a mortgagee of the property insured, may attack the mortgage for fraud as to creditors.

Where a distributive share in the hands of the executor has been levied on by a foreign attachment, as provided by Act of July 27, 1842, it may be shown that a previous assignment of such share is void as against creditors. Sinnickson v. Painter, 32 Pa. St. 384.

84. Dow v. Taylor, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

85. Peoples' Bank v. Smith, 75 Miss. 753, 23 So. 428, 65 Am. St. Rep. 618; Van Winkle v. McKee, 7 Mo. 435.

86. Van Ness v. McLeod, 3 Ida. 439, 31 Pac. 798.

87. *U. S.*—Citizens' Bank v. Farwell, 63 Fed. 117, 11 C. C. A. 108, under Kansas Gen. St., § 4296, the pendency of another action does not affect the rights of a creditor under this statute.

some states both the remedy by garnishment and by attachment are given.[88]

§ 13. **Ejectment.**—A conveyance of land by a debtor may be attacked as fraudulent, by a creditor or other person who has purchased the same at a creditor's execution or other judicial sale, in an action of ejectment brought by or against the grantee in the conveyance.[89]

§ 14. **Right of creditor or levying officer to attack conveyance in action by grantee generally.**—None but creditors or purchasers can take advantage of a fraudulent conveyance; but a sheriff, in seizing the property of a debtor in the hands of one to whom it has been fraudulently conveyed, is the lawfully authorized agent of the creditors.[90] Where a creditor is allowed to

Me.—Page v. Smith, 25 Me. 256.

Mass.—Harmon v. Osgood, 151 Mass. 501, 24 N. E. 401.

Mich.—Gumberg v. Treusch, 103 Mich. 543, 61 N. W. 872; Crippen v. Fletcher, 56 Mich. 386, 23 N. W. 56, property held under a fraudulent chattel mortgage may be reached in the hands of the mortgagee by creditors of the mortgagor; Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946.

Minn.—Davis v. Mendenhall, 19 Minn. 149.

Pa.—French v. Breidelman, 2 Grant (Pa.) 319.

Wis.—La Crosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153, drafts and notes which are the proceeds of a fraudulent conveyance made by plaintiffs' debtor are subject to garnishment in the hands of those holding them for the fraudulent vendee; First Nat. Bank v. McDonald Mfg. Co., 67 Wis. 373, 28 N. W. 225; Sutton v. Chapman, 58 Wis. 556, 17 N. W. 416.

88. Hastings v. Baldwin, 17 Mass. 552; Dahlman v. Greenwood, 99 Wis. 163, 74 N. W. 215.

89. *Fla.*—McClellan v. Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Mich.—Cleland v. Taylor, 3 Mich. 201.

Minn.—Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683.

Mo.—Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478.

N. J.—Mulford v. Peterson, 35 N. J. L. 127.

Pa.—Girard Nat. Bank v. Maguire, 15 Phila. 313.

Wis.—Eastman v. Schettler, 13 Wis. 324.

As to whether ejectment is the proper remedy after the death of the grantor. Pease v. Shirlock. 63 Vt. 622, 22 Atl. 661.

90. Swanzey v. Hunt, 2 Nott. M. (S. C.) 211.

seize property fraudulently conveyed and the sheriff or other officer has taken it under process duly issued, they have a right to show, in defense to an action for ejectment, replevin, trespass, trover, or other proceedings, brought by the grantee against the creditor, or against the officer making the levy, to compel the restoration of the property or recover damages for the seizure, that the title of the plaintiff, claiming under a conveyance or transfer from the grantor, is fraudulent as against the creditors of the grantor.[91] A purchaser from the execution creditor has the same right to show the fraudulent character of the conveyance in an action brought against him by the fraudulent grantee.[92] Evidence that plaintiff's title was acquired in fraud of creditors is admissible under a denial of his title in a suit against a sheriff for property seized by him under a writ,[93] and the sheriff is not bound to prove insolvency of the grantor in a conveyance absolutely void under the statute.[94] If a judgment creditor has been made a party to the action by the grantee he may attack the conveyance, if affirmative relief is sought against him, although he

91. *N. Y.*—Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324; Hall v. Stryker, 27 N. Y. 596; Thayer v. Willet, 18 N. Y. Super. Ct. 344, 9 Abb. Pr. 325.

In replevin for property attached by a sheriff as belonging to a third person, the sheriff cannot justify by proof that it was transferred by such third person to the plaintiff in the replevin under a fraudulent contract of sale. Deutsch v. Reilly, 57 How. Prac. 75.

Cal.—Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162.

Mass.—Gates v. Gates, 15 Mass. 310. *Compare* Bond v. Endicott, 149 Mass. 282, 21 N. E. 361.

Mich.—French v. Newberg, 124 Mich. 147, 82 N. W. 840; Pierce v. Hill, 35 Mich. 194, 24 Am. Rep. 541; Haynes v. Ledyard, 35 Mich. 319.

N. H.—Walker v. Lovell, 28 N. H. 138, 61 Am. Dec. 605; Russell v. Dyer, 3 N. H. 186.

Ohio.—Dougherty v. Schlotman, 1 Cinc. Super. Ct. 292.

S. C.—Paris v. DuPre, 17 S. C. 282.

S. D.—Griswold v. Sundback, 6 S. D. 269, 60 N. W. 1068, but the officer loses this right where he relinquishes his lien and becomes a trespasser from the beginning, by unlawfully turning the property over to an agent of the plaintiff in the attachment.

92. Russell v. Fabyan, 34 N. H. 218.

93. Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

94. Calkins v. Howard (Cal. App. 1905), 83 Pac. 280.

has not attempted to seize the property under his judgment.[95] But where the legal title is in a complainant seeking to redeem, mere creditors as such, without the intervention of legal process to divest such title, have no right to interfere, on the ground that the conveyance to him was fraudulent as against creditors.[96]

§ 15. **Contest of claims to property levied on.**—A sheriff and his indemnitors being sued for trespass in levying upon personal property, under an execution against one from whom plaintiff acquired title, may not attack the transfer for fraud without proving a judgment against the transferrer, and that the execution was issued pursuant thereto so as to acquire the standing of the creditors of the transferrer.[97] An officer sued in trover for property attached by him as the property of a third person and sold under a void judgment cannot attack a plaintiff's title for fraud, until he shows a valid debt for which the attachment was made.[98] A judgment must be shown if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that he acted for the creditor that he can question the title of the transferee.[99] Although the officer levying a writ of attachment and made defendant in an action by the transferee of the property to recover back the property seized need not show recovery of a judgment against the transferrer,[1] he must show that a debt was owing to the attaching creditor by the transferrer,[2] and that the attachment was regularly issued.[3]

§ 16. **Right of creditor on intervention of grantee.**—Where property which has been fraudulently conveyed by a debtor has been levied upon by a creditor by execution or attachment as that

95. Kelly v. Lenihan, 56 Ind. 448; Evans v. Ely, 55 Wis. 194, 12 N. W. 372.

96. Stone v. Bartlett, 46 Me. 438.

97. McKinlay v. Bowe, 97 N. Y. 93; Keys v. Grannis, 3 Nev. 548.

98. Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. 1012.

99. Sandford Mfg. Co. v. Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

1. Botcher v. Berry, 6 Mont. 448, 13 Pac. 45.

2. Maley v. Barrett, 34 Tenn. 501.

3. Keys v. Grannis, 3 Nev. 548.

of the debtor, and the grantee or transferee interposes a claim thereto under his conveyance from the debtor, the creditor may resist such claim and attack the transfer as being fraudulent and void as to creditors.[4] An attaching creditor may show the fraudulent character of a conveyance of the property to one asserting a claim as a third person in the attachment proceedings.[5] In some instances the statute provides that where an execution is so levied, and the plaintiff suggests that defendant has conveyed his property to defraud creditors or to avoid payment of the execution, an issue shall be made up and tried by a jury, who shall determine whether the conveyance is fraudulent or without consideration,[6] and the burden rests upon the grantee to show that the conveyance was made in good faith.[7]

§ 17. **Intervention by creditors.**—Creditors whose rights are effected may intervene in suits affecting the property or interests of their debtors and prosecute or defend the claim, where there is reason to apprehend that the debtor is not sufficiently active in defending his rights or is about to abandon his rights in fraud of his creditors.[8] A mere general creditor cannot intervene to stop the execution of a judgment against his debtor on the ground that it is fraudulent and void as to him, since, if he should succeed in setting aside the execution, it would not redound to his benefit, but the debtor, into whose possession the goods levied upon would be returned, might sell or dispose of them at pleasure.[9] A suggestion against a confession of judgment as fraudulent can only be

4. *Ala.*—Loeb v. Manasses, 78 Ala. 555.

Ark.—Blair v. Alston, 26 Ark. 41.

Cal.—Mamlock v. White, 20 Cal. 598.

Ga.—Cole v. Byrd, 83 Ga. 207, 9 S. E. 613.

Md.—Cecil Bank v. Snively, 23 Md. 253.

Minn.—North Star Boot, etc., Co. v. Ladd, 32 Minn. 381, 20 N. W. 334.

Neb.—Greenwood v. Ingersoll, 61 Neb. 785, 86 N. W. 476.

5. Bernheim v. Dibrell (Miss. 1892), 11 So. 795.

6. Smith v. Newlon, 62 Miss. 230.

7. North Star Boot, etc., Co. v. Ladd, 32 Minn. 381.

8. Succession of Baum, 11 Rob. (La.) 314; Clapp v. Eli, 27 N. J. L. 555.

9. Ludlow v. Dutton, 1 Phila. (Pa.) 226.

filed by leave of court, on cause shown creating a reasonable ground to believe that the confession is fraudulent, and upon such conditions as the court imposes.[10]

§ 18. **Remedy where equitable interests in real estate are sought to be reached.**—Equitable interests of a debtor in property the legal title of which he does not possess cannot be reached by execution or attachment,[11] in the absence of a statute allowing such remedy.[12] Where a debtor, therefore, pays the purchase money of lands, and takes the conveyance, or causes the lands to be conveyed, to his wife, child, or other third person, even though the transaction was fraudulent and intended to protect the land from the claims of creditors, his interest in the property so purchased and conveyed being merely an equitable and not a legal interest, is not, in the absence of a statute, the subject of a levy and sale under an execution or attachment by his creditors, but can be reached only by a bill in equity, or an action in the nature of a bill in equity, to subject the land to the debt.[13] By statute, however, in certain states, the interest of a debtor in lands which

10. Hatch v. Clark, Rice (S. C.), 268; Robinson v. Stuart, 1 Rich. (S. C.) 3.

11. Anthony v. Wood, 96 N. Y. 180, 67 How Pr. 424, *rev'g* 29 Hun, 239; Hartshorn v. Eames, 31 Me. 93. Where one has an estate in equity which enables him to call for the legal title without further condition save the proof of the facts which establish his estate, this trust estate is made the subject of sale under execution; but where one has only a right in equity to convert the holder of the legal estate into a trustee and call for a conveyance his right is not subject to a sale under execution. Hinsdale v. Thorton, 75 N. C. 181.

12. Peterson v. Farmer, 121 Mass. 476; Livermore v. Boutelle, 77 Mass. 217, 71 Am. Dec. 708; Shute v. Harder, 9 Tenn. 3, 24 Am. Dec. 427.

13. *N. Y.*—Garfield v. Hatmaker, 15 N. Y. 475, *overruling* the doctrine of Wait v. Day, 4 Den. 439, and Arnot v. Beadle, Lalor, 181, and *approving* that of Brewster v. Power, 10 Paige, 562. See also Underwood v. Sutcliffe, 77 N. Y. 58; Everett v. Everett, 48 N. Y. 218; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; McCartney v. Bostwick, 32 N. Y. 53; Wood v. Robinson, 22 N. Y. 564; Wright v. Douglass, 3 Barb. 554.

Ala.—Doe v. McKinney, 5 Ala. 719.

Fla.—Robinson v. Springfield Co., 21 Fla. 203.

Me.—Fletcher v. Tuttle, 97 Me. 491, 54 Atl. 1110; Webster v. Folsom, 58 N. E. 230; Griffin v. Nitcher, 57 Me. 270.

Mass.—Hamilton v. Cone, 99

he has purchased and caused to be conveyed to a third person with the intent to defraud his creditors is liable to attachment or execution.[14] In some states, although a levy of execution or attachment will not divest the legal estate in the land, a court of equity will aid a creditor, who has exhausted all legal remedies and extended his execution on the land, in perfecting his title thereto.[15] Where a debtor purchases personal property in the name of a third person, even though a bill of sale be made to the latter, his creditors may levy execution thereon.[16]

Mass. 478; Howe v. Bishop, 44 Mass. 26.

Mich.—Maynard v. Hoskins, 9 Mich. 485; Trask v. Green, 9 Mich. 358.

Miss.—Furguson v. Bobo, 54 Miss. 121; Carlisle v. Tindall, 49 Miss. 229.

N. J.—Haggerty v. Nixon, 26 N. J. Eq. 42.

N. C.—Everett v. Raby, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; Gentry v. Harper, 55 N. C. 177; Jimmerson v. Duncan, 48 N. C. 537; Gowing v. Rich, 23 N. C. 553. *Compare* Dobson v. Erwin, 18 N. C. 569.

Or.—Silver v. Lee, 38 Or. 508, 63 Pac. 882, a purchaser at execution sale acquires no title.

S. C.—Bauskett v. Holsondack, 2 Rich. 624.

Tenn.—Smith v. Hinson, 51 Tenn. 250.

Vt.—Buck v. Gilson, 37 Vt. 653; Dewey v. Long, 25 Vt. 564.

Wis.—Allen v. McRae, 91 Wis. 226, 64 N. W. 889; Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922; Gettelman v. Gitz, 78 Wis. 439, 47 N. W. 660; Hyde v. Chapman, 33 Wis. 391. See also Property purchased in name of third person, chap. II, § 5, *supra;* chap. IV, § 29, *supra.*

14. *Ark.*—Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707; Hershy v. Latham, 42 Ark. 305; Harman v. May, 40 Ark. 146. *Compare* Doster v. Manistee Nat. Bank. 67 Ark. 325.

Ind.—Eve v. Louis, 91 Ind. 457; Hanna v. Aebker, 84 Ind. 411; Hubble v. Osborn, 31 Ind. 249; Tevis v. Doe, 3 Ind. 129.

Mass.—Peterson v. Farnum, 121 Mass. 476; Clark v. Chamberlain, 95 Mass. 257.

Mo.—Dunnica v. Coy, 28 Mo. 525, 75 Am. Dec. 133, 24 Mo. 167, 69 Am. Dec. 420; Herrington v. Herrington, 27 Mo. 560; Eddy v. Baldwin, 23 Mo. 588; Rankin v. Harper, 23 Mo. 579.

Pa.—Appeal of Winch, 61 Pa. S. 424.

Tenn.—Thomas v. Walker, 25 Tenn. 93; Smitheal v. Gray, 20 Tenn. 491, 34 Am. Dec. 664; Shute v. Harder, 9 Tenn. 3; Russell v. Stinson, 6 Tenn. 1.

Crops raised by the debtor upon lands so conveyed are subject to execution for his debts. Turner-Looker Co. v. Garvey, 19 Ky. L. Rep. 1205, 43 S. W. 202.

15. Botsford v. Beers, 11 Conn. 369; Griffin v. Nitcher, 57 Me. 270; Low v. Marco, 53 Me. 45; Dockray v. Mason, 48 Me. 178; Williams v. Michenor, 11 N. J. Eq. 520. *Compare* Mason v. Eichels, 8 Ohio Dec. 436, 8 Cinc. L. Bul. 7.

16. Golding v. Brackett, 34 Me.

§ 19. **Right of creditor to appropriate property without legal process.**—The process by which a creditor may lawfully take property fraudulently conveyed to another out of the possession of the grantee is either an attachment or an execution. He cannot without process interfere and, taking the remedy into his own hands, seize upon such property and hold it as security for his debt.[17] A conveyance objectionable merely because it is fraudulent as to creditors is good until avoided by them.[18] A conveyance made to defraud creditors, though void as to a creditor who is pursuing legal process to reach the property, is valid as against inactive creditors when collaterally drawn in question.[19] The debtor cannot by a subsequent conveyance to the creditor enable the latter without process to take the property from the grantee in the fraudulent conveyance.[20] He cannot substitute his own conveyance for the process of the law and thus indirectly, by his own act, defeat the legal title of the grantee which he could have assailed directly,[21] and a simple contract creditor cannot acquire any ownership or right of possession of the property conveyed by an attempted purchase after the conveyance.[22] Inadequacy of the price paid for property purchased in good faith from one in failing circumstances will not authorize a judgment creditor of the vendor to subject the property to the satisfaction of his judgment by tendering, after a levy on the property, the price the claimant paid for the property.[23] It has been held, however,

27; French v. Newberry, 124 Mich. 147, 82 N. W. 840. See also Property purchased in name of third person, chap. II, § 5, *supra;* chap. IV, § 29 *supra*. See Parris v. Thompson, 46 N. C. 57, personal property received in exchange for real property purchased in the name of another cannot be levied on by creditors.

17. Price v. Heubler, 63 Conn. 310, 28 Atl. 524; Owen v. Dixon, 17 Conn. 492; Tolbert v. Horton, 31 Minn. 518, 15 N. W. 647; Hilzheim v. Drane, 18 Miss. 556.

18. Hill v. Pine River Bank, 45 N. H. 300.

19. Boyd v. Turpin, 94 N. C. 137, 55 Am. Rep. 597.

20. Owen v. Dixon, 17 Conn. 492.

21. Tolbert v. Horton, 31 Minn. 518.

22. Jones v. Rahilly, 16 Minn. 320.

23. Sharp v. Hicks, 94 Ga. 624, 21 S. E. 208.

that a creditor is not restricted to the single mode of proceeding on legal process, but may treat the sale as wholly void, where it was made for the purpose of defrauding creditors, and obtain satisfaction of his debt by a subsequent transfer of the property from the debtor in consideration of his claim.[24] A creditor may with the consent of the parties to the conveyance appropriate the subject of it to the payment of his claim without resort to legal process,[25] as by taking a mortgage to secure his claim from the purchaser of the property conveyed.[26]

§ 20. **Collateral attack on fraudulent judgment or transfer.**—A judgment duly confessed or entered in person or by warrant of attorney, though conclusive on the judgment debtor, is open to attack by his other creditors, who may show that it was without consideration or fraudulent as to them,[27] even in a collateral proceeding.[28] But where the grantee has been adjudged to be the owner of the property conveyed in an action at law, a judgment creditor of the grantor cannot subsequently attack the property by garnishment on the ground that the transfer was fraudulent.[29] In garnishment proceedings in aid of execution, the record of successful attack made upon a judgment confessed by the debtor is admissible in favor of the plaintiff, who was not party thereto.[30] The method of attacking a prior judgment on the ground that it was suffered by collusion and in fraud of creditors

24. Frost v. Goddard, 25 Me. 414.

25. Johnson v. Trust Co. of America, 104 Fed. 174, 43 C. C. A. 458.

26. Brown v. Webb, 20 Ohio, 389.

27. *Md.*—Citizens' Fire, etc., Co. v. Wallis, 23 Md. 173; Thomas v. Mason, 8 Gill. 1.

N. J.—Wandling v. Thompson, 41 N. J. L. 309.

N. C.—Morrison v. McNeill, 51 N. C. 450.

Pa.—In re Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326; Building Assoc. v. O'Connor, 3 Phila. (Pa.) 453.

Wis.—Nassauer v. Techner, 65 Wis. 388, 27 N. W. 40.

28. Atlas Nat. Bank v. More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274, *aff'g* 40 Ill. App. 336; and cases cited in preceding note.

29. Schneider v. Lee (Or. 1888), 17 Pac. 269.

30. Bloodgood v. Meisner, 84 Wis. 452, 54 N. W. 722.

is governed by the statutory provisions,[31] such a judgment in some instances being declared by statute void as against creditors.[32]

§ 21. **Remedy by action for damages.**—The rule is maintained by the weight of authority that, in the absence of special legislation, a simple contract or general creditor, or a creditor without a lien on the property of his debtor, cannot bring an action for damages against his debtor, or against those combining or colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors, or based upon participation in the fraudulent transfer of the property of the one to the others, and their purpose to aid in preventing the debtor's property from being appropriated by due process of law to the payment of his debts.[33] But where the creditor has acquired a specific lien upon the property of the debtor which is the subject of a fraudulent conveyance, and such existing lien has been impaired or divested by the act of the debtor or his grantees the rule is otherwise.[34] The reasons

31. Stevens v. Newman, 68 Ill. App. 549; Page v. Williamsport Suspender Co., 191 Pa. St. 511, 43 Atl. 345.

32. Bloodgood v. Meisner, *supra*.

33. Braem v. Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597; Hurwitz v. Hurwitz, 10 Misc. Rep. 353, 31 N. Y. Supp. 25; Murtha v. Curley, 47 N. Y. Super. Ct. 393, *rev'd* on other grounds in 90 N. Y. 372. *Compare* Yates v. Joyce, 11 Johns. 136, action for fraudulently removing property from premises of the debtor.

U. S.—Adler v. Fenton, 20 How. 407, 16 L. Ed. 696.

Conn.—Austin v. Barrows, 41 Conn. 287; Smith v. Blake, 1 Day, 258.

Ind.—Greene v. Kimble, 6 Blackf. 552; Smith v. Wright, 6 Blackf. 550.

Me.—Moody v. Burton, 27 Me. 427, 46 Am. Dec. 612.

Mass.—Willington v. Small, 57 Mass. 145, 50 Am. Dec. 719; Lamb v. Stone, 28 Mass. 527. *Compare* Bradley v. Fuller, 118 Mass. 239, right to sue for false representations, inducing a creditor to refrain from suing out an attachment for execution.

R. I.—Klous v. Hennessey, 13 R. I. 332.

Tex.—LeGierse v. Kellum, 66 Tex. 242, 18 So. 509; Blum v. Goldman, 66 Tex. 621, 1 S. W. 899; Lemp Brewing Co. v. LaRose, 20 Tex. Civ. App. 575, 50 S. W. 460.

34. Quimby v. Strauss, 90 N. Y. 664; Yates v. Joyce, 11 Johns. (N. Y.) 136; Powers v. Wheeler, 63 Ill. 29; Ley v. Madill, 1 U. C. Q. B. 546; Smith v. Tonstall, Carth. 3.

for the rule first stated are that before the acquisition of a lien on the property by a creditor he has no legal interest in the property which the judgment debtor injures, even by a fraudulent transfer of the property; that no legal damage could accrue to the creditor, the damages resulting to a general creditor from the wrongful acts being too uncertain, contingent, and remote for legal estimation; and that if one creditor could maintain such an action all other creditors would be entitled to sue and the effect upon the grantees would be to subject them to damages in no degree regulated by the amount of the property received.[35] But the contrary rule has been held in Pennsylvania on the ground that as the property sought to be reached was choses in action and this was not the subject of execution the creditor would not have been in any different position with an execution, and that because of the defect of equity jurisdictions a remedy by common law action was indispensable in that jurisdiction.[36] And in Massachusetts the court distinguishes those cases in which a conspiracy or an illegal combination is charged.[37] In Maine the statute now allows creditors to maintain an action for damages against the fraudulent grantee.[38]

§ 22. **Action for penalty.**—Under the statute in some of the states,[39] as well as under the statute of Elizabeth,[40] a right of action is given to the creditor to recover a penalty from the grantee for knowingly aiding the debtor in the fraudulent conveyance or transfer of his property,[41] and such an action may be joined with an action to set aside the conveyance or transfer as fraudulent as to

35. See cases cited in note 33, *supra.*

36. Penrod v. Morrison, 2 Pen. & W. (Pa.) 126, 8 Serg. & R. (Pa.) 522; Mott v. Danforth, 6 Watts (Pa.), 304, 31 Am. Dec. 468.

37. Lamb v. Stone, 28 Mass. 527.

38. Spaulding v. Fisher, 57 Me. 411.

39. Smith v. Blake, 1 Day (Conn.), 258; Fogg v. Lawry, 71 Me. 215; Spaulding v. Fisher, 57 Me. 411.

40. Millar v. McTaggart, 20 Ont. 617.

41. See also Penalties and actions therefor, chap. XX, § 1, *infra.*

creditors.[42] The right to sue for a penalty may be waived by the creditor.[43]

§ 23. **Remedy by suit in equity generally.**—Relief against fraudulent transfers and concealment of his property by a debtor, asked for in a bill filed by a creditor, is a substantial ground of equity jurisdiction.[44] The jurisdiction of a court of equity in such a case does not depend upon statute,[45] and statutes which confer such jurisdiction are merely declaratory of the common law.[46] Equity will take jurisdiction where a conspiracy of creditors to defraud the debtor and other creditors,[47] or a conspiracy between the judgment debtor and a fraudulent grantee or mortgagee,[48] is charged and a discovery may be necessary, or where a trust estate is involved.[49] An action in the nature of a creditors' bill lies to reach property in the hands of one who purchased it at an execution sale, and holds it for the benefit of the debtor to defraud the creditors of the debtor.[50] Where a debtor was in-

42. Millar v. McTaggart, 20 Ont. 617.

43. Fogg v. Lawry, 71 Me. 215.

44. *N. Y.*—Hammond v. Hudson River Iron, etc., Co., 20 Barb. 378.

U. S.—Currie v. Jordan, 6 Fed. Cas. No. 3,491, 4 Biss. 513; Odenheimer v. Hanson, 18 Fed. Cas. No. 10,429, 4 McLean, 437.

Ala.—Ladd v. Smith, 107 Ala. 506, 18 So. 195.

Cal.—Swift v. Arents, 4 Cal. 390.

Me.—Traip v. Gould, 15 Me. 82; Augusta Sav. Bank v. Crossman (1886), 7 Atl. 396.

Md.—Allein v. Sharp, 7 Gill & J. 96.

Mich.—Trask v. Greene, 9 Mich. 358.

Mo.—George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203.

N. H.—Dodge v. Griswold, 8 N. H. 425.

N. J.—Cubberly v. Yager (Ch. 1886), 2 Atl. 814.

Ohio.—Mason v. Eichels, 8 Ohio Dec. 436, 8 Wkly. L. Bul. 7.

S. C.—Bomar v. Means, 53 S. C. 232, 31 S. E. 234.

Tex.—Morris v. House, 32 Tex. 492.

Wis.—Kickbusch v. Corwith, 108 Wis. 634, 85 N. W. 148.

Can.—Sawyer v. Linton, 23 Grant Ch. (U. C.) 43.

45. McCaffrey v. Hickey, 66 Barb. (N. Y.) 489.

46. Alden v. Gibson, 63 N. H. 12.

47. Gray v. Simon, 1 Phila. (Pa.) 551.

48. Murtha v. Curley, 47 N. Y. Super. Ct. 393, *rev'd* on other grounds 90 N. Y. 372; Peoples Nat. Bank v. Loeffert, 184 Pa. St. 164, 38 Atl. 996.

49. Lathrop v. McBurney, 71 Ga. 815.

50. Decker v. Decker, 108 N. Y. 128, 15 N. E. 307.

duced by the fraud of a buyer to sell his business to the buyer, the buyer became a constructive trustee of the property bought for the debtor, which constituted an equitable asset of the debtor subject to be reached by a judgment creditor in a suit in equity.[51] A court of equity has the power not only to set aside a fraudulent conveyance so as to disembarrass complainant's remedy by execution at law, but also, where property cannot be reached by execution, to subject the property fraudulently assigned directly to the payment of complainant's debt, under its own jurisdiction.[52] But where, at an execution sale of real estate, the title which the judgment debtor had when the judgment became a lien was sold, a subsequent fraudulent transfer of the property furnishes no ground for a creditors' bill.[53] Though a judgment creditor may proceed at law to sell under execution property which his debtor has fraudulently conveyed, as if there had been no conveyance, the existence of such a legal remedy does not prevent the creditor from resorting to a suit in equity to have the fraudulent conveyance set aside. The judgment creditor may enforce his judgment by a sale of the land under execution, or he may bring an action to remove the obstruction caused by the debtor's fraudulent act and proceed to enforce his judgment by a sale of the land, unembarrassed by the cloud of the transfer.[54] Where there is a

51. Pritz v. Jones, 102 N. Y. Supp. 549.

52. Catchings v. Manlove, 39 Miss. 655; Hunt v. Knox, 34 Miss. 655.

53. Newman Grove State Bank v. Linderholm (Neb. 1903), 94 N. W. 616.

54. *N. Y.*—Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

U. S.—Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason, 252.

Ala.—Flewellen v. Crane, 58 Ala. 627; Planters', etc., Bank v. Walker, 7 Ala. 926.

D. C.—Fecheimer v. Hollander, 6 Mackey, 512, 1 L. R. A. 368.

Fla.—Logan v. Logan, 22 Fla. 651, 1 Am. St. Rep. 212.

Ga.—Lathrop v. McBurney, 71 Ga. 815.

Ky.—Baker v. Dobyns, 34 Ky. 220; Lillard v. McGee, 7 Ky. 165.

Md.—Hartshorn v. Eames, 31 Me. 93.

Mass.—Stratton v. Hernon, 154 Mass. 310, 28 Me. 269.

Miss.—Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 108, 1 So. 7.

Mo.—Zoll v. Soper, 75 Mo. 460.

Neb.—National Bank of Columbus v. Hollerin, 31 Neb. 558, 48 N. W. 392.

N. J.—Smith v. Wood, 42 N. J. Eq.

full, adequate, and complete remedy at law, equity will usually decline to take jurisdiction of the application of the creditor and he will be relegated to his legal remedy.[55] But a creditors' bill for equitable relief will not be dismissed where the remedy at law is not plain and adequate, or fully adequate and complete,[56] or where there is simply an available remedy which may be effectively pursued.[57] The remedy at law is held to be circuitous and cumbersome and leaves a cloud upon the record title,[58] not usually adequate to the exigencies of the case,[59] or for all the purposes for which the creditor may claim relief.[60] No relief it is held is complete and adequate for all purposes excepting that which removes a fraudulent title.[61] Where the remedy at law is

563, 7 Atl. 881, 44 N. J. Eq. 603, 17 Atl. 1104; Cox v. Graver, 40 N. J. Eq. 473, 3 Atl. 172; Cook v. Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

Pa.—Orr v. Peters, 197 Pa. St. 606, 47 Atl. 849.

Tenn.—Templeton v. Mason, 107 Tenn. 625, 65 S. W. 25.

55. *Colo.*—Bailey v. American Nat. Bank (App. 1898), 54 Pac. 912.

Ga. Manhein v. Claflin, 81 Ga. 129, 7 S. E. 284; Bessman v. Cronan, 65 Ga. 559, a void transfer does not authorize equitable interference in behalf of a judgment creditor.

Kan.—Taylor v. Lander, 61 Kan. 588, 60 Pac. 320.

Mass.—Ames v. Sheehan, 161 Mass. 274, 37 N. E. 199; Swamscott Mach. Co. v. Perry, 119 Mass. 123; Mill River Loan Fund Assoc. v. Claflin, 91 Mass. 101; Taylor v. Robinson, 89 Mass. 253.

Mich.—Ideal Clothing Co. v. Hazle, 126 Mich. 262, 85 N. W. 735.

Mo.—Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

N. J.—Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869.

N. C.—Smitherman v. Allen, 59 N. C. 17.

Pa.—McAndrew v. McAndrew, 3 C. Pl. 174.

Tex.—White Sewing Mach. Co. v. Atkeson, 75 Tex. 330, 12 S. W. 812.

W. Va.—Horner-Gaylord Co. v. Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

56. Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason 252; Orendorf v. Budlong, 12 Fed. 24.

57. Sheppard v. Iverson, 12 Ala. 97; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

58. Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Brown v. J. Wayland Kimhall Co., 84 Me. 492, 24 Atl. 1007.

59. Marston v. Brackett, 9 N. H. 336.

60. Smith v. Cockrell, 66 Ala. 64.

61. Towle v. Janvrin, 61 N. H. 605; Stone v. Anderson, 26 N. H. 506; Tappan v. Evans, 11 N. H. 311. *Compare* Hall v. Greenly, 1 Del. Ch. 274.

not plain, adequate and effectual, equity as a rule will entertain a bill to set aside the conveyance.[62] The right of the creditor to relief in equity against a fraudulent conveyance will not be denied because the property may be attached,[63] or the creditor has a remedy by garnishment,[64] or by execution and sale of the property as though the conveyance had not been made,[65] as the colorable title may prevent or prejudice the sale.[66] The remedy by garnishment is not so full and complete as a proceeding in chancery,[67] and the

62. *N. Y.*—Patchen v. Rofkar, 52 App. Div. 367, 65 N. Y. Supp. 122, where creditor could not obtain a judgment upon personal service of the summons.

U. S.—Lee v. Hollister, 5 Fed. 752.

Ga.—Kruger v. Walker, 111 Ga. 383, 36 S. E. 794.

Ill.—Harting v. Jockers, 31 Ill. App. 67.

N. J.—Williams v. Michenor, 11 N. J. Eq. 520.

Pa.—People's Nat. Bank v. Loeffert, 184 Pa. St. 164, 38 Atl. 996.

Tex.—Rutherford v. Carr (1905), 87 S. W. 815; Gaines v. National Exch. Bank, 64 Tex. 18.

W. Va.—State v. Bowen, 38 W. Va. 91, 18 S. E. 375, right of State as judgment creditor.

Wis.—Sweetzer v. Silber, 87 Wis. 102, 58 N. W. 239, remedy against collusive judgment; Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881, inability to give indemnity to levying officer.

63. Brown v. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007; Hartshorn v. Eames, 31 Me. 93.

64. Sheppard v. Iverson, 12 Ala. 97; Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 108, 1 So. 7. *Contra*, Wells, etc., Grocery Co. v. Clark, 79 Mo. App. 401.

65. *Ind.*—Scott v. Indianapolis Wagon Works, 48 Ind. 75.

Mo.—Central Nat. Bank v. Doran, 109 Mo. 40, 18 S. W. 836; Zoll v. Soper, 75 Mo. 460; Welch v. Mann, 193 Mo. 304, 92 S. W. 98, the better practice is to first sue to set aside the conveyance.

Neb.—First Nat. Bank v. Hollerin, 31 Neb. 558, 48 N. W. 392.

N. J.—Cook v. Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

Wis.—Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965.

Remedy by execution held inadequate.—Martin v. Atchison, 2 Ida. 624, 33 Pac. 47; Abbey v. Commercial Bank, 31 Miss. 434; Boyle v. Thomas, 1 Chest. Co. Rep. (Pa.) 117.

Remedy by execution held adequate.—Bailey v. American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912; Field v. Jones, 10 Ga. 229; Swamscott Mach. Co. v. Perry, 119 Mass. 123; Clark v. Jones, 87 Mass. 379; Peoples Nat. Bank v. Kern, 193 Pa. St. 59, 88, 44 Atl. 331, 1103.

66. *Ga.*—Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440.

Ky.—Lillard v. McGee, 7 Ky. 165.

Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351.

N. C.—Frank v. Robinson, 96 N. C. 28, 1 S. E. 781.

67. Mann v. Appel, 31 Fed. 378; Phillips v. Wesson, 16 Ga. 137.

remedy by foreign attachment is partial and limited.[68] An equitable suit to set aside a conveyance of land transferred after it had been attached cannot be maintained where the creditor obtained judgment in the attachment action, and an order for the sale of the real estate so seized. In such case the judgment creditor has an adequate remedy at law by a sale of the property upon execution.[69] Where a judgment is procured before a sale of the judgment debtor's land, and there is nothing to preclude the enforcement of the judgment against the land in the hands of the purchaser, the judgment creditor has a plain remedy at law, and has no occasion to seek relief in equity by a suit to follow the proceeds of the sale.[70] Proceedings in aid of execution, under statutory provisions, however, do not furnish such adequate remedy at law as will preclude equitable interference to set aside a debtor's fraudulent conveyance.[71] A concurrent remedy in equity is given by express statutory provisions in some jurisdictions.[72]

§ 24. **Action in equity in aid of remedy at law.**—It is the province of equity to set aside fraudulent conveyances which are an impediment or obstruction to the collection of a judgment or decree in chancery, and to give its aid to perfect the title of a levying creditor by removing fraudulent liens out of the way of an execution, attachment, or other process. An action in the nature of a creditor's suit may be brought for this purpose on the footing of a lien by force of the judgment and execution, or

68. Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

69. Lander v. Pollard, 61 Kan. 588, 60 Pac. 320, *aff'g* 5 Kan. App. 621, 46 Pac. 975. See Weingarten v. Marcus, 121 Ala. 187, 25 So. 852; Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486.

70. Davis v. Yonge (Ark. 1905), 85 S. W. 90.

71. Patchen v. Rofkar, 52 App. Div. (N. Y.) 367, 65 N. Y. Supp. 122; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381; Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Chamberlain Banking House v. Turner-Frazier Mercantile Co., 66 Neb. 48, 92 N. W. 172; Klosterman v. Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136; Faber v. Matz, 86 Wis. 370, 57 N. W. 39.

72. Weingarten v. Marcus, 121 Ala. 187, 25 So. 852; Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 Atl. 1007; Stratton v. Hernon, 154 Mass. 310, 28 N. E. 269.

otherwise, which is impaired or obstructed by the alleged fraudulent conveyance or transfer.[73] Such a proceeding in aid of the legal remedy is one formerly recognized and much favored in the court of chancery and the jurisdiction of equity does not depend upon statute.[74] Equity will take jurisdiction for the purpose of rendering the creditors' lien more available, not because the remedy at law is futile, but because it is inadequate.[75] The statute in aid of executions issued on judgments at law enlarge rather than restrict the jurisdiction of equity in such cases.[76] The jurisdiction of a court of equity is ample, either before or after a sale under a judgment, to set aside a deed made in fraud of creditors; before sale, to enable the creditor to

73. *N. Y.*—Stowell v. Haslett, 5 Lans. 380; Nicholson v. Leavitt, 4 Sandf. 252; Hendricks v. Robinson, 2 Johns. Ch. 283, 484.

Ala.—Chardavoyne v. Galbraith, 81 Ala. 521, 1 So. 771; Planters', etc., Bank v. Walker, 7 Ala. 926.

Conn.—Botsford v. Beers, 11 Conn. 369.

Ill.—Lewis v. Lamphere, 79 Ill. 187; Getzler v. Saroni, 18 Ill. 511; Farnsworth v. Stresler, 12 Ill. 482; Merchants' Nat. Bank v. Hogle, 25 Ill. App. 543.

Me.—Wyman v. Fox, 59 Me. 100; Dockray v. Mason, 48 Me. 178. *Compare* Esten v. Jackson, 68 Me. 292.

Mich.—Thayer v. Swift, Harr. 430.

Miss.—Fowler v. McCartney, 27 Miss. 509.

Neb.—Howard v. Raymers, 64 Neb. 213, 89 N. W. 1004; Hargreaves v. Tennis, 63 Neb. 356, 88 N. W. 486, lien by garnishment; Foley v. Doyle, 1 Neb. (Unoff.) 643, 95 N. W. 1067; Coulson v. Galtsman, 1 Neb. (Unoff.) 502, 96 N. W. 349, lien by attachment.

N. J.—Robert v. Hodges, 16 N. J. Eq. 299; Cox v. Dunham, 8 N. J. Eq. 594.

Wis.—Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317.

Can.—See Kerr v. Bain, 11 Grant Ch. (U. C.) 423.

74. Hammond v. Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378; Chardavoyne v. Galbraith, 81 Ala. 521, 1 So. 771; Hirsch v. Israel, 106 Iowa, 498, 76 N. W. 811; Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262; Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169.

75. Schofield v. Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Guyton v. Terrell, 132 Ala. 66, 31 So. 83; Wollenberg v. Minard, 37 Or. 621, 62 Pac. 532; Ewing v. Cantrell, 19 Tenn. 364, the equity jurisdiction is ancillary merely and can be exercised only to remove impediments to executions at law and never where, if the impediment were removed, the property sought to be subjected could not be reached at law.

76. Hammond v. Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 378; Anderson v. Provident Life, etc., Co., 25 Wash. 20, 64 Pac. 933.

present an unembarrassed title for sale, after sale, to remove clouds from the title.[77] The remedies in equity and at law are concurrent.[78] In an action to enforce a mechanic's lien, a conveyance of the premises before notice of the lien was filed, but after the work was done, may be set aside as in fraud of creditors.[79]

§ 25. **Effect of statutory provisions for proceedings supplemental to execution.**—Proceedings supplementary to execution are held in New York to be remedies in equity for the collection of the creditor's judgment and were intended as a substitute for the creditors' bill, as formerly used in chancery.[80] But in other states they are held not to supersede the remedy by creditors' bill to set aside a fraudulent conveyance, but to constitute an additional remedy. The reason assigned for the rule is that the remedy by supplementary proceedings is not as effective as that furnished by creditors' bills as administered by courts of equity, being merely proceedings in the original action for the purpose of enforcing the judgment already recovered.[81] The pendency of proceedings supplementary to execution upon a judgment is not a bar to an action in the nature of a creditors'

77. Taylor v. Dwyer, 131 Ala. 91, 32 So. 509; Phillips v. Kesterson, 154 Ill. 572, 39 N. E. 599, the execution creditor purchasing at his own sale may sue to set aside such conveyance although he is not in possession of the land; Gallman v. Perrie, 47 Miss. 131.

78. Anderson v. Provident Life, etc., Co., 25 Wash. 20.

79. Linneman v. Bieber, 85 Hun (N. Y.), 477, 33 N. Y. Supp. 129; Meehan v. Williams, 36 How. Pr. (N. Y.) 73.

80. Importers & T. Nat. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728; Lynch v. Johnson, 48 N. Y. 27; Barnes v. Morgan, 2 Hun, 703; Storm v. Waddell, 2 Sand. Ch. 494.

81. Allen v. Tritch, 5 Colo. 222; Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94; Ludes v. Hood, 29 Kan. 49; Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Chamberlain Banking House v. Turner-Frazer Mercantile Co., 66 Neb. 48, 92 N. W. 172; Monroe v. Reid, 46 Neb. 316, 61 N. W. 983; Klosterman v. Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136; Winslow v. Dousman, 18 Wis. 456, remedy by creditors' bill restored by statute after it had been held to have been superseded by code provisions for supplementary proceedings.

bill to enforce satisfaction of the judgment out of the property fraudulently conveyed.[82] A judgment creditor may discontinue supplementary proceedings and institute a creditors' suit, in his own name, to avoid a fraudulent conveyance,[83] notwithstanding the appointment of a receiver in supplementary proceedings, the judgment having become a lien prior to such appointment.[84]

§ 26. **Action by personal representative after death of grantor.** —A fraudulent conveyance cannot be impeached by the grantor. Ordinarily the personal representative of a grantor can only maintain such action as the grantor might if living, and, as the grantor in the conveyance is bound by it, his personal representative, as a general rule, is also bound by it, in the absence of statute.[85] But in some states this rule has been changed by statutes in relation to the distribution of estates and the duties of administrators,[86] and in some states the administrator or executor is permitted to recover back property fraudulently conveyed by his decedent,[87] where there is or will be a deficiency of

82. Faber v. Matz, 86 Wis. 370, 57 N. W. 39, and the creditor may, at his election, bring such action in his own name or in the name of the receiver.

83. Bennett v. McGuire, 58 Barb. (N. Y.) 625.

84. Gere v. Dibble, 17 How. Pr. (N. Y.) 31.

85. *Ala.*—Davis v. Swanson, 54 Ala. 277, 25 Am. Rep. 678.

Ark.—Anderson v. Dunn, 19 Ark. 650.

Ga.—Anderson v. Brown, 72 Ga. 713.

Iowa.—Cooley v. Brown, 30 Iowa, 470.

Kan.—Crawford v. Lehr, 20 Kan. 509.

Miss.—Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

Mo.—Hall v. Callahan, 66 Mo. 316.

Ohio.—Doney v. Dunnick, 8 Ohio Cir. Ct. 163, 4 Ohio Cir. Dec. 380.

S. C.—Giles v. Pratt, 1 Hill, 239, 26 Am. Dec. 170.

Tex.—Wilson v. Demander, 71 Tex. 603, 9 S. W. 678.

Compare Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949, on principles of equitable jurisprudence as administrator can sue to set aside a conveyance by the decedent of personal property in fraud of creditors, the estate being insufficient to pay the debts of the decedent. See also Parker v. Flagg, 127 Mass. 28; Janvrin v. Curtis, 63 N. H. 312.

86. Cooley v. Brown, 30 Iowa, 470.

87. Doe v. Clark, 42 Iowa, 123; Martin v. Crosby, 79 Tenn. 198; McLane v. Johnson, 43 Vt. 48.

assets to pay creditors.[88] In New York the statute provides that the executor or administrator may, for the benefit of creditors, disaffirm all transfers in fraud of the rights of creditors.[89] In some states the personal representative of the decedent is made by statute a trustee for the creditors of the decedent, with respect to lands conveyed by him in fraud of his creditors, and may sue to set aside a fraudulent conveyance.[90]

§ 27. **Action by creditor after death of grantor.**—The proper remedy of a creditor, after the death of the debtor, to attack a conveyance made by the decedent as fraudulent as to creditors, is, as a rule, held to be by a bill in equity to set aside the conveyance and subject the land to the payment of the debt.[91] In New York the creditor has by statute a primary right to sue to set aside a fraudulent conveyance, to be exercised independently of the right vested in any one else, and it is not necessary that he should have previously obtained judgment nor does his right to sue depend upon the refusal of the personal representatives to sue,[92] as was formerly the rule.[93] The personal representa-

88. Beith v. Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402, such a statute is merely declaratory of the common law; Ecklor v. Wolcott, 115 Wis. 19, 90 N. W. 1081.

89. West Troy Nat. Bank v. Levy, 127 N. Y. 549, 28 N. E. 592.

90. Frost v. Libby, 79 Me. 56, 8 Atl. 149; Caswell v. Caswell, 28 Me. 232; Doney v. Clark, 55 Ohio St. 294, 45 N. E. 316.

91. Hagan v. Walker, 14 How. (U. S.) 29, 14 L. Ed. 312; Chambers v. Sallie 29 Ark. 407; Trippe v. Ward, 2 Ga. 304, the jurisdiction of law and equity is concurrent; Snodgrass v. Andrews, 30 Miss. 472; Houseman v. Grossman, 179 Pa. St. 453, 35 Atl. 736, the death of the debtor furnishes a reason for entertaining such a bill, although the remedy ordinarily is by execution, sale and action of ejectment; Fowler's Appeal, 87 Pa. St. 449, at least if the creditor has a lien; Bankes v. Lindemuth, 23 Pa. Co. Ct. 459; Heard v. McKinney, 1 Tex. Unrep. Cas. 83.

92. National Bank of Republic v. Thurber, 39 Misc. Rep. (N. Y.) 13, 78 N. Y. Supp. 766; Lilienthal v. Drucklieb, 92 Fed. 753, 34 C. C. A. 657; Montgomery v. Boyd, 78 App. Div. (N. Y.) 64, 79 N. Y. Supp. 879; Nill v. Phelps, 20 Misc. Rep. 488, 46 N. Y. Supp. 662.

93. Harvey v. McDonnell, 113 N. Y. 526, 21 N. E. 695; Lichtenberg v. Herdtfelder, 103 N. Y. 302, 8 N. E. 526. The rule as laid down in these cases was changed by the statutes of 1889, 1894 and 1897 being now section 7 of the Personal Property Law.

tive also has the right to bring such action on behalf of the creditor.[94] In Massachusetts the remedy of the creditor is through the administrator who is required to bring an action at the request of the creditor under penalty of removal.[95] In Vermont a creditor may sue, on obtaining leave of the probate court, in the name of the personal representative, but may prosecute a suit in his own name without such leave.[96] Where the personal representative is by statute given power to sue or is required to sue to recover property fraudulently conveyed, for the benefit of creditors, the creditor himself may nevertheless maintain an action where the action cannot for some reason be brought by the personal representative,[97] or he stands in a position antagonistic to the interests of the creditors,[98] or refuses, on proper request by a creditor, to bring the action.[99]

§ 28. **Relief in equity on theory of resulting trust.**—In some jurisdictions, sometimes as in New York by virtue of a statutory provision,[1] where land is conveyed to one person and the consideration is paid by another with the intent to defraud creditors, a trust results to the then existing creditors which is enforceable in equity to the extent to which it may be necessary to satisfy their just demands.[2] In other jurisdictions, in the absence of a statute on the subject, the courts have held that the remedy of a creditor defrauded by such a conveyance is by a

94. See statute and cases cited in last two preceding notes.

95. Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370.

96. Farmers' Nat. Bank v. Thomson, 74 Vt. 442, 52 Atl. 961.

97. Emmons v. Barton, 109 Cal. 662, 42 Pac. 303, where the personal representative was the alleged fraudulent grantee.

98. Barker v. Battey, 62 Kan. 584, 64 Pac. 75.

99. See New York cases cited in preceding notes 92 and 93.

1. Wood v. Robinson, 22 N. Y. 564; Garfield v. Hatmaker, 15 N. Y. 475.

2. Overnire v. Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; Mason v. Eichels, 8 Ohio Dec. 436, 8 Cinc. L. Bul. 7. See also Property purchased in name of third person, chap. II, § 5, *supra;* chap. IV, § 29, *supra;* Remedy where equitable interests are sought to be reached, chap. XV, § 18, *supra.*

suit in equity founded on the fraud and not on the theory of a resulting trust.[3]

§ 29. **Jurisdiction with respect to transfers of personal property.**—An action to set aside a transfer of personal property as in fraud of creditors may be maintained in the same manner, and under the same circumstances and upon the same grounds, as an action to set aside a conveyance of real property,[4] and it is immaterial whether the transfer is void because fraudulently made, or because the instrument of transfer was not filed as required by law.[5] This rule applies to an action to set aside a fraudulent transfer of a chose in action.[6]

§ 30. **Election of remedies.**—If both a court of law and a court of equity have concurrent jurisdiction over the subject matter, a party seeking relief may elect as to which tribunal shall determine the controversy.[7] One seeking relief against a fraudulent conveyance by his debtor may be compelled to elect whether the suit should be prosecuted at law or in equity,[8] but an election will not as a rule be compelled unless the legal proceeding and the proceeding in equity are instituted to obtain the same relief.[9] A creditor who has levied executions on property conveyed and

3. Perea v. DeGallegos, 3 N. M. 151, 3 Pac. 246; Rhem v. Tull, 35 N. C. 57. *Compare* Whitney v. Stearns, 52 Mass. 319.

4. Martha v. Curley, 90 N. Y. 372; Webb v. Staves, 1 App. Div. (N. Y.) 145, 37 N. Y. Supp. 414; McClosky v. Stewart, 63 How. Pr. (N. Y.) 137; Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881, 44 N. J. Eq. 603, 17 Atl. 1104; Meyer Boot, etc., Co. v. Shenkberg Co., 11 S. D. 620, 20 N. W. 126.

5. Webb v. Staves, 1 App. Div. (N. Y.) 145, 37 N. Y. Supp. 414.

6. Hall & Farley v. Alabama Terminal, etc., Co. (Ala. 1905), 39 So. 285.

7. Bently v. Dillard, 6 Ark. 79; Sampson v. Payne, 5 Munf. (Va.) 176; Bumley v. Lambert, 1 Wash. (Va.) 308; Miller v. Lake, 24 W. Va. 545.

8. Planter's, etc., Bank v. Walker, 7 Ala. 926; Ulrich v. Duson, 36 La. Ann. 989; Lanahan v. Latrobe, 7 Md. 268; Rodgers v. Kinsey, 3 Ohio Dec. 308, 7 Cinc. L. Bul. 64.

9. Powers v. Benedict, 88 N. Y. 605.

mortgaged by the defendant in execution may, notwithstanding, go into equity to avoid the conveyances *in toto*. The only effect on the remedy in equity would be that, on a claim of property interposed, the complainant would be compelled to elect, if the matters of controversy are identical, whether the suit should be prosecuted at law or in equity.[10] The rule is well established that where a judgment creditor causes an execution to be levied on the land fraudulently conveyed and the property to be sold thereunder, after purchasing at the execution, he may then bring suit in equity to have the conveyance set aside as fraudulent and a cloud upon his title.[11] But in some jurisdictions it has been held that where a judgment creditor has pursued property fraudulently conveyed to execution and become the purchaser and taken a sheriff's deed he has no right to call upon a court of equity to remove the fraudulent deed as a cloud upon his title, for the reason that the latter conveyance is to be treated as a nullity and that the title of the purchaser at the execution sale is legal or it is nothing.[12] In other states it has been held, under statutes giving to general creditors a remedy by attachment, that

10. Planter's, etc., Bank v. Walker, 7 Ala. 926.

11. *N. Y.*—Best v. Staple, 61 N. Y. 71; Carpenter v. Simmons, 1 Rob. 360; Porter v. Parmley, 14 Abb. N. C. 16.

U. S.—Orendorf v. Budlong, 12 Fed. 24.

Ind.—Frakes v. Brown, 2 Blackf. 295.

Iowa.—Howland v. Knox, 59 Iowa, 46, 12 N. W. 777.

Ky.—Gaitskill v. Stivers, 5 Ky. L. Rep. 856.

Miss.—Gallman v. Perrie, 47 Miss. 131.

Mo.—Lionberger v. Baker, 88 Mo. 447, *aff'g* 14 Mo. App. 353; Kinealy v. Macklin, 2 Mo. App. 241, *rev'd* on other grounds 67 Mo. 95.

Ohio.—Barr v. Hatch, 3 Ohio, 527.

R. I.—Tucker v. Denico, 26 R. I. 560, 59 Atl. 920.

Tenn.—Burrow v. Smith, 34 Tenn. 566.

Tex.—Lynn v. Gierse, 48 Tex. 138.

Wash.—Wagner v. Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784. See also § 24, *supra*.

12. Betts v. Nichols, 84 Ala. 278, 4 So. 195; Pettus v. Glover, 68 Ala. 417; Grigg v. Swindal, 67 Ala. 187; Smith v. Cockrell, 66 Ala. 64; Cranston v. Smith, 47 Mich. 189, 10 N. W. 194, and the creditor by thus failing to directly attack the conveyance as fraudulent leaves the question of the fraudulent character of the conveyance in doubt and thereby discourages bidding at the sale; Thigpen v. Pitt, 54 N. C. 49; Malloch v. Plunkett, 9

such creditors cannot resort to equity where they have taken advantage of the statute.[13]

§ 31. **Conditions precedent; necessity of exhausting legal remedy generally.**—A creditor's suit or an action in the nature of a creditor's suit to set aside a conveyance made in fraud of creditors is governed by the general rules which prevail in equity proceedings.[14] As a general rule it must appear that the creditor has exhausted his legal remedies in attempting to obtain satisfaction of his debt before resorting to equity to that end,[15] or before a creditors' bill to set aside the fraudulent conveyance and reach property conveyed in fraud of creditors can be maintained.[16] Except in cases where courts of law and courts of

Grant Ch. (U. C.) 556. *Compare* Tubbs v. Williams, 26 Tenn. 367, if the judgment creditor should buy the land for less than its value neither the fraudulent grantor nor the fraudulent grantee could complain.

13. Manheim v. Claflin, 81 Ga. 129, 7 S. E. 284; Hardson v. Newton, 63 Ga. 163.

14. Robinson v. Frankville First M. E. Church, 59 Iowa, 717, 12 N. W. 772.

15. Smith v. Ellison (Ark. 1906), 97 S. W. 666, where lien of judgment had expired; Mesmer v. Jenkins, 61 Cal. 151; Detroit Copper, etc., Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751, a simple contract creditor cannot maintain a bill to obtain discovery; Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924, a bill cannot be maintained upon a dormant judgment.

16. *N. Y.*—National Tradesman's Bank v. Wetmore, 42 Hun, 359; Bownes v. Weld, 3 Dlay, 253.

U. S.—Jones v. Green, 68 U. S. 330, 17 L. Ed. 553.

Ark.—Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Clark v. Anthony, 31 Ark. 546.

D. C.—Hess v. Horton, 2 App. Cas. (D. C.) 81.

Fla.—Robinson v. Springfield Co., 21 Fla. 203.

Ill.—Detroit Copper, etc., Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; McConnel v. Dickson, 43 Ill. 99; Stone v. Manning, 3 Ill. 530, 35 Am. Dec. 119.

Ind. T.—Parrott v. Crawford (1904), 82 S. W. 688.

Iowa.—Goode v. Garrity, 75 Iowa, 713, 38 N. W. 150.

Ky.—Moffat v. Ingham, 37 Ky. 495.

Me.—Caswell v. Caswell, 28 Me. 232.

Mo.—Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624; Atlas Nat. Bank v. John Moran Packing Co., 138 Mo. 59, 39 S. W. 71; Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

N. J.—Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Brown v. Fuller, 13 N. J. Eq. 271.

equity have concurrent jurisdiction,[17] a bill to reach a judgment debtor's equitable assets which have been fraudulently conveyed will not lie until the creditor has exhausted his remedy at law to every available extent and has secured a return of his execution *nulla bona*.[18] The right to resort to the jurisdiction of equity in such a case attaches because of the fact that there is no property which can be reached by execution.[19] Where property has been purchased by the debtor in the name of a third person the creditor has priority who first acquires a lien by suit in the nature of a creditor's action.[20] But where the assets sought to be reached are in their nature subject to execution, and the creditor seeks in equity to remove some obstruction fraudulently interposed to prevent or embarrass a sale under execution, he is not required to first exhaust his legal remedies.[21] A creditor who has acquired a lien on the property can maintain a suit to set aside a fraudulent conveyance thereof by his debtor without the return

N. C.—Wheeler v. Taylor, 41 N. C. 225.

S. C.—Screven v. Bostick, 2 McCord Eq. 410, 16 Am. Dec. 664.

Tex.—Taylor v. Gillean, 23 Tex. 508.

17. See §§ 1 and 23, *supra*.

18. *N. Y.*—Child v. Brace, 4 Paige, 309; Clarkson v. DePeyster, 3 Paige, 320. See Beadsley Scythe Co. v. Foster, 36 N. Y. 561; Dunlevy v. Tallmadge, 32 N. Y. 457; Starr v. Rathbone, 1 Barb. 70; Strange v. Langley, 3 Barb. Ch. 650; Willis v. Moore, Clark Ch. 150; Howard v. Sheldon, 11 Paige, 558; Austin v. Figueira, 7 Paige, 56.

U. S.—Jones v. Green, 68 U. S. 330, 17 L. Ed. 553.

Fla.—Robinson v. Springfield Co., 21 Fla. 203.

Ill.—Ishmael v. Parker, 13 Ill. 324.

Miss.—Farned v. Harris, 11 Sm. & M. 366.

Tex.—Taylor v. Gillean, 23 Tex. 508.

Wis.—Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.

19. Cace v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Fleming v. Grafton, 54 Miss. 79.

20. Mandeville v. Campbell, 45 App. Div. (N. Y.) 512, 61 N. Y. Supp. 443.

21. Schofield v. Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Stock Growers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Logan v. Logan, 22 Fla. 561, 1 Am. St. Rep. 212; Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108; Lillard v. McGee, 7 Ky. 165; Spooner v. Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651; Zoll v. Soper, 75 Mo. 460; Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.

of an execution *nulla bona* or without exhausting his other legal remedies.[22]

§ 32. **Necessity of judgment in general.**—The general rule may be regarded as established by abundant authority that a suit by a simple contract creditor, or general creditor, or creditor at large, who has not established his demand at law, to set aside an alleged fraudulent conveyance by his debtor of property applicable to the payment of the debt, cannot be sustained, and that his indebtedness must previously have been established by a judgment at law; and, when the property sought to be reached is in its nature subject to execution, a judgment creditor cannot assail an assignment or other transfer of property by the debtor as fraudulent as against creditors, until he either acquires a lien on the specific property or is in a situation to perfect a lien and subject the property to the satisfaction of his judgment on the removal of the obstacle presented by the fraudulent transfer.[23] The attacking creditor must be one with a specific right

22. McElwain v. Willis, 9 Wend. (N. Y.) 548; Schofield v. Ute Coal, etc., Co., *supra;* Wadsworth v. Schisselbaur, 32 Minn. 84, 19 N. W. 390.

23. *N. Y.*—Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661; Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. 240, a general creditor cannot attack another creditor's judgment; Spelman v. Friedman, 130 N. Y. 421, 29 N. E. 765; Briggs v. Austin, 129 N. Y. 208, 29 N. E. 4; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060; Sullivan v. Miller, 106 N. Y. 635, 13 N. E. 772; Reynolds v. Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; McKinley v. Bowe, 97 N. Y. 93; Adsit v. Butler, 87 N. Y. 585; Sturges v. Vanderbilt, 73 N. Y. 384; Southard v. Benner, 72 N. Y. 424; Briggs v. Oliver, 68 N. Y. 336; Geery v. Geery, 63 N. Y. 252; Thompson v. Van Vechten, 27 N. Y. 568; Reubens v. Joel, 13 N. Y. 488; Robinson v. Stewart, 10 N. Y. 189; Voorhees v. Howard, 4 Keys, 371, 4 Abb. Dec. 503; Van Dewater v. Gear, 21 App. Div. 201, 47 N. Y. Supp. 503; Webster v. Lawrence, 47 Hun, 565; Burnett v. Gould, 27 Hun, 366; Mills v. Block, 30 Barb. 549; Cropsey v. McKinney, 30 Barb. 47; Frisbey v. Thayer, 25 Wend. 396. *Compare* Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338, construing statutory provisions requiring a creditor of a corporation to first obtain judgment against it before suing the stockholders.

or equity in the property sought to be reached.[24] It is not sufficient that a simple contract creditor, seeking to avoid his debtor's

U. S.—Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Peoples Sav. Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754; Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Smith v. Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. Ed. 437; Virginia Bd. of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; Jones v. Green, 1 Wall. 330, 17 L. Ed. 553; Lefmann v. Brill, 142 Fed. 44, 73 C. C. A. 230; First Nat. Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51; Tompkins v. Catawba Mills, 82 Fed. 782; England v. Russell, 71 Fed. 818; Putney v. Whitmire, 66 Fed. 385; Morrow Shoe Mfg. Co. v. New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; Chadbourne v. Coe, 51 Fed. 479, 2 C. C. A. 327; Dahlman v. Jacobs, 15 Fed. 863, 5 McCrary, 130; Stewart v. Fagan, 23 Fed. Cas. No. 13,426, 2 Woods, 215.

Ala.—Deposit Bank v. Caffee, 135 Ala. 208, 33 So. 152; Sanders v. Watson, 14 Ala. 198; Reese v. Bradford, 13 Ala. 837.

Ark.—Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334; Hunt v. Weiner, 39 Ark. 70; Clark v. Anthony, 31 Ark. 546; Sale v. McLean, 29 Ark. 621; Wright v. Campbell, 27 Ark. 637; Phelps v. Jackson, 27 Ark. 585; Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274.

Cal.—Ohm v. San Francisco, Super. Ct., 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; Mesmer v. Jenkins, 61 Cal. 151; McMinn v. Whalen, 27 Cal. 300; Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 294.

D. C.—Hess v. Horton, 2 App. Cas. 81.

Fla.—Robinson v. Springfield Co., 21 Fla. 203; Barrow v. Bailey, 5 Fla. 9; Carter v. Bennett, 4 Fla. 283.

Ga.—McDermott v. Blois, R. M. Charlt. 281.

Ill.—Austin v. Bruner, 169 Ill. 178, 48 N. E. 449; Detroit Copper, etc., Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; Dormueil v. Ward, 108 Ill. 216; Goembel v. Arnett, 100 Ill. 34; Bennett v. Stout, 98 Ill. 47; Shufeldt v. Boehm, 96 Ill. 560; Moritz v. Hoffman, 35 Ill. 353, no creditor without a lien has a right to complain that his debtor is giving away his property; Greenway v. Thomas, 14 Ill. 271; Rogers v. Dimon, 106 Ill. App. 201; Beidler v. Douglass, 35 Ill. App. 124.

Ind.—Shirley v. Shields, 8 Blackf. 273.

Iowa.—Klay v. McKellar, 122 Iowa, 163, 97 N. W. 1091; Goode v. Garrity, 75 Iowa, 713, 38 N. W. 150; Joseph v. McGill, 52 Iowa, 127, 2 N. W. 1007; Buchanan v. Marsh, 17 Iowa, 494.

Kan.—Chicago Bldg., etc., Co. v. Taylor Banking Co. (1904), 78 Pac. 808; Tennent v. Battey, 18 Kan. 324.

Ky.—Behan v. Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439; Kyle v. O'Neil, 88 Ky. 127, 10 Ky. L. Rep. 709, 10 S. W. 275; Turner v. Short (1887), 4 S. W. 347;

fraudulent conveyance has become a judgment creditor in the

Martz v. Pfeifer, 80 Ky. 600; Napper v. Yager, 79 Ky. 241.

La.—Zimmerman v. Fitch, 28 La. Ann. 454.

Me.—Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Griffin v. Nitcher, 57 Me. 270; Fletcher v. Holmes, 40 Me. 364; Skeele v. Stanwood, 33 Me. 307; Caswell v. Caswell, 28 Me. 232; Webster v. Clerk, 25 Me. 313.

Md.—Rich v. Levy, 16 Md. 74; Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172.

Mich.—Trowbridge v. Bullard, 81 Mich. 451, 45 N. W. 1012; Nugent v. Nugent, 70 Mich. 52, 37 N. W. 706; First Nat. Bank v. Hosmer, 48 Mich. 200, 12 N. E. 212; Tyler v. Peatt, 30 Mich. 63.

Minn.—Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647; Jones v. Rahilly, 16 Minn. 320; Massey v. Gorton, 12 Minn. 145, 90 Am. Dec. 287.

Miss.—Ferguson v. Bobo, 54 Miss. 121; Fleming v. Grafton, 54 Miss. 79; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Parish v. Lewis, Freem. 299.

Mo.—Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624; Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924; Alnutt v. Leper, 48 Mo. 319; Turner v. Adams, 46 Mo. 95; Merry v. Fremon, 44 Mo. 518; Martin v. Michael, 23 Mo. 50, 66 Am. Dec. 656; Clarke v. Laird, 60 Mo. App. 289; Dodd v. Levy, 10 Mo. App. 121; Kent v. Curtis, 4 Mo. App. 121.

Neb.—Missouri, etc., Trust Co. v. Richardson, 57 Neb. 617, 78 N. W. 273; Fairbanks v. Welshans, 55 Neb. 362, 75 N. W. 865; Crowell v. Horacek, 12 Neb. 622, 12 N. W. 99; Weinland v. Cochran, 9 Neb. 480, 4 N. W. 67; Weil v. Lankins, 3 Neb. 384.

N. J.—Francis v. Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Haggerty v. Nixon, 26 N. J. Eq. 42; Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365

N. M.—Wolcott v. Ashenfelter, 5 N. M. 442, 23 Pac. 780, 8 L. R. A. 691; Talbott v. Randall, 3 N. M. 226, 5 Pac. 533.

N. C.—Hafner v. Irwin, 26 N. C. 529.

N. D.—Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37.

Or.—Dawson v. Coffey, 12 Or. 513, 8 Pac. 838.

R. I.—Smith v. Millett, 12 R. I. 59.

Tenn.—McKeldin v. Gouldy, 91 Tenn. 680, 20 S. W. 231; Hopkins v. Webb, 28 Tenn. 519; Williams v. Tipton, 24 Tenn. 66, 42 Am. Dec. 420; Chester v. Greer, 24 Tenn. 26.

Tex.—Arbuckle Bros. Coffee Co. v. Werner, 77 Tex. 43, 13 S. W. 963; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248.

Vt.—Bassett v. St. Albans Hotel Co., 47 Vt. 313.

Va.—Tate v. Liggat, 2 Leigh, 84; Chamberlayne v. Temple, 2 Rand. 384, 14 Am. Dec. 786.

Wash.—Rothchild v. Trewella, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281, under a statute declaring fraudulent and void a sale of a stock of goods in bulk unless the purchaser obtains a list of the seller's creditors, and sees that the purchase money is applied on their claims, a simple contract creditor of the seller, without judgment

time intermediate between the bill and the answer.[25] The fact that the debtor is entirely without assets and a suit would be of no avail does not relieve a creditor from the necessity of reducing his claim to judgment.[26] The fact that the general creditor has obtained possession of the property alleged to have been fraudulently conveyed does not take him out of the rule,[27] and a landlord who has levied a distress warrant is no more than a simple contract creditor of the tenant.[28] A surety who has discharged a judgment rendered against him and his principal is a simple contract creditor of his principal,[29] and the United States is merely a simple contract creditor of the sureties on an official bond, within the rule stated.[30] For the purpose of enforcing their rights against fraudulent or void acts of an insolvent, however, the allowance and approval of creditors' claims in an insolvency court are equivalent to a judgment.[31] A trustee who has entered a judgment against a debtor upon an order for

or lien, cannot maintain a direct action at law against a purchaser not complying with the act to recover on the seller's debt to him; Klosterman v. Mason County Cent. R. Co., 8 Wash. 281, 36 Pac. 136; Thompson v. Caton, 3 Wash. Ter. 31, 13 Pac. 185.

W. Va.—Frye v. Miley, 54 W. Va. 324, 46 S. E. 135; Kennewig Co. v. Moore, 49 W. Va. 323, 38 S. E. 558.

Wis.—Miller v. Drane, 122 Wis. 315, 99 N. W. 1017; Weber v. Weber, 90 Wis. 467, 63 N. W. 757; Gregory v. Rosenkrans, 78 Wis. 451, 47 N. W. 832; Ullman v. Duncan, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; Manson v. Phoenix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

24. Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804.

25. Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Post v. Roach, 26 Fla. 442, 7 So. 854, mere buying of the action is not sufficient; St. Michael's College v. Merrick, 26 Grant Ch. (U. C.) 216.

26. Austin v. Bruner, 169 Ill. 178, 48 N. E. 449, *aff'g* 65 Ill. App. 301; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229.

27. Andrews v. Durant, 18 N. Y. 496.

28. Hastings v. Belknap, 1 Den. (N. Y.) 190.

29. Sanders v. Watson, 14 Ala. 198; Mugge v. Ewing, 54 Ill. 236; Peoples v. Tatum, 36 N. C. 414. But where a judgment creditor has filed his bill to set aside a conveyance made by his debtor, a surety of the debtor may also join in the suit without obtaining a judgment at law. Waller v. Todd, 33 Ky. 503, 28 Am. Dec. 94.

30. United States v. Ingate, 48 Fed. 251.

31. Ruggles v. Cannedy (Cal. 1898), 53 Pac. 911.

the payment of money to his predecessors in office, in their names, is a judgment creditor of the debtor.[32] Judgment need not be docketed in the county where the land conveyed is located, where it was recovered in the county of the debtor's residence and execution thereon has been returned unsatisfied.[33] One reason for the general rule stated above is that a court of equity can only interfere with the right of the debtor to dispose of his property at the instance of *bona fide* creditors and that it cannot be known with certainty that any one is an actual and subsisting creditor until the judgment has been obtained upon his claim.[34] The principle of equitable intervention to annul or set aside transfers of a debtor's property, for being fraudulent as to his creditors, demands for its application an adjudication of the fact of the debt, and that it shall appear that an execution upon the judgment is incapable of levy because of the fraudulent transfer by the judgment debtor.[35] It is based upon the assumption that a judgment which is a lien on the debtor's real estate and chattels real is a necessity in order to effectively exhaust all remedies at law,[36] since it is the settled rule that unless the creditor has

32. Stokes v. Amerman, 121 N. Y. 337, 24 N. E. 819, *aff'g* 7 N. Y. Supp. 733.

33. Lanahan v. Caffrey, 47 App. Div. (N. Y.) 124, 57 N. Y. Supp. 724.

34. Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229.

35. Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661; Prentice v. Bowden, 145 N. Y. 342, 40 N. E. 13; Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Rogers v. Rogers, 3 Paige (N. Y.) 379; Virginia Bd. of Public Works v. Columbia College, 17 Wall. (U. S.) 521, 21 L. Ed. 687; Powell v. Howell, 63 N. C. 283; Colman v. Croker, 1 Ves. Jr. 161, 27 Eng. Reprint, 280.

36. *N. Y.*—Importers', etc., Nat. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728.

U. S.—Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Viquesney v. Allen, 131 Fed. 21, 65 C. C. A. 259.

Ill.—Austin v. Bruner, 65 Ill. App. 301.

Minn.—Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865; Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683.

Mo.—Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624; Crim v. Walker, 79 Mo. 335; Fisher v. Tallman, 74 Mo. 39; Merry v. Fremon, 44 Mo. 518.

R. I.—Stone v. Wescott, 18 R. I. 517, 28 Atl. 662.

exhausted all his remedies at law, or in case he is not in a position to avail himself of all the remedies which courts of law give for the enforcement of judgments, a bill in equity cannot be maintained.[37] Courts of equity are not tribunals for the collection of debts.[38] It is also held that the creditor should have a specific lien upon the property involved to entitle him to equitable relief and that without a judgment he is not in a position to sustain legal injury from any disposition which the debtor may make of his property.[39] In same states the general rule above stated has been recognized by legislative enactment.[40] However, in some states, it has been modified in important respects by statute,[41] and in other states by judicial decision.[42]

§ 33. **Statutory modification of rule as to necessity for judgment.**—By statute in a number of states creditors are permitted to sue to set aside a fraudulent conveyance without hav-

37. *N. Y.*—Importers', etc., Nat. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728.

Neb.—Brumbaugh v. Jones (1904), 98 N. W. 54.

N. J.—Bayley v. Bayley, 66 N. J. Eq. 84, 57 Atl. 271.

N. C.—Brown v. Long, 36 N. C. 190, 36 Am. Dec. 43.

Wis.—French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

38. Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; Howe v. Whitney, 66 Me. 17; Webster v. Clark, 25 Me. 313; Fleming v. Grafton, 54 Miss. 79.

39. Ready v. Smith, 170 Mo. 163, 70 S. W. 484.

40. Bach v. Leopold, 8 La. Ann. 386.

41. DeLacy v. Hurst, 83 Ga. 223, 9 S. E. 1052; Mebane v. Layton, 86 N. C. 572; Gasget v. Scott, 17 Tenn. 244; Cassaday v. Anderson, 53 Tex. 527. See also next section.

42. Chadbourne v. Coe, 51 Fed. 479, 2 C. C. A. 327; Sandorn v. Maxwell, 18 App. Cas. (D. C.) 245; Frank v. Kissler, 30 Ind. 8; Meinhard v. Youngblood, 37 S. C. 231, 15 S. E. 950, 16 S. E. 771, a distinction is made between legal and actual fraud and it is held that the rule, being an arbitrary one, should not be applied in the latter case.

The English and Canadian rule makes a distinction between actions in which the relief asked is the setting aside of the conveyance and those in which the creditor seeks to subject the property and holds that a simple contract creditor may maintain suit in the former case. Longeway v. Mitchell, 17 Grant Ch. (U. C.) 190; Reese River Silver Min. Co. v. Atwell, L. R. 7 Eq. 347, 20 L. T. Rep. N. S. 163, 16 Wkly. Rep. 601.

ing previously obtained judgment against the debtor for the debt.[43] But under a statute making a chattel mortgage void as to creditors unless filed as required by statute, although a simple contract creditor is as much within the protection of the statute as a creditor whose debt has been merged into a judgment, the mortgage cannot legally be questioned until the creditor clothes himself with a judgment and execution or with some legal process against the property, since the creditors cannot interfere with the property of the debtor without process.[44] Under a statute providing that a creditor of a deceased insolvent debtor may, without obtaining a judgment on his claim, for the benefit of himself and other creditors, maintain an action to set aside any transfer made in fraud of creditors, that a creditor has ob-

43. *U. S.*—In re Anrae Co., 117 Fed. 561.

Ala.—Freeman v. Pullen, 119 Ala. 235, 24 So. 57; Alabama Iron, etc., Co. v. McKeever, 112 Ala. 134, 20 So. 84; Carter v. Coleman, 82 Ala. 177, 2 So. 354; Bromberg v. Heyer, 69 Ala. 22; Lide v. Parker, 60 Ala. 165, the statute applies only to property situate within the State.

Ind.—Phelps v. Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Carr v. Huette, 73 Ind. 378.

Ky.—Smith v. Curd, 24 Ky. L. Rep. 1960, 72 S. W. 744.

Md.—Christopher v. Christopher, 64 Md. 583, 3 Atl. 296; Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708; Sanderson v. Stockdale, 11 Md. 563.

Miss.—McBride v. State Revenue Agent, 70 Miss. 716, 12 So. 699. See Jones v. Jones, 79 Miss. 261, 30 So. 551, as to suit for a tort.

N. C.—Dawson Bank v. Harris, 84 N. C. 206.

Ohio.—Bloomingdale v. Stein, 42 Ohio St. 168; Combs v. Watson, 32 Ohio St. 228.

S. C.—Miller v. Hughes, 33 S. C. 530, 12 S. E. 419; Austin v. Morris, 23 S. C. 393.

Tenn.—Nailer v. Young, 75 Tenn. 735; August v. Seeskind, 42 Tenn. 166; Croone v. Bivens, 39 Tenn. 339.

Va.—Russell v. Randolph, 26 Gratt. (Va.) 705, the fact that a creditor obtains judgment does not make it necessary for him to issue execution.

W. Va.—Frye v. Miley, 54 W. Va. 324, 46 S. E. 135, but such a statute does not enable the creditor to sue before the maturity of his claim; Witz v. Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874; State v. Bowen, 38 W. Va. 91, 18 S. E. 375.

44. Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Kitchen v. Lowery, 127 N. Y. 59; Southard v. Benner, 72 N. Y. 424; Thompson v. Van Vechten, 27 N. Y. 568.

tained judgment does not bar his remedy under the statute.[45] In some states, under statutes which confer upon a court both legal and equitable jurisdiction, it has been held that a creditor may obtain judgment for his debt and in the same suit may have that judgment enforced against property fraudulently conveyed by the debtor with intent to hinder and delay creditors, and that consequently judgment and execution are no longer necessary prerequities to an action to reach property so conveyed.[46] The remedies in the federal courts, at law and in equity, are not, however, according to the practice of the state courts, but according to the principles of common law and equity, and a federal court has no jurisdiction of a suit in equity in which a claim only cognizable at law is united with a claim for equitable relief.[47] Neither can a suit in equity to set aside and vacate a fraudulent conveyance and subject the property of a debtor to the payment of a debt be maintained in a federal court by a simple contract creditor before proceedings at law to establish and enforce it.[48] And in the federal courts the right to trial by jury secured by the constitution cannot be impaired by blending with a claim cognizable at law a demand for equitable relief.[49]

§ 34. **Sufficiency of judgment generally.**—Holders of judgments which are void for want of jurisdiction are not judgment creditors, and cannot attack conveyances, made by their debtors as fraudulent.[50] And a creditor after reversal of his judgment and before he has recovered judgment on the second trial is

45. Roselle v. Klein, 42 App. Div. (N. Y.) 316, 59 N. Y. Supp. 94.

46. Kruger v. Walker, 111 Ga. 383, 36 S. E. 794; Delacy v. Hurst, 83 Ga. 223, 9 S. E. 1052; Lindley v. Cross, 31 Ind. 106, 99 Am. Dec. 610; Harker v. Glidewell, 23 Ind. 219; Dawson Bank v. Harris, 84 N. C. 206.

47. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.

48. Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Scott v. Neely, *supra*.

49. Sommer v. New York Elev. R. Co., 14 N. Y. Supp. 619, 38 St. Rep. (N. Y.) 419; Scott v. Neely, *supra*.

50. Epstein v. Ferst, 35 Fla. 498, 17 So. 414; Miller v. Babcock, 29 Mich. 526. See Nugent v. Nugent, 70 Mich. 52, 37 N. W. 706, as to necessity for strict compliance with statutory requirements in order to secure judgment in attachment upon which a creditors' bill may be based.

merely a creditor at large.[51] Where all the requirements of the statute have been substantially complied with a merely formal defect in the judgment is not sufficient to deprive a creditor of his right as an execution creditor to assail a fraudulent conveyance, or to sustain an objection that he has not exhausted his remedy at law.[52] A confession of judgment, although defective in form, or upon a statement insufficient or not as full and explicit as the statute requires, but for a *bona fide* debt, will uphold a suit to impeach a fraudulent conveyance.[53] A judgment rendered in an attachment proceeding, although obtained on service by publication and not a personal judgment,[54] is sufficient upon which to base a bill in equity to set aside a fraudulent conveyance of the attached property.[55]

§ 35. **Effect of foreign judgment.**—A creditor under a judgment of another state or jurisdiction cannot maintain an action or bill in equity to set aside a conveyance of his debtor as fraudulent. A foreign judgment can no more constitute a basis for the ordinary creditors' action than the general indebtedness itself. It is a mere evidence of indebtedness like a simple contract until it is made a judgment of the local court.[56] The re-

51. North Hudson Mut. Bldg., etc., Assoc. v. Childs, 86 Wis. 292, 56 N. W. 870.

52. Produce Bank v. Morton, 67 N. Y. 199; King v. Baer, 31 Misc. Rep. (N. Y.) 308, 64 N. Y. Supp. 228; Hiler v. Hetterick, 5 Daly (N. Y.), 33.

53. St. John Wood Working Co. v. Smith, 82 App. Div. (N. Y.) 348, 82 N. Y. Supp. 1025, *aff'd* 178 N. Y. 629, 71 N. E. 1139, the absence of an affidavit of the authority of defendant's attorney is a mere irregularity; Neusbaum v. Keim, 24 N. Y. 325; Robinson v. Hawley, 45 App. Div. (N. Y.) 287, 61 N. Y. Supp. 138; Merry v. Fremon, 44 Mo. 518.

54. Parmenter v. Lomox, 68 Kan. 61, 74 Pac. 634.

55. Getzler v. Saroni, 18 Ill. 511.

56. *N. Y.*—Patchen v. Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35; Davis v. Bruns, 23 Hun, 648; Tarbell v. Griggs, 3 Paige, 207; 23 Am. Dec. 790; McCartney v. Bostwick, 31 Barb. 390, plaintiff must first sue upon such judgment, and receive a new judgment and issue an execution thereon, and have it returned unsatisfied, and thus establish the fact that he has exhausted his remedy at law.

Cal.—Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

covery of a judgment in a federal court, and the return of an execution issued therein unsatisfied, is not sufficient to authorize a creditor to maintain suit in a state court to set aside an alleged fraudulent conveyance. The creditor must first have exhausted his remedy by action in a state court,[57] but a creditor's bill may be maintained in the United States circuit court upon a state court judgment.[58] A judgment rendered against the administrator of a deceased person in one state is not evidence of indebtedness or a judgment *in rem* so as to sustain a bill by the creditor in another state to set aside a conveyance by the decedent of property in that state.[59]

§ 36. **Effect of judgment of justice of the peace.**—In many jurisdictions a judgment creditor must have a specific lien upon property liable to sale on execution or be in a position to perfect a lien thereon, in order to maintain an action in the nature of a creditor's bill to set aside a conveyance thereof or remove fraudulent incumbrances therefrom,[60] and, therefore, it is held that such an action cannot be sustained upon a judgment rendered before a justice of the peace, where the only execution returned was issued by the justice,[61] unless the property sought

Ill.—Winslow v. Leland, 128 Ill. 304, 21 N. E. 588; Steere v. Hoagland, 39 Ill. 264.

Iowa.—Buchanan v. Marsh, 17 Iowa, 494.

Miss.—Berryman v. Sullivan, 21 Miss. 65; Farned v. Harris, 19 Miss. 366.

Mo.—Crim v. Walker, 79 Mo. 335.

N. J.—Guy B. Waite Co. v. Otto (Ch.), 54 Atl. 425; Mechanics', etc., Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272; Davis v. Dean, 26 N. J. Eq. 436.

S. C.—King v. Clarke, 2 Hill Eq. 611.

57. Davis v. Bruns, 23 Hun (N. Y.), 648; Tompkins v. Parcell, 12 Hun (N. Y.), 662; Tarbell v. Griggs, 3 Paige (N. Y.), 207, 23 Am. Dec. 790; Steere v. Hoagland, 39 Ill. 264. *Contra.*—Brown v. Bates, 10 Ala. 432; Bullitt v. Taylor, 34 Miss. 708.

58. Wilkinson v. Yale, 29 Fed. Cas. No. 17,678, 6 McLean, 16.

59. Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; McLean v. Meek, 18 How. Pr. (U. S.) 16, 15 L. Ed. 277; Aspden v. Nixon, 4 How. (U. S.) 467, 11 L. Ed. 1059; King v. Clarke, 2 Hill Eq. (S. C.) 611.

60. Crippen v. Hudson, 13 N. Y. 161; Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056. See § 54, *infra.*

61. Crippen v. Hudson, *supra;* Swayze v. Swayze, 9 N. J. Eq. 273.

is personal property on which there is a lien by reason of the levy of execution.[62] The judgment must first have been docketed in a court of record so as to become a lien upon real estate, and an execution against both the real and personal property of the debtor returned unsatisfied.[63] Until so docketed the creditor has not exhausted his legal remedies, but when so docketed the judgment creditor becomes as much entitled to the aid of a court of equity as though the judgment was originally recovered in a court of record.[64] But a justice's judgment has been held sufficient where the property sought to be reached is equitable and no lien upon it can be created in any event,[65] and also where the judgment is large enough to confer jurisdiction on the court of chancery.[66] In some instances the statute permits an action to be based upon the judgment of a justice of the peace.[67]

§ 37. **Effect of having acquired lien by attachment.**—In many jurisdictions an attaching creditor need not reduce his claim to judgment before filing a creditor's bill to reach assets of his debtor which have been transferred in fraud of creditors, the lien by attachment being sufficient.[68] The writ of attachment, it is claimed, accomplishes all that an execution under a judgment

62. Bailey v. Burton, 8 Wend. (N. Y.) 339.

63. Crippen v. Hudson, *supra;* State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62, justice's judgment not sufficient where the land sought to be subjected is located in another county.

64. Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056.

65. Ballentine v. Beall, 4 Ill. 203.

66. Steere v. Hoagland, 39 Ill. 364.

67. Newdigate v. Jacobs, 39 Ky. 17; Heiatt v. Barnes, 35 Ky. 219.

68. *Iowa.*—Taylor v. Brauscombe, 74 Iowa, 534, 38 N. W. 400.

Ky.—Martz v. Pfeifer, 80 Ky. 600.

Miss.—Cogburn v. Pollock, 54 Miss. 639.

N. H.—Perham v. Haverhill Fiber Co., 64 N. H. 2, 3 Atl. 312; Stone v. Anderson, 26 N. H. 506; Kittredge v. Warren, 14 N. H. 509; Tappan v. Evans, 11 N. H. 311. *Compare* Dodge v. Griswold, 8 N. H. 425.

N. J.—Francis v. Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Cocks v. Varney, 45 N. J. Eq. 72, 17 Atl. 108; Curry v. Glass, 25 N. J. Eq. 108, the statutory affidavit is sufficient to create the lien on the property attached essential to the maintenance of the bill; Robert v. Hodges, 16 N. J. Eq. 299; Williams v. Michenor, 11 N. J. Eq. 520.

does, since it enables the creditor to acquire a lien for the security of his claim by a levy made before instead of after the entry of judgment. The issuing and return of an execution is proof that the creditor has exhausted his legal remedy and an attachment serves the same purpose.[69] In some states the statutes are construed to authorize the rule above stated.[70] In other jurisdictions the rule is maintained that the attachment creditor, assuming to litigate the good faith of his debtor's conveyance, must have his right settled by reducing his demand to judgment before he can resort to equity to assail the fraudulent conveyance.[71] The reasons upon which this rule is based are that, although the attachment is a specific lien, it is a lien of uncertain and contingent tenure, as it may be defeated by dissolution on motion

Or.—Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Dawson v. Sims, 14 Or. 561, 13 P. C. 506.

Wash.—Benham v. Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851; Meacham Arms Co. v. Swartz, 2 Wash. Terr. 412, 7 Pac. 859.

Wis.—Breslauer v. Geilfuss, 65 Wis. 377, 27 N. W. 47, as to the right of an attaching creditor to intervene to prevent the sheriff from paying over the proceeds of a sale under an alleged fraudulent judgment.

69. Francis v. Lawrence, *supra;* Dawson v. Sims, *supra.*

70. Martz v. Pfeifer, 80 Ky. 600; Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624; Hahn v. Salmon, 20 Fed. 801, Oregon statute; Fleischner v. First Nat. Bank, 36 Oreg. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Evans v. Laughton, 69 Wis. 138, 33 N. W. 573.

71. *N. Y.*—Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661; Bowe v. Arnold, 31 Hun, 256; Bentley v. Goodwin, 38 Barb. 633, none but a judgment creditor can impeach the *bona fides* of a judgment confessed by a debtor to a third person, and an attaching creditor, whose attachment was levied after such confession, cannot do so; Hall v. Stryker, 29 Barb. 105, *rev'd* on other grounds 27 N. Y. 596.

Cal.—Aigeltinger v. Einstein, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; McMinn v. Whelan, 27 Cal. 300.

Ill.—Bigelow v. Andress, 31 Ill. 322.

Kan.—Tennent v. Battey, 18 Kan. 324.

Me.—Griffin v. Nitcher, 57 Me. 270, attachment must be followed by judgment.

Mo.—Turner v. Adams, 46 Mo. 95; Martin v. McMichael, 23 Mo. 50, 66 Am. Dec. 656; Greene County Bank v. Epperson, 74 Mo. App. 10.

Neb. — Ainsworth v. Roubal (1905), 105 N. Y. 248; Weinland v. Cochran, 9 Neb. 480, 4 N. W. 67; Weil v. Lankins, 3 Neb. 384. *Compare* Fairbanks v. Welshans, 55 Neb. 362, 57 N. W. 865.

Can.—Whiting v. Laurason, 7 Grant Ch. (U. C.) 603.

or by a judgment in favor of the defendant on the merits of the claim, and that no advantage will inure to the creditor except in the mere matter of time by sustaining the equitable action by him before obtaining judgment.[72] But a creditor who has attached property constituting the subject matter of alleged fraudulent conveyance, or the officer in possession, may when sued by the alleged fraudulent grantee, impeach the validity of the conveyance, although the creditor has not secured judgment.[73] In such a case it is held that the attaching creditor ceases to occupy the defenceless position of a creditor at large and becomes, in a certain sense, invested with the privileges of a creditor whose debt has been adjudged valid and who finds himself embarrassed in its collection by the fraudulent conduct of the debtor; and that while the mere existence of a fraudulent transfer would not be sufficient to authorize a court of equity to entertain an action at the suit of an attaching creditor to set it aside, when it is sought to make use of such a transfer for the purpose of removing the attached property from the jurisdiction of the officer who has it in custody, nothing but the equitable arm of the court can prevent the consummation of the wrong.[74] This principle has also been applied to enable an attaching creditor to sue to set aside fraudulent judgments under which executions had been levied upon the property attached.[75] But an at-

72. Aigeltinger v. Einstein, 43 Cal. 609.

73. People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446; Hess v. Hess, 117 N. Y. 306, 22 N. E. 956; Frost v. Mott, 34 N. Y. 253; Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75; Hall v. Stryker, 27 N. Y. 596; Lux v. Davidson, 56 Hun (N. Y.), 345, 9 N. Y. Supp. 816; Webster v. Lawrence, 47 Hun (N. Y.), 565; Bowe v. Arnold, 31 Hun (N. Y.), 256; Gross v. Daly, 5 Daly (N. Y.), 540; Noble v. Holmes, 5 Hill (N. Y.), 194; Aigeltinger v. Einstein, *supra;* Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162; Sheafe v. Sheafe, 40 N. H. 516; Swanzy v. Hunt, 2 Nott & M. (S. C.) 211. And see Right of levying officer to attack conveyance in action by fraudulent grantee, chap. XV, § 14, *supra.*

74. People v. Van Buren, 136 N. Y. 252.

75. Lopez v. Merchants', etc., Nat. Bank, 18 App. Div. (N. Y.) 427, 46 N. Y. Supp. 91. And see Greenleaf v. Mumford, 30 How. Pr. (N. Y.) 30; Falconer v. Freeman, 4 Sandf.

taching creditor may not sue to set aside a fraudulent transfer of mere equitable assets.[76]

§ 38. **Effect of lien acquired otherwise than by judgment or attachment.**—As a chattel mortgage gives to the mortgagee a specific lien on the property, a creditor who is the owner and holder of a chattel mortgage given by his debtor to secure a precedent debt may bring an action to set aside a prior incumbrance on the ground that it is fraudulent as to the creditors of the mortgagor,[77] and a person having a mechanic's lien may sue to set aside as fraudulent a conveyance of the premises by the owner.[78] But it has been held that a mortgagee, although a judgment creditor who took such mortgage in payment of his judgment, could not call in question the validity of a prior conveyance which was fraudulent as to creditors, inasmuch as he had not taken out execution on his judgment and levied on the land fraudulently conveyed.[79] Persons justifying under a distress warrant are not in a condition to impeach a conveyance made by the tenant on account of fraud against creditors. To enable a landlord to take such objection, he must, like any other creditor, obtain judgment and issue execution.[80] The fact that a general creditor, without judgment and execution, has obtained possession of property fraudulently conveyed by his debtor, will not enable him to defend the fraudulent grantee's action for the value thereof.[81]

§ 39. **Circumstances excusing failure to obtain judgment generally.**—The rule that the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential

Ch. (N. Y.) 602. *Compare* Brooks v. Stome, 19 How. Pr. (N. Y.) 395.

76. Thurbee v. Blanck, 50 N. Y. 80.

77. Anderson v. Hunn, 5 Hun (N. Y.), 79.

78. Mahoney v. McWalters, 3 App. Div. (N. Y.) 248, 38 N. Y Supp. 256; Mechan v. Williams, 36 How. Pr. (N. Y.) 73.

79. Fox v. Willis, 1 Mich. 321.

80. Hastings v. Belknap, 1 Den. (N. Y.) 190.

81. Andrews v. Durant, 18 N. Y. 496.

prerequisites to the maintainance of an action in the nature of a creditor's bill to set aside a fraudulent conveyance does not rest necessarily upon a want of equitable power or its denial, but rather is adopted as a rule governing and regulating the exercise by the court of jurisdiction within its equitable powers. It has the merit of uniformity and in effect relieves a case of any uncertainty as to what would have resulted from the use of an execution if one had been issued. And it is founded upon the doctrine that a court of equity will not take cognizance of a controversy which can be determined at law, and not until the remedy there is exhausted, which has quite uniformly been the rule of the common law applicable to equitable jurisdiction.[82] And it has become the settled rule in some jurisdictions not to dispense with those preliminary proceedings at law, although it may be made to appear by evidence that no benefit could result to the creditor from them.[83] But the rule is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to there take the preliminary steps and produce what ordinarily may be treated as the condition precedent to the application for equitable relief.[84] Where a debtor is a married woman, a creditor may maintain a bill in equity attacking her fraudulent conveyance without first reducing his claim to judgment.[85] But the fact that the debtor is of unsound mind does not constitute an excuse for not obtaining a judgment, in the absence of any statutory provision for such an exception.[86] In some of the states the issue and return of execution preliminary to an action in equity is not required where it clearly appears that it would be utterly fruitless;[87] and the same doctrine

82. National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548; Ideal Clothing Co. v. Hazel, 126 Mich. 262, 85 N. W. 735.

83. Adsit v. Butler, 87 N. Y. 585; Estes v. Wilcox, 67 N. Y. 264.

84. National Tradesmen's Bank v. Wetmore, *supra*.

85. Dahlman v. Jacobs, 16 Fed. 614, 5 McCrary, 230.

86. Faivre v. Gillman, 84 Iowa, 573, 51 N. W. 46.

87. Early Times Distillery Co. v. Zeiger, 9 N. M. 31, 49 Pac. 723, where

has been declared in the United States Supreme Court, as for example, where the debtor's estate is a mere equitable one which cannot be reached by any proceeding at law.[88] A trustee in bankruptcy, acting for creditors, may maintain an action in the nature of a creditor's bill to set aside a fraudulent conveyance, without reducing the claims of the creditors to judgment.[89] A creditor of an insolvent who is under injunction not to sue has a good excuse for not obtaining judgment on his debt before proceeding by bill in equity to set aside a fraudulent conveyance,[90] but a restraining order which is a nullity furnishes no reason why a creditor should be permitted, without first obtaining a judgment, to sue to set aside a conveyance.[91]

§ 40. **Non-residence of debtor or absence from jurisdiction.** —The rule that a creditor must obtain judgment before he can maintain a bill attacking his debtor's conveyance as fraudulent is held, in some jurisdictions, not to apply where the debtor is a non-resident of the state or has removed from the jurisdiction and made it impossible for the creditor to serve process upon him.[92] This exception to the general rule is based upon the ground that the creditor cannot obtain a personal judgment against a non-resident,[93] and that a judgment recovered against

the facts show that there is no remedy at law, or that such remedy is wholly inadequate, or that the creditor claims a trust in his favor; Austin v. Morris, 23 S. C. 393, where the debtor is shown to have been utterly insolvent at the time of the fraudulent transfer.

88. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 817; Telley v. Curtam, 54 Fed. 43, 4 C. C. A. 177.

89. Crary v. Kurtz (Iowa, 1906), 105 N. W. 590; Shreck v. Hanlon (Neb. 1905), 104 N. W. 193.

90. Cleveland v. Chambliss, 64 Ga. 352.

91. Weber v. Weber, 90 Wis. 457, 63 N. W. 757.

92. First Nat. Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Quarl v. Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Kipper v. Glancey, 2 Blackf. (Ind.) 356; Corn Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Anderson v. Bradford, 28 Ky. 69; Scott v. McMillen, 1 Litt. (Ky.) 302, 13 Am. Dec. 239; Peay v. Morrison, 10 Gratt. (Va.) 149.

93. Quarl v. Abbett, 102 Ind. 233.

the debtor in another state, where jurisdiction could be obtained of his person, would have no other validity in the state where the subject of the conveyance is located than a simple contract claim, and would no more constitute a basis for the ordinary creditor's action in the latter state than the general indebtedness itself.[94] In other jurisdictions the rule is maintained that a bill in equity will lie without first obtaining judgment where, in addition to such non-residence of the debtor or removal from the jurisdiction, the fact appears that there is no property of the debtor within the state which is subject to appropriation by legal proceedings.[95] These cases proceed upon the principle that the creditor has exhausted his remedy at law, or that he has no remedy at law, which he can pursue or exhaust,[96] or has no adequate remedy at law,[97] it being held in some jurisdictions that no legal remedy is adequate if the party is compelled to go into a foreign jurisdiction to avail himself of it.[98] But where the absent debtor has property within the jurisdiction which can be reached and appropriated by legal proceedings, the fact of the debtor's non-residence or his removal to another state will not, in many states, give jurisdiction to set aside a fraudulent conveyance until the creditor has obtained judgment and pursued such property in the mode required by statute.[99] Where a judgment has been obtained against a non-resident on service by publication in attachment proceedings, and on the judgment rendered the attached property has been ordered to be sold, an action by credi-

94. Patchen v. Rofkar, 42 N. Y. Supp. 35.

95. *N. Y.*—Patchen v. Rofkar, 42 N. Y. Supp. 35. But see Ballou v. Jones, 13 Hun, 629.

Ill.—Getzler v. Saroni, 18 Ill. 511.

Minn.—Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660, enforcement of resulting trust in favor of creditor defrauded.

R. I.—Merchants' Nat. Bank v. Paine, 13 R. I. 592.

Vt.—Hanks v. Hanks, 75 Vt. 273, 54 Atl. 959.

96. Patchen v. Rofkar, 42 N. Y. Supp. 35.

97. Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

98. Stanton v. Embry, 46 Conn. 595.

99. Sanders v. Watson, 14 Ala. 198; Reese v. Bradford, 13 Ala. 837; Dewey v. Eckert, 62 Ill. 218; Greenway v. Thomas, 14 Ill. 271; Dodd v. Levy, 10 Mo. App. 121.

tor's bill cannot be maintained to set aside as fraudulent a conveyance by the debtor and subject the land to the judgment.[1]

§ 41. **Enforcement of claims against estates of decedents.**—Equity has jurisdiction to set aside a fraudulent conveyance, made by a deceased debtor, at the suit of a general creditor, and, as a judgment and execution against the personal representative would be unavailing, the creditor may resort to a court of equity in the first instance without having secured a judgment at law,[2] especially where it appears that the estate is insolvent or that there are not sufficient legal assets in the hands of the administrator for the payment of the debt,[3] and the creditor has had his claim allowed by the proper tribunal,[4] or where the claim is not disputed.[5] The allowance of a claim by a proper tribunal is

1. Parmenter v. Lomax, 68 Kan. 61, 74 Pac. 634.

2. Nill v. Phelps, 20 Misc. Rep. (N. Y.) 488, 46 N. Y. Supp. 662; Gardner v. Lansing, 28 Hun (N. Y.), 413; Spicer v. Ayers, 2 Thomps. & C. (N. Y.) 626; Loomis v. Tifft, 16 Barb. (N. Y.) 541; Steere v. Hoagland, 39 Ill. 264; Johnson v. Jones, 79 Ind. 141; Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; Nicters v. Brockman, 11 Mo. App. 600; Schurtz v. Howell, 30 N. J. Eq. 418; Fowler's Appeal, 87 Pa. St. 449; Cairus v. Ingram, 8 Pa. Super. Ct. 514, right of creditor obtaining verdict before death of grantor; Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785; Brown v. McDonald, 1 Hill Eq. (S. C.) 297; Longeway v. Mitchell, 17 Grant Ch. (U. C.) 190.

3. Battle v. Reid, 68 Ala. 149; Dunn v. Murt, 4 Mackey (D. C.), 289.

4. *N. Y.*—Phelps v. Platt, 50 Barb. 430; Loomis v. Tifft, *supra;* Spicer v. Ayers, *supra.*

Ala.—Halfman v. Ellison, 51 Ala. 543.

Ark.—Williamson v. Furbush, 31 Ark. 539; Wright v. Campbell, 27 Ark. 637.

Cal.—Hills v. Sherwood, 48 Cal. 386.

D. C.—Offutt v. King, 1 MacArthur, 312.

Ill.—White v. Russell, 79 Ill. 155; Hall v. Black, 21 Ill. App. 293.

Ind.—Love v. Mikals, 11 Ind. 227; Kipper v. Glancey, 2 Blackf. 356.

Mo.—Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

N. J.—Haston v. Castner, 29 N. J. Eq. 536.

Pa.—Irwin v. Hess, 12 Pa. Super. Ct. 163.

S. C.—Reeder v. Speake, 4 S. C. 293.

Tenn.—Armstrong v. Croft, 71 Tenn. 191; Spencer v. Armstrong, 59 Tenn. 707.

5. Nieters v. Brockman, 11 Mo. App. 600; Merchants', etc., Transp. Co. v. Borland, 53 N. J. Eq. 282, 21 Alt. 272.

regarded in the nature of a judgment,[6] and it is not necessary that a creditor should have a lien to set aside a conveyance made by the decedent.[7] The jurisdiction of courts of equity in relation to the enforcement of the claims of creditors against the estate of a decedent is original and primary resting upon the general powers of a court of equity, and not, as in other cases, ancillary or in aid of the legal tribunals whose powers are found inadequate to the emergency.[8] Jurisdiction is expressly conferred in some instances by statutes authorizing the creditor of a decedent, whose claim remains unpaid after the assets in the administrator's hands are exhausted, to sue in behalf of himself and other creditors to set aside a fraudulent conveyance of property made by the decedent, upon the refusal of the administrator to do so,[9] or by making the debts of a decedent a lien upon the lands of the decedent for a certain period subsequent to his death.[10] The creditor's claim should be presented to the proper tribunal for approval and, in the absence of a judgment, the allowance of the claim has in some cases been held necessary.[11] A creditor at large cannot, however, maintain an action to enforce a resulting trust in lands purchased and paid for by his debtor and conveyed to another, although the debtor has died insolvent, until his claim has been prosecuted to judgment against the personal representatives of the debtor.[12]

6. Fletcher v. Holmes, 40 Me. 364; Winn v. Barnett, 31 Miss. 653; Adoue v. Spencer, 59 N. J. Eq. 231, 46 Atl. 543.

7. Hagan v. Walker, 14 How. (U. S.) 29, 14 L. Ed. 312; Shell v. Boyd, 32 S. C. 359, 11 S. E. 205; Bullock v. Gordon, 4 Munf. (Va.) 450.

8. Hagan v. Walker, 14 How. (U. S.) 29, 14 L. Ed. 312; Pharis v. Leachman, 20 Ala. 662; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628, enforcement of claim against estate of deceased partner.

9. Harvey v. McDonnell, 113 N. Y. 526, 21 N. E. 695.

10. Fowler's Appeal, 87 Pa. St. 449.

11. Williamson v. Furbush, 31 Ark. 539; Mesmer v. Jenkins, 61 Cal. 151; Houston v. Maddux, 179 Ill. 377, 53 N. E. 599; Austin v. Bruner, 169 Ill. 178, 48 N. E. 449, *aff'g* 65 Ill. App. 301; Hall v. Black, 21 Ill. App. 293; O'Connor v. Boylan, 49 Mich. 209, 13 N. W. 519; Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

12. Estes v. Wilcox, 67 N. Y. 264; Allyn v. Thurston, 53 N. Y. 622.

§ 42. **Adjudications equivalent to judgment.**—The rule that a creditor must first obtain a judgment at law before he can ask relief in equity applies only where the court is called on to aid a creditor in furtherance of his legal remedy, and does not apply when the court is asked to give effect to its own judgment.[13] A party has the right to the same remedies to enforce the collection of a decree in chancery for a specific sum of money that he has to enforce a judgment at law,[14] and such a decree is sufficient after the death of a debtor upon which to found an application in equity to set aside a fraudulent conveyance.[15] Where a purchaser at a judicial sale refused to complete his purchase, and was ordered by the court to pay a certain sum as damages, this afforded sufficient basis for a creditor's suit to set aside conveyances made by the purchaser in fraud of creditors.[16] A suit in the nature of a creditor's bill may be maintained to subject property fraudulently conveyed by a husband to a decree for alimony in a divorce suit, although execution has not been taken out.[17]

§ 43. **Waiver of failure to secure judgment.**—The failure of a creditor to obtain judgment at law against his debtor before suing in equity to set aside a conveyance as fraudulent may be waived.[18] Where a trust deed that was the subject of attack recognized plaintiff's claim, the necessity for a judgment before filing a bill in equity did not exist.[19]

§ 44. **Necessity of issuance of execution generally.**—In jurisdictions where the general doctrine that all available legal remedies

13. Brown v. McDonald, 1 Hill Eq. (S. C.) 297.

14. Weightman v. Hatch, 17 Ill. 281; Farnsworth v. Strasler, 12 Ill. 482.

15. Aetne Nat. Bank v. Manhattan L. Ins. Co., 24 Fed. 769.

16. Lydecker v. Smith, 44 Hun (N. Y.), 454.

17. Twell v. Twell, 6 Mont. 19, 9 Pac. 537.

18. McMakin v. Stratton, 82 Ky. 226.

19. Springfield Grocery Co. v. Thomas, 3 Ind. T. 330, 58 S. W. 557. See Stephens v. Curran, 28 Mont. 366, 72 Pac. 753.

must be pursued and exhausted before a resort to a court of equity is maintained, the rule is enforced that the creditor must not only obtain a judgment, but also a valid execution against the property of the debtor,[20] and that such execution must be returned unsatisfied to show that the legal remedy has been exhausted.[21] Execution is necessary even where the property sought to be reached stands in the name of a third person and has never been in the name of the debtor.[22] There are, however, certain exceptions or limitations to the general rule stated above, which will be noted hereafter.[23]

§ 45. **Rule where judgment is not per se a lien.**—In those jurisdictions where the recovery and docketing of a judgment does not create a lien upon the real estate of the debtor, a creditor must issue an execution against the property conveyed before he can maintain a bill in equity to set aside a conveyance thereof as fraudulent.[24] Where the property involved is personalty, since

20. Adsit v. Butler, 87 N. Y. 585; Bostwick v. Scott, 40 Hun (N. Y.), 212; McCullough v. Colby, 5 Bosw. (N. Y.) 477; North American F. Ins. Co. v. Graham, 7 Sandf. (N. Y.) 197; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330; Bassett v. St. Albans Hotel Co., 47 Vt. 313.

21. Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. See also cases cited in preceding note; §§ 48, 49, *infra*.

22. Allyn v. Thurston, 53 N. Y. 622.

23. See §§ 47, 48, *infra*.

24. *N. Y.*—See Snedecker v. Snedecker, 18 Hun, 355, one claiming under a judgment recovered after the fraudulent conveyance cannot, in a proceeding for the distribution of surplus arising from a foreclosure of a prior mortgage, attack the conveyance, since his execution has not been returned unsatisfied. But see Hillyer v. LeRoy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919, the rule in New York is that a judgment recovered and docketed becomes a lien upon any real estate which may have been fraudulently conveyed as well as upon that actually held by the judgment debtor.

Ark.—Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 334.

Iowa.—Byers v. McEnirny, 117 Iowa, 499, 91 N. W. 797; Joye v. Perry, 111 Iowa, 567, 82 N. W. 941.

Wis.—French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910, in the absence of seizure under execution or attachment, a judgment creditor has no lien but only a right to a lien upon the property fraudu-

a judgment does not operate as a lien upon personalty, the creditor is required not only to obtain a judgment, but also to take out an execution giving him a legal preference or lien upon the goods and chattels of the debtor.[25]

§ 46. **Rule where creditor has acquired a lien.**—In New York there is some conflict in the decisions as to whether the judgment alone is sufficient to enable the creditor to bring a suit to set aside a fraudulent conveyance of real estate in aid of his legal remedy. It is not necessary to issue an execution in order to establish a judgment creditor's lien upon the real estate of his debtor,[26] as that is bound by the docketing of the judgment.[27] It has sometimes been held that the lien of the judgment alone gave the plaintiff his standing in a court of equity without any execution, and that it was not necessary for the judgment creditor to do more than recover and docket his judgment.[28] But the weight of authority seems to be that the judgment, with an execution issued and not returned, is sufficient to enable the plaintiff in such case to maintain his action, and that a return unsatisfied is unnecessary,[29] although it has been held that the execution should both be issued and returned unsatisfied.[30] But where execution has been issued and returned

lently conveyed; Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922.

25. Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Robert v. Hodges, 16 N. J. Eq. 299; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Frye v. Miley, 54 W. Va. 324, 46 S. E. 135.

26. Royer Wheel Co. v. Fielding, 61 How. Pr. (N. Y.) 437.

27. Underwood v. Sutcliffe, 77 N. Y. 58; Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275.

28. Payne v. Sheldon, 63 Barb. (N. Y.) 169; Clarkson v. DePeyster, 3 Paige (N. Y.), 320; Mohawk Bank v. Atwater, 2 Paige (N. Y.), 54; Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

29. Fox v. Moyer, 54 N. Y. 125; Mechanics', etc., Bank v. Dakin, 51 N. Y. 519; McCullough v. Colby, 18 N. Y. Super. Ct. 477; North American Fire Ins. Co. v. Graham, 7 N. Y. Super. Ct. 197; Hendricks v. Robinson, 2 Johns. Ch. 283.

30. Shaw v. Dwight, 27 N. Y. 249, 84 Am. Dec. 275; Crippen v. Hudson, 13 N. Y. 161.

unsatisfied, an outstanding execution is not necessary.[31] In many of the states the statute makes a lien of a judgment attach on the docketing of the judgment in the county where the real estate is situated, and this affords to a creditor seeking to set aside a fraudulent conveyance a sufficient lien to warrant the interference of equity in aid of such a lien, and to enable a creditor seeking to set aside a fraudulent conveyance to maintain his suit without issuing execution upon the judgment or procuring its return unsatisfied,[32] if the action is brought for the purpose of removing an obstruction in the way of the creditor's legal remedy by way of execution and making his lien more available and efficient, and in aid of an execution thereafter to be issued.[33] But the judgment must be shown to be an existing

31. Haswell v. Llncks, 87 N. Y. 637.

32. *U. S.*—Lazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, 50 C. C. A. 393; Schofield v. Ute Coal., etc., Co., 92 Fed. 269; Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason, 252; McCalmont v. Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

Ill.—Wisconsin Granite Co. v. Gerrity, 144 Ill. 77, 33 N. E. 31.

Me.—Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

Minn.—Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. Y. 390.

Miss.—Fleming v. Grafton, 54 Miss. 79; Pulliam v. Taylor, 50 Miss. 551.

Neb.—An attaching creditor acquires a lien which may be enforced, after recovery of judgment, without issuing an execution. Grandin v. First Nat. Bank (Neb. 1904), 98 N. W. 70; Westervelt v. Haggs, 61 Neb. 647, 85 N. W. 852, 54 L. R. A. 333; Coulson v. Galtsman, 1 Neb. (Unoff.), 502, 96 N. W. 349.

N. J.—Robert v. Hodges, 16 N. J. Eq. 299.

Wis.—Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317, issue and levy of execution necessary. But see Gilbert v. Stockman, 81 Wis. 602, 52 N. W. 1054, 29 Am. St. Rep. 922; Cornell v. Radway, 22 Wis. 260.

Eng.—Mountford v. Taylor, 6 Ves. Jr. 788.

33. *Ala.*—Dargan v. Waring, 11 Ala. 988, 46 Am. Dec. 234.

Ill.—Newman v. Willetts, 52 Ill. 98; Weightman v. Hatch, 17 Ill. 281; Andrews v. Donnerstag, 70 Ill. App. 236; Binnie v. Walker, 25 Ill. App. 82; Redden v. Potter, 16 Ill. App. 265.

Kan.—Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599.

Minn.—Peasley v. Ridgeway, 82 Minn. 288, 84 N. W. 1024; Sanlon v. Murphy, 51 Minn. 536, 53 N. W. 799.

Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351.

N. J.—Hall v. Nash, 58 N. J. L. 554, 43 Atl. 683.

Or.—Multnomah St. R. Co. v. Harris, 13 Or. 198, 9 Pac. 402.

lien, and if the lien no longer exists because of failure to issue an execution within the time prescribed by statute,[34] or if the judgment cannot be revived,[35] the judgment creditor cannot maintain the suit to set aside the conveyance of his debtor as fraudulent.

§ 47. **Necessity of levy of execution.**—Where a statute requires that execution shall have been issued upon a judgment before an action can be brought to set aside a conveyance as fraudulent, whether the execution must be actually levied upon the property depends in a given case upon whether a levy is necessary to create a lien.[36] The statute in some instances provides that a levy must be made to preserve the lien of a judgment if the property sought to be reached is capable of being levied upon.[37] But one who has a general judgment lien on the debtor's property need not levy an execution or procure its return unsatisfied to entitle him to maintain a bill to remove a fraudulent obstruction to the enforcement of his lien.[38] And a levy is not necessary if it would be of no use, as where the judgment debtor never had the title to the premises sought to be reached.[39]

§ 48. **Necessity of return of execution unsatisfied generally.**—As a general rule the issuance of an execution, and a return

34. Evans v. Hill, 18 Hun (N. Y.), 464; Weis v. Tiernan, 91 Ill. 27; Chambers v. Jones, 72 Ill. 275; Newman v. Willetts, 52 Ill. 98; Fleming v. Grafton, 54 Miss. 79. But see Bennett v. Stout, 98 Ill. 47, as to conveyance from debtor to debtor's wife.

35. Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924.

36. Corey v. Greene, 51 Me. 114, levy is essential to transfer the debtor's title to the creditor; Hall v. Nash, 58 N. J. Eq. 554, 43 Atl. 683, delivery of execution to the sheriff binds the personalty of the defendant; Gilbert v. Stockman, 81 Wis. 602, 51 N. W. 1076, 52 N. W. 1045, 29 Am. St. Rep. 922. *Compare* Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965.

37. Spence v. Repass, 94 Va. 716, 27 S. E. 583.

38. Schofield v. Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

39. Hamlen v. McGilicuddy, 62 Me. 268; Griffin v. Nitcher, 57 Me. 270; Des Brisay v. Hogan, 53 Me. 554; Corey v. Greene, 51 Me. 114; Fairbairn v. Middlemiss, 47 Mich. 372, 11 N. W. 203.

of "No property found," is a condition precedent to the right of a judgment creditor to maintain a suit in equity to set aside a fraudulent conveyance by the debtor, and to subject the land conveyed to the payment of the judgment, on the ground that he has no remedy at law for the collection of the debt,[40] and especially so where it is sought to reach equitable interests of the debtor.[41] In New York, where proceedings supplementary to

40. *N. Y.*—Adsit v. Butler, 87 N. Y. 585, *aff'g* 23 Hun, 45; Geery v. Geery, 63 N. Y. 252; Dunlevy v. Talmadge, 32 N. Y. 457; Bowe v. Arnold, 31 Hun, 256, *aff'd* 101 N. Y. 652; Howell v. Cooper, 37 Barb. 582; McElwain v. Willis, 9 Wend. 548; Lawton v. Levy, 2 Edw. Ch. 197.

U. S.—Swan Land, etc., Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Schofield v. Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Moore v. Baker, 34 Fed. 1; Kimberling v. Hartly, 1 Fed. 571, 1 McCrary, 136.

Ala.—Morton v. New Orleans, etc., R. Co., 79 Ala. 590; Matthews v. Mobile Ins. Co., 75 Ala. 85; Henderson v. McVay, 32 Ala. 471; Roper v. McCook, 7 Ala. 318.

Cal.—Castle v. Bader, 23 Cal. 75.

Ga.—Woodward v. Solomon, 7 Ga. 246.

Ill.—Beach v. Bestor, 45 Ill. 341; Heacock v. Durand, 42 Ill. 230; Weightman v. Hatch, 17 Ill. 281; Dillman v. Nadelhoffer, 56 Ill. App. 517; Beidler v. Douglass, 35 Ill. App. 124.

Iowa.—Gwyer v. Figgins, 37 Iowa, 517, or insolvency of the debtor must be shown by other evidence. *Contra.*—Brainard v. Van Kuran, 22 Iowa, 261; Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108.

Ky.—Kyle v. O'Neil, 88 Ky. 127, 10 S. W. 275, 10 Ky. L. Rep. 709; Montgomery v. Turner, 85 Ky. 55; Yankey v. Sweeney, 85 Ky. 55, 2 S. W. 559; Scott v. Wallace, 27 Ky. 654; Johnson v. Bonfield, 19 Ky. L. Rep. 300, 47 S. W. 697, prior to act of March 8, 1896; Beadles v. Jones, 9 Ky. L. Rep. 986, 7 S. W. 916; Hill v. Cannon, 6 Ky. L. Rep. 591; Vance v. Campbell, 3 Ky. L. Rep. 448; Kroger v. Roger Wheel Co., 1 Ky. L. Rep. 419.

Me.—Griffin v. Nitcher, 57 Me. 270; Webster v. Clark, 25 Me. 313.

Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Hogan v. Burnett, 37 Miss. 617.

Mo.—Merry v. Fremon, 44 Mo. 518.

Neb.—Morgan v. Bogue, 7 Neb. 429.

N. H.—Tappan v. Evans, 11 N. H. 311.

N. C.—Gentry v. Harper, 55 N. C. 177; Peoples v. Tatum, 36 N. C. 414.

S. C.—Compton v. Patterson, 28 S. C. 152, 5 S. E. 470; Verner v. Downs, 13 S. C. 449; Hall v. Joiner, 1 S. C. 186.

Wis.—Gates v. Boomer, 17 Wis. 455.

41. National Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Parish v. Lewis, Freem. (Miss.) 299.

execution are held to be an equitable remedy and intended as a substitute for the creditors' bill as formerly used in chancery, the return unsatisfied of an execution issued after the judgment has ceased to be a lien is not such evidence of exhaustion of the legal remedy as will warrant such proceedings.[42] Where it appears by proof *aliunde* that the judgment debtor has no property except that embraced in the alleged fraudulent conveyance which can be levied upon under execution, and that the issue of an execution would be useless and unavailing, it is not necessary, in an action to subject the property conveyed by him in fraud of creditors to sale under the judgment, to show that execution was first issued and returned *nulla bona*.[43] The fact that the legal remedy of the creditor has been exhausted may be established otherwise than by the return of the execution unsatisfied.[44] In some states the statute dispenses with the necessity

42. Importers', etc., Nat. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728.

43. *Ga.*—Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440.

Ind.—Towns v. Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.—O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133, 63 Am. St. Rep. 368; Smalley v. Mass, 72 Iowa, 171, 33 N. W. 619; Gordon v. Worthley, 48 Iowa, 429; Miller v. Dayton, 47 Iowa, 312.

Mo.—Turner v. Adams, 46 Mo. 95; Dodd v. Levy, 10 Mo. App. 121.

Or.—Hodges v. Silver Hill Min. Co., 9 Or. 200.

Wash.—Benham v. Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851.

44. *U. S.*—Sage v. Memphis, etc., R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; In re H. G. Andrae Co., 117 Fed. 561; In re Pekin Plow Co., 112 Fed. 308, 50 C. C. A., 257. See Chicago, etc., Bridge Co. v. Anglo-American Packing, etc., Co., 46 Fed. 584; Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7. *Compare* Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 37 L. Ed. 804.

Cal.—Blanc v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Ind. T.—Springfield Grocery Co. v. Thomas, 3 Ind. T. 330, 58 S. W. 557.

Ky.—Locheim v. Eversole, 24 Ky. L. Rep. 1031, 70 S. W. 661; Treadway v. Turner, 10 Ky. L. Rep. 949, 10 S. W. 816; Haskell v. Wynne, 3 Ky. L. Rep. 54.

Mo.—Reyburn v. Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229.

S. C.—Miller v. Hughes, 33 S. C. 530, 12 S. E. 419; Austin v. Morris, 23 S. C. 393.

Wis.—Oppenheimer v. Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A.

of a return of the execution unsatisfied.[45] Where the claim is purely equitable and such as a court of equity will take cognizance of in the first instance, a court of equity may proceed to grant such relief without requiring the creditor to first exhaust his remedy at law by judgment and return of execution thereon *nulla bona*.[46]

§ 49. **Rule where action is brought in aid of execution or legal remedy.**—The return of an execution *nulla bona* is not necessary before bringing an action in equity which, while closely allied to a creditor's bill proper whose object is to discover assets and to reach equitable estates that cannot be reached by common law process, is clearly distinct therefrom, and the purpose of which is to procure the removal of obstructions that hinder the enforcement of the legal process.[47] Before bringing an action in the nature of a creditor's suit to reach property which in its nature is liable to sale under execution, but which has been fraudulently transferred so that an execution cannot be enforced, it is not necessary to have a return of the execution unsatisfied;[48]

406; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229.

45. *Ala.*—Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140.

Ky.—Since the act of March 12, 1896, O'Kane v. Vinnedge, 108 Ky. 34, 21 Ky. L. Rep. 1551, 55 S. W. 711; Locheim v. Eversole, 24 Ky. L. Rep. 1031, 70 S. W. 661.

Me.—Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. St. Rep. 783, statute does not dispense with necessity for a return of execution unsatisfied.

Wis.—Ahlhauser v. Doud, 74 Wis. 400, 43 N. W. 169, a judgment creditor by levy acquires a lien sufficient to sustain an action in equity.

46. Moore v. Baker, 34 Fed. 1; McMakin v. Shelton, 6 Ky. L. Rep. 154.

47. Paulson v. Ward, 4 N. D. 100, 58 N. W. 792.

48. *N. Y.*—Mechanics', etc., Bank v. Dakin, 51 N. Y. 519, *rev'g* 50 Barb. 587.

U. S.—McCalmont v. Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232; Jones v. Green, 1 Wall. 330, 17 L. Ed. 553.

Ark.—Hunt v. Weiner, 39 Ark. 70.

Cal.—Hagar v. Shindler, 29 Cal. 47.

Fla.—Logan v. Logan, 22 Fla. 561, 1 Am. St. Rep. 212.

Ga.—Stephens v. Beal, 4 Ga. 319.

Ill.—Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215, *aff'g* 113 Ill. App. 581; French v. Commercial Nat. Bank, 79 Ill. App. 110; Dillman v. Nadelhoffer, 56 Ill. App. 517; Quinn v. People, 45

nor is a return of the execution unsatisfied necessary where the action seeks to subject the property fraudulently conveyed to the payment of a judgment which in itself constitutes a lien upon the property,[49] or where a specific lien upon the property has otherwise been acquired by the creditor.[50]

§ 50. **Sufficiency of return.**—The object of the return of an execution unsatisfied is to show the exhaustion, by the creditor, of his legal remedy, but no precise rule is laid down as to what will constitute a sufficient exhaustion of legal remedy to justify resort to equity. It has been held that the fact that the writ has been returned unsatisfied is not sufficient, but that it must be returned *nulla bona*.[51] But the sufficiency of exhaustion of legal remedy and of the return seem to depend largely upon the circumstances of the case. It has been held that a creditor might apply to a court of equity to set aside a fraudulent conveyance made by his debtor and to subject the land fraudulently conveyed, where he has obtained an ineffectual judgment against his deceased debtor's personal representatives, and failed to obtain judgment against the heir because he had "nothing by de-

Ill. App. 547; Fusze v. Stern, 17 Ill. App. 429.

Iowa.—Brainard v. Van Kuran, 22 Iowa, 261.

Miss.—Lewis v. Cline (1888), 5 So. 112.

Mont.—Merchants' Nat. Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851.

Neb.—Foley v. Doyle, 1 Neb. (Unoff.) 643, 95 N. W. 1067.

N. H.—Tappan v. Evans, 11 N. H. 311.

Ohio.—Gormley v. Potter, 29 Ohio St. 597.

Wis.—Galloway v. Hamilton, 68 Wis. 651, 32 N. E. 636.

49. Buswell v. Lincks, 8 Daly (N. Y.), 518; Stephens v. Parvin (Colo. 1904), 78 Pac. 688; Austin v. First Nat. Bank, 47 Ill. App. 224; Spooner v. Travlers' Ins. Co., 76 Minn. 311, 79 N. Y. 305, 77 Am. St. Rep. 651; Pulliam v. Taylor, 50 Miss. 551.

50. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Emery v. Yount, 7 Colo. 107, 1 Pac. 686; Fletcher v. Tuttle, 97 Me. 491, 54 Atl. 1110, lien acquired by attachment not effectual; Grandin v. First Nat. Bank (Neb. 1904), 98 N. W. 70, lien by attachment; Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317; Gilbert v. Stockman, 81 Wis. 602; Evans v. Virgin, 69 Wis. 148, 33 N. W. 585, where attachment had not become a specific lien.

51. Stephens v. Parvin (Colo. 1904), 78 Pac. 688.

scent,"[52] where the creditor, whose claim was purely legal committed his debtor in execution, and the debtor escaped without paying the debt,[53] where it was shown by parol testimony of the sheriff that he made certain entries on the execution and that the property levied on has not been sold,[54] where the return of the sheriff showed that partners against whom an execution had been taken out were not, either as partners or individuals, possessed of any property which could be taken by execution,[55] where an execution issued against a firm and its members has been returned *nulla bona* as to the firm but not against some of the members.[56] But where the execution directed to a sheriff was, in his absence, received and returned by the coroner "no property found," it was held that there was no return *nulla bona* upon which to base an action to set aside a fraudulent conveyance.[57] An execution returned *nulla bona* before the return day thereof is sufficient upon which to base a suit in equity to set aside a fraudulent conveyance,[58] although so made at the request of the plaintiff,[59] unless collusion with the plaintiff is shown.[60] Where a creditor attacking a conveyance as fraudulent has procured issuance of execution on one judgment and return thereof unsatisfied, relief will be given him as to another judgment on which execution has not been issued, the issuance and return of execution on the first judgment conferring jurisdiction on the court.[61] But the issuance of a single execution is not sufficient where the creditor has permitted his judgment to become dormant by lapse of the statutory period of time without further attempt to enforce it.[62]

52. Harrison v. Campbell, 36 Ky. 263.

53. Poague v. Boyce, 20 Ky. 70.

54. National Bank of Newberry v. Kinard, 28 S. C. 101, 5 S. E. 464.

55. Randolph v. Daly, 16 N. J. Eq. 313.

56. Hyatt v. Dusenbury, 12 Civ. Proc. R. (N. Y.) 152.

57. Johnson v. Elkins, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552.

58. Reeves v. Sherwood, 45 Ark. 520; Barth v. Heider, 7 D. C. 71.

59. Forbes v. Waller, 25 N. Y. 430.

60. Leggat v. Leggat, 79 App. Div. (N. Y.) 141, 80 N. Y. Supp. 327.

61. St. John Woodworking Co. v. Smith, 82 App. Div. (N. Y.) 348, 82 N. Y. Supp. 1025; Selz v. Hocknell, 63 Neb. 503, 88 N. W. 767.

62. Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924.

§ 51. **Effect of return of execution as evidence.**—The return of an execution unsatisfied is *prima facie* evidence of exhaustion of the creditor's legal remedies, and he is not required to prove the debtor's insolvency in any other way,[63] and a return *nulla bona* has been held to be conclusive.[64] It is the duty of the sheriff to ascertain whether the debtor has property to satisfy the execution, and when the sheriff makes return that he has no property the legal remedy is exhausted.[65] It has been held that where an execution was issued against a grantor about two weeks after the execution of a voluntary conveyance, and was returned about a month later unsatisfied, it was evidence of the grantor's condition at the time the conveyance was made,[66] but that the return of an execution *nulla bona* five years after the making of a gift by a father to his son was not sufficient to establish the father's insolvency when the gift was made.[67] The right of the creditor to equitable relief as against a debtor's fraudulent conveyance will not be defeated by a subsequent levy by the sheriff upon an equitable interest of the debtor in property which was not subject to sale under execution, after the execution had been returned unsatisfied.[68]

§ 52. **Necessity of outstanding execution.**—If an action be

63. *N. Y.*—Leggat v. Leggat, 79 App. Div. 141, 80 N. Y. Supp. 327; Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406; Hyatt v. Dusenbury, 12 Civ. Proc. R. 152.

Cal.—Windhaus v. Boots (1890), 25 Pac. 404.

Colo.—Goddard v. Fischel-Schlichten Importing Co., 9 Colo. App. 306, 48 Pac. 279.

Ill.—Lewis v. Lamphere, 79 Ill. 187.

Ind.—Warmouth v. Dryden, 125 Ind. 355, 25 N. E. 433; Lee v. Lee, 77 Ind. 251.

Me.—Corey v. Greene, 51 Me. 114; Hartshorn v. Eames, 31 Me. 93.

S. C.—Bates v. Cobb, 29 S. C. 395, 7 S. E. 743, 13 Am. St. Rep. 742.

Wis.—Oppenheimer v. Collins, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406; Daskam v. Neff, 79 Wis. 161, 47 N. W. 1132; Hopkins v. Joyce, 78 Wis. 443, 47 N W. 722; Zweig v. Horican Iron, etc., Co., 17 Wis. 362.

64. United States v. Lotridge, 26 Fed. Cas. No. 15,628, 1 McLean, 246.

65. Pope v. Cole, 55 N. Y. 124, 14 Am. Rep. 198.

66. Fuller v Brown, 76 Hun (N. Y.), 557, 28 N. Y. Supp. 189.

67. Windhaus v. Bootz (Cal. 1890), 25 Pac. 404.

68. Wright v. Petrie, 1 Sm. & M. Ch. (Miss.) 282, 326.

brought to set aside a fraudulent conveyance in aid of an execution, the execution must remain outstanding, especially where the property is personalty whereon a lien exists only by virtue of the levy.[69] It has been held, however, that a judgment creditor might sue to set aside a conveyance as fraudulent, although execution on the judgment had been returned unsatisfied,[70] that where execution has been issued and returned unsatisfied, an outstanding execution is not necessary,[71] and that such an action is not affected by the fact that, during its pendency, the execution was returned unsatisfied.[72] Though the usual course is for the creditor to issue and deliver to the sheriff an execution, and then bring an equitable action in its aid, still the court having jurisdiction of an equitable action for certain purposes, may grant relief as to the fraudulent conveyance, though the execution has been returned.[73]

§ 53. **Issuance and return of execution against decedent's estate.**—While courts of equity will not assist a creditor to the satisfaction of his debt out of property fraudulently conveyed by his debtor until he has exhausted his remedy at law, yet creditors of an insolvent estate, who have probated their claims, being in effect prohibited from suing the executor or administrator of an insolvent estate, may resort in the first instance to a court of equity to subject to the payment of their claims property fraudulently conveyed by the debtor, as a court of law is inadequate by its powers to do so.[74] In New York, the statute provides that real estate belonging to any deceased person shall

69. Adsit v. Butler, 87 N. Y. 585; Blish v. Collins, 68 Mich. 542, 36 N. W. 731, the lien acquired by levy of the execution must exist at the time the bill is filed; Paulson v. Ward, 4 N. D. 100, 58 N. W. 792.

70. Wilcox v. Payne, 55 Hun (N. Y.), 607, 8 N. Y. Supp. 407.

71. Haswell v. Lincks, 87 N. Y. 637.

72. Royer Wheel Co. v. Fielding, 31 Hun (N. Y.), 274, 18 N. Y. Wkly. Dig. 409.

73. Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965.

74. Hamilton v. Mississippi College, 52 Miss. 65; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

not be affected by any judgment against his executors or administrators.[75] Where more than one year has elapsed without administration having been granted on the estate of the deceased judgment debtor, it is not necessary that the creditor obtain a return of *nulla bona* before resorting to land conveyed in fraud of creditors.[76] But a judgment creditor who has not exhausted his legal remedies cannot come into equity to subject property fraudulently conveyed by the debtor in his lifetime without alleging and proving a deficiency of legal assets.[77] Where the statute gives a simple contract creditor of a decedent the right to sue to set aside a conveyance of the decedent the fact that the creditor has secured a judgment does not prevent him from occupying the position of a simple contract creditor under the statute.[78] In New York statutory provisions permit the issuance of an execution against the estate of a decedent on a judgment rendered before his death, and such judgment may be enforced by execution against any property upon which it is a lien with like effect as if the judgment debtor was still living.[79] But the judgment creditor may sue the grantee of the deceased judgment debtor to set aside a conveyance, though no execution had been issued, where the judgment never became a lien on the debtor's realty, in consequence of which execution could not be issued after the death of the debtor.[80]

§ 54. **Necessity of lien in general.**—As a general rule creditors who seek to reach property of their debtor fraudulently held by third persons, by asking a court of equity to set aside the conveyance, must have obtained a lien thereon.[81] The juris-

75. Lichtenberg v. Herdtfelder, 103 N. Y. 302, 8 N. E. 526.

76. Treadway v. Turner, 10 Ky. L. Rep. 949, 10 S. W. 816.

77. Quarles v. Grigsby, 31 Ala. 172.

78. Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

79. Adsit v. Butler, 87 N. Y. 585, *aff'g* 23 Hun, 45; Code Civ. Proc., § 1380.

80. LeFevre v. Phillips, 81 Hun (N. Y.), 232, 30 N. Y. Supp. 709.

81. *N. Y.*—Frothingham v. Hodenpyl, 135 N. Y. 630, 32 N. E. 240; Crippen v. Hudson, 13 N. Y. 161; Jacobstein v. Abrams, 41 Hun, 272; Mohawk Bank v. Atwater, 2 Paige,

diction of a court of equity attaches, as a general rule, by virtue of a lien created either by operation of law, as by judgment, attachment, or other proceeding in the nature of a proceeding *in rem*, or by contract.[82] The object of the attachment or execution is to bring the attaching party into privity with the property.[83] A creditor, to entitle himself to equitable aid in the recovery of his debt, must show judgment and execution, by which he has gained a legal lien and preference at the time of filing his bill, or at least before issue joined,[84] or he must show some other claim which would be a lien on the property, if the title were in the debtor.[85] If the creditor is a judgment creditor he must show that he has a lien either by judgment, if the statute gives such a lien, or if the lien arises from the levy of the writ, that a levy

54; Brinkerhoff v. Brown, 4 Johns. Ch. 671, 6 Johns. Ch. 139.

U. S.—Wells v. Dalrymple, Fed. Cas. No. 17,392.

Ark.—Harman v. May, 40 Ark. 146.

Cal.—Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204. See Ruggles v. Cannedy (Cal. 1898), 53 Pac. 911, as to right of creditor who has not acquired a lien upon the personal property of the debtor to attack a prior mortgage on the ground that it has not been recorded, and for fraud.

Ill.—Scripps v. King, 103 Ill. 469.

Kan.—Daugherty v. Powell, 67 Kan. 857.

Ky.—Anderson v. Bradford, 28 Ky. 69.

Me.—Wyman v. Richardson, 62 Me. 293.

Mich.—Krolik v. Root, 63 Mich. 562, 30 N. W. 339; Trask v. Green, 9 Mich. 358; Fox v. Willis, 1 Mich. 321; McKibben v. Barton, 1 Mich. 213.

Miss.—Green & Sons v. Weems, 85 Miss. 566, 38 So. 551; Hilzheim v. Drane, 18 Miss. 556.

Mo.—Clarke v. Laird, 60 Mo. App. 289; Lackland v. Smith, 5 Mo. App. 153.

Nev.—Clute v. Steele, 6 Nev. 335.

N. H.—Sheafe v. Sheafe, 40 N. H. 516.

N. J.—Glorieux v. Schwartz, 53 N. J. Eq. 231, 28 Atl. 470.

N. C.—Grimsley v. Hooker, 56 N. C. 4, 67 Am. Dec. 227.

Pa.—Kelly v. Herb, 157 Pa. St. 41, 27 Atl. 559.

Vt.—McLane v. Johnson, 43 Vt. 48.

Wash.—Thompson v. Caton, 3 Wash. T. 31, 13 Pac. 185.

Wis.—Weber v. Weber, 90 Wis. 457, 63 N. W. 757; Gilbert v. Stockman, 81 Wis. 602.

82. Cassaday v. Anderson, 53 Tex. 527.

83. Peoples' Sav. Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754.

84. Williams v. Brown, 4 Johns. Ch. (N. Y.) 682.

85. Holdrege v. Gwynne, 18 N. J. Eq. 26.

has been made.[86] A creditor cannot attack a conveyance as fraudulent merely upon his contract right. He must either have an attachment or execution upon personal property, or a judgment at law or a decree in equity which is a lien upon real estate. No mere outsider, or person having no lien by contract or process, can litigate any question of fraud arising upon the purchase or transfer of property by other persons.[87] But one who has a general judgment lien on the debtor's property is entitled to maintain a bill to remove a fraudulent obstruction to the enforcement of his lien.[88] There are exceptions to the general rule that a creditor, before suing to set aside his debtor's fraudulent conveyance, must have perfected a lien on the property by judgment or otherwise,[89] as, for example, where the judgment debtor purchased lands in the name of a third person,[90] or where by reason of the death of the debtor he has no remedy at law to satisfy his debt.[91] The statutes in some states permit a creditor without a lien to bring suit in equity to subject to the payment of his debt any property which has been fraudulently conveyed by his debtor, and a judgment creditor without a lien is a creditor within the meaning of such a statute.[92]

§ 55. **Necessity of exhausting other assets of debtor.**—If the debtor has property, other than that which constitutes the subject matter of the fraudulent conveyance, which can be reached at law, the general rule, supported by the weight of authority, is that suit cannot be maintained in behalf of a creditor to set

86. Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

87. Dana v. Haskell, 41 Me. 25; Mullen v. Hewitt, 103 Mo. 639, 15 S. W. 924; Griswold v. Sundback, 4 S. D. 411, 57 N. W. 339.

88. Schofield v. Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334.

89. Swan v. Dent, 2 Md. Ch. 111; Merry v. Fremon, 44 Mo. 518; Dodd v. Levy, 10 Mo. App. 121; Carr v. Parker, 10 Mo. App. 364.

90. Scoville v. Halladay, 16 Abb. N. C. (N. Y.) 43; Arbuckle Bros.' Coffee Co. v. Werner, 77 Tex. 43, 13 S. W. 963.

91. Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

92. Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947. See also Statutory modification of rule as to necessity of judgment, § 33, *supra*.

aside a conveyance as being fraudulent as against him.[93] A bill to set aside a conveyance as fraudulent, brought by a judgment creditor who has levied on some of the debtor's property, cannot be maintained where it does not appear that the property covered by the levy would upon a sale have been insufficient to satisfy his demand.[94] But if the lien which the creditor has on the property levied on is unavailable because of prior liens, the suit can be maintained without enforcing the lien against such other property.[95] A contrary rule to that above stated is maintained by the courts of some states,[96] the reasons assigned being that, the grantee's title being tainted with fraud, he has no right to say that all other means shall be exhausted before he shall be

93. *N. Y.*—Morris v. Morris, 62 Hun, 256, 16 N. Y. Supp. 824, an action to set aside a conveyance of real estate is not maintainable where the debtor has abundant personal property out of which to pay the debt; Hyatt v. Dusenbury, 12 Civ. Proc. R. 152; Payne v. Sheldon, 63 Barb. 169, it must appear that there is no other property of the debtor out of which the judgment can be paid.

Ark.—Clark v. Anthony, 31 Ark. 546.

Cal.—Harris v. Taylor, 15 Cal. 348.

Ind.—Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649, acquisition by the debtor of property at any time before the bringing of the suit will defeat the suit; Sell v. Bailey, 119 Ind. 51, 21 N. E. 338; Towns v. Smith, 115 Ind. 480, 16 N. E. 811; Lee v. Lee, 77 Ind. 251; Morgan v. Olvey, 53 Ind. 6; Baugh v. Boles, 35 Ind. 524; Ritchey v. McKay (Ind. App. 1905), 75 N. E. 161, 1090; Jackson v. Sayler, 30 Ind. App. 72, 63 N. E. 881.

Iowa.—Gwyer v. Figgins, 37 Iowa, 517.

La. — Succession of Coyle, 32 La. Ann. 79, rule prescribed by statute.

Md.—Morsell v. Baden, 22 Md. 391.

Mich.—Pierce v. Rich, 76 Mich. 648, 43 N. W. 582; Brock v. Rich, 76 Mich. 644, 43 N. W. 580, if it also appears that any fraud connected with the transfer can be disposed of in an action at law.

N. J.—Burne v. Kunzman (N. J. Ch. 1890), 19 Atl. 667, where it appeared that property covered by the levy might be sufficient to pay the debt; Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078.

Wis.—Mason v. Pierron, 63 Wis. 239, 23 N. W. 119.

94. Gayoso v. Lewis, 4 La. 329; Burne v. Kunzman (N. J. Ch. 1890), 19 Atl. 667; Canaday v. Nuttall, 37 N. C. 265.

95. Allis v. Newman, 33 Neb. 597, 50 N. W. 1048.

96. Montgomery v. Turney, 85 Ky. 55, 2 S. W. 562; Patton v. Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730; Westerman v. Westerman, 25 Ohio St. 500.

disturbed in his title,[97] that no title whatever passes by virtue of the conveyance as against existing creditors and they may levy upon the property and sell it without reference to the conveyance and without resorting to a suit in equity,[98] and that a creditor has an absolute right to a suit in equity to annul a fraudulent conveyance, and he need not first subject other property of the debtor, by execution or otherwise.[99] A creditor, before he is permitted to attack the conveyance which he conceives to be fraudulent, is not obliged to search beyond the jurisdiction of the court for unincumbered property out of which to make his debt,[1] and where the suit is in aid of the creditor's legal remedy, he is not bound, as a condition of obtaining relief, to show that the debtor has no other property, or that he is insolvent, or that any execution has been returned unsatisfied.[2] Under the statutes in some states a creditor is permitted to sue, although the debtor has other property.[3] The fact that the debtor has some other property subject to execution will not preclude the creditor's resort to equity to set aside a fraudulent conveyance, where such other property is insufficient to satisfy the creditor's claim.[4] And where there have been several fraudulent transfers the creditor may choose the one which he will attack.[5]

97. Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715; Dunphy v. Gorman, 29 Ill. App. 132.

98. Yankey v. Sweeney, 85 Ky. 55, 2 S. W. 559, 8 Ky. L. Rep. 944.

99. Hoffman v. Fleming, 43 W. Va. 762, 28 S. E. 790.

1. Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

2. Botsford v. Beers, 11 Conn. 369; Robinson v. Springfield Co., 21 Fla. 203; Smith v. Muirheid, 24 N. J. Eq. 4; Spooner v. Travelers Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651; Gormley v. Potter, 29 Ohio St. 597.

3. Wood v. Potts, 140 Ala. 425, 37 So. 253; Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Beall v. Lehman Durr Co., 110 Ala. 446, 18 So. 230; McClarin v. Anderson, 109 Ala. 571, 19 So. 982; O'Neil v. Birmingham Brew. Co., 101 Ala. 383, 13 So. 576; Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486, 51 S. W. 632; Citizens' Bank v. Buddig, 65 Miss. 284, 4 So. 94.

4. McConnell v. Citizens' State Bank, 130 Ind. 127, 27 N. E. 616; Lee v. Lee, 77 Ind. 251.

5. Miller v. Dayton, 47 Iowa, 312; First Nat. Bank v. Hosmer, 48 Mich. 200, 12 N. E. 212; Cox v. Dunham, 8 N. J. Eq. 594.

§ 56. **Exhaustion of estate of deceased debtor.**—A creditor of an estate cannot maintain a suit in equity to set aside a fraudulent conveyance made by the decedent, where it appears that the assets are sufficient to pay his claim.[6] He must allege and prove a deficiency of assets.[7] Ordinary creditors, alleging their debtor's sale fraudulent, must show the want of effects to satisfy their claims; and, if he be dead, this must be shown by a judicial settlement of his succession.[8] But by statute creditors of a deceased grantor are in some instances permitted to subject land fraudulently conveyed to the satisfaction of their claims, without regard to the sufficiency of the legal assets of the estate.[9] Where a court of equity is satisfied from the facts of the case that a deceased debtor left no personal estate to be administered, it will not require letters to be taken out or proceedings against an administrator to be shown, to support proceedings against property fraudulently conveyed away by the debtor.[10]

§ 57. **Necessity of pursuing legal remedy against debtor's co-obligor.**—In some jurisdictions a fraudulent conveyance by a joint obligor will not be set aside so long as there is a legal remedy against the other joint obligors,[11] unless the co-obligors are residents of and having all their property in another juris-

6. State, Little v. Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Jordan v. Stephenson, 17 Iowa, 514; Rutherford v. Alyea, 54 N. J. Eq. 411, 34 Atl. 1078. But see First Nat. Bank v. Tompkins, 3 Neb. (Unoff.) 328, 91 N. W. 551, holding to the contrary where the creditor has obtained an attachment lien in the debtor's lifetime.

7. State Bank v. Ellis, 30 Ala. 478; Chamberlayne v. Temple, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

8. Semple v. Fletcher, 3 Mart. N. S. (La.) 382.

9. Wood v. Potts, 140 Ala. 425, 37 So. 253.

10. Jordan v. Stephenson, 17 Iowa, 514; Birely v. Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

11. Euclid Nat. Bank v. Judkins, 66 Ark. 486, 51 S. W. 632; Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088; Geiser Mfg. Co. v. Lee, 33 Ind. App. 38, 66 N. E. 701; Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002; Wales v. Lawrence, 36 N. J. Eq. 207; Randolph v. Daly, 16 N. J. Eq. 313. See Dreyfus v. Childs, 48 La. Ann. 872, 19 So. 929.

diction,[12] or unless the other joint judgment debtors are merely sureties.[13] Where the obligation created by the judgment is several as well as joint, in an action to set aside a conveyance by one of the judgment debtors as in fraud of the judgment creditor, it is not necessary that the creditor should have previously exhausted his legal remedies against the other debtor.[14] The rule is the same where the statute has abolished all distinction between joint and several liabilities and authorizes action to be brought against any one of several joint obligors.[15] But where one of two debtors executing a joint obligation to plaintiff was solvent at that time, but afterwards became insolvent, plaintiff could come into equity to set aside a fraudulent conveyance made by the other, the rule that equity will not extend relief to set aside a conveyance of one joint debtor so long as a remedy exists against the other debtor not applying.[16]

§ 58. **Reimbursement of grantee or other creditors.**—A person seeking to have an alleged fraudulent conveyance set aside should come into equity with clean hands.[17] A creditor cannot recover possession of goods, transferred by his debtor with intent to defraud his creditors, from a purchaser in good faith, without refunding to the purchaser such part of the price as has been paid.[18] Where a debtor has deeded certain property to secure the claims of some of his creditors, other creditors, whose claims are unsecured, cannot insist upon a court of equity annulling the

12. Alford v. Baker, 53 Ind. 279. See also § 40, *supra*.

13. Baker v. Potts, 73 App. Div. (N. Y.) 29, 76 N. Y. Supp. 406; Euclid Ave. Nat. Bank v. Judkins, 66 Ark. 486; Harvey v. State, 123 Ind. 260, 24 N. E. 239; Duffy v. State, 115 Ind. 351, 17 N. E. 615.

14. Tuthill v. Goss, 89 Hun (N. Y.), 609, 35 N. Y. Supp. 136; Clarkson v. Dunning, 51 Hun (N. Y.), 644, 4 N. Y. Supp. 430.

15. Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74.

16. Stark v. Lamb (Ind. 1906), 78 N. E. 668.

17. Robinson v. Frankville First N. E. Church, 59 Iowa, 717, 12 N. W. 772.

18. Van Wyck v. Baker, 16 Hun (N. Y.), 168; Martin v. Matthews, 10 Wash. 176, 38 Pac. 1001. See also Reimbursement, subrogation, and indemnity in case of constructive fraud

deed without offering to pay the secured claims.[19] Where a creditor has received the benefits of an alleged fraudulent conveyance as, for instance, the notes of the vendee given in payment therefor, he cannot avoid it without returning or offering to return such benefits.[20] But a creditor holding a pledge or collateral for the payment of his claim is not bound to surrender it before attacking a conveyance by the debtor as fraudulent.[21] While equity will place the honest purchaser *in statu quo* by restoring to him whatever he has paid upon his purchase or otherwise reinstating him in the possession he occupied before the purchase,[22] if the grantee has participated in the fraudulent intent of the grantor, any consideration which may have been parted with by the grantee need not be repaid or tendered.[23] Equity may require the payment or tender of the amount of a debt to secure which the alleged fraudulent conveyance was given,[24] or a consent to a resale of land purchased at sheriff's sale at a merely nominal price,[25] as a condition of granting relief by the setting aside of the conveyance. It is not necessary for a creditor to redeem from a mortgage given by the alleged fraudulent grantee, since he has no right to redeem.[26]

§ 59. **Joinder of causes of action.**—In a suit by a judgment creditor to obtain the debtor's property from persons to whom it was fraudulently transferred in distinct parcels, the cause of action, being the fraudulent disposition of the property to defendants, is the same, affecting all defendants, within the statute

or good faith of grantee, chap. XIV, § 40, *supra*.

19. Anderson v. McNeal, 82 Miss. 542, 34 So. 1. But see Hall v. Harrington, 7 Colo. App. 474, 44 Pac. 365.

20. Bowden v. Spellman, 59 Ark. 251, 27 S. W. 602. See Estoppel, chap. V, § 17, *supra*.

21. Alabama Warehouse Co. v. Jones, 62 Ala. 550.

22. Crockett v. Phinney, 33 Minn. 157, 22 N. W. 292.

23. Miles v. Lewis, 115 Pa. St. 580, 10 Atl. 123. See Reimbursement, etc., in case of actual fraud, chap. XIV, § 41, *supra*.

24. Wise v. Jefferis, 51 Fed. 641, 2 C. C. A. 432, 7 U. S. App. 275.

25. White v. Cates, 37 Ky. 357.

26. Ware v. Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

which provides that the causes of action to be united must affect all the parties to the action.[27] Where several fraudulent conveyances have been made as parts of the same transaction, they may be attacked in one proceeding, though the defendants claim different interests.[28] It is not a misjoinder of causes of action to seek in one action to set aside as fraudulent conveyances made by the same grantor on the same day to different grantees.[29] A creditor may, in one suit, sue to set aside fraudulent conveyances by the debtor made at different times and independently to separate persons.[30] If defendants have combined and acted in concert in the fraudulent transaction and all have a common interest centering in the point in issue in the cause, they may be joined in one bill.[31] A creditor may obtain relief in one suit against several fraudulent judgments against his debtor obtained in several different courts.[32] The creditor may join, as party defendant with the debtor, several persons to whom he has conveyed different parcels of property, out of which the creditor seeks satisfaction of his debt, although such persons may have no common interest in the several parcels so conveyed,[33] and although no joint fraud in any one transaction may be charged against all the transferrees.[34] A conveyance made by the debtor with intent to defraud creditors and a purchase by the debtor of property in the name of a third person with the like intent, both transactions being of the same nature al-

27. Morton v. Weil, 11 Abb. Prac. (N. Y.) 421; Jacot v. Boyle, 18 How. Prac. (N. Y.) 106; Marx v. Tailer, 12 N. Y. Civ. Proc. R. 226; Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

28. Oakley v. Tugwell, 33 Hun (N. Y.), 357.

29. Anderson v. Anderson, 4 Ky. L. Rep. 579. *Compare* Tucker v. Tucker, 29 Mo. 350.

30. Reed v. Stryker, 12 Abb. Prac. (N. Y.) 77, *rev'g* 6 Abb. Prac. 109, 4 Abb. Dec. 26, though there be no privity between the several transferees in such a case, there is a privity between each of them and the debtor, which makes it proper to join them as defendants in an action to reach the property of that debtor; Hughes v. Tennison, 3 Tenn. Ch. 641.

31. Winslow v. Dousman, 18 Wis. 456.

32. Uhlfelder v. Levy, 9 Cal. 607.

33. Chase v. Searles, 45 N. H. 511.

34. Brian v. Thomas, 63 Md. 476; Trego v. Skinner, 42 Md. 426.

though different in form, may be attacked in the same action.[35] In jurisdictions where code provisions require that the causes of action, in order to be united must affect all parties to the action, a cause of action to set aside a fraudulent conveyance to one defendant cannot be united with a cause of action for the foreclosure of a valid chattel mortgage held by another defendant.[36]

§ 60. **Jurisdiction of the person and cause of action.**—As a general rule the courts of one state have no jurisdiction to set aside a conveyance of lands or assets of a judgment debtor situate in another state, on the ground that the debtor has fraudulently conveyed them away,[37] but equity has jurisdiction of an action, on personal service on the debtor and his grantee, to restrain the alienation of lands situated in another state, which have been fraudulently mortgaged, pending an action in such other state, and to compel the satisfaction of the mortgage.[38] An action to set aside a pledge of mortgage notes may be brought in the state where the pledgor and pledgee are found, although the notes are kept in another state where the pledgee resides.[39] The jurisdiction of equity of a suit to subject property fraudulently conveyed by a debtor to the claims of creditors does not depend upon the amount of the creditors' claims.[40] A judicial sale of personal property in one state may be set aside for fraud, in an action brought in another state, if the property has been removed into the latter state.[41] The jurisdiction of particular

35. North v. Bradway, 9 Minn. 183.

36. Higgins v. Crichton, 63 How. Prac. (N. Y.) 354.

37. Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159, 20 How. Pr. 62; Nicholson v. Leavitt, 4 Sandf. (N. Y.) 252; Carpenter v. Stange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; West Point Min., etc., Co. v. Allen (Ala. 1905), 39 So. 351; Grandin v. First Nat. Bank (Neb. 1904), 98 N. W. 70. See, as to rule in Canada, Burns v. Davidson, 21 Ont. 547; Clarkson v. Dupre, 16 Ont. Pr. 521; Livingstone v. Sibbald, 15 Ont. Pr. 315.

38. Kirdahi v. Basha, 36 Misc. Rep. (N. Y.) 715, 74 N. Y. Supp. 383.

39. Meyer v. Moss, 110 La. 132, 34 So. 332.

40. Lore v. Getsinger, 7 N. J. Eq. 191, *rev'd* 7 N. J. Eq. 639; Mebane v. Layton, 86 N. C. 571. But see Bailey v. Burton, 8 Wend. (N. Y.) 339, under a statute since repealed.

41. White v. Trotter, 22 Miss. 30, 53 Am. Dec. 112.

courts in a state is governed by the provisions of the statutes of the state.[42] The probate court, as a general rule, has no jurisdiction.[43] Jurisdiction to set aside a fraudulent conveyance made by a non-resident debtor may be obtained in an attachment suit by service of process by publication, and without obtaining jurisdiction of the person, and though no personal judgment can be rendered against the defendant.[44]

§ 61. **Venue.**—An action to procure a decree adjudging a conveyance of land fraudulent and setting it aside is an action for the determination of interest in land, and, as a general rule, must be brought in the county where the land, or some part thereof, is situated.[45] But not necessarily, where the object

42. *N. Y.*—People v. New York Common Pleas, 28 How. Pr. 477, 18 Abb. Pr. 438, the common pleas, now "city court of New York," has jurisdiction.

Ga.—Manheim v. Claflin, 81 Ga. 129, 7 S. E. 284, creditor restricted to the superior court.

Ill.—First Nat. Bank v. North Wisconsin Lumber Co., 41 Ill. App. 383, county court has jurisdiction except in case of assignment for the benefit of creditors.

Ind.—Tyler v. Wilkerson, 20 Ind. 473, both circuit court and common pleas.

N. H.—Stone v. Anderson, 26 N. H. 506, superior court.

Ohio.—Benedict v. Market Nat. Bank, 6 Ohio S. & C. Pl. Dec. 320, 4 Ohio N. P. 231, common pleas has jurisdiction where there has been no assignment.

Tex.—Heard v. McKinney, 1 Tex. Unrep. Cas. 83, district court exclusive jurisdiction.

Can.—Merchants Bank v. Brooker, 9 Ont. Pr. 133, superior court.

43. *Ill.*—Harting v. Jockers, 31 Ill. App. 67.

Kan.—Barker v. Battey, 62 Kan. 584, 64 Pac. 75.

Mass.—See Holland v. Cruft, 37 Mass. 321.

Miss.—Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169.

N. C.—Greer v. Cagle, 84 N. C. 385, superior court has exclusive jurisdiction.

Ohio.—Spoors v. Cowen, 44 Ohio St. 497, 9 N. E. 132.

44. First Nat. Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Quarl v. Abbott, 102 Ind. 233, 1 N. E. 476; Moody v. Gay, 81 Mass. 457.

45. *N. Y.*—Wood v. Hollister, 3 Abb. Pr. 14; Starks v. Bates, 12 How. Pr. 465; Mairs v. Remsen, 3 Code Rep. 138.

Ill.—Richards v. Hyde, 21 Ill. 640.

Ky.—Marcum v. Powers, 10 Ky. L. Rep. 380, 90 S. W. 255, although the judgment was recovered and the debtor lives in another county.

of the action is not only to avoid the conveyance as fraudulent, but to apply the land in payment of plaintiff's debt.[46] An action in aid of an execution has been held not to be one "to enforce a lien upon real property,"[47] and there are other authorities holding that an action to set aside a fraudulent conveyance need not be tried in the county where the property is located.[48] If the real estate is situated in more than one county, suit may be brought in either county.[49] Separate suits need not be brought in each county for land fraudulently conveyed to a single person.[50] An action to reach personalty may be brought in the county where the debtor resides.[51]

§ 62. **Parties plaintiff.**—The general rule is that a suit to set aside a fraudulent conveyance or judgment should be brought in the name of the party in interest, and a creditor may bring a suit in his own name and for his own benefit and need not make other creditors standing in the same situation parties,[52] where it is not a general creditors' bill but merely one charging

Mich.—Krolik v. Bulkley, 58 Mich. 407, 29 N. W. 205.

Ohio.—Leaf v. Marriott, 4 Ohio S. & C. Pl. Dec. 402, 29 Cinc. L. Bul. 225.

S. C.—Augusta Sav. Bank v. Stelling, 31 S. C. 360, 9 S. E. 1028; New Home Sewing Mach. Co. v. Wray, 28 S. C. 86, 5 S. E. 603, but the rule does not apply where the fraudulent conveyance is a mere incident to the suit and there is no prayer to set aside the conveyance.

46. Rawls v. Carr, 17 Abb. Pr. (N. Y.) 96.

47. Woodbury v. Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730; Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77.

48. *Ga.*—Coleman v. Franklin, 26 Ga. 368.

Ill.—Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205.

Tex.—Lehmberg v. Biberstein, 51 Tex. 457; Vandever v. Freeman, 20 Tex. 333, 70 Am. Dec. 391.

49. Hunt v. Dean, 91 Minn. 96, 37 N. W. 574; Benton v. Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; and New York cases cited in preceding notes.

50. Lindell Real Estate Co. v. Lindell, 133 Mo. 386, 33 S. W. 466.

51. First Nat. Bank v. Gibson (Neb. 1903), 94 N. W. 965.

52. *N. Y.*—Lopez v. Farmers', etc., Nat. Bank, 18 App. Div. 427, 46 N. Y. Supp. 91; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454.

Ala.—Freeman v. Stewart, 119 Ala. 158, 24 So. 31, and he need not make prior mortgagees parties.

fraud as against complainant.[53] He may likewise file a bill in his own name if he owns the judgment, although it was recovered to the use of a third party.[54] The assignee of a judgment may likewise maintain suit to set aside as fraudulent a conveyance by the judgment debtor, without joining the assignor as a party plaintiff.[55] The rule is well established also that a creditor may bring an action in behalf of himself and all other creditors to set aside alleged fraudulent conveyances or transfers, and to have the property sold to pay his and other debts, all sharing alike whose claims are in the same class.[56] Several judgment creditors may join in an action to set aside a fraudulent conveyance made by their common debtor, even where their claims are several and distinct.[57] But while judgment creditors

Cal.—Baker v. Bartol, 6 Cal. 483.

Ill.—Mann v. Ruby, 102 Ill. 348; Ballentine v. Beall, 4 Ill. 263.

Ind.—New v. New, 127 Ind. 576, 27 N. E. 154.

Mass.—Crompton v. Anthony, 95 Mass. 33; Silloway v. Columbia Ins. Co., 74 Mass. 199.

Mo.—Jackson v. Robinson, 64 Mo. 289.

N. J.—Annin v. Annin, 24 N. J. Eq. 184; Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

53. Tissier v. Wailes (Ala. 1905), 39 So. 924.

54. Postlewait v. Howes, 3 Iowa, 365; Lewis v. Whitten, 112 Mo. 318, 20 S. W. 617.

55. Jones v. Smith, 92 Ala. 455, 9 So. 179; Broughton v. Mitchell, 64 Ala. 210; Coale v. Mildred, 3 Har. & J. (Md.) 278; Buckingham v. Walker, 51 Miss. 491, and the heirs of a deceased judgment creditor are not necessary parties complainant where the judgment was assigned by the judgment creditor in his lifetime.

56. *N. Y.*—Campbell v. Heiland, 55 App. Div. 95, 66 N. Y. Supp. 1116; Louis v. Belgard, 17 N. Y. Supp. 882; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454. See also Hendricks v. Robinson, 2 Johns. Ch. 283; Hutchinson v. Smith, 7 Paige 26.

Ill.—Chicago, etc., Land Co. v. Peck, 112 Ill. 108; Beebe v. Saulter, 87 Ill. 518.

Ind.—Carr v. Huette, 73 Ind. 378; Barton v. Bryant, 2 Ind. 189.

Ky.—Baker v. Kinnaird, 94 Ky. 5, 21 S. W. 237, 14 Ky. L. Rep. 695.

Me.—Frost v. Libby, 79 Me. 56, 8 Atl. 149.

Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

57. *N. Y.*—White's Bank v. Farthing, 101 N. Y. 344, 4 N. E. 734; Bailey v. Burton, 8 Wend. 329; Clarkson v. De Peyster, 3 Paige, 320; Edmeston v. Lyde, 1 Paige, 637; Brinkerhoff v. Brown, 6 Johns. Ch. 139.

Ark.—Fry v. Kruse, 43 Ark. 142.

Ind.—Armstrong v. Dunn, 143 Ind. 433, 41 N. E. 540; Elliott v. Pontius, 136 Ind. 641, 35 N. E. 562, 36 N. E. 421; Strong v. Taylor School Tp., 79 Ind. 208; Ruffing v. Tilton,

may unite in an action to set aside a fraudulent conveyance, the court is not required in such action to compel the plaintiff to bring them in.[58] Several attachment creditors may unite in an action where the evidence shows that their levies are upon the same property.[59] The joinder of a judgment creditor with a simple contract creditor, in a bill to set aside fraudulent conveyances made by a debtor, is permitted by statute in Alabama.[60]

§ 63. **Parties defendant in general.**—As a general rule all parties interested in the controversy, or who may be affected by the judgment or decree rendered therein, should be made parties, and all who are in any way interested are proper parties and should therefore be joined.[61] One having no privity in the

12 Ind. 259; Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105.

Iowa.—Gamet v. Simmons, 103 Iowa, 163, 72 N. W. 444.

La.—Marx v. Meyer, 50 La. Ann. 1229, 23 So. 923; Williams v. Hawthorn, 14 La. Ann. 615.

Mich.—Smith v. Rumsey, 33 Mich. 183.

Miss.—Buckingham v. Walker, 51 Miss. 491.

N. J.—Morehouse v. Kissam, 58 N. J. Eq. 364, 43 Atl. 891; Lore v. Getsinger, 7 N. J. Eq. 191, *rev'd* 7 N. J. Eq. 693.

N. C.—Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997; Mebane v. Layton, 86 N. C. 571.

S. C.—Ferst v. Powers, 64 S. C. 221, 41 S. E. 974; Bomar v. Means, 37 S. C. 520, 16 S. E. 537, 34 Am. St. Rep. 772.

Va.—Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854.

W. Va.—Crim v. Price, 46 W. Va. 374, 33 S. E. 251; Pappenheimer v. Roberts, 24 W. Va. 702, other judgment creditors should be made parties.

Wis.—Gates v. Boomer, 17 Wis. 455.

Can.—Ferguson v. Kenney, 12 Ont. Pr. 455; Turner v. Smith, 26 Grant Ch. (U. C.) 198.

58. White's Bank v. Farthing, 101 N. Y. 344, 4 N. E. 734.

59. Brumley v. Golden, 27 Mo. App. 160.

60. Brooks v. Lowenstein, 124 Ala. 158, 27 So. 520; Gassenheimer v. Kellogg, 121 Ala. 109, 26 So. 29; Steiner Land, etc., Co. v. King, 118 Ala. 546, 24 So. 35; Steiner v. Parker, 108 Ala. 357, 19 So. 386; Tower Mfg. Co. v. Thompson, 90 Ala. 129, 7 So. 530.

61. *N. Y.*—National Broadway Bank v. Yuengling, 58 Hun, 474, 12 N. Y. Supp. 762; Hammond v. Hudson River Iron, etc., Co., 20 Barb. 378; Watts v. Wilcox, 13 N. Y. Supp. 492, 20 N. Y. Civ. Proc. 164.

alleged fraudulent conveyance, however, should not be made a party defendant.[62] A creditor instituting an original action to set aside the fraudulent conveyance of the debtor, having a prior lien, is not a necessary or proper party to the action brought by a receiver, pending the first, for the same purpose.[63] A creditor who seeks to subject to his debt property paid for, as alleged, by the debtor, though bought in the name of another, need not make the vendor a party, as he has no interest in the question.[64] An attorney employed to examine the title to real estate and to prepare a conveyance of it is not a proper party to a creditor's bill to set aside the conveyance as fraudulent, when he is not charged with having any interest in the matter and no relief is sought against him.[65] It is a general rule that all persons claiming a present interest in the property should be made parties defendant in an action to set aside a fraudulent

Ark.—Thornberry v. Baxter, 24 Ark. 76.

Cal.—Raynor v. Mintzer, 67 Cal. 159, 7 Pac. 431.

Fla.—Howse v. Moody, 14 Fla. 59.

Ga.—Kruger v. Walker, 111 Ga. 383, 36 S. E. 794.

Ind.—Doherty v. Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

Me.—American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 Atl. 515.

Mo.—Burke v. Flournoy, 4 Mo. 116.

N. J.—Dunham v. Ramsey, 37 N. J. Eq. 388.

Ohio.—Barrett v. Reed, Wright, 700.

Vt.—Wilson v. Spear, 68 Vt. 145, 34 Atl. 429.

Va.—Clough v. Thompson, 7 Gratt. 26; Greer v. Wright, 6 Gratt. 154, 52 Am. Dec. 111.

62. *N. Y.*—Gardner v. C. B. Keogh Mfg. Co., 63 Hun, 519, 18 N. Y. Supp. 391, where a complaint to set aside conveyances to a corporation, after setting forth the alleged fraudulent transfer, further alleged that the debtors had also transferred a large amount of stock of the corporation to persons who were not *bona fide* creditors, with like fraudulent intent, the latter allegation being merely made to characterize the debtors' action, the assignees of such stock were not necessary parties to the suit.

Fla.—McDonald v. Russell, 16 Fla. 260.

Me.—Merrill v. McLaughlin, 75 Me. 64; Whitmore v. Woodward, 28 Me. 392.

Md.—Farrow v. Teackle, 4 Har. & J. 271.

N. D.—Daisy Roller Mills v. Ward, 6 N D. 317, 70 N. W. 271.

63. Metcalf v. Del Valle, 64 Hun (N. Y.), 245, 19 N. Y. Supp. 16.

64. Bronsema v. Rind, 2 La. Ann. 959.

65. Davis v. Harper, 14 App. Cas. (D. C.) 463.

conveyance thereof.[66] The *cestuis que trustent* as well as the trustee are necessary parties to a bill to set aside a trust deed as executed in fraud of creditors.[67] But where the rights of a person claiming an interest in the property are not brought in question or affected by the action, such person is not a necessary although he may be a proper party.[68] A party claiming an interest in a conveyance under a parol declaration of trust evidenced by parol only need not be made a party to a suit to set aside the conveyance, as such trust could not be enforced.[69] No one can make himself a necessary party defendant to a suit to set aside an alleged fraudulent conveyance by purchasing or otherwise acquiring, *pendente lite,* an interest in the subject matter of the litigation.[70]

66. *Ala.*—Perkins v. Brierfield Iron, etc., Co., 77 Ala. 403.

Fla.—Howse v. Moody, 14 Fla. 59.

Ind.—Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Fletcher v. Mansur, 5 Ind. 267.

Ky.—Smiser v. Stevens-Wolford Co., 20 Ky. L. Rep. 501, 45 S. W. 357.

La.—J. Grossman's Sons v. Sanders, 114 La. 958, 38 So. 692; Vandine v. Eherman, 26 La. Ann. 388.

Minn.—Tatum v. Roberts, 59 Minn. 52, 60 N. W. 348.

Mo.—Judson v. Walker, 155 Mo. 166, 55 S. W. 1083.

N. J.—Miller v. Jamison, 24 N. J. Eq. 41; Williams v. Michenor, 11 N. J. Eq. 520.

N. C.—Le Duc v. Brandt, 110 N. C. 289, 14 S. E. 778.

S. C.—Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

Tex.—Cleveland v. People's Nat. Bank (Civ. App. 1899), 49 S. W. 523.

Va.—Clough v. Thompson, 7 Gratt. 26; Bullock v. Gordon, 4 Munf. 450.

67. Talbott v. Leatherbury, 92 Md. 166, 48 Atl. 733; Thomas v. Torrance, 1 Ch. Chamb. (U. C.) 46.

68. *N. Y.*—Briggs v. Davis, 20 N. Y. 15, 75 Am. Dec. 363; Sprogg v. Dichman, 28 Misc. Rep. 409, 59 N. Y. Supp. 966.

U. S.—Venable v. Bank of U. S., 27 U. S. 107, 7 L. Ed. 364.

Ala.—Watts v. Burgess, 126 Ala. 170, 27 So. 763; Brooks v. Lowenstein, 124 Ala. 158, 27 So. 520; Williams v. Spragins, 102 Ala. 424, 15 So. 247.

Colo.—Clark v. Knox, 32 Colo. 342, 76 Pac. 372.

D. C.—Clark v. Bradley Coal, etc., Co., 6 App. Cas. 437.

Ill.—Kratz v. Buck, 111 Ill. 40.

Ohio.—Bowlus v. Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Can.—Thompson v. Dodd, 26 Grant Ch. (U. C.) 381.

69. Whelan v. Whelan, 3 Cow. (N. Y.) 537.

70. Johnson v. Worthington, 30 Ill. App. 617.

§ 64. **Grantor or debtor as defendant.**—In many jurisdictions the grantor or debtor is a necessary party defendant to an action to set aside a conveyance alleged to have been made by him in fraud of creditors, or to a bill filed by his creditors to reach land alleged to have been fraudulently conveyed.[71] In other jurisdictions it is held that the debtor is a necessary party where the property has been transferred merely as security for

71. *N. Y.*—Miller v. Hall, 70 N. Y. 250, *aff'g* 40 N. Y. Super. Ct. 262; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Lawrence v. Bank of Republic, 35 N. Y. 320; Hubbell v. Merchants' Nat. Bank, 42 Hun, 200; Allison v. Weller, 3 Hun, 608, 6 Thomp. & C. 291; Shaver v. Brainard, 29 Barb. 25; Hammond v. Hudson River Iron, etc., Co., 20 Barb. 378; Palen v. Bushnell, 18 Abb. Pr. 301; Wallace v. Eaton, 5 How. Pr. 99; Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412; Boyd v. Hoyt, 5 Paige, 65; Sewall v. Russell, 2 Paige, 175.

U. S.—Gaylord v. Kelshaw, 68 U. S. 81, 17 L. Ed. 612.

Ala.—Powe v. McLeod, 76 Ala. 418; Harris v. Moore, 72 Ala. 507.

Ga.—Stephens v. Whitehead, 75 Ga. 294.

Ky.—Bevins v. Eisman, 21 Ky. L. Rep. 1772, 56 S. W. 410. But see Matthews v. Lloyd, 89 Ky. 625, 11 Ky. L. Rep. 843, 13 S. W. 106, the debtor is not a necessary party where he is insolvent.

La.—Black v. Bordelon, 38 La. Ann. 696; Zimmerman v. Fitch, 28 La. Ann. 454; Lawrence v. Bowman, 6 Rob. 21. To annul a contract for fraud or simulation, the original debtor must be a party to the suit only where the debt has not been previously liquidated by a judgment. Russell v. Keefe, 28 La. Ann. 928; Dumas v. Lefebvre, 10 Rob. 399.

Me.—Laughton v. Harden, 68 Me. 208, where a creditor, having levied an execution on land which his debtor had previously conveyed to defraud his creditors, filed a bill against the grantee to compel him to release his title, claiming also certain rights as an attaching creditor to a part of the land so conveyed, but not included in the levy, as to the land levied on, the grantor was not a necessary party to the bill, but as to that part of the bill praying relief as to land not levied on, he was an indispensable party.

Md.—Lovejoy v. Irelan, 17 Md. 525, 77 Am. Dec. 667.

N. J.—Robinson v. Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591; Hunt v. Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

N. C.—Murphy v. Jackson, 58 N. C. 11.

Tenn.—Tyler v. Hamblin, 58 Tenn. 152; Harrison v. Hallum, 45 Tenn. 525.

Tex.—Birdwell v. Butler, 13 Tex. 338.

Can.—Gibbons v. Darvill, 12 Ont. Pr. 478; Beattie v. Wenger, 24 Ont. App. 72. But see Scott v. Burnham, 19 Grant. Ch. (U. C.) 234, grantor residing in the United States not a necessary party.

a debt, but, where he has parted with it absolutely, he has no rights to be affected, and is not a necessary party to an action to set the conveyance aside, which is regarded as in the nature of a proceeding *in rem,* although he is always a proper party.[72] In Illinois the rule is maintained that the judgment debtor is a necessary party where the conveyance contains covenants of warranty.[73] In an action to set aside a deed fraudulent as to creditors, a person to whom the alleged fraudulent transaction was made, and who merely conveyed the land by a quit claim deed, is not a necessary party defendant.[74] Where the debtor becomes bankrupt, he is not a necessary party to a bill filed by the assignee in bankruptcy.[75]

§ 65. **Representatives of grantor or debtor.**—As in the case of the judgment debtor, in many jurisdictions, where a bill is filed by creditors to avoid as fraudulent the conveyance of a de-

72. *Cal.*—Blanc v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Colo.—Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532. *Contra.*—McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420, 13 Am. St. Rep. 579; Allen v. Tritch, 5 Colo. 222.

Iowa.—Dunn v. Wolf, 81 Iowa, 688, 47 N. W. 887; Taylor v. Branscombe, 74 Iowa, 534, 38 N. W. 400; Potter v. Phillips, 44 Iowa, 353. But see Cedar Rapids Nat. Bank v. Lavery, 110 Iowa, 575, 81 N. W. 775, 80 Am. St. Rep. 325.

Kan.—Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599.

Minn.—Leonard v. Green, 34 Minn. 137, 24 N. W. 915, 30 Minn. 496, 16 N. W. 399; Campbell v. Jones, 25 Minn. 155.

Miss.—Leach v. Selby, 58 Miss. 681; Taylor v. Webb. 54 Miss. 36.

Mo.—Schneider v. Patton, 175 Mo. 684, 75 S. W. 155; Jackman v. Robinson, 64 Mo. 289; Merry v. Fremon, 44 Mo. 518; Wright v. Cornelius, 10 Mo. 174, the debtor is not a proper party.

Neb.—Glover v. Hargardine—McKittrick Dry Goods Co., 62 Neb. 483, 87 N. W. 170. But see First Nat. Bank v. Gibson (Neb. 1903), 94 N. W. 965.

73. Quinn v. People, 146 Ill. 275, 34 N. E. 148; Johnson v. Huber, 134 Ill. 511, 25 N. E. 790; Spear v. Campbell, 5 Ill. 424.

74. Hoffman v. Ackermann, 110 La. 1070, 35 So. 293; Hunt v. Dean, 91 Minn. 96, 97 N. W. 574.

75. Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Benton v. Allen, 2 Fed. 448; Weise v. Wardle, L. R. 19 Eq. 171, 23 Wkly. Rep. 280. *Contra.*—Verselius v. Verselius, 28 Fed. Cas. No. 16,925, 9 Blatchf. 189; Johnson v. May, 16 Nat. Bankr. Reg. 425.

ceased debtor or grantor, his executor or administrator is held to be a necessary party,[76] while in other jurisdictions it is held that he is a proper but not a necessary party to the action, and that it is only when the estate in the hands of the personal representative may be affected by the decree that he is a necessary party.[77] In many jurisdictions it is held that the assignee in bankruptcy, or the trustee or receiver of an insolvent debtor, is a necessary party to a bill filed by the creditors to set aside a fraudulent conveyance made by the bankrupt or insolvent prior to the bankruptcy or insolvency proceedings.[78] In some jurisdictions it is

76. *Cal.*—Bachman v. Sepulveda, 39 Cal. 688.

Ill.—Johnson v. Huber, 134 Ill. 511, 25 N. E. 790, *rev'g* 34 Ill. App. 527, where the conveyance was made by a warranty deed; McDowell v. Cochran, 11 Ill. 31.

Ind.—Hays v. Montgomery, 118 Ind. 91, 20 N. E. 646; Vestal v. Allen, 94 Ind. 268; Willis v. Thompson, 93 Ind. 62; Allen v. Vestal, 60 Ind. 245.

Iowa.—Postlewait v. Howes, 3 Iowa, 365.

Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

S. C.—Brockman v. Bowman, 1 Hill Eq. 338; Brock v. Bowman, Rich. Eq. Cas. 185.

Vt.—Peaslee v. Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

Va.—Chamberlayne v. Temple, 2 Rand. 384, 14 Am. Dec. 786.

W. Va.—Boggs v. McCoy, 15 W. Va. 344.

77. *N. Y.*—First Nat. Bank v. Wright, 38 App. Div. 2, 56 N. Y. Supp. 308; Jackson v. Forrest, 2 Barb. Ch. 576.

Ala.—Tompkins v. Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31; Coffey v. Norwood, 81 Ala. 512, 8 So. 199; Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756. *Compare* Powe v. McLeod, 76 Ala. 418; Pharis v. Leachman, 20 Ala. 662.

Me.—Dockray v. Mason, 48 Me. 178.

Miss.—Taylor v. Webb, 54 Miss. 36.

Mo.—Jackman v. Rohinson, 64 Mo. 289; Merry v. Fremon, 44 Mo. 518. But see Coates v. Day, 9 Mo. 304.

Tenn.—McCutcheon v. Pigue, 51 Tenn. 565.

Tex.—Heard v. McKinney, 1 Tex. Unrep. Cas. 83, the creditor and vendee are the only necessary parties.

Wis.—Cornell v. Radway, 22 Wis. 260.

78. *N. Y.*—Ward v. Van Bokkelen, 2 Paige, 289.

Ala.—Davis v. W. F. Vandiver & Co. (1905), 38 So. 850; Harris v. Moore, 72 Ala. 507.

Cal.—Pfister v. Dascey, 65 Cal. 403, 4 Pac. 393.

Md.—Jamison v. Chestnut, 8 Md. 34; Waters v. Dashiell, 1 Md. 455; Swan v. Dent, 2 Md. Ch. 111. But see Farrow v. Teackle, 4 Har. & J. 271.

N. J.—Rankin v. Gardner (Ch. 1896), 34 Atl. 935.

held that the heirs of the debtor or grantor are not necessary parties to an action to set aside a fraudulent conveyance made by the debtor, on the ground that they have no interest in the property.[79]

§ 66. **Co-grantors or co-obligors.**—Where a judgment debtor who is a part owner of a tract of land joins with the other owners thereof in a conveyance thereof which, though absolute on its face, is intended only as a mortgage, the other grantors are not necessary or proper defendants to a bill in equity filed by a creditor to set aside the conveyance on the ground of fraud, since the creditor has no rights in or to the interest conveyed by them.[80] In a suit to set aside as fraudulent a deed executed by one of two joint judgment debtors, the other judgment debtor is not a necessary party.[81] Where a husband and wife jointly executed a fraudulent conveyance and a fraudulent mortgage of all the property owned by the husband, the wife is not a necessary party in an action to set them aside.[82]

§ 67. **Grantee as defendant.**—The grantee or transferee, where he still retains the title to the property, is a necessary party to an action by the grantor's creditors to set aside a conveyance or transfer as fraudulent.[83] But where property has

Va.—Tabb v. Hughes (1887), 3 S. E. 148.

Contra.—Oliphant v. Hartley, 32 Ark. 465; Mechanics' Nat. Bank v. Landauer, 68 Wis. 44, 31 N. W. 160.

79. Freeman v. Pullen, 119 Ala. 235, 24 So. 57; Simmons v. Ingram, 60 Miss. 886; Taylor v. Webb, 54 Miss. 36; Wall v. Fairley, 73 N. C. 464; Irwin v. Hess, 12 Pa. Super. Ct. 163. *Compare* Hunt v. Van Derveer, 43 N. J. Eq. 414, 6 Atl. 20; Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729.

80. Campbell v. Davis, 85 Ala. 56, 4 So. 140, but their misjoinder is a defense personal to them, and not available as ground of demurrer to the grantee.

81. Freeman v. Pullen, 119 Ala. 235, 24 So. 57; Quinn v. People, 146 Ill. 275, 34 N. E. 148, *aff'g* 45 Ill. App. 547; Johnson v. Worthington, 30 Ill. App. 617. *Contra.*—Pyper v. Cameron, 13 Grant Ch. (U. C.) 131.

82. Tatum v. Roberts, 59 Minn. 52, 60 N. W. 848. See also Jones v. Slubey, 5 Har. & J. (Md.) 372.

83. *N. Y.*—Gray v. Schenck, 4 N. Y. 460; Sage v. Mosher, 28 Barb. 287;

been fraudulently assigned by a debtor, but he still retains the legal or equitable interest in the property, on a bill by creditors to obtain satisfaction out of the property assigned the assignee need not be made a party.[84] In an action to set aside a deed of land granted in trust for the grantee and others, or where there are several grantees or other parties claiming an interest under the conveyance, all are proper and necessary parties defendant to the action.[85] In an action by a creditor to subject property fraudulently conveyed to the payment of his claim, different grantees, holding under separate and distinct fraudulent conveyances from the debtor, may be joined in one action as defendants.[86]

Miller v. Hall, 40 N. Y. Super. Ct. 262.

Ky.—Ouerbacker v. White, 6 Ky. L. Rep. 739.

La.—Tounstine v. Ware, 39 La. Ann. 939, 3 So. 122; Seixas v. King, 39 La. Ann. 510, 2 So. 416; Yocum v. Bullit, 6 Mart. N. S. 324, 17 Am. Dec. 184.

Md.—Lovejoy v. Irelan, 17 Md. 525, 79 Am. Dec. 667.

Miss.—Stanton v. Green, 34 Miss. 576.

N. J.—Terhune v. Sibbald, 55 N. J. Eq. 236, 37 Atl. 454; Randolph v. Daly, 16 N. J. Eq. 313.

S. C.—Frazer v. Legare, Bailey Eq. 389.

Tex.—Waddell v. Williams, 37 Tex. 351; O'Neal v. Clymer (Civ. App. 1900), 61 S. W. 545; Archenhold v. B. C. Evans Co., 11 Tex. Civ. App. 138, 32 S. W. 795.

84. Edmeston v. Lyde, 1 Paige (N. Y.), 637, 19 Am. Dec. 454.

85. *Ala.*—Smith-Dimmick Lumber Co. v. Teague, 119 Ala. 385, 24 So. 4.

Ill.—Gudgel v. Kitterman, 108 Ill. 50.

Ky.—Whayne v. Morgan, 11 Ky. L. Rep. 254, 12 S. W. 128.

Mo.—Jackman v. Robinson, 64 Mo. 289.

N. C.—Le Duc v. Brandt, 110 N. C. 289, 14 S. E. 778; Dawson Bank v. Harris, 84 N. C. 206.

Wis.—Adkins v. Loucks, 107 Wis. 587, 83 N. W. 934; Winslow v. Dousman, 18 Wis. 456.

Can.—Pyper v. Cameron, 13 Grant Ch. (U. C.) 131, a demurrer for multifariousness allowed where the conveyances were executed at different times to separate grantees.

86. *N. Y.*—Reed v. Stryker, 4 Abb. Dec. 26, 12 Abb. Pr. 47, *rev'g* 6 Abb. Pr. 109; Hammond v. Hudson River Iron, etc., Co., 20 Barb. 378; Morton v. Weil, 11 Abb. Pr. 421; Jacot v. Boyle, 18 How. Pr. 106; Bank of British North America v. Suydam, 6 How. Pr. 379; Boyd v. Hoyt, 5 Paige, 65; Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412.

Ala.—Allen v. Montgomery R. Co., 11 Ala. 437.

Fla.—Bauknight v. Sloan, etc., Co., 17 Fla. 284.

§ 68. **Intermediate grantees.**—It is held, as a general rule, that an intermediate grantee through whom the title to a fraudulent conveyance passes from the debtor to the ultimate grantee, and who acts merely to promote the scheme for defrauding creditors and who has parted with his title, has no legal or equitable interest in the property fraudulently conveyed, and is not a necessary party defendant in an action to set aside such conveyances as fraudulent, although he may be a proper party.[87] Where, however, such an intermediate grantee disposes of the property by a warranty deed, he is held in some jurisdictions to be a necessary party,[88] unless his grantee conveys by a quit-claim deed and thereby releases his liability under the warranty.[89]

Md.—Brian v. Thomas, 63 Md. 476; Trego v. Skinner, 42 Md. 426.

Minn.—North v. Bradway, 9 Minn. 183.

Miss.—Waller v. Shannon, 53 Miss. 500; Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169; Wright v. Shelton, Sm. & M. Ch. 399.

Mo.—Rinehart v. Long, 95 Mo. 396, 8 S. W. 559; Donovan v. Dunning, 69 Mo. 436.

N. H.—Chase v. Searles, 45 N. H. 511.

N. J.—Randolph v. Daly, 16 N. J. Eq. 313; Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

N. C.—Dawson Bank v. Harris, 84 N. C. 206.

Tenn.—Harrison v. Hallum, 45 Tenn. 525; Hughes v. Tennison, 3 Tenn. Ch. 641.

Wis.—Hamlin v. Wright, 23 Wis. 491.

87. *N. Y.*—Sprogg v. Dichman, 28 Misc. Rep. 409, 59 N. Y. Supp. 966.

U. S.—Pullman v. Stebbins, 51 Fed. 10.

Ala.—Williams v. Spragins, 102 Ala. 424, 15 So. 247; Sides v. Scharff, 93 Ala. 106, 9 So. 228; Tompkins v. Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

Cal.—Blanc v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149.

Ind.—Stout v. Stout, 77 Ind. 537.

Md.—Walter v. Riehl, 38 Md. 211.

Minn.—Hunt v. Dean, 91 Minn. 96, 97 N. W. 574.

Mo.—Jackman v. Robinson, 64 Mo. 289.

S. C.—Bomar v. Means, 37 S. C. 520, 16 S. E. 537, 34 Am. St. Rep. 772.

Utah.—United States v. Church of Jesus Christ, etc., 5 Utah, 538, 18 Pac. 35.

Vt.—Wilson v. Spear, 68 Vt. 145, 34 Atl. 429.

W. Va.—Herzog v. Weiler, 24 W. Va. 199.

Contra.—Hyde v. Craddick, 10 Rob. (La.) 387.

88. Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Pappenheimer v. Roberts, 24 W. Va. 702.

89. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112, 10 Am. St. Rep. 215, *aff'g* 113 Ill. App. 581.

§ 69. **Purchasers from grantee.**—A purchaser from an alleged fraudulent grantee, as a general rule, is held to be a necessary party to a bill by a creditor to set aside a conveyance as fraudulent, and subject the lands to the payment of his debt,[90] where he is in possession of the lands, although not shown to have paid therefor or received a conveyance.[91] In an action to set aside a fraudulent conveyance, it is not necessary to join persons to whom the land is conveyed *pendente lite* as defendants.[92] The personal representative of the deceased grantee, who is not a debtor of the plaintiff, and who has no control over the lands or the proceeds thereof, is not a necessary party to a suit seeking to set aside the conveyance to such grantee and another on the ground of fraud.[93]

§ 70. **Representative of grantee.**—Where a plaintiff seeks to set aside an assignment or deed of trust on the ground of fraud, he may proceed against the fraudulent trustee, and need not join the *cestui que trust*.[94] In an action by a creditor to avoid a conveyance alleged to be fraudulent and void, one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a proper party.[95] To a bill which is filed by a surety against his principal, and which seeks to subject to the payment of the debt lands alleged to have been conveyed by the principal in secret trust, the holder of the legal title to the lands

90. *N. Y.*—Grey v. Schenck, 4 N. Y. 460; Cook v. Lake, 50 App. Div. 92, 63 N. Y. Supp. 818.

Ark.—Thornberry v. Baxter, 24 Ark. 76.

La.—Blum v. Wyly, 111 La. 1092, 36 So. 202.

Mo.—Potter v. Stevens, 40 Mo. 229.

Ohio.—Detwiler v. Louison, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Tenn.—Brevard v. Summar, 49 Tenn. 97.

Va.—Thornton v. Gaar, 87 Va. 315, 12 S. E. 753; Henderson v. Henderson, 9 Gratt. 394.

91. Jones v. Wilson, 69 Ala. 400.

92. Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708.

93. Simon v. Sabb, 56 S. C. 38, 33 S. E. 799.

94. Rogers v. Rogers, 3 Paige (N. Y.), 379; Platt v. Schreyer, 25 Fed. 83.

95. Spicer v. Hunter, 14 Abb. Prac. (N. Y.) 4.

is a necessary party.[96] Where creditors claiming adversely to an assignment made by a debtor in trust, and whose demands existed prior to the execution thereof, file a bill to avoid the assignment on the ground of fraud, they need not make any of the other creditors parties to the suit. Under such circumstances it is enough to bring the assignor and the assignee before the court.[97] The failure to join the trustee of a fraudulent mortgage, who took the bare legal title, as defendant in a creditor's bill, does not deprive the court of jurisdiction to determine the rights of the original owner and the *cestui que trust* and to decide that the mortgage was fraudulent as to creditors.[98] Where an assignee after appointment receives conveyances of realty standing in the name of the wife of his insolvent as security for debts of his insolvent which he assumed for the benefit of the insolvent's wife, the assignee is a proper party defendant to a creditors' bill to set aside the conveyance as in fraud of creditors.[99]

§ 71. **Preferred creditors under trust deed.**—It is held in some jurisdictions that where a creditor's bill attacks as fraudulent an assignment in trust for the payment of a creditor, or a deed of trust made to prefer creditors, it is sufficient to make the trustee a party defendant, and that a preferred creditor is not a necessary party defendant.[1] In other jurisdictions the preferred creditors are held to be necessary parties, although the trustee named in the instrument is made a defendant.[2]

§ 72. **Intervention and change of parties.**—The practice of permitting judgment creditors similarly situated and so circum-

96. Kimball v. Grieg, 47 Ala. 230.

97. Russell v. Lasher, 4 Barb. (N. Y.) 232.

98. Smith v. Ford, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462.

99. Rankin v. Gardner (N. J. Ch. 1896), 34 Atl. 935.

1. Scudder v. Voorhis, 7 N. Y. Supe . Ct. 271; Le Duc v. Brandt, 110 N. C. 289, 14 S. E. 778; Hancock v. Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

2. Hudson v. Eisenmayer Milling, etc., Co., 79 Tex. 401, 15 S. W. 385; Collins v. Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500; Clough v. Thompson, 7 Gratt. (Va.) 26.

stanced that they could themselves have filed a similar bill to intervene in an action by a judgment creditor to set aside conveyances for fraud is well settled, and the summons and complaint need not show that it is brought in behalf of all judgment creditors similarly situated who may choose to come in and share the expense and results, to enable the court to permit them to do so.[3] In order to make a person interested in the property a party to a suit to set aside a conveyance in fraud of creditors, however, the plaintiff must allege that such person has or claims an interest in the property, or that he seeks some relief against such person.[4] In some jurisdictions the statutes permit any person claiming an interest in the property to become a party to the action by joining the plaintiff in his bill, or by uniting with the defendant in resisting the claim of the plaintiff, or demanding something adverse to both.[5] A creditor, after bringing suit in behalf of himself and other creditors to subject lands fraudulently conveyed by their debtor, cannot, after the intervention of another creditor, affect his rights by a compromise with the defendant,[6] and an interpleading creditor may prosecute the action to judgment, even where the original plaintiff has quit the suit.[7] Notice of application to intervene must be given to

3. Honegger v. Wettstein, 94 N. Y. 252; Lallman v. Hovey, 92 Hun (N. Y.), 419, 36 N. Y. Supp. 662; Parmelee v. Egan, 7 Paige (N. Y.), 610; Edmeston v. Lyde, 1 Paige (N. Y.), 637, 19 Am. Dec. 454; Myers v. Fenn, 5 Wall. (U. S.) 205, 18 L. Ed. 604; Strike v. McDonald, 2 Harr. & G. (Md.) 291.

4. Constable v. Weser, 8 Ohio Dec. 247, 6 Wkly. L. Bul. 666. See Hinkle v. Gale, 11 Ky. L. Rep. 126, 11 S. W. 664.

5. *Ark.*—Senter v. Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200.

Iowa.—Corn Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268; Des Moines Ins. Co. v. Lent, 75 Iowa, 522, 39 N. W. 826.

Kan.—Miller v. Wilkinson, 10 Kan. App. 576, 62 Pac. 253.

Ky.—Sawyers v. Langford, 68 Ky. 539.

Va.—Anderson v. Mossy Creek Woolen Mills Co., 100 Va. 420, 41 S. E. 854.

W. Va.—Cox v. Horner, 43 W. Va. 786, 28 S. E. 780.

6. Nix v. Dukes, 58 Tex. 96.

7. Slusher v. Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692, 19 Ky. L. Rep. 1184.

both the claimant and the grantee under the New Jersey statute.[8] After a judgment creditor has filed a bill to reach property fraudulently assigned, the debtor's bail may pay the judgment debt, and by agreement with the creditor be allowed, on petition, to prosecute the bill himself, being substituted for the judgment creditor.[9]

§ 73. **Defenses in general.**—The grantee in an alleged fraudulent conveyance must have an opportunity to dispute it, and may plead any defense, not merely personal, which the debtor could have made.[10] That the plaintiff is indebted upon simple contract to the judgment debtor in an amount equal to plaintiff's judgment is a defense.[11] Defendant may show that the cause of action has been extinguished by lapse of time within which it might be brought,[12] or that the judgment has been paid and has therefore been extinguished and become inoperative as a basis of a suit in equity.[13] As already shown, a creditor who seeks relief in equity should come with clean hands,[14] but in an action by a judgment creditor to set aside a conveyance as in fraud of creditors, a defense that the deed under which the plaintiff claims title to the property for the rent of which his judgment was recovered has itself been set aside as fraudulent is not available, since the defendant, not being a creditor of the plaintiff, cannot complain of such conveyance.[15] Where a debtor transfers property to defraud a creditor, the creditor may condemn such property, though such transfer would be good as against the debtor,

8. Perrine v. Perrine, 63 N. J. Eq. 483, 52 Atl. 627.

9. Harris v. Carlisle, 12 Ohio, 169.

10. Deposit Bank of Frankfort v. Caffee, 135 Ala. 208, 33 So. 152.

It is no defense to an equitable action to allege that plaintiff has an adequate remedy at law; it being a conclusion only. Holland v. Grote, 56 Misc. Rep. (N. Y.) 370, 107 N. Y. Supp. 667.

11. Lashmett v. Prall, 2 Neb. (Unoff.) 284, 96 N. W. 152.

12. See Limitations and laches, §§ 78-82, *infra*.

13. Nichols v. Nichols, 40 Misc. Rep. (N. Y.) 9, 81 N. Y. Supp. 156; The Minneapolis Threshing Mach. Co. v. Jones, 89 Minn. 184, 94 N. W. 551.

14. See § 58, *supra*.

15. Yetzer v. Yetzer, 112 Iowa, 162, 83 N. W. 889.

and although the condemnation may operate to the advantage of the debtor, but not where there is a fraudulent arrangement between the creditor and the debtor, by which the debtor is to have the proceeds of the sale, in which case the grantee may resist such action.[16] Where the conveyance operates to defeat the legal rights of creditors, the defense cannot be asserted against a creditor seeking to reach the property that the conveyance may have been best adapted to conserve the rights of all the creditors.[17] That the grantee has made valuable improvements pending the action is not a defense.[18] It is not a defense that the grantor purposed to compromise with his creditors and pay them a part of the amount owing to them.[19] It is no defense, in an action by a purchaser at an execution sale of property to set aside an alleged fraudulent conveyance thereof, that the plaintiff paid an inadequate consideration for the property,[20] especially if such inadequacy is due to the effect of the conveyance in clouding the title.[21]

§ 74. **Impeachment of creditor's claim or judgment.**—Where a creditor calls in question a conveyance made by his debtor, upon the ground of fraud, in an action between him and the grantee, the demand of the creditor must be subject to examination, in order to see whether he has a right, as such, to question the validity of the conveyance.[22] And if a judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not preclude the latter from examining the grounds of it. He may show that it was obtained by fraud, or that the cause of action accrued under circumstances which would not

16. Feagan v. Cureton, 19 Ga. 404.

17. Stewart v. Lapsley, 7 La. Ann. 456.

18. Grandin v. First Nat. Bank (Neb.), 98 N. W. 70. See Compensation for improvements, chap. XIV, § 43, *supra*.

19. Fox v. Webster, 46 Mo. 181.

20. Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685; Rinehart v. Long, 95 Mo. 396, 8 S. W. 559.

21. Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308.

22. See Persons who may attack conveyance, chap. V, *supra*.

give the creditor a right to impeach the conveyance.[23] The latter fact may be shown by the grantee as well as the grantor.[24] Parties claiming under the conveyance have not only the right to require proof of the existence of the debt to which the property conveyed would be subject, if the conveyance did not stand in the way, obstructing legal remedies to reach it, but also have the right to make, as already stated, any defense to the claim or demand pleaded which the debtor could make in an action to which he was a party, except such defenses as are personal to the debtor.[25]

§ 75. **Effect of judgment obtained by creditor.**—To disturb the title of one who has received a conveyance in fraud of creditors, the fact that the party in whose favor the judgment is rendered is a creditor must be established as against the grantee, and the judgment recovered against the grantor for the debt is conclusive to show that he is entitled to protection as a creditor, when offered as against the grantee.[26] But judgments may be fraudulent as well as deeds, and it is, therefore, open to the grantee to show that the recovery of the judgment was by covin or collusion,[27] or that it was obtained by fraud,[28] the general rule being that when the right of a third person may be affected collaterally by a judgment procured by fraud or collusion of the parties thereto, or where for any reason the judgment is erroneous and void and he cannot procure a reversal by appeal or a writ of error, he is not prohibited from impeaching its validity in a collateral proceeding in which it is sought to be used to his prejudice or injury.[29] The grantee in the convey-

23. Miller v. Miller, 10 Shep. (Me.) 22, 39 An. Dec. 597.

24. Hibben v. Sawyer, 33 Wis. 319.

25. Deposit Bank of Frankfort v. Caffee, 135 Ala. 208, 33 So. 152; Pickett v. Pipkin, 64 Ala. 520; Hibben v. Sawyer, 33 Wis. 319.

26. Inman v. Mead, 97 Mass. 310.

27. Lawson v. Alabama Warehouse Co., 73 Ala. 289; Carter v. Bennett, 4 Fla. 283; Church v. Chapin, 35 Vt. 223.

28. Faris v. Dunham, 21 Ky. 397, 17 Am. Dec. 77; Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597.

29. Collinson v. Jackson, 14 Fed. 305, 8 Sawy. 357.

ance, being a stranger to the record, not being a party to the action in which the judgment was rendered nor in privity with a party, may, in a suit in which the validity of the conveyance is assailed, show a want of jurisdiction in the court which rendered the judgment,[30] or that there was no debt or legal obligation nor any real cause of action to support the judgment,[31] or that the cause of action accrued under such circumstances that the creditor has no right to impeach the conveyance, as, for example, where he was a mere nominal creditor.[32] The judgment is not evidence of an indebtedness existing at any time anterior to its rendition, and if the conveyance is impeached as merely voluntary and the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords to show the existence of the debt when the conveyance was made.[33] The grantee may show that the claim upon which the judgment is based accrued after his purchase from the debtor, unless the conveyance was merely colorable, so that the beneficial interest was not intended to pass to the grantee, or unless the object appears to have been to defraud future as well as prior creditors.[34]

§ 76. **Effect of judgment in absence of fraud or collusion.**—A judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or after contestation, is upon all questions affecting the title to his property, conclusive evidence to establish the relation of creditor and debtor between the parties to the record and the amount of the indebtedness, and cannot be collaterally impeached by third parties in a subsequent suit in which such relation and

30. Lawson v. Alabama Warehouse Co., 73 Ala. 289.

31. Lawson v. Alabama Warehouse Co., 73 Ala. 289.

32. Esty v. Long, 41 N. H. 103.

33. Thomson v. Crane, 73 Fed. 327; Lawson v. Alabama Warehouse Co., 73 Ala. 289.

In Louisiana the grantee may controvert the demand of plaintiff, although liquidated by judgment, in the same manner that the debtor might have done before the judgment. Lopez v. Bergel, 12 La. 197.

34. Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597.

indebtedness are called in question.[35] The grantee cannot show error or irregularity in the rendition of the judgment,[36] or laches in making defense against it,[37] or that the court was mistaken as to the law and the rights of the parties, in the absence of fraud or collusion.[38] The grantee may not show that the person in whose name the judgment was recovered was not the real party in interest,[39] or that the claim was barred by limitation at the time of the transfer where the bar was not pleaded by the debtor.[40]

§ 77. **Alternative defenses.**—Where a debtor conveys land, all or a part of which is his homestead, and the conveyance is attacked as fraudulent, he may defend against the alleged fraud, and, in the alternative, claim and select his homestead to guard against the event of it being adjudged a fraudulent conveyance,[41] and he cannot be required to elect between the defenses.[42]

§ 78. **Limitation of actions generally.**—The time within which an action to set aside an alleged fraudulent conveyance or

35. *N. Y.*—Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294. *Compare* Voorhees v. Seymour, 26 Barb. 569; New York, etc., R. Co. v. Kyle, 5 Bosw. 587.

U. S.—Alkire Grocery Co. v. Richesin, 91 Fed. 79.

Ala.—Pickett v. Pipkin, 64 Ala. 520.

Ind.—Reid v. Brown, Wils. 312.

Iowa.—Strong v. Lawrence, 58 Iowa 55, 12 N. W. 74.

Me.—Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527.

Minn.—Ferguson v. Kumler, 11 Minn. 104.

N. H.—Vogt v. Ticknor, 48 N. H. 242.

Tenn.—Mowry v. Davenport, 74 Tenn. 80.

36. Lawson v. Alabama Warehouse Co., 73 Ala. 289; Walters v. Walters, 28 Ill. App. 633; Taylor v. Webb, 54 Miss. 36.

37. Scott v. Indianapolis Wagon Works, 48 Ind. 75; Fuller v. Nelson, 35 Minn. 213, 28 N. W. 511; Minnesota Thresher Mfg. Co. v. Schaack, 10 S. D. 511, 74 N. W. 445.

38. Pickett v. Pipkin, 64 Ala. 520.

39. Lawson v. Alabama Warehouse Co., 73 Ala. 289; Scott v. Indianapolis Wagon Works, 48 Ind. 75.

40. McMannomy v. Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712, *rev'g* 63 Ill. App. 259.

41. Wilks v. Vaughan (Ark. 1904), 83 S. W. 913.

42. Stubendorf v. Hoffman, 23 Neb. 360, 36 N. W. 581.

transfer may be brought is governed by the provisions of the various statutes in the different jurisdictions.[43] In some jurisdictions the statutory provisions limit the time within which the suit may be brought to avoid a conveyance, assignment, or transfer of the property of a debtor on the ground that it is without consideration deemed valuable in law,[44] but these statutes are held to impose no limitation upon the right of a creditor to institute a suit to attack a transfer as fraudulent in fact.[45] Special statutes have been passed in some jurisdictions limiting the time within which suit may be brought to avoid perferential transfers.[46] If creditors do not by proper judicial process effect the cancellation of the fraudulent grantor's title within the statutory period it becomes final and conclusive.[47] An action to subject land conveyed in fraud of creditors to the payment of

43. *U. S.*—Sheldon v. Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470, Wisconsin statute.

Ala.—Washington v. Norwood, 128 Ala. 383, 30 So. 405; Stoutz v. Huger, 107 Ala. 248, 18 So. 126.

Ark.—James v. Mallory (1905), 89 S. W. 472, there must be an actual adverse holding of the property for the statutory period to bar action.

Ind.—State v. Osborn, 143 Ind. 671, 42 N. E. 921; De Armond v. Ballou, 122 Ind. 398, 23 N. E. 766; Vestal v. Allen, 94 Ind. 268; Duncan v. Cravens, 55 Ind. 525.

Ky.—Dorsey v. Phillips, 84 Ky. 420, 1 S. W. 667; Phillips v. Shipp, 81 Ky. 436; Green v. Salmon, 23 Ky. L. Rep. 517, 63 S. W. 270; Poynter v. Mallory, 20 Ky. L. Rep. 284, 45 S. W. 1042.

La.—Gladney v. Manning, 48 La. Ann. 316, 19 So. 276; Mossop v. His Creditors, 41 La. Ann. 296, 6 So. 134; St. Germain v. Landry, 28 La. Ann. 652.

Mich.—Daniel v. Palmer, 124 Mich. 335, 82 N. W. 1067.

Ohio.—Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884.

Tenn.—German Bank v. Haller, 101 Tenn. 83, 52 S. W. 870.

Tex.—Grumbles v. Sneed, 22 Tex. 565; Rutherford v. Carr (Civ. App. 1905), 84 S. W. 659.

44. Kinney v. Craig, 103 Va. 158, 48 S. E. 864; Vashon v. Barrett, 99 Va. 344, 38 S. E. 200; Scraggs v. Hill, 43 W. Va. 162, 27 S. E. 310; McCue v. McCue, 41 W. Va. 151, 23 S. E. 689.

45. Flook v. Armentrout, 100 Va. 638, 42 S. E. 686; Boggess v. Richards, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

46. Downer v. Porter, 116 Ky. 422, 76 S. W. 135; Morris v. Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418; Maas v. Miller, 58 Ohio St. 483, 51 N. E. 158; Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 257.

47. Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

their claims is not an action to enforce a trust, so as to prevent the application thereto of the statute of limitations, as the rule exempting trusts from the statute of limitations does not apply to a resulting trust in favor of creditors.[48] Where a bill is filed by a judgment creditor to set aside a fraudulent conveyance, the statute cannot be interposed to the original debt.[49] The time covered by the pending of a suit to set aside a deed as being in fraud of the rights of creditors is not to be taken into account either to create a bar by limitation to such suit or to raise a presumption that the judgment in favor of the creditor on which the suit is founded is paid.[50] The running of the statute against a cause of action to set aside a conveyance as fraudulent as to creditors is not interrupted by an appeal in a suit against the debtor in the original cause of action in favor of the creditor, where the appeal did not prevent the commencement of the action to set aside the conveyance.[51] A suit in equity to set aside an assignment or conveyance of property made to hinder or delay creditors should ordinarily be brought within the same time after the right accrues as an action at law to recover possession of the same property.[52]

§ 79. **Nature of action.**—What period of limitation is to be applied to suits or proceedings for relief against fraudulent conveyances or transfers is sometimes determined by the nature or character of the action or proceeding in which the relief is sought.[53] A distinction has been made in this respect where the

48. Stone v. Brown, 116 Ind. 78, 18 N. E. 392; Sims v. Gray, 93 Iowa, 38, 61 N. W. 171; Dole v. Wilson (Minn.), 40 N. W. 161; O'Neal v. Clymer (Tex. Civ. App. 1900), 61 S. W. 545.

49. Hickox v. Elliott, 22 Fed. 13, 10 Sawy. 415; Stoutz v. Huger, 107 Ala. 248, 18 So. 126.

50. St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 S. W. 359.

51. State v. Osborn, 143 Ind. 671, 42 N. E. 921.

Suspension of running of statute by non-residence of grantee.—Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34.

52. Hickox v. Elliott, 22 Fed. 13, 10 Sawy. 415; McDowell v. Goldsmith, 2 Md. Ch. 370. *Compare* Greenman v. Greenman, 107 Ill. 404.

53. Eve v. Louis, 91 Ind. 457; Succession of Baum, 11 Rob. (La.) 314.

relief was sought in an action to quiet title or to remove a cloud from the complainant's title.[54] An action to subject land conveyed in fraud of creditors to the payment of their claims is not an action to enforce a trust, so as to prevent the application thereto of the statute of limitations, but is one for "relief on the ground of fraud," and must therefore be brought within the statutory period after the fraud has been discovered.[55] The attack of a transfer to a married woman as a fraudulent preference over the husband's creditors,[56] or opposition *in concurso* to a creditor's mortgage from the insolvent as in fraud of other creditors,[57] is in the nature of a suit to annul it, and is barred by the statute as to revocatory actions. Where a judgment creditor proceeds to sell the property under execution, leaving the validity of the transfer to be determined in an action by the purchaser at such sale to recover possession of the land, such action not being one to set aside the deed for fraud, the statute of limitations relating to fraudulent transfers does not apply.[58] But where it appears, either from the pleadings, or from the evidence in cases where the pleadings do not show the source of title and there is no opportunity to plead the statutes, that the statutory period has elapsed after the discovery of the fraud before the commencement of the action to have a transfer set aside as fraudulent, the right is barred by limitations, which cannot be avoided by bringing ejectment, instead of an action to remove the cloud.[59]

§ 80. **Accrual of right of action.**—In many jurisdictions the rule is either prescribed by statute or maintained by the courts that the cause of action for relief against a fraudulent transfer shall not be deemed to have accrued for the purpose of the run-

54. Goodnow v. Parker, 112 Cal. 437, 44 Pac. 738; Stewart v. Thompson, 32 Cal. 260; Eve v. Louis, 91 Ind. 457.

55. Sims v. Gray, 93 Iowa, 38, 61 N. W. 171.

56. Renshaw v. Dowty, 39 La. Ann. 608, 2 So. 58.

57. Avart v. His Creditors, 8 Mart. N. S. (La.) 528.

58. Amaker v. New, 33 S. C. 28, 11 S. E. 386.

59. Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865.

ning of the statute of limitations until the discovery of the facts constituting the fraud,[60] and this, although the plaintiff's right of action is otherwise perfect at the time.[61] The courts in some jurisdictions hold that the statute begins to run from the time that the creditor by reasonable diligence might have discovered the fraud and that the fraud is to be considered to have been discovered when the creditor is in possession of sufficient facts to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery of the fraud.[62] The burden of alleging and proving the non-discovery of the fraud is held to be upon the party seeking relief.[63] The statute in some jurisdictions begins to run from the time the fraudulent transfer was made.[64] In some jurisdictions a fraudulent conveyance of real estate is conclusively presumed to be discovered when the fraudulent conveyance is filed for record.[65]

60. *N. Y.*—Decker v. Decker, 108 N. Y. 128, 15 N. E. 307.

U. S.—Farrar v. Bernheim, 75 Fed. 136, 21 C. C. A. 264; Sheldon v. Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470, under Wisconsin statute.

Ky.—Cavanaugh v. Britt, 90 Ky. 273, 13 S. W. 922, 12 Ky. L. Rep. 204; Phillips v. Shipp, 81 Ky. 436; Green v. Salmon, 23 Ky. L. Rep. 517, 63 S. W. 270; Poynter v. Mallory, 20 Ky. L. Rep. 284, 45 S. W. 1042.

Minn.—Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340, 94 Am. St. Rep. 709, 67 L. R. A. 865; Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838.

Miss.—Abbey v. Commercial Bank, 31 Miss. 434.

Neb.—Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302.

Ohio.—Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884; Boies v. Johnson, 25 Ohio Cir. Ct. 331.

Tex.—Calboun v. Burton, 64 Tex. 510; Vodrie v. Tynan (Civ. App. 1900), 57 S. W. 680.

61. Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631, *aff'g* 68 Hun, 376, 22 N. Y. Supp. 1012; Decker v. Decker, *supra*.

62. *Kan.*—Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846.

Ky.—Phillips v. Shipp, 81 Ky. 436.

Minn.—Duxbury v. Boise, *supra*.

Miss.—Gordon v. Anderson (1907), 44 So. 67.

Neb.—Gillespie v. Cooper, *supra*.

Tex.—Calhoun v. Burton, *supra;* Vodrie v. Tynan, *supra*.

63. Brown v. Brown, 91 Ky. 639, 11 S. W. 4; Duxbury v. Boice, *supra;* Combs v. Watson, 32 Ohio St. 228; Boies v. Johnson, *supra*.

64. State v. Osborn, 143 Ind. 671, 42 N. E. 921; Himan v. Thorn, 32 W. Va. 507, 9 S. E. 930; Hunter v. Hunter, 10 W. Va. 321.

65. *Iowa.*—Brook v. Jones (1900), 82 N. W. 434; Nash v. Stevens, 96

In other jurisdictions mere constructive notice of the conveyance by reason of its being filed for record is not notice of the facts and circumstances which render it fraudulent within the meaning of statutes declaring that the cause of action shall not be deemed to have accrued until the discovery of the facts constituting the fraud.[66] In Louisiana the courts make a distinction between the time of the accrual of an action for relief against undue preferences and actions for relief against fraudulent transfers generally.[67]

§ 81. **Prior establishment of creditor's claim.**—In some jurisdictions the statute of limitations does not begin to run against the right of a creditor to bring an action in the nature of a creditor's bill to set aside a conveyance or transfer, fraudulent as against creditors, and to subject to the payment of his claim the land alleged to have been so conveyed, until the recovery of judgment by such creditor and the return of execution unsatisfied, the time when the creditor has placed himself in a position to assail the conveyance and not the time when the fraud was committed being the period from which the limitation is to be computed,[68] and this, without reference to the creditor's

Iowa, 616; 65 N. W. 825; Sims v. Gray, 93 Iowa, 38, 61 N. W. 171.

Kan.—Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846, the statute runs from the time the deed was recorded where the creditor knew of the execution of deed when it was made.

Ky.—Poynter v. Mallory, 20 Ky. L. Rep. 284, 45 S. W. 1042; Cockrill v. Cockrill, 13 Ky. L. Rep. 10, 15 S. W. 1119, the statute runs from the time the deed was recorded where the creditor might by reasonable diligence have discovered the deed at any time after it was recorded. *Compare* Ward v. Thomas, 81 Ky. 452.

Mo.—Rogers v. Brown, 61 Mo. 187.

Neb.—Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302.

Va.—Vashon v. Barrett, 99 Va. 344, 38 S. E. 200.

66. Rose v. Dunkles, 12 Colo. App. 403, 56 Pac. 342; Duxbury v. Boies, 70 Minn. 113, 72 N. W. 838; Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884.

67. Planter's Bank v. Watson, 9 Rob. (La.) 267; Hill v. Barlow, 6 Rob. (La.) 142; Prats v. His Creditors, 5 Rob. (La.) 288.

68. *N. Y.*—Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; *aff'g* 68 Hun, 376, 22 N. Y. Supp. 1012; Gates v. Andrews, 37 N. Y. 657, 99 Am. Dec. 764; Renaud v. O'Brien, 35 N. Y. 99, *rev'g* 25 How. Pr. 67, action may be brought although the period allowed for the

knowledge of the fraud.[69] But it has been held that since a creditor is not limited to a creditor's bill in order to obtain relief from a fraudulent conveyance, but may attach the property, the statute of limitations begins to run against the creditor from the time the right of action accrued by the discovery of the fraud, whether the creditor's claim has been reduced to judgment or not.[70] And the running of limitations in an action to subject property fraudulently conveyed cannot be indefinitely postponed by the delay of the creditor in reducing his claim to judgment, where the statute does not begin to run until the creditor's claim has been reduced to judgment.[71] Though the statute of limitations does not run against an action to set aside a fraudulent conveyance until the creditor has obtained judgment on his claim, if he fails to put his claim in judgment for a long period of time, having notice during that time of the conveyance, his right of action is barred by his laches.[72]

return of execution has not expired.

Cal.—Watkins v. Wilhoit (1894), 35 Pac. 646. See also Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62.

Colo.—Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Iowa.—Mickel v. Walraven, 92 Iowa, 423, 60 N. W. 633.

Kan.—Donaldson v. Jacobitz, 67 Kan. 244; Taylor v. Lander, 61 Kan. 588, 60 Pac. 320.

Mich.—Daniel v. Palmer, 124 Mich. 335, 82 N. W. 1067.

Minn.—Rounds v. Green, 29 Minn. 139, 12 N. W. 454, the statute does not begin to run until the judgment is docketed.

Mont.—Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

Neb.—Ainsworth v. Roubal (1905), 105 N. W. 248.

Okla.—Blackwell v. Hatch, 13 Okla. 169, 73 Pac. 933.

S. D.—Watt v. Morrow (1905), 103 N. W. 45.

Tenn.—See Howell v. Thompson, 95 Tenn. 396, 32 S. W. 309, the right of action accrues as soon as the original debt becomes due, its reduction to judgment being unnecessary.

The same rule is applied to transfers assailed as voluntary.—National Bank v. Kinard, 28 S. C. 101, 5 S. E. 464; Suber v. Chandler, 18 S. C. 526, *overruling* McGowan v. Hitt, 16 S. C. 602. See also Richardson v. Mounce, 19 S. C. 477.

69. Weaver v. Haviland, 142 N. Y. 534.

70. Rogers v. Brown, 61 Mo. 187; Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302. *Compare* Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342.

71. Stubblefield v. Gadd, 112 Iowa, 681, 84 N. W. 917; Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846; First Nat. Bank v. King, 60 Kan. 733, 57 Pac. 952; Vodric v. Tynan (Tex. Civ. App. 1900), 57 S. W. 680.

72. Mickel v. Walraven, 92 Iowa, 423, 60 N. W. 633.

§ 82. **Laches.**—The right to institute a suit for relief against a fraudulent conveyance may be lost in equity by the laches of the complainant in failing to attack the conveyance, after he has knowledge of the material facts as to its fraudulent character,[73] and this may be so independently of a statute of limitations,[74] or of the expiration of the statutory period.[75] Where a creditor, having notice of the fraud so that he would be at liberty to treat the conveyance as a nullity, fails to pursue such a course, but lies quietly by resting upon his rights and suffers the grantee or assignee to make valuable improvements, or make other expenditures in reliance upon his title, and thus creates a situation where the granting of the relief sought would prejudice the adverse party, the creditor's equity is regarded as a stale one and the conveyance will not be set aside as fraudulent.[76] In

73. *N. Y.*—Bliss v. Ball, 9 Johns. 132, where an execution lay dormant in the hands of a sheriff without actual levy.

Ill.—Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Merrill v. Johnson, 96 Ill. 224; McDowell v. Chicago Steel Works, 22 Ill. App. 405, *aff'd* 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381.

Iowa.—Mickle v. Walraven, 92 Iowa, 423, 60 N. W. 633, rule applied to suit for proceeds of land fraudulently conveyed.

Me.—Herriman v. Townsend (1886), 5 Atl. 267, delay in taking out letters of administration.

N. J.—Kinmouth v. Walling (Ch. 1897), 36 Atl. 891; Frenche v. Kitchen, 53 N. J. Eq. 37, 30 Atl. 815; De Graw v. Mechan, 48 N. J. Eq. 219, 21 Atl. 193; Swayze v. Swayze, 9 N. J. Eq. 273.

Pa.—Silliman v. Haas, 151 Pa. St. 52, 25 Atl. 72; Ball v. Campbell, 134 Pa. St. 602, 19 Atl. 802.

S. C.—Eigleberger v. Kibler, 1 Hill. Eq. 113, 26 Am. Dec. 192; Brock v. Bowman, Rich. Eq. Cas. 185.

Tex.—Calhoun v. Burton, 64 Tex. 510.

Wis.—Hildebrand v. Tarbell, 97 Wis. 446, 73 N. W. 53.

74. Bumgardner v. Harris, 92 Va. 188, 23 S. E. 229.

75. Wall v. Beedy, 161 Mo. 625, 61 S. W. 864.

Laches of grantee as precluding attack on creditor's judgment.—A fraudulent transferee, who lived twenty-four years after the commencement of an action to set aside the conveyance, was guilty of gross neglect in not pleading a part payment of the judgment alleged to have been made by the judgment debtor shortly after the rendition of the judgment, and the transferee's executors will not be permitted to set up such payment by supplemental answer. Palen v. Bushnell, 13 N. Y. Supp. 785, 18 Civ. Proc. R. 56.

76. *Mo.*—Bobb v. Woodward, 50 Mo. 95.

determining the staleness of a claim or equity, the court is not confined to the statutory period of limitations, but may refuse relief where the delay is less or greater than the statutory period,[77] if the claim is not reasonably made.[78] Length of time alone is not the test of staleness of a demand, but the question must be determined by the facts and circumstances of each case and according to right and justice.[79] Circumstances not amounting to laches sufficient to deprive a creditor of his right to proceed against the fraudulent transferee of property are set forth in numerous cases cited in the note below.[80]

N. J.—Coyne v. Sayre, 54 N. J. Eq. 702, 36 Atl. 96.

Ohio.—Constable v. Weaser, 8 Ohio Dec. 339, 7 Wkly. L. Bul. 113.

Or.—Neppach v. Jones, 20 Or. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145.

Vt.—Allen v. Knowlton, 47 Vt. 512.

Wis.—Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

77. Neppach v. Jones, 20 Or. 491; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804.

But no delay merely short of such lapse of time as will raise the bar of the statute of limitations or the presumption of satisfaction will preclude a creditor from pursuing the property of his debtor in the hands of a voluntary donee. Izard v. Middleton, Bailey Eq. (S. C.) 228. See also Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770.

78. Gordon v. Anderson (Miss. 1907), 44 So. 67.

79. Marcotte v. Hartman (Minn.), 48 N. W. 767; Neppach v. Jones, *supra.*

80. *N. Y.*—Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631; Bridenbecker v. Mason, 16 How. Pr. 203.

U. S.—Lant v. Manley, 75 Fed. 627, 21 C. C. A. 457.

Fla.—Robinson v. Springfield Co., 21 Fla. 203.

Ill.—Murphy v. Nilles, 62 Ill. App. 193, *aff'd* 166 Ill. 99, 46 N. E. 772.

Iowa.—Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34; Brundage v. Cheneworth, 101 Iowa, 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Ky.—Strutton v. Young, 15 Ky. L. Rep. 657, 25 S. W. 109; Easum v. Pirtle, 5 Ky. L. Rep. 572.

Mich.—Upton v. Dennis, 133 Mich. 238, 94 N. W. 728; Barrett v. Lowrey, 77 Mich. 668, 43 N. W. 1065; Reeg v. Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431.

N. J.—Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770; Second Nat. Bank v. Farr (Ch. 1887), 7 Atl. 892.

R. I.—Hammond v. Stanton, 4 R. I. 65.

S. C.—Charleston Bank v. Dowling, 52 S. C. 345, 29 S. E. 788; National Bank of Newberry v. Kinard, 28 S. C. 101, 5 S. E. 464.

Can.—Currie v. Gillespie, 21 Grant Ch. (U. C.) 267.

CHAPTER XVI.

PLEADINGS.

Section 1. The bill, complaint, or petition; jurisdictional facts.
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33. Confession and avoidance.
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35. Disclaimer.

Section 1. **Pleadings; the bill, complaint or petition; jurisdictional facts.**—Where a fraudulent conveyance is sought to be

set aside by a judgment creditor, the bill, complaint, or petition must allege that such conveyance embarrasses the satisfaction of the debt,[1] and must contain an averment of facts sufficient to present a case for relief to the complainant by a court of equity.[2] It should allege that legal remedies for the satisfaction of the judgment have been exhausted,[3] or facts showing that there is no adequate remedy at law.[4] So long as there is an adequate legal remedy against others jointly bound with the grantor equitable relief will not be granted.[5] In some jurisdictions the rule is firmly established that the creditor must allege not only that his claim has been reduced to judgment, but also that an execution has been issued thereon and that it has been returned unsatisfied in whole or in part, or such facts as show that he has exhausted his remedy at law, and mere allegations of the debtor's insolvency are insufficient. The general rule is maintained that a court of equity does not interfere to enforce the payment of debts until the creditor has exhausted all the remedies known to the law to obtain satisfaction on the judgment.[6] But although

1. Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

2. Taylor v. Dwyer, 131 Ala. 91, 32 So. 509.

3. Parrott v. Crawford (Ind. T. 1904), 82 S. W. 488; Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114, a complaint is defective if it does not allege the docketing of the creditor's judgment and that he has a lien on the property sought to be appropriated; Stockton v. Lippincott, 37 N. J. Eq. 443, so where it alleges that the execution on the judgment has never been returned.

4. Botsford v. Beers, 11 Conn. 369.

5. Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088. See also Necessity to pursue legal remedy against persons jointly bound with grantor, chap. XV, § 57, *supra*.

6. Spelman v. Freedman, 130 N. Y. 421, 29 N. E. 765; Adsit v. Butler, 87 N. Y. 585; Adee v. Bigler, 81 N. Y. 349; Estes v. Wilcox, 67 N. Y. 264; Allyn v. Thurston, 53 N. Y. 622; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Dunlevy v. Tallmadge, 32 N. Y. 457; Forbes v. Waller, 25 N. Y. 430; Crippen v. Hudson, 13 N. Y. 161; McElwain v. Willis, 9 Wend. (N. Y.) 548; Corey v. Cornelius, 1 Barb. Ch. (N. Y.) 571; Morrow Shoe Mfg. Co. v. New England Shoe Co., 57 Fed. 685, 8 C. C. A. 652, 24 L. R. A. 417; Baxter v. Moses, 77 Me. 465, 1 Atl. 350; Howe v. Whitney, 66 Me. 17; Griffin v. Nitcher, 57 Me. 270; Corey v. Greene, 51 Me. 114; Dockray v. Mason, 48 Me. 178; Dana v. Haskell, 41 Me. 25; Hortshorn v. Eames, 31 Me. 93; Webster v. Clarke, 25 Me. 313.

A complaint which alleges, in

an allegation in the bill that execution has been issued on the judgment and returned unsatisfied is sufficient to show that the complainant has exhausted his legal remedy and has no adequate remedy at law,[7] it may appear otherwise. And as neither law nor equity requires the doing of entirely useless things, it has been held in many jurisdictions that a judgment creditor whose judgment would have been a lien on the property but for the fraudulent conveyance, if he alleges and proves that the debtor is insolvent and that the issue of an execution would necessarily be of no practical utility, may proceed to have the conveyance set aside, without the further allegation and proof that an execution has been issued and returned unsatisfied.[8] If the creditor wishes to reach and appropriate personal property of the

substance, the recovery of judgment by the plaintiff against one of the defendants and the return of an execution unsatisfied; that, after the cause of action accrued, said defendant transferred his property which would be subject to the lien of an execution to his wife, daughter, and brother, by instruments set forth; that said transfers were made without consideration and with intent to hinder, delay, and defraud the plaintiff, sets forth facts sufficient to constitute a cause of action as against a general demurrer. Kain v. Larkin, 141 N. Y. 144, 36 N. E. 9, *rev'g* 66 Hun, 209, 20 N. Y. Supp. 938.

To maintain an action against the estate of a deceased debtor, under N. Y. St. 1897, chap. 417, § 7, it is necessary to allege the facts and acts which the statute itself sets forth as authorizing the action. Rosselle v. Klein, 42 App. Div. (N. Y.) 316, 59 N. Y. Supp. 94.

7. Quinn v. People, 146 Ill. 275, 34 N. E. 148.

8. *Ala.*—Henderson v. Farley Nat. Bank, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Jones v. Smith, 92 Ala. 455, 9 So. 179.

Cal.—Lee v. Orr, 70 Cal. 398, 11 Pac. 475. *Compare* Thornburgh v. Hand, 7 Cal. 554; Heynemann v. Dannenberg, 6 Cal. 376.

Ga.—Thurmond v. Reese, 3 Ga. 449, 46 Am. Dec. 440.

Ill.—French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252, such an allegation is superfluous; Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558; Shufeldt v. Boehm, 96 Ill. 560; Weightman v. Hatch, 17 Ill. 281; McDowell v. Cochran, 11 Ill. 31; Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715; First Nat. Bank v. Chapman, 77 Ill. App. 105; Binnie v. Walker, 25 Ill. App. 82; Fusze v. Stern, 17 Ill. App. 429.

Iowa.—Ticonic Bank v. Harvey, 16 Iowa, 141; Postlewait v. Howes, 3 Iowa, 365.

Ky.—Campbell v. Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. Rep. 277.

Minn.—Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Rounds v. Green, 29 Minn. 139, 12 N. W. 454; Banning v. Armstrong, 7 Minn. 40.

debtor which has been fraudulently transferred he must allege that the plaintiff has acquired a lien on the property. If the lien arises from the execution he must allege that one has been issued, and if it arises from the levy of the writ he must allege that a levy has been made under the writ.[9] The general creditors of a mortgagor of chattels have no right to assail a mortgage or other conveyance of property made by him, as invalid, until they have secured a lien thereon by levy under a judgment and execution, or have by some other method acquired a legal or equitable interest in the property.[10] If the creditor seeks in a court of equity to reach and subject the equitable assets or choses in action not subject to be taken on execution for the payment of his claim, the rule is well settled that he must first obtain a judgment at law, take out a writ of execution and have the same returned unsatisfied in whole or in part, and these facts must be alleged in the complaint.[11] A *cestui que trust* is not required to establish his claim by an action at law in order to compel an

Mo.—Turner v. Adams, 46 Mo. 95; Merry v. Fremon, 44 Mo. 518.

Mont.—Ryan v. Spieth, 18 Mont. 45, 44 Pac. 403.

N. J.—Robert v. Hodges, 16 N. J. Eq. 299; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

Ohio.—Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Or.—Fleischner v. First Nat. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345.

R. I.—McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354.

S. C.—Miller v. Hughes, 33 S. C. 530, 12 S. E. 419; State v. Foot, 27 S. C. 340, 3 S. E. 546; Burch v. Brantley, 20 S. C. 503.

Wis.—Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317; Cornell v. Radway, 22 Wis. 360.

9. *Cal.*—Castle v. Bader, 23 Cal. 75.

Ill.—French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

Minn.—Wadsworth v. Schisslebauer, 32 Minn. 84, 19 N. W. 390.

Miss.—Fleming v. Grafton, 54 Miss. 79.

N. J.—Robert v. Hodges, 16 N. J. Eq. 299; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

Va.—Chamberlayne v. Temple, 2 Rand. 384, 14 Am. Dec. 786.

10. Sullivan v. Miller, 106 N. Y. 635, 13 N. E. 772; Southard v. Benner, 72 N. Y. 424; Geery v. Geery, 63 N. Y. 252. See also McKinlay v. Bowe, 97 N. Y. 93.

11. *N. Y.*—McElwain v. Willis, 9 Wend. 548; Clarkson v. DePeyster, 3 Paige, 320.

U. S.—Van Weel v. Winston, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. Ed. 384.

Colo.—Burdsall v. Waggoner, 4 Colo. 256.

Ill.—Newman v. Willetts, 52 Ill. 98.

Me.—Baxter v. Moses, 77 Me. 465;

enforcement of the trust or to protect the trust property from unlawful interference.[12] Whenever a creditor has a trust in his favor or a lien on property for the debt due him, he may go into a court of equity without first exhausting his remedy at law.[13] It has been held that he may maintain his suit without even alleging the insolvency of the debtor, if he stands in the relation of a *cestui que trust* or is able to allege a specific lien on the property sought to be subjected to his demand.[14]

§ 2. **Statutory provisions.**—The statute in some states creates a new equitable right by providing that a creditor without a lien may file his bill in equity to subject to the payment of his debt property which has been fraudulently conveyed, or may maintain a suit to set aside a fraudulent conveyance without the previous recovery of a judgment at law and may recover his judgment in the same action in which he seeks equitable relief.[15] It is not necessary for a creditor without a lien to allege that there has been an issue and return of execution on the judgment sought to be enforced,[16] but he must aver that he has prosecuted his claim to judgment at law,[17] or, if there be no judgment, that

Griffin v. Nitcher, 57 Me. 270; Hatshorn v. Eames, 31 Me. 93.

Minn.—Wadworth v. Schisselbauer, *supra.*

Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Brown v. State Bank, 31 Miss. 454; Farned v. Harris, 11 Sm. & M. 366.

N. H.—Tappan v. Evans, 11 N. H. 311.

N. J.—Stockton v. Lippincott, 37 N. J. Eq. 443; Bigelow Blue Stone Co. v. Magee, 27 N. J. Eq. 392.

R. I.—McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354.

12. Spelman v. Freedman, 130 N. Y. 421, 29 N. E. 765.

13. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Bank of California v. Cowan, 61 Fed. 871; Holt v. Bancroft, 30 Ala. 193; Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813; Tappan v. Evans, 11 N. H. 311.

14. Emery v. Yount, 7 Colo. 107, 1 Pac. 686.

15. Steiner Land, etc., Co. v. King, 118 Ala. 546, 24 So. 35; Huntington v. Jones, 72 Conn. 45, 43 Atl. 564; Vail v. Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330; Sanderson v. Stockdale, 11 Md. 563; Grunsfeld v. Brownell (N. M. 1904), 76 Pac. 310; Early Times Distilling Co. v. Zeiger, 9 N. M. 31, 49 Pac. 723.

16. Jones v. Smith, 92 Ala. 455, 9 So. 179.

17. Ferguson v. Bobo, 54 Miss. 121.

the claim is due and demandable at the time of the filing of the complaint.[18] But simple contract creditors whose claims have not been reduced to judgment, and who have no express lien by mortgage, trust deed, or otherwise, cannot come into a federal court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. Remedies in federal courts, at law and in equity, are not according to the practice of the state courts, but according to the principles of common law and equity.[19]

§ 3. **Right to sue in general; existence of creditor's claim.**—In an action to set aside a fraudulent conveyance, the complaint must state facts showing that the plaintiff is either a creditor or the representative of creditors, in order to entitle him to assail the conveyance.[20] It should state facts showing the character and validity of the debt,[21] but it need not state the

18. Gibson v. Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Jones v. Massey, 79 Ala. 370; Ferguson v. Bobo, *supra*.

19. Hollins v. Brierfield Coal, etc., Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, 7 Nat. Corp. Rep. 370; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Smith v. Ft. Scott, etc., R. Co., 99 U. S. 398, 25 L. Ed. 437; Hudson v. Wood, 119 Fed. 764; Peacock v. Williams, 110 Fed. 917; Harrison v. Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443; Hall v. Gambrill, 92 Fed. 32, 34 C. C. A. 190; First Nat. Bank v. Prager, 91 Fed. 689, 34 C. C. A. 51; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780; Childs v. N. B. Carlstein Co., 76 Fed. 86; England v. Russell, 71 Fed. 818; Putney v. Whitmire, 66 Fed. 385; Morrow Shoe Mfg. Co. v. New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417; United States v. Ingate, 48 Fed. 251. See Statutory modification of rule as to necessity for judgment, chap. XV, § 33, *supra*.

20. *Ala.*—Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870; Walthall v. Rives, 34 Ala. 91.

Cal.—First Nat. Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Colo.—National Bank of Commerce v. Appel Clothing Co. (1905), 83 Pac. 965.

Ind.—Robinson v. Rogers, 84 Ind. 539.

Ky.—Alexander v. Quigley, 63 Ky. 399.

Md.—Mahaney v. Lazier, 16 Md. 69.

Minn.—Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402.

Miss.—Ferguson v. Bobo, 54 Miss. 121.

21. Gibson v. Trowbridge Furni-

consideration of the debt.[22] An allegation that goods were sold and delivered of the value of a certain amount by plaintiff, which has not been paid, is a sufficient averment of indebtedness.[23] But a mere allegation by a general creditor that he holds a valid claim will not authorize him to go into a court of equity.[24] If the plaintiff sues as the assignee of a judgment he must allege that the whole judgment has been assigned,[25] and that he is the owner of it,[26] but he need not state the consideration for the assignment,[27] or allege whether the judgment was recovered before or after the conveyance.[28] Where suit is brought by partnership creditors, it need not be alleged that there are no individual creditors, as that is a matter of defense.[29] In an action by a judgment creditor to set aside a conveyance on the ground of fraud, the complaint need not allege the debt for which the judgment was rendered with the same definiteness required in a complaint to recover the debt,[30] but plaintiff must state facts showing the character and validity of the judgment.[31] In pleading the judgment it is enough to allege that it was duly recovered in an action then pending without pleading the jurisdictional facts.[32]

§ 4. **Time when claim accrued.**—A bill of complaint to have a conveyance set aside as fraudulent, which fails to allege either that the plaintiff's claim was for a subsisting indebtedness and

ture Co., 93 Ala. 579, 9 So. 370; Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088.

22. Curry v. Glass, 25 N. J. Eq. 108.

23. Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997.

24. Cox v. Fraley, 26 Ark. 20.

25. Strange v. Longley, 3 Barb. Ch. (N. Y.) 650.

26. Richardson v. Gilbert, 21 Fla. 544; Postlewait v. Howes, 3 Iowa, 365.

27. Gleason v. Gage, 7 Paige (N. Y.) 121.

28. Newman v. Van Duyne, 42 N. J. Eq. 485, 7 Atl. 897.

29. Smith v. Selz, 114 Ind. 229, 16 N. E. 524.

30. Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

31. Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088; Alexander v. Quigley, 63 Ky. 399.

32. Scanlan v. Murphy, *supra*.

In Montana it is necessary to allege the docketing of the creditor's judgment. Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114.

that complainant was a creditor at the time of the conveyance,[33] or that the conveyance was made with intent to defraud subsequent creditors,[34] is fatally defective and will be properly dismissed. Such a complaint does not show that plaintiff was in a position to be injured by the conveyance.[35] It need not, however, be alleged that the plaintiff has suffered damage, excepting such as results from the fraud.[36] The allegations must show that a debt or legal duty was due from the grantor to the plaintiff, the payment or discharge of which is in some way injuriously affected by such conveyance; otherwise the complaint is demurrable.[37] Where a bill alleges that complainant is assignee of demands which existed against the debtor at the time of the fraudulent transfer, it is not demurrable in failing to allege that he was owner thereof at the time.[38]

§ 5. Ownership and description of property conveyed.—An

33. *N. Y.*—Holmes v. Clark, 48 Barb. 237.

U. S.—Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603.

Ala.—Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Donley v. McKiernan, 62 Ala. 34.

Cal.—Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

Colo.—Emery v. Yount, 7 Colo. 107, 1 Pac. 686.

Ill.—Merrill v. Johnson, 96 Ill. 224; Wilson v. Derrwaldt, 100 Ill. App. 396; Wagner v. Koch, 45 Ill. App. 501; Uhre v. Melum, 17 Ill. App. 182.

Ind.—McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357; Bruker v. Kelsey, 72 Ind. 51; Bentley v. Dunkle, 57 Ind. 374; Harrison v. Jaquess, 29 Ind. 208.

Ind. T.—Parrott v. Crawford (1904), 82 S. W. 688.

Ky.—Marcum v. Powers, 10 Ky. L. Rep. 380, 9 S. W. 255.

Mass.—Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547.

Minn.—Piper v. Johnston, 12 Minn. 60.

Neb.—Chamberlain Banking House v. Turner-Frazier Mercantile Co., 66 Neb. 48, 92 N. W. 172.

Pa.—Palmer v. Wyoming Mfg. Co., 1 Lack. Leg. N. 271.

Tex.—Kerr v. Hutchins, 36 Tex. 452.

Wash.—West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35.

34. Holmes v. Clark, 48 Barb. (N. Y.) 237; Craft v. Wilcox, 102 Ala. 378, 14 So. 653; Emery v. Yount, 7 Colo. 107, 1 Pac. 686; Walsh v. Burns, 39 Minn. 527, 40 N. W. 831.

35. Fox v. Dyer (Cal. 1889), 22 Pac. 257.

36. Alden v. Gibson, 63 N. H. 12.

37. Ullrich v. Ullrich, 68 Conn. 580, 37 Atl. 393.

38. Aiken v. Edringer, 1 Fed. Cas. No. 111.

allegation in the complaint that the grantor "was the owner in fee simple of the unincumbered title" is a sufficient allegation of ownership,[39] and an allegation that the debtor executed a deed by which he pretended to convey the land in question sufficiently states the debtor's ownership of the property alleged to have been fraudulently conveyed, in the absence of a demurrer.[40] But a complaint which contains no direct averment that the debtor, when the alleged fraudulent conveyance was made, had or claimed any interest in the land, is bad on demurrer.[41] In an action by a creditor to cancel a deed executed by another than the debtor, and to subject the land conveyed, on the ground that the debtor owned the equitable title, it is not sufficient to allege such ownership, but the facts showing that the debtor is the equitable owner should be alleged.[42] A complaint or bill in equity which seeks to set aside transfers of real estate, and apply the same to the debts of the transferrer, must definitely describe and identify the real estate sought to be reached.[43] A bill is not demurrable as a whole for uncertainty of description, where part of the lands are sufficiently described.[44] A complaint is deficient on demurrer where it describes the land only by numbers of the sections, townships, and ranges, without any reference to the state or county in which they are located or reference to any fixed monuments from which their location could be inferred.[45] To create a *lis pendens,* operating as notice, the bill must be so definite in the description that any one read-

39. Trent v. Edmonds, 32 Ind. App. 432, 70 N. E. 169.

40. Gibbons v. Pemberton, 101 Mich. 397, 59 N. W. 663, 45 Am. St. Rep. 417.

41. Manning v. Drake, 1 Mich. 34.

42. Bevins v. Eisman, 21 Ky. L. Rep. 1772, 56 S. W. 410.

43. *U. S.*—Brown v. John V. Farwell Co., 74 Fed. 764.

Ala.—Freeman v. Stewart, 119 Ala. 158, 24 So. 31.

Ind.—Alford v. Baker, 53 Ind. 279; Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88.

Mont.—Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114.

Pa.—Harding v. Bunnell, 14 Pa. Co. Ct. 417.

Tenn.—Stacker v. Wilson (Ch. App. 1899), 52 S. W. 709.

44. Little v. Sterne, 125 Ala. 609, 27 So. 972.

45. Sheffer v. Hines, 149 Ind. 413, 49 N. E. 348.

ing it can learn thereby what property is intended to be made the subject of litigation.[46] A complaint is defective which does not state whether the property is real, or personal, or both.[47] A failure to allege the value of real estate, a conveyance of which it is sought to have set aside as fraudulent, does not render the complaint insufficient.[48]

§ 6. **Nature and execution of conveyance.**—The allegations of the complaint or bill should aver the fraudulent conveyance of the property in question by the debtor or by the holder of the legal title at his direction to the alleged grantee,[49] or facts equivalent to an averment of a conveyance or transfer,[50] and a complaint which avers that defendant furnished another the money with which to purchase the land, but fails to show that the land was conveyed to him in trust for defendant is insufficient.[51] The complaint will be fatally defective unless it avers a delivery of the deed.[52] An allegation that the debtor is still the owner of the property and that it is simply held "in trust for him" by the grantee is insufficient, in the absence of an allegation that the conveyance was made in trust for such judgment debtor.[53] But although there must be some description of the instrument by which the alleged fraudulent conveyance was accomplished,[54] a copy of the deed, bill of sale, judgment, or other instrument need not be set out in the complaint or made an exhibit and filed with the complaint, the foundation or cause of the action being the fraud alleged and not the conveyance as

46. Miller v. Sherry, 2 Wall. (U. S.) 237, 17 L. Ed. 820.

47. Castle v. Bader, 23 Cal. 75.

48. Sherman v. Hogland, 73 Ind. 472.

49. Little v. Sterne, 125 Ala. 609, 27 So. 972; Smith v. Tate, 30 Ind. App. 367, 66 N. E. 88.

50. Floyd v. Floyd, 77 Ala. 353; Arzbacher v. Mayer, 53 Wis. 380, 10 N. W. 440.

51. Bright v. Bright, 132 Ind. 56, 31 N. E. 470.

52. Doerfler v. Schmidt, 64 Cal. 265, 30 Pac. 816.

53. Anderson v. Lindberg, 64 Minn. 476, 67 N. W. 538.

54. Allen v. Vestal, 60 Ind. 245, in an action by a creditor against the heirs of his deceased debtor the complaint must allege whether the conveyance was joint or several to the defendants.

such.[55] A complaint to set aside a fraudulent conveyance need not point out the particular features of or clauses objected to, where the vice of the instrument is inherent in its terms.[56] If two or more conveyances are attacked as fraudulent in the bill or complaint, the facts and circumstances attending each conveyance need not be set forth as a separate cause of action, the fraudulent disposition of his property by the debtor constituting the sole cause of action.[57]

§ 7. **Insolvency of debtor or want of assets other than property conveyed.**—In some jurisdictions a complaint, in an action to set aside a fraudulent conveyance, is bad, unless it alleges that the alleged fraudulent grantor was insolvent at the time of making the conveyance assailed, or did not retain sufficient property to pay his debts, or had no other property subject to execution at the time of the conveyance.[58] In other jurisdictions it is not necessary to allege or prove the debtor's insolvency at

55. Heckelman v. Rupp, 85 Ind. 286; Stout v. Stout, 77 Ind. 537; Bray v. Hussey, 24 Ind. 228; Smith v. Summerfield, 108 N. C. 284, 12 S. E. 997. *Compare* Mahaney v. Lazier, 16 Md. 69.

56. Jessup v. Hulse, 29 Barb. (N. Y.) 539.

57. Armstrong v. Dunn, 143 Ind. 433, 41 N. E. 540; Strong v. Taylor School Tp., 79 Ind. 208; Mareton v. Dresen, 76 Wis. 418, 45 N. W. 110, and if stated as separate causes of action the court will look to the whole pleading as stating but one cause of action.

58. *Cal.*—Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

Colo.—National Bank of Commerce v. Appel Clothing Co. (1905), 83 Pac. 965; Fox v. Lipe, 14 Colo. App. 258, 59 Pac. 850, or that the transfer tended to produce insolvency.

Ill.—Merrill v. Johnson, 96 Ill. 224.

Ky.—H. Krisch & Co. v. Kentucky Jeans Clothing Co. (1907), 102 S. W. 803.

Ind.—Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, '95 Am. St. Rep. 294; Slagle v. Hoover, 137 Ind. 314, 36 N. E. 1099; Noble v. Hines, 72 Ind. 12; Borror v. Carrier, 33 Ind. App. 353, 73 N. E. 123.

Mo.—Rinehart v. Long, 95 Mo. 396, 8 S. W. 559.

Md.—Goodman v. Wineland, 61 Md. 449.

Minn.—Seager v. Armstrong, 95 Minn. 414, 104 N. W. 479.

S. C.—Miller v. Hughes, 33 S. C. 530, 12 S. E. 419; State v. Foote, 27 S. C. 340, 3 S. E. 546.

Wash.—Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Cook v. Tibbals, 12 Wash. 207, 40 Pac. 935; O'Leary v. Duvall, 10 Wash. 666, 39 Pac. 163; Wagner v. Law, 3 Wash. 500.

the time he executed the conveyance, although such fact is material as bearing upon the purpose of the conveyance.[59] Where the complaint alleges that the debtor was wholly insolvent at the time of the transfer, this is equivalent to stating that he did not own property enough to pay his debts, and it is not necessary to also allege that he had no property subject to execution.[60] If the facts alleged in the bill show that the debtor was insolvent, his insolvency need not be alleged in terms.[61] In some jurisdictions the rule is maintained that it must be alleged in the bill or complaint not only that the grantor had at the time of the conveyance no other property subject to execution sufficient to satisfy the complainant's demand but also that he had no such property at the time of the commencement of the action. Hindrance or delay of creditors which amount to actual fraud, as well as a fraudulent purpose, must be alleged.[62] An allegation that the debtor did not have at the time of the conveyance, and has not had since, up to the time of the commencement of the suit, sufficient property subject to execution to pay his debts, is a sufficient allegation of his insolvency.[63] An allegation that

59. Crary v. Kurtz (Iowa, 1906), 105 N. W. 590; Ogden State Bank v. Barker, 12 Utah, 13, 40 Pac. 765.

60. Coal City Coal, etc., Co. v. Hazard Powder Co., 108 Ala. 218, 19 So. 392; Lammert v. Stockings, 27 Ind. App. 619, 61 N. E. 945; Grunsfeld v. Brownell (N. M. 1904), 76 Pac. 310.

61. Gassenheimer v. Kellogg, 121 Ala. 109, 23 So. 29.

62. Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Emery v. Yount, 7 Colo. 107, 1 Pac. 686; Burdsall v. Waggoner, 4 Colo. 256; Thomas v. Mackey, 3 Colo. 390; Van Sickle v. Shenk, 150 Ind. 413, 50 N. E. 381; Nevers v. Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Crow v. Carver, 133 Ind. 260, 32 N. E. 569; Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649; and other earlier Indiana cases.

In Indiana the same rule is applied in an action by the executor or administrator of a deceased grantor. Wilson v. Boone, 136 Ind. 142, 35 N. E. 1096. In an action by a creditor to set aside a fraudulent conveyance made by his deceased debtor it is sufficient to allege that he had no other property at the time he made the conveyance and that there are no "assets" in the hands of the administrator. State v. Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Bottorff v. Covert, 90 Ind. 508.

63. Pierce v. Hower, 142 Ind. 626, 42 N. E. 223; York v. Rockwood, 132 Ind. 358, 31 N. E. 1110.

the debtor had no real or personal estate liable to levy and sale, except the property conveyed, and that his property was wholly inadequate to satisfy his indebtedness sufficiently shows insolvency.[64] It need not be alleged that the property in controversy was subject to execution. If it was not, that is a matter of defense. [65] In many jurisdictions the insolvency of the grantor at the time of the commencement of the suit is held to be an essential allegation of a creditor's bill or complaint to invoke the aid of a court of equity to set aside a fraudulent conveyance,[66] but this allegation is not necessary where the creditor has obtained a lien on the property transferred.[67] The controlling inquiry is not as to the extent of the debtor's property when the conveyance was made, but at the time the action to set it aside was begun.[68] But this rule is held not to apply when it is averred that the conveyance was either voluntary or for an inadequate consideration, and rendered the debtor without means to pay his debts.[69] When it is averred in the complaint that an execution has been issued upon the judgment against defendant and returned *nulla bona,* this implies insolvency and, if proved,

64. Dunsback v. Collar, 95 Mich. 611, 55 N. W. 435; Rinehart v. Long, 95 Mo. 396, 8 S. W. 559.

65. State v. Parsons, 147 Ind. 579.

66. *Ala.*—State Bank v. Ellis, 30 Ala. 478.

D. C.—Hess v. Horton, 2 App. Cas. 81.

Iowa.—Hill v. Denneny, 106 Iowa, 726, 77 N. W. 472; Banning v. Purinton, 105 Iowa, 642, 75 N. W. 639.

Ky.—Evans v. Reay, 3 Ky. L. Rep. 193.

La.—Hart v. Bowie, 34 La. Ann. 323; Zimmerman v. Fitch, 28 La. Ann. 454.

Miss.—Miles v. Richards, Falk. 477, 12 Am. Dec. 584.

Mo.—Bird v. Bolduc, 1 Mo. 701. It is not necessary that the petition state that the debtor did not have other property subject to execution at the time of making the fraudulent deed. Clark v. Thias, 173 Mo. 628, 73 S. W. 616.

Neb.—Dufrene v. Anderson, 67 Neb. 136, 93 N. W. 139.

Contra.—Dawson Bank v. Harris, 84 N. C. 206; Gormley v. Potter, 29 Ohio St. 597; Westerman v. Westerman, 25 Ohio St. 500.

67. Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390.

68. Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa, 293, 82 N. W. 765; Rounds v. Green, 29 Minn. 139, 12 N. W. 454.

69. Beall v. Lehman-Durr Co., 110 Ala. 446, 18 So. 320; Dunklee v. Rose, 12 Colo. App. 420, 56 Pac. 348.

is sufficient to establish the insolvency of the debtor, and it is not necessary that the complaint should have alleged insolvency.[70] The fact of insolvency is important only as it bears on the question whether or not the conveyance is fraudulent as against the creditor who assails it.[71] In New York the rule is that a complaint which sufficiently alleges fraudulent intent need not allege the insolvency of the debtor. The evidence necessary to support allegations of a fraudulent intent may be and usually is, made up of different facts and circumstances, but it is not necessary to insert them in a pleading, and it is generally improper to do so. Insolvency, while a fact, is an evidential fact which need not be alleged. It is involved in a finding of fraud, provided it is necessary to support that finding.[72] It is only where one makes a voluntary conveyance in good faith, with no intent to defraud his creditors, that it will be upheld by proof showing that when he made it he retained an ample estate to pay all his debts.[73] Such an allegation although not essential, may be useful where it is necessary for plaintiff to show actual fraud.[74]

70. Quinn v. People, 146 Ill. 275, 34 N. E. 148; Stuckwisch v. Holmes, 29 Ind. App. 512, 64 N. E. 894; Breitkreutz v. Holton Nat. Bank (Kan. 1905), 79 Pac. 686; Nebraska Nat. Bank v. Hallowell, 63 Neb. 309, 88 N. W. 556; Page v. Grant, 9 Or. 116; McAvoy v. Jennings (Wash. 1906), 87 Pac. 53; Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Reed v. Loney, 22 Wash. 433, 61 Pac. 41. *Contra.*—Williams v. Kemper (Minn. 1906), 109 N. W. 242, in an action to subject property conveyed in trust for the use of a debtor.

71. Rhead v. Hounson, 48 Mich. 243, 9 N. W. 267.

72. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277; Kain v. Larkin, 141 N. Y. 144, 36 N. E. 9; Citizens' Nat. Bank v. Hodges, 80 Hun (N. Y.), 471, 30 N. Y. Supp. 445; Fuller v. Brown, 76 Hun (N. Y.), 557, 28 N. Y. Supp. 189.

Where plaintiff sued to set aside a conveyance of real property as in fraud of creditors, and the complaint alleged that the conveyance was without consideration and with intent to defraud plaintiff's assignor and other creditors of the grantor, all with the knowledge of the grantee, it sufficiently alleged the insolvency of the grantor. Holland v. Grote, 56 Misc. Rep. (N. Y.) 370, 107 N. Y. Supp. 667.

73. Fox v. Moyer, 54 N. Y. 125, 131.

74. Nealis v. American Tube, etc., Co., 76 Hun (N. Y.), 220, 27 N. Y. Supp. 733; Kain v. Larkin, 66 Hun (N. Y.), 209, 20 N. Y. Supp. 938.

§ 8. **Necessity of alleging facts constituting fraud.**—Equity will not entertain a creditors' bill to set aside a debtor's conveyance as fraudulent, brought against one claiming title and against whom no fraud is charged.[75] Fraud is never presumed, and whenever it constitutes an element of a cause of action, or of a defense which is of an affirmative nature, and is invoked as conferring a right against the opposite party, it must be alleged.[76] In a pleading attacking a conveyance as fraudulent towards the grantor's creditors, it is not sufficient to allege the fraud in general terms, as for example, that it was fraudulently given with intent to hinder and delay creditors, but the facts constituting or tending to show fraud must be specifically stated. Vague and general allegations as to fraud are insufficient, but the circumstances from which fraud may be reasonably inferred must be pleaded.[77] Cases in which the complaint was held to

75. Spaulding v. Myers, 64 Ind. 264; Lawrence v. Bowman, 6 Rob. (La.) 21; Towle v. Janvrin, 61 N. H. 605. But see Hamlen v. McGillicuddy, 62 Me. 268, a bill brought under the statute need contain only the requirements of the statute.

76. Wetherly v. Strauss, 93 Cal. 283, 28 Pac. 1045, a transfer of money from a husband to a wife cannot be attacked as fraudulent under allegations that the money was never her separate property, but was at all times that of the husband, and that it was deposited by her and a certificate of deposit taken therefor as agent of her husband; but the fraud must be pleaded.

77. *N. Y.*—Bodine v. Edwards, 10 Paige, 504.

U. S.—Williamson v. Beardsley, 137 Fed. 467.

Ala.—Little v. Sterne, 125 Ala. 609, 27 So. 972; Warren v. Hunt, 114 Ala. 506, 21 So. 939; Coal City Coal, etc., Co. v. Hazard Powder Co., 108 Ala. 218, 10 So. 393; Heinz v. White, 105 Ala. 670, 17 So. 185; Curran v. Olmstead, 101 Ala. 692, 14 So. 398; Loucheim v. First Nat. Bank, 98 Ala. 521, 13 So. 374; Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Pickett v. Pipkin, 64 Ala. 520; Flewellen v. Crane, 58 Ala. 627.

Ark.—Knigbt v. Glasscock, 51 Ark. 390, 11 S. W. 580.

Cal.—Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Fox v. Dyer (1899), 22 Pac. 257; Pehrson v. Hewitt, 79 Cal. 594, 21 Pac. 950; Castle v. Bader, 23 Cal. 75; Oakland v. Carpenter, 21 Cal. 642; Harris v. Taylor, 15 Cal. 348; Kinder v. Macy, 7 Cal. 206.

Colo.—Brereton v. Bennett, 15 Colo. 254, 25 Pac. 310; Burdsall v. Waggoner, 4 Colo. 256; Fox v. Lipe, 14 Colo. App. 258, 59 Pac. 850.

Ga.—Rowland v. Coleman, 45 Ga. 204.

Ill.—Klein v. Horine, 47 Ill. 430.

Ind.—Old Nat. Bank v. Heckman,

state facts sufficient to show fraud and to be sufficient as a matter of pleading,[78] and other cases in which the facts set forth were

148 Ind. 400, 47 N. E. 953; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306.

Ind. T.—Hargadine-McKittrick Dry Goods Co. v. Bradley (1902), 69 S. W. 862; Cox v. Swofford Bros. Dry Goods Co., 2 Ind. T. 61, 47 S. W. 303.

Kan.—Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698.

Me.—Pease v. McKusick, 25 Me. 73.

Minn.—Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

Miss.—McInnis v. Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Mo.—Burnham v. Boyd, 167 Mo. 185, 66 S. W. 1088; Reed v. Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089; Wilkinson v. Goodin, 71 Mo. App. 394.

Neb.—Weckerly v. Taylor (1905), 103 N. W. 1065; Kemper, etc., Dry Goods Co. v. Renshaw, 58 Neb. 513, 78 N. W. 1071; Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236.

N. J.—Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881, 44 N. J. Eq. 603, 17 Atl. 1104.

N. C.—Bryan v. Spruill, 57 N. C. 27.

Or.—Leasure v. Forquer, 27 Or. 334, 41 Pac. 665.

Utah.—Wilson v. Sullivan, 17 Utah, 341, 53 Pac. 994.

Va.—Millhiser v. McKinley, 98 Va. 207, 35 S. E. 446.

Wash.—Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819; West Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35.

W. Va.—Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553.

Wis.—Prentice v. Madden, 3 Pinn. 376, 4 Chandl. 170.

78. *N. Y.*—Kain v. Larkin, 141 N. Y. 144, 36 N. E. 9; Citizens' Nat. Bank v. Hodges, 80 Hun, 471, 30 N. Y. Supp. 445; Beethoven Piano Organ Co. v. C. C. McEwen Co., 59 N. Y. Super. Ct. 7, 12 N. Y. Supp. 552; Carpenter v. Adickes, 34 Misc. Rep. 645, 70 N. Y. Supp. 607; National Bank of Orange Co. v. Van Steenburgh, 65 Hun, 621, 20 N. Y. Supp. 35; Weil v. Levenson, 8 St. Rep. 834.

U. S.—Kittel v. Augusta, etc., R. Co., 65 Fed. 859.

Ala.—Taylor v. Dwyer, 131 Ala. 91, 32 So. 509; Plaster v. Thorne Franklin Shoe Co., 123 Ala. 360, 26 So. 225; Freeman v. Stewart, 119 Ala. 158, 24 So. 31; Steiner Land., etc., Co. v. King, 118 Ala. 546, 24 So. 35; Beall v. Lehman Durr Co., 110 Ala. 446, 18 So. 230; Echols v. Peurrung, 107 Ala. 660, 18 So. 250; Williams v. Spragins, 102 Ala. 424, 15 So. 247; Gibson v. Trowbridge Furniture Co., 93 Ala. 579, 9 So. 370; Miller v. Lehman, 87 Ala. 517, 6 So. 361; Globe Iron Roofing, etc., Co. v. Thatcher, 87 Ala. 458, 6 So. 366; Pickett v. Pipkin, 64 Ala. 520.

Cal.—Anderson v. Lassen County Bank, 140 Cal. 695, 74 Pac. 287.

Ga.—McKenzie v. Thomas, 118 Ga. 728, 45 S. E. 610; Leonard v. New England Mortg. Security Co., 102 Ga. 536, 29 S. E. 147.

Ill.—Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558; Manchester v. McKee, 9 Ill. 511.

Ind.—Searles v. Little, 153 Ind. 432, 55 N. E. 93.

Iowa.—Pratt v. Green, 25 Iowa, 39.

held to be insufficient,[79] are cited in the notes below. It has been held in New York that in an action to set aside a conveyance fraudulent as to creditors on its face, it is not necessary that the complaint should specify the objectionable clauses. It is sufficient to allege that the conveyance was made to defraud creditors. It is the intent on which the statute fastens, and the law treats certain provisions as conclusive evidence of such intent.[80] The averment that a deed was made for the purpose of hindering, delaying and defrauding creditors of the grantor is a mere statement of a conclusion, and not only renders the bill or complaint demurrable, but it will not support a judgment depending upon the fraud in the conveyance.[81] A bill to set aside a deed for fraud, which alleges the fraud on information and belief, is insufficient, in the absence of an allegation of facts on which the belief is founded.[82] The admission, by filing a demurrer, of a general allegation that a deed was fraudulent, without

Ky.—Marcum v. Powers, 10 Ky. L. Rep. 380, 9 S. W. 255.

La.—Blum v. Wyly, 111 La. 1092, 36 So. 202.

Miss.—Pine Cone Lumber Co. v. White Sand Lumber Co. (1905), 38 So. 188.

Neb.—Chamberlain Banking House v. Turner-Frazer Mercantile Co., 66 Neb. 48, 92 N. W. 172.

N. H.—Alden v. Gibson, 63 N. H. 12.

N. J.—Bayley v. Bayley, 66 N. J. Eq. 84, 57 Atl. 271; Couse v. Columbia Powder Mfg. Co. (Ch. 1895), 33 Atl. 297.

N. D.—Paulson v. Ward, 4 N. D. 100, 58 N. W. 792.

S. C.—Meinhard v. Youngblood, 37 S. C. 321, 15 S. E. 950, 16 S. E. 771.

Va.—American Net, etc., Co. v. Mayo, 97 Va. 182, 33 S. E. 523.

W. Va.—Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611; Watkins v. Wortman, 19 W. Va. 78.

Wis.—Level Land Co. No. 3 v. Sivyer, 112 Wis. 442, 88 N. W. 317; Allen v. McRae, 91 Wis. 226, 64 N. W. 889; Marston v. Dresen, 76 Wis. 418, 45 N. W. 110.

79. Lipperd v. Edwards, 39 Ind. 165; Anderson v. Lindberg, 64 Minn. 476, 67 N. W. 538; Lackner v. Sawyer, 5 Neb. (Unoff.) 257, 98 N. W. 49; Burr v. Davis (Tex. Civ. App. 1896), 36 S. W. 137. See also Wilcoxson, etc., Banking House v. Darr, 139 Mo. 660, 41 S. W. 227.

80. Jessup v. Hulse, 29 Barb. (N. Y.) 539, *rev'd* on another point 21 N. Y. 168; Hastings v. Thurston, 10 Abb. Pr. (N. Y.) 418, 18 How. Pr. (N. Y.) 430.

81. Leasure v. Forquer, 27 Or. 334, 41 Pac. 665.

82. Brooks v. O'Hara, 8 Fed. 529; Murphy v. Murphy, 189 Ill. 360, 59 N. E. 796; Walton v. Westwood, 73 Ill. 125; Wilkinson v. Goodin, 71 Mo. App. 394.

setting out in what particular, does not sustain a bill otherwise deficient in equity.[83] If, however, the facts are well pleaded, a demurrer admits the fraudulent transfer charged.[84] A bill to set aside a conveyance as in fraud of creditors, alleging in the alternative different agreements as constituting the fraud, is bad as a whole of either alternative is bad.[85]

§ 9. **Facts need not be minutely alleged.**—While a mere general allegation of fraud is insufficient, as has already been shown, it is not necessary or required that all the particular facts and circumstances which conduce to prove the general charge, or which confirm and assist, should be minutely alleged or set forth in detail. A general averment or statement of the matters of fact, from which, unexplained, the conclusion of fraud arises, is sufficient, leaving the circumstances to be proven.[86] The substantial facts out of which the rights and liabilities sought to be enforced arose should be alleged, but not the circumstances out of which these facts arise and are to be made to appear. The latter are properly matters of evidence.[87]

83. Flewellen v. Crane, 58 Ala. 627; Bryan v. Spruill, 57 N. C. 27.

84. Riley v. Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Large v. Bristol Steam Tow-Boat, etc., Co., 2 Ashm. (Pa.) 394.

85. Mountain v. Whitman, 103 Ala. 630, 16 So. 15.

86. *N. Y.*—Passavant v. Sickle, 14 Civ. Proc. R. 57.

Ala.—Gassenheimer v. Kellogg, 121 Ala. 109, 23 So. 29; Williams v. Spragins, 102 Ala. 424, 15 So. 247; Burford v. Steele, 80 Ala. 147; Pickett v. Pipkin, 64 Ala. 520; Kennedy v. Kennedy, 2 Ala. 571.

Cal.—Threlkel v. Scott (1893), 34 Pac. 851.

Conn.—Mallory v. Gallagher, 75 Conn. 665, 55 Atl. 209.

D. C.—Edwards v. Entwisle, 2 Mackey, 43.

Ill.—Mitchell v. Bryns, 67 Ill. 522.

La.—Hillard v. Taylor, 114 La. 883, 38 So. 594.

Mich.—McMahon v. Rooney, 93 Mich. 390, 53 N. W. 539; Reeg v. Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; Merrill v. Allen, 38 Mich. 487; Tong v. Marvin, 15 Mich. 60.

W. Va.—Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553. See also Miller v. Gillespie, 54 W. Va. 450, 46 S. E. 451.

Can.—Wright v. Henderson, 1 U. C. Q. B. O. S. 304.

87. De Hierapolis v. Lawrence, 115 Fed. 761.

§ 10. **Fraudulent intent of grantor.**—A complaint in an action to set aside a conveyance as fraudulent as against creditors must show fraud in the conveyance, and must either allege a fraudulent intent on the part of the grantor or set forth the facts logically indicating the existence of such intent.[88] A distinction is made between fraud and intent to defraud. The intent to defraud is a fact, an essential fact in the cause of action, without an allegation of which the complaint is defective; the fraud is a legal conclusion, being an inference from particular facts. It is therefore held in some cases that an allegation of a fraudulent intent, which is the material fact in the case, is sufficient, without allegations of facts to show that intent, which would be simply a pleading of evidence.[89] Other authorities hold, however, that the general averment of a fraudulent intent, without alleging specific facts showing such fraudulent intent, presents no issue as against a proper demurrer.[90] Some of the cases, especially where by statute the question of fraudulent intent is made a question of fact, hold that the fraudulent intent must be alleged in terms.[91] In other

88. Pritz v. Jones, 102 N. Y. Supp. 549.

89. *N. Y.*—Fuller v. Brown, 76 Hun, 557, 28 N. Y. Supp. 189; National Union Bank v. Reed, 12 N. Y. Supp. 920, 27 Abb. N. Cas. 5; Hastings v. Thurston, 18 How. Pr. 530; Bogert v. Haight, 9 Paige, 297.

Cal.—Threlkel v. Scott (1893), 34 Pac. 851.

Iowa.—Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa, 293, 82 N. W. 765.

Neb.—McIntyre v. Malone, 3 Neb. (Unoff.) 159, 91 N. W. 246.

N. D.—Paulson v. Ward, 4 N. D. 100, 58 N. W. 792.

S. D.—Probert v. McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Wis.—Evans v. Williams, 82 Wis. 666, 53 N. W. 32.

Can.—Sawyer v. Linton, 23 Grant Ch. (U. C.) 43.

90. *Ala.*—Little v. Sterne, 125 Ala. 609, 27 So. 972; Warren v. Hunt, 114 Ala. 506, 21 So. 939; Heinz v. White, 105 Ala. 670, 17 So. 185; Curran v. Olmstead, 101 Ala. 692, 14 So. 398.

Colo.—Burdsall v. Waggoner, 4 Colo. 256.

Ga.—Rowland v. Coleman, 45 Ga. 204.

Ind.—Spaulding v. Myers, 64 Ind. 246.

Kan.—Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698.

Mo.—First Nat. Bank v. Rohrer, 138 Mo. 369, 39 S. W. 1047.

91. *Cal.*—Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045.

Ind.—National State Bank v. Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Wil-

cases this is held not to be essential, although it is customary and proper, but that it is sufficient if facts are averred which, if proved, would authorize an inference of fraudulent intent.[92] The complaint is not defective for not alleging that the conveyance was in fraud of the plaintiff, if it alleges that it was made to defraud creditors generally, and the fact appears that the plaintiff was a creditor at the date of the conveyance.[93] Where it is alleged by a creditor that the debtor was insolvent and that the transfer was a mere gift, it is not necessary that he should also allege a fraudulent intent, since a voluntary conveyance by an insolvent debtor is fraudulent as to creditors and such a creditor is required only to state the facts necessary to sustain his action, the law drawing the legal conclusion from these facts.[94]

§ 11. **Knowledge and intent of grantee.**—In an action by a creditor to set aside, on the ground of fraud, a voluntary conveyance, made by an insolvent debtor, it is not necessary to aver that the grantee participated in the fraud, or that he had knowledge or notice of the grantor's fraudulent intent or purpose, as the fraud of the grantor is implied fraud on the part of a voluntary grantee.[95]

lis v. Thompson, 93 Ind. 62; Lockwood v. Harding, 79 Ind. 129; Bentley v. Dunkle, 57 Ind. 374. See also Hutchinson v. First Nat. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537.

Kan.—Van Vliet v. Halsey, 37 Kan. 116, 14 Pac. 482.

Mass.—Carpenter v. Cushman, 121 Mass. 265.

Miss.—Hogan v. Burnett, 37 Miss. 617.

Mo.—Martin v. Fox, 40 Mo. App. 664.

N. D.—Dalrymple v. Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

92. Whittlesey v. Delaney, 73 N. Y. 571; Cohen v. Plonsky, 60 Hun (N. Y.), 103, 14 N. Y. Supp. 324; Beall v. Lehman Durr Co., 110 Ala. 446, 18 So. 230; Cola City Coal, etc., Co. v. Hazard Powder Co., 108 Ala. 218, 19 So. 392; Sides v. Scharff, 93 Ala. 106, 9 So. 228; O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

A positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent. Robinson v. Stewart, 10 N. Y. 189; Jackson v. Hart, 11 Wend. (N. Y.) 349.

93. Harrison v. Jaquess, 29 Ind. 208.

94. Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Catchings v. Manlove, 39 Miss. 655.

95. McGee v. Importers', etc., Nat. Bank, 93 Ala. 192, 9 So. 734; State v.

An allegation that a debtor transferred his property wholly without valuable consideration, leaving nothing with which to pay his debts, is sufficient of itself to show fraud as against existing creditors.[96] But in the case of a conveyance or transfer by a debtor for a valuable consideration, although an inadequate one, the complaint should allege that the grantee had knowledge of the grantor's insolvency or failing circumstances, and that he had knowledge of or participated in the grantor's purpose or scheme to defraud his creditors.[97] It is sufficient if the facts alleged,

Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep 430; Phillips v. Kennedy, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147; Wilson v. Boone, 136 Ind. 142, 35 N. E. 1096; Rollet v. Heiman, 120 Ind. 511, 22 N. E. 666, 16 Am. St. Rep. 340; Spaulding v. Blythe, 73 Ind. 93; Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400; Flook v. Armentrout, 100 Va. 638, 42 S. E. 686; Reed v. Loney, 22 Wash. 433, 61 Pac. 41. See knowledge and intent of grantee where transfer is voluntary, chap. XIII, § 5, *supra*.

96. *Ala.*—Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Beall v. Lehman Durr Co., 110 Ala. 446, 18 So. 230, it is not necessary to allege that the vendors were insolvent, or that the property conveyed was all that they owned, where it is averred that the conveyance was either voluntary or for an inadequate consideration.

Ariz.—Rountree v. Marshall (1899), 59 Pac. 109.

Cal.—Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025.

Ill.—Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558.

Ky.—O'Kane v. Vinnedge, 108 Ky. 34, 21 Ky. L. Rep. 1551, 55 S. W. 711.

La.—Blum v. Wyly, 111 La. 1092, 36 So. 202.

Miss.—Catchings v. Manlove, 39 Miss. 655.

Wis.—Marston v. Dresen, 76 Wis. 418, 45 N. W. 110.

See Effect of want of consideration, chap. VIII, § 32, *supra*.

97. *Ala.*—Frey v. Fenn, 126 Ala. 291, 28 So. 789; Little v. Sterne, 125 Ala. 609, 27 So. 972: Coal City Coal, etc., Co. v. Hazard Powder Co., 108 Ala. 218, 19 So. 392.

Ga.—Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138. 33 S. E. 945.

Ill.—Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558; Powers v. Wheeler, 63 Ill. 29.

Ind.—Wilson v. Boone, 136 Ind. 142, 35 N. E. 1096; Seager v. Aughe, 97 Ind. 285; Willis v. Thompson, 93 Ind. 62; Spaulding v. Myers, 64 Ind. 264.

Iowa.—Witham v. Blood, 124 Iowa, 695, 100 N. W. 558; Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa, 293, 82 N. W. 765.

La.—New Orleans Gas, etc., Co. v. Currell, 4 Rob. 438.

Pa.—Garis v. Fish, 133 Pa. St. 555, 19 Atl. 561.

W. Va.—Laidley v. Reynolds (1905), 52 S. E. 405; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

See Knowledge and intent of grantee, chap. XIII, § 4, *supra*.

unexplained, fairly sustain the conclusion that the conveyance or transfer was both made and received with the intent to defraud the creditors of the grantor.[98] The complaint need not allege that there existed a conspiracy to defraud creditors.[99] An allegation that the grantee had notice of the grantor's fraudulent intent is sufficient, notwithstanding the payment of a consideration.[1] But an allegation that the grantee knew that the grantor was insolvent is not sufficient to show that the grantee had notice of the grantor's fraudulent intent.[2]

§ 12. **Fraudulent intent and knowledge as to subsequent creditors or purchasers.**—A creditor whose debt accrued after a conveyance by the debtor may maintain an action to set aside the conveyance as fraudulent, where it was made with intent to defraud subsequent creditors, and as a rule he must allege and prove that the conveyance was made with intent to defraud future or subsequent creditors, with whom the grantor intended to deal on the faith of his owning the property transferred, by putting his property beyond their reach and that he was fraudulently affected thereby.[3] A voluntary conveyance is good, as against subsequent creditors, unless made with intent to defraud them, or made secretly so that knowledge thereof was withheld from them and they dealt with the grantor upon the faith of his owning the property transferred, or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon those giving him credit in such business, or as a cover for some future schemes of fraud.[4]

98. Cohen v. Plonsky, 60 Hun (N. Y.), 103, 14 N. Y. Supp. 234.

99. Alden v. Gibson, 63 N. H. 12.

1. State v. Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

2. Arbertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200.

3. Little v. Sterne, 125 Ala. 609, 27 So. 972; Heinz v. White, 105 Ala. 670, 17 So. 185; Dickson v. McLarney, 97 Ala. 383, 12 So. 398; Seals v. Robinson, 75 Ala. 363; Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300; O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Willett v. Frodich, 28 Ky. L. Rep. 798, 90 S. W. 572; Seager v. Armstrong, 95 Minn. 414, 104 N. W. 479.

4. *N. Y.*—Neuberger v. Keim, 134 N. Y. 35, 31 N. E. 268.

U. S.—Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 755;

Subsequent purchasers likewise must allege and prove that a conveyance was intended as a fraud upon subsequent purchasers, in order to have it set aside on the ground that it was made to hinder, delay, and defraud creditors.[5] The nearness or remoteness, however, of the time of the contraction of the creditor's claim sued upon to the date of the conveyance, while important as an evidentiary fact, is not decisive, and the statement of it, therefore, is not essential to the statement of a good cause of action.[6] Where a plaintiff seeks the aid of equity on the ground of being a *bona fide* purchaser without notice of land sought to be subjected to the payment of a judgment against another, he must fully and explicitly deny notice in his bill.[7]

§ 13. **Suing in behalf of all creditors.**—That an action by a creditor to set aside an alleged fraudulent transfer by a debtor is prosecuted in behalf of himself and all other creditors interested must appear on the face of the complaint, a statement to that effect in the title of the cause being insufficient. It should be alleged that there are other creditors and that the suit is brought for the benefit of the plaintiff and all other creditors of the defendant who choose to come in and share in the relief and contribute to the expenses of the suit.[8] But a bill may properly be considered a

Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; Burton v. Platter, 53 Fed. 901, 4 C. C. A. 95.

Ark.—Cunningham v. Williams, 42 Ark. 170.

Colo.—Emery v. Yount, 7 Colo. 107, 1 Pac. 686.

Del.—Hood v. Jones, 5 Del. Ch. 77.

Ill.—Moritz v. Hoffman, 35 Ill. 553; Edgerly v. First Nat. Bank, 30 Ill. App. 425; Cramer v. Bode, 24 Ill. App. 219.

Ind.—Stumph v. Bruner, 89 Ind. 556.

Tenn.—Templeton v. Twilty, 88 Tenn. 595, 14 S. W. 435.

See Subsequent creditors, chap. V, § 3, *supra;* Want of consideration as to subsequent creditors, chap. VIII, § 36, *supra.*

5. Reynolds v. Faust, 179 Mo. 21, 77 S. W. 855; Evans v. David, 98 Mo. 405, 11 S. W. 975; Bonney v. Taylor, 90 Mo. 63, 1 S. W. 740. See also Subsequent purchasers, chap. V, § 3, *supra.*

6. Loehr v. Murphy, 45 Mo. App. 519.

7. Brinkerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65.

8. *N. Y.*—Louis v. Belgard, 63 Hun, 630, 17 N. Y. Supp. 882; Elwell v. Johnson, 3 Hun, 558; Brown v. Ricketts, 3 Johns. Ch. 553.

creditor's suit, though it was not alleged to have been instituted for the benefit of the creditors generally, where the nature of the case is such as to require the creditors to be called in.[9] In such case the fund is retained in chancery until all the creditors are notified to come in and assert their claims, and the omission may be supplied by amendment before making the decree.[10] In some cases it has been held that the bill may be treated as a creditor's bill in the decree and other proceedings founded on it, and that amendment is not absolutely necessary.[11]

§ 14. **Excusing laches.**—A creditor is not deemed guilty of laches in the commencement of a suit to set aside a conveyance for fraud where the facts constituting the fraud remained undiscovered, if the facts were kept concealed and he could not by reasonable or ordinary diligence have discovered the fraud sooner. Ignorance of the facts from which the conclusion or inference of a fraudulent intent is to be drawn is ignorance of the facts constituting the fraud. But means of easily obtaining knowledge are equivalent to actual knowledge,[12] and concealment by mere silence, attended by no other circumstances of concealment, is not enough to show absence of the means of obtaining knowledge or want of knowledge of the fraud, and thus avoid the running of the statute

U. S.—Horner v. Henning, 93 U. S. 228, 28 L. Ed. 879; Pullman v. Stebbins, 51 Fed. 10.

Me.—Crocker v. Craig, 46 Me. 327; Fletcher v. Holmes, 40 Me. 364; Caswell v. Caswell, 28 Me. 232.

N. J.—Hunt v. Field, 9 N. J. Eq. 36, 42, 57 Am. Dec. 365.

N. C.—Long v. Yanceyville Bank, 81 N. C. 42; Wilson v. Lexington Bank, 72 N. C. 621.

Eng.—Good v. Blewitt, 13 Ves. Jr. 397, 33 Eng. Reprint, 343.

See Parties plaintiff, chap. XV, § 62, *supra*.

9. Hammond v. Hammond, 2 Bland. (Md.) 306.

10. Hammond v. Hammond, *supra;* Good v. Blewitt, *supra;* Atty.-Gen. v. Newcombe, 14 Ves. Jr. 1.

11. Simms v. Lloyd, 58 Md. 477; Gibson v. McCormick, 10 Gill. & J. (Md.) 65; Birely v. Staley, 5 Gill. & J. (Md.) 432, 25 Am. Dec. 303; Strikes' Case, 1 Bland. 57.

12. Erickson v. Quinn, 47 N. Y. 410; Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Bailey v. Glover, 21 Wall. (U. S.) 342, 22 L. Ed. 636; Washington v. Norwood, 128 Ala. 383, 30 So. 405; Lockard v. Nash, 64 Ala. 385; Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

of limitations from the time when the fraud was perpetrated.[13] In order to avoid the statute of limitations in a suit to set aside a deed for fraud, and to avoid the imputation of laches apparent on the face of the bill, by want of knowledge of the fraud, the bill must set forth specifically the impediments to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants to fraudulently keep him in ignorance, and how and when he first obtained knowledge of the matters alleged in the bill.[14] If plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not sooner made.[15] In New York, under the ruling of the court of appeals that the discovery by a creditor of a fraudulent transfer of property by his debtor does not start limitations running against a suit to subject the property, unless the creditor has already obtained judgment and issued execution thereon in the state,[16] but that his right of action accrues only when he has taken such preliminary steps, where sufficient time has not elapsed thereafter to bar his suit, the time, manner, or circumstances of discovering the alleged fraud are immaterial, and need not be alleged; such allegations being necessary only when the ordinary period of limitation is sought to be extended by reason of lack of knowledge of fraud.[17]

§ 15. **Pleading evidence.**—In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated therein is not irrelevant or redundant matter.[18] But matters of evidence or evidential facts

13. Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807.

14. Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; Wood v. Carpenter, *supra;* Fox v. Lipe, 14 Colo. App. 258, 59 Pac. 850, a bill which does not allege when the fraud was discovered, nor the fact constituting the fraud and the circumstances under which it was ascertained, is demurrable; Annett v. Coffey, 1 Colo. App. 34, 27 Pac. 614.

15. Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548.

16. Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641, 40 Am. St. Rep. 631.

17. Lehman v. Crosby, 99 Fed. 542.

18. Perkins v. Center, 35 Cal. 713.

should not be pleaded.[19] Where the issues to be raised are whether a deed was made and whether, if made, it was made with fraudulent intent, if these points are distinctly presented, it is enough.[20] A general averment of facts according to their legal effect, without setting forth the particulars which lead to it, is sufficient, and necessary circumstances implied by law need not be expressed in the plea.[21]

§ 16. **Prayer for relief.**—The formal relief asked for in a complaint in equity is not of such importance as to be controlling, and the court will grant such judgment as shall be consistent with the case made by the complaint and embraced within the issues.[22] A court of equity, having obtained jurisdiction of the parties and the subject matter of an action, may adapt its relief to the exigencies of the case, and the plaintiff is entitled to such judgment and relief as the law pronounces upon the facts pleaded and proved, although it may not have been specially prayed, and when it is for any reason impracticable to grant the specific equitable relief demanded.[23] But, while under the general prayer for relief, a party may have any relief to which he may show himself entitled, such relief must be founded on and consistent with the allegations in the bill, and not such as may be proven at the trial.[24] A court of equity will not render a decree in favor of a complainant on

19. Hall v. Henderson, 126 Ala. 449, 28 So. 531, 85 Am. St. Rep. 53, 61 L. R. A. 621; Zimmerman v. Willard, 114 Ill. 364, 2 N. E. 70.

20. Zimmerman v. Willard, *supra.*

21. Sullivan v. Iron & Silver Min. Co., 109 U. S. 550, 3 Sup. Ct. 339, 27 L. Ed. 1028.

22. Dudley v. Third Order of St. Francis, 138 N. Y. 451, 34 N. E. 281; Valentine v. Richardt, 126 N. Y. 272, 27 N. E. 255; Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436; Fisher v. Moog, 39 Fed. 665; Treadwell v. Brown, 44 N. H. 551.

23. *N. Y.*—Valentine v. Richardt, 126 N. Y. 272, 27 N. E. 255; Donovan v. Sheridan, 37 N. Y. Super. Ct. 256; Buswell v. Lincks, 8 Daly, 518.

Ill.—Alexander v. Tams, 13 Ill. 221.

Ky.—Campbell v. Trooper, 108 Ky. 602, 22 Ky. L. Rep. 277, 57 S. W. 245.

Mo.—Schneider v. Patton, 175 Mo. 684, 75 S. W. 155.

S. C.—Miller v. Hughes, 33 S. C. 530, 12 S. E. 419; Brown v. McDonald, 1 Hill Eq. 297.

24. Schneider v. Patton, 175 Mo. 684, 75 S. W. 155.

grounds not stated in his bill.[25] Courts of equity will give judgment for money only, where that is all the relief needed,[26] but where the petition in no way intimates, nor contains any allegations from which it would be inferred, on what account, if at all, a personal judgment against defendant would be asked, such judgment is unauthorized.[27] A court of equity will not render a decree setting aside a conveyance as made to hinder and delay creditors where the bill does not pray for such a decree.[28] In a bill in equity to set aside a fraudulent conveyance, the complainant may properly embody a prayer for an account of the rents and profits, and the court will take jurisdiction of the same;[29] but, if he neglects to do this, equity has no original jurisdiction to take cognizance of a bill subsequently filed for this purpose alone.[30] A creditor's bill may be filed in equity with a double aspect, asking alternative relief, where there is no inconsistency or uncertainty in its terms.[31] But if the forms of relief asked are inconsistent, as that the conveyance be set aside and the title to the property vested in the complainant and that the complainant be awarded the proceeds of the sale of the property,[32] or that the conveyance be set aside as fraudulent or be enforced as a general assignment,[33] the prayer is bad for repugnancy. A prayer for relief is also bad where it cannot be reconciled with the allegations of the petition.[34] And where the prayer of the petition fails to show what relief is sought, a demurrer to the petition is properly sustained.[35] A complaint in an action by a judgment creditor to set aside a sale made by the

25. Bailey v. Ryder, 10 N. Y. 363; Pochelu v. Catonnet, 40 La. Ann. 327, 4 So. 74; Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. 773.

26. Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55; Murtha v. Curley, 90 N. Y. 372.

27. Schneider v. Patton, 175 Mo. 684, 75 S. W. 155.

28. Clark v. Kraus, 2 Mackey (D. C.), 559; Eastman v. Ramsey, 3 Ind. 419.

29. See Rents and profits, chap. XIV, § 38, *supra*.

30. Hadley v. Morrison, 39 Ill. 392.

31. Fisher v. Moog, 39 Fed. 665; Crawford v. Kirksey, 50 Ala. 590.

32. Chisholm v. Wallace (Ala. 1906), 40 So. 219; Caldwell v. King, 76 Ala. 149.

33. Moog v. Talcott, 72 Ala. 210.

34. Maynard v. Way, 11 Ky. L. Rep. 166, 11 S. W. 806.

35. Van Vliet v. Halsey, 37 Kan. 116, 14 Pac. 482.

debtor on the ground that the sale was procured by the fraud of the buyer need not offer to return the consideration paid by the buyer, especially where it prays for general relief, which may be taken as a prayer for a recovery of the value of the property minus what was paid therefor by the buyer.[36]

§ 17. **Multifariousness.**—The demand in one bill of several matters of a distinct and independent nature against several defendants,[37] or the uniting in one bill against a single defendant several matters perfectly distinct and unconnected,[38] constitutes multifariousness. It may be taken advantage of by demurrer, or by plea and answer previous to a hearing, or by the court of its own accord at any time, even if not objected to by the defendant.[39] A bill is subject to demurrer for multifariousness by reason of the misjoinder of parties, plaintiff or defendant, who have no common interest in the matter of litigation, as well as for multifariousness in the subject matter of the suit.[40] The subject admits of no general rules, it having been held that to lay down any rule applicable universally or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.[41]

36. Pritz v. Jones, 102 N. Y. Supp. 549.

37. Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412; Stephens v. Whitehead, 75 Ga. 294; Bobb v. Bobb, 8 Mo. App. 257; Jordan v. Liggan, 95 Va. 616, 29 S. E. 330.

38. Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729, where the relief sought involved totally distinct questions, requiring different evidence and leading to different decrees; Robinson v. Springfield Co., 21 Fla. 239; Stephens v. Whitehead, 75 Ga. 294.

A creditor's bill is not multifarious, because based on two several judgments both in favor of the complainant and against the same defendant, nor because it attacks as fraudulent a conveyance of property in trust from the judgment defendant to certain of his co-defendants, by which an annuity was reserved to the grantor, and also an assignment of the annuity so reserved to other co-defendants; the relief sought by the bill being in the alternative. De Hierapolis v. Lawrence, 115 Fed. 761.

39. Walker v. Powers, *supra.*

40. United States v. American Bell Teleph. Co., 128 U. S. 315, 352, 9 Sup. Ct. 90, 32 L. Ed. 450; Cogwill, etc., Milling Co. v. L. M. Nicholson Co. (Miss. 1899), 24 So. 880.

41. Campbell v. Mackay, 1 Myl. & C. 603, 13 Eng. Ch. 603, 40 Eng. Reprint, 507, 7 Sim. 564, 8 Eng. Ch. 564.

The courts, in the exercise of a sound discretion, seem to consider the circumstances of each case with reference to avoiding on one hand a multiplicity of suits, and on the other hand inconvenience and hardships to the defendants from being obliged to answer matters with which they have, in great part, no connection, and the complication and confusion of evidence. The question must be determined alone by the averments and the relief prayed for in the bill.[42] Courts, however, seek to discourage a multiplicity of suits, and will not permit the objection of multifariousness to prevail where there is no liability to injustice.[43] Very great latitude is allowed in pleading in cases involving the question of fraud, and circumstances, however various, may be set forth, and parties, however numerous, may be impleaded in the same bill, so long as one connected scheme of fraud is alleged.[44] The objection of multifariousness will not hold against a bill where one general right is claimed by plaintiff, although defendants may have separate and distinct rights, and distinct grounds of defense.[45] The rule is well established that a creditor's action seeking to set aside several fraudulent conveyances made by the debtor, at various times to various persons, and to subject the property, states but one cause of action, and the grantor and the various transferees may be joined on defendants, although there was no privity between the transferees and they may have no common interest in the parcels so conveyed, and such a bill is not multifarious. The object of the suit in such case is single, based upon one general right, to reach property which has been conveyed in fraud of creditors, although

42. *U. S.*—Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622; Gaines v. Chew, 2 How. 619, 11 L. Ed. 402; McLean v. Lafayette Bank, 16 Fed. Cas. No. 8,886, 3 McLean, 415.

Ala.—Steiner Land, etc., Co. v. Kind, 118 Ala. 545, 24 So. 35; Hill v. Moone, 104 Ala. 353, 16 So. 67; Collins v. Stix, 95 Ala. 338, 11 So. 380; Hinds v. Hinds, 80 Ala. 225; Lehman v. Meyer, 67 Ala. 396.

Conn.—DeWolf v. A. W. Sprague Mfg. Co., 49 Conn. 282.

43. Jordan v. Liggan, 95 Va. 616, 29 S. E. 330.

44. Jordan v. Liggan, *supra*.

45. Dimmock v. Bixby, 37 Mass. 368; Lewis v. St. Albans Iron, etc., Works, 50 Vt. 477.

each vendee is charged only with participating in the fraud concerning his own purchase, and it is not necessary to allege a conspiracy between the different grantees to defeat the grantor's creditors.[46] A bill to reach property fraudulently conveyed by a debtor in the hands of a subsequent grantee is not multifarious, if it joins as defendants the debtor and all persons through whom his title has been conveyed, as well as the present holders.[47]

46. *N. Y.*—Reed v. Stryker, 4 Abb. Dec. 26, 12 Abb. Pr. 47; Hammond v. Hudson River Iron, etc., Co., 20 Barb. 378; Newbould v. Warrin, 14 Abb. Pr. 80; Morton v. Weil, 11 Abb. Pr. 421; Jacot v. Boyle, 18 How. Pr. 106; Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412; Boyd v. Hoyt, 5 Paige, 65; Brinkerhoff v. Brown, 6 Johns. Ch. 139.

U. S.—Jones v. Slauson, 33 Fed. 632; Potts v. Hahn, 32 Fed. 660.

Ala.—Gassenheimer v. Kellogg, 121 Ala. 109, 23 So. 29; Burford v. Steele, 80 Ala. 147; Russell v. Garrett, 75 Ala. 348; Allen v. Montgomery R. Co., 11 Ala. 437.

Fla.—Bauknight v. Sloan, 17 Fla. 284.

Ga.—Conley v. Buck, 100 Ga. 187, 28 S. E. 97.

Iowa.—Bowers v. Keesecher, 9 Iowa, 422; Pierson v. David, 1 Iowa, 23.

Md.—Trego v. Skinner, 42 Md. 426.

Minn.—North v. Bradway, 9 Minn. 183.

Miss.—Walker v. Shannon, 53 Miss. 500; Forniquet v. Forstall, 34 Miss. 87.

Mo.—Rinehart v. Long, 95 Mo. 396, 8 S. W. 559, where an insolvent husband purchased separate parcels of land and had the deeds all made to his wife, all may be attacked in one suit; Bobb v. Bobb, 76 Mo. 419; Perkins v. Baer, 95 Mo. App. 70, 68 S. W. 939.

N. H.—Chase v. Searles, 45 N. H. 511.

N. J.—Miller v. Jamison, 24 N. J. Eq. 41; Randolph v. Daly, 16 N. J. Eq. 313; Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

N. C.—Dawson Bank v. Harris, 84 N. C. 206; Vann v. Hargett, 22 N. C. 31.

S. C.—State v. Foot, 27 S. C. 340; Williams v. Neel, 10 Rich. Eq. 338, 73 Am. Dec. 94.

Tenn.—Harrison v. Hallum, 45 Tenn. 525; Bartee v. Tompkins, 36 Tenn. 623.

Tex.—Waddell v. Williams, 37 Tex. 351.

Va.—Commonwealth v. Drake, 81 Va. 305; Almond v. Wilson, 75 Va. 613.

Wis.—Hamlin v. Wright, 23 Wis. 491; Blake v. Van Tilborg, 21 Wis. 672.

Eng.—Cornish v. Clark, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897.

47. Craft v. Wilcox, 102 Ala. 378, 14 So. 653. The joinder in a bill to set aside a certain conveyance, as in fraud of creditors, of one claiming under a subsequent mortgage, also alleged to be fraudulent, does not render the bill multifarious, when a unity of fraudulent design permeates the whole transaction. Williams v. Spragins, 102 Ala. 424, 15 So. 247.

§ 18. Amendments.—It is within the discretion of the trial court, and may be a proper exercise of the court's discretion, to permit an amendment of a bill in equity or other pleading by the addition of specific allegations or otherwise, and the granting of leave to amend a bill will not be reversed on appeal unless it is shown that such discretion has been abused.[48] The plaintiff having the right to amend the petition at any time before trial, if defective, any other creditor has that right after plaintiff has quit the suit.[49] When amendments are permitted to be made is immaterial, except as to the terms the court may impose as a condition thereto.[50] An amendment to a bill setting up an alternative ground of relief is proper, when the matter of amendment might have been stated in the alternative in the original bill.[51] An amendment of a bill is properly allowed on the hearing, in furtherance of justice, to avoid the effects of a variance from the proofs, provided it is not inconsistent with the original theory of the case.[52] But amendments will not be allowed of additional allegations which bring into the case a new and substantive cause of action different from that set forth in the original bill, and which the complainant then

48. *U. S.*—Smith v. Babcock, 22 Fed. Cas. No. 13,008, 3 Sumn. 583.

Ga.—Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S. E. 945.

Ill.—Gordon v. Reynolds, 114 Ill. 118, 28 N. E. 455; McArtee v. Engart, 13 Ill. 242.

Ky.—Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242, the debtor may by amendment set up in his answer that the land alleged to have been fraudulently conveyed was his homestead.

Neb.—Monroe v. Reid, 46 Neb. 316, 64 N. W. 983.

Va.—Kinney v. Craig, 103 Va. 158, 48 S. E. 864.

49. Slusher v. Simpkinson, 101 Ky. 594, 40 S. W. 570, 43 S. W. 692, 10 Ky. L. Rep. 1184.

50. Gordon v. Reynolds, 114 Ill. 118, 28 N. E. 455.

51. Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

52. *U. S.*—Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590; Fisher v. Campbell, 101 Fed. 156, 41 C. C. A. 256; Collinson v. Jackson, 14 Fed. 305, 8 Sawy. 357.

Ala.—Tissier v. Wailes (1905), 39 So. 925.

Ga.—Kruger v. Walker, 111 Ga. 383, 36 S. E. 794.

Mich.—Smith v. Sherman, 52 Mich. 637, 18 N. W. 394, where no demurrer has been entered.

N. J.—Foster v. Knowles, 42 N. J. Eq. 226, 7 Atl. 290.

Va.—Kinney v. Craig, 103 Va. 158, 48 S. E. 864.

Can.—Watson v. McCarthy, 10

intended to assert, or which set up new defenses inconsistent with that originally relied upon, particularly after the former issue has been decided.[53] Material matters occurring after the filing of the original bill may properly be brought into the bill by way of amendment,[54] but an amendment to the bill to introduce a subsequent judgment obtained by one of the creditors will not be permitted,[55] nor may the complaint be amended so as to allege that, after the service of the summons and complaint upon the debtor, an execution was issued upon the judgment, although it was issued before the summons and complaint was served on the grantee.[56]

§ 19. **Supplemental pleadings.**—A supplemental bill, when properly filed, is to be considered as part of the original bill, and if, upon the whole bill, the complainant is entitled to relief, it must be decreed him.[57] An objection that a second complaint, made and served as supplemental in pursuance of an order of the court, is not in aid of the original complaint, and therefore not supplemental, cannot be raised on appeal from the judgment. Defendant should appeal from the order.[58] Where there is no defect in the original bill, and new matters transpiring after the filing of the original bill, but connected with the grounds of recovery relied on in the original bill, must be relied on by the complainant for complete relief, a supplemental bill should be filed stating the facts which entitle him to the relief and asking the appropriate relief.[59] But if a bill be so wholly defective

Grant. Ch. (U. C.) 416; Rees v. Wittrock, 6 Grant Ch. (U. C.) 418.

53. Davidson v. Dishman, 22 Ky. L. Rep. 940, 59 S. W. 326; Skowhegan Bank v. Cutler, 49 Me. 315; Farwell v. Meyer, 67 Mo. App. 566; Kinney v. Craig, 103 Va. 158, 48 S. E. 864; Tidball v. Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867.

54. Cleveland v. Chambliss, 64 Ga. 352; Jamison v. Bagot, 106 Mo. 240, 16 S. W. 697; Fidelity L. & T. Co. v. Engleby, 99 Va. 168, 37 S. E. 957; First Nat. Bank v. Prager, 50 W. Va. 660, 41 S. E. 363.

55. Lore v. Getsinger, 7 N. J. Eq. 191.

56. McCullough v. Colby, 17 N. Y. Super. Ct. 603.

57. Cunningham v. Rogers, 14 Ala. 147; French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

58. Wetmore v. Truslow, 51 N. Y. 338.

59. French v. Commercial Nat. Bank, *supra;* Edgar v. Clevenger, 3

that no decree can be made upon it, it will not be aided by a supplemental bill founded on facts that have subsequently taken place.[60] A supplemental bill may be filed when facts have occurred subsequently to the filing of the original bill, which vary the relief to which the plaintiff was entitled under it,[61] and if the original bill were sufficient for one kind of relief, and facts afterwards occur which entitle the plaintiff to other and more extensive relief, he may have such relief by setting out the new matter in a supplemental bill.[62] Where it is essential that the creditor should allege the issuing of an execution in order to state a cause of action in equity, if the creditor files his original bill before he has exhausted his remedy at law, he cannot cure the defect by filing a supplemental bill alleged a subsequent judgment and execution returned unsatisfied.[63] But this defect is waived if no objection be made to the supplemental bill on this specific ground.[64] Where a bill is sustainable on any ground, even for the purpose of granting temporary relief, the court will retain possession of it, to allow the complainant to file a supplemental bill.[65]

§ 20. **Demurrer.**—Where matter in bar of relief is apparent on the face of the bill, the defendant may demur.[66] But where the matter of defense is not apparent on the face of the bill, the

N. J. Eq. 258; Fleischner v. First Nat. Bank, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; Pike v. Miles, 23 Wis. 164, 99 Am. Dec. 148.

60. Candler v. Pettit, 1 Paige (N. Y.), 168, 19 Am. Dec. 399; Edgar v. Clevenger, 3 N. J. Eq. 258.

61. Hasbrouck v. Schuster, 4 Barb. (N. Y.) 285.

62. Candler v. Pettit, 1 Paige (N. Y.), 168, 19 Am. Dec. 399.

63. McCullough v. Colby, 17 N. Y. Super. Ct. 603, 18 N. Y. Super Ct. 477; Candler v. Pettit, *supra;* Butchers, etc., Bank v. Willis, 1 Edw. Ch. (N. Y.) 645; Morrison v. Schuster, 1 Mackey (D. C.) 190; Brown v. State Bank, 31 Miss. 454.

64. Fleischner v. First Nat. Bank, 36 Or. 553; Meacham Arms Co. v. Swarts, 2 Wash. Terr. 412, 7 Pac. 859.

65. Edgar v. Clevenger, *supra.*

66. Bromberg v. Heyer, 69 Ala. 22; Levy v. Marx (Miss. 1895), 18 So. 575; Tappan v. Evans, 11 N. H. 311; Reed Fertilizer Co. v. Thomas, 97 Tenn. 478, 37 S. W. 220, allegations which raise the question whether an assignment for the benefit of creditors was fraudulent in law, but do not charge fraud in fact, are properly heard on demurrer; Gullickson v.

defendant, if he intends to take advantage of it, must show the matter which creates the objection by plea or answer.[67] If he neither so demurs nor pleads, but answers fully to the merits of the bill or demurs on some other ground, he is held to waive the objection that he might have pleaded.[68] A demurrer should be so stated as to apprise the court of the real objection.[69] A demurrer to a bill for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill, and if the demurrer is sustained, the bill will be dismissed as to the party who demurred.[70] On demurrer to the whole bill, if the bill be good in part, the demurrer should be overruled.[71] As a general rule a demurrer is waived by answering to the merits,[72] except in jurisdictions where defendant is permitted to demur and answer at the same time.[73] The insertion of irrelevant matter in a complaint for equitable relief is not a ground of demurrer. The remedy is by motion to strike it out.[74] A demurrer admits the truth of the allegations of fact contained in the pleading demurred to.[75]

Madsen, 87 Wis. 19, 57 N. W. 965, defendant, upon a written general demurrer, may avail himself of the objection that plaintiff has an adequate remedy at law.

67. Thomas v. McEwen, 11 Paige (N. Y.), 131, or he may insist upon it at the hearing; Schwarz, Rosenbaum & Co. v. Barley, 142 Ala. 439, 38 So. 119; Tappan v. Evans, 11 N. H. 311; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831.

68. *N. Y.*—Loomis v. Tifft, 16 Barb. 541.

Ala.—Mountain v. Whitman, 103 Ala. 630, 16 So. 15.

Ky.—Barton v. Barton, 80 Ky. 212; Shaw v. Shaw, 15 Ky. L. Rep. 592, 24 S. W. 630.

Minn.—Welch v. Bradley, 45 Minn. 540, 48 N. W. 440.

N. H.—Tappan v. Evans, 11 N. H. 311.

69. Kellogg v. Hamilton, 43 Mich. 269, 5 N. W. 315.

70. Boyd v. Hoyt, 5 Paige (N. Y.), 65.

71. Vanderveer v. Stryker, 8 N. J. Eq. 175.

72. Gordon v. Reynolds, 114 Ill. 118, 28 N. E. 455.

73. Smith v. Kelley, 56 Me. 64; Hartshorn v. Eames, 31 Me. 97.

74. Bank of British North America v. Suydam, 6 How. Pr. (N. Y.) 379.

75. Riley v. Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Large v. Bristol Steam Towboat, etc., Co., 2 Ashm. (Pa.) 394.

On a demurrer to an answer, the court may determine the sufficiency of the complaint. Holland v. Grote, 56 Misc. Rep. (N. Y.) 370, 107 N. Y. Supp. 667.

§ 21. **Cross bill.**—A defendant may file a cross bill either for discovery or for relief, as where he seeks to impeach the judgment which is the foundation of the plaintiff's claim.[76]

§ 22. **Plea or answer in general.**—To so much of the bill, in an action to set aside a conveyance as fraudulent as against creditors, as is material and necessary for the defendant to answer, he must speak directly, without evasion, not by way of negative pregnant. He must not answer the charges merely literally, but must confess or traverse the substance of each positively and with certainty, and particular precise charges must be answered particularly and precisely, not in a general manner. To a fact in defendant's own knowledge, he must answer positively; to facts not within his knowledge, he must answer as to information and belief, and not as to information or hearsay merely, without stating belief. An answer denying all knowledge and belief of the matters charged in the principal allegations of the bill, or a general denial of the fraud and allegation of good faith without the facts showing good faith, or a denial of fraudulent intent without a denial of notice of fraudulent intent, is insufficient.[77] An answer alleging that defendants

76. Story Eq. Pl., § 389; Buchanan v. Cunningham, 10 Grant Ch. (U. C.) 513.

77. *N. Y.*—Churchill v. Bennett, 8 How. Pr. 309; Cunningham v. Freeborn, 3 Paige, 557; Woods v. Morrell, 1 Johns. Ch. 103; Leaycraft v. Dempsey, 15 Wend. 83; Smith v. Lasher, 5 Johns. Ch. 247.

Ala.—Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Freeman v. Stuart, 119 Ala. 158, 24 So. 31.

Colo.—Stephens v. Parvin (1904), 78 Pac. 688.

Fla.—Barrow v. Bailey, 5 Fla. 9; Hunter v. Bradford, 3 Fla. 269.

Ky.—Aulick v. Reed, 104 Ky. 465, 20 Ky. L. Rep. 653, 47 S. W. 331; Loving v. Meyler, 20 Ky. L. Rep. 1654, 49 S. W. 961.

Minn.—Johnston v. Piper, 4 Minn. 192.

Miss.—Stanton v. Green, 34 Miss. 576.

Mont.—National Wall Paper Co. v. McPherson, 19 Mont. 355, 48 Pac. 550.

Tenn.—Welcker v. Price, 70 Tenn. 66.

W. Va.—Dent v. Pickens (1906), 53 S. E. 154.

In an equitable action, an answer alleging that the cause of action was barred because suit was not commenced within ten years after the cause of action accrued is insufficient,

were *bona fide* purchasers, not privy to the fraud, and believed the title to be good, because they did not know or believe the deeds to be fraudulent, is insufficient to dissolve an injunction, staying ejectment.[78] Although the answer should be full, clear, and specific as to all material charges in the bill, the records of the court should not be filled with long recitals, or with long digressions in matters of fact, which are altogether unnecessary and totally immaterial to the matter in question. Such matter is redundant.[79]

§ 23. **Voluntary conveyance.**—Where a suit is brought to set aside an alleged fraudulent conveyance on the ground that there was no consideration for the conveyance, the grantee as defendant must not only deny that there was no consideration, but must allege and prove that there was a valuable consideration and state affirmatively in what the consideration consisted, and when and how it was paid.[80] And where the fraud of the grantor clearly appears, the purchaser must show himself a *bona fide* purchaser by alleging and proving that at the time of such payment he had no notice of the grantor's fraudulent intent and that he acted in good faith. It is not for the plaintiff to show the contrary.[81] The grantees in a fraudulent conveyance which is set aside in an action by a creditor of the grantor cannot be

where the complaint does not show on its face that such period of limitation has expired, and the answer does not allege facts establishing such expiration. Holland v. Grote, 56 Misc. Rep. (N. Y.) 370, 107 N. Y. Supp. 667.

78. Schemerhorn v. Merrill, 1 Barb. (N. Y.) 511; Ward v. Van Bokkelen, 1 Paige (N. Y.), 100; Apthorpe v. Comstock, Hopk. (N. Y.) 143; Roberts 1. Anderson, 2 Johns. Ch. (N. Y.) 202; Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

79. Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Wood v. Mann, 30 Fed. Cas. No. 17,952, 1 Sumn. 578.

80. Noble v. Gilliam, 136 Ala. 618; Watts v. Burgess, 131 Ala. 333, 30 So. 868; British, etc., Mfg. Co. v. Norton, 125 Ala. 522, 28 So. 31; Gamble v. Aultman, 125 Ala. 372, 28 So. 30; J. B. Brown Co. v. Henderson, 123 Ala. 623; Weber v. Rothchild, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

81. McKee v. West (Ala. 1904), 37 So. 740; Killian v. Cox, 132 Ala. 664, 32 So. 738; Weber v. Rothchild, *supra*.

substituted to the rights of mortgagees whose liens they discharged, in the absence of a pleading alleging the facts entitling them to such relief.[82]

§ 24. **Purchaser from fraudulent grantee.**—In order to entitle a person to protection as a *bona fide* purchaser or mortgagee, without notice, he must deny notice fully and particularly, whether the defense be set up by plea or answer. He must deny notice positively, not evasively, though it be not charged in the bill, and every fact from which notice may be inferred.[83]

§ 25. **Exempt property.**—Where the defendant seeks to defeat an action to set aside a conveyance as fraudulent as against creditors, by showing that the property conveyed was exempt and that the conveyance therefore was not fraudulent, the answer must set forth all the facts necessary to show that the property was exempt and that the right of exemption existed at the time the alleged fraudulent conveyance was made. An allegation that such right existed at the time the answer was filed is not sufficient.[84] A creditor's complaint to set aside a fraudulent conveyance of land need not allege that the land was not exempt from execution, such exemption being a matter of defense.[85] It has been held, however, that evidence that the property conveyed was held by the grantor as a homestead or was otherwise exempt is admissible under a general denial.[86] And evidence that the

82. Campbell v. Trosper, 108 Ky. 602, 22 Ky. L. Rep. 277, 57 S. W. 245. See also Reimbursement, indemnity and subrogation, chap. XIV, § 40, *supra*.

83. Lowry v. Tew, 3 Barb. Ch. (N. Y.) 407; Balcom v. New York Life Ins., etc., Co., 11 Paige (N. Y.), 454; Harris v. Fly, 7 Paige (N. Y.), 421; Manhattan Co. v. Evertson, 6 Paige (N. Y.), 457; Gallatian v. Cunningham, 8 Cow. (N. Y.) 361; Brinkerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 332; Frost v. Beekman, 1 Johns. Ch. 288; McKee v. West (Ala. 1904), 37 So. 740; Miller v. Fraley, 21 Ark. 22; Stanton v. Green, 34 Miss. 576.

84. Phoenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. 270; Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242.

85. State v. Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

86. Starke v. Lamb (Ind. 1906), 78 N. E. 668, 79 N. E. 895; Hobson v. Noel (Ky. 1906), 97 So. 388; De-

property was exempt is admissible to rebut the charge of fraud.[87] Where plaintiff's title is attacked as obtained in fraud of creditors, he may show that the property was exempt from execution without having anticipated and avoided the attack by specially alleging such fact in his complaint.[88]

§ 26. **Justifying seizure.**—A pleader who seeks to justify the seizure of goods under legal process, notwithstanding a previous transfer, is not required to refer to the statutory provisions relating to fraudulent conveyances and transfers. It is sufficient to allege that the goods levied upon were the property of the person against whom the process was issued, or that he had a leviable or attachable interest therein.[89] The portions of the statute of frauds that are waived unless pleaded, relate to contracts which although previously capable of valid proof by parol evidence are declared to be void unless in writing.[90]

§ 27. **Answers, denials, and admissions, as evidence.**—A statement in a sworn answer, responsive to the material allegations or to a direct interrogatory contained in the bill, must be accepted as true, unless disproved, and the rule of equity practice is that the defendant's answer, under oath, expressly negativing the allegations of the bill can only be overcome by the evidence of two witnesses, or by that of one and corroborating circumstances equal to that of another,[91] but this rule does not extend

weese v. Deweese (Ky.), 90 S. W. 256; Hibben v. Soyer, 33 Wis. 319.

87. Isgrigg v. Pauley, 148 Ind. 436, 47 N. E. 821.

88. Furman v. Tenney, 28 Minn. 77, 9 N. W. 172.

89. Dearing v. McKinnon Dash, etc., Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708.

90. Dearing v. McKinnon Dash, etc., Co., *supra;* Sanger v. French, 157 N. Y. 213, 51 N. E. 979; Matthews v. Matthews, 154 N. Y. 288, 48 N. E. 531; Crane v. Powell, 139 N. Y. 379, 34 N. E. 911.

91. *N. Y.*—Jacks v. Nichols, 5 N. Y. 178.

U. S.—Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179; Voorhees v. Bonesteel, 16 Wall. 16, 21 L. Ed. 268; Tobey v. Leonard, 2 Wall. 423, 17 L. Ed. 842; Hill v. Ryan Grocery Co., 78 Fed. 21, 23 C. C. A. 624.

Ala.—Birmingham Nat. Bank v. Steele, 98 Ala. 85, 12 So. 783; Marshall v. Croom, 52 Ala. 554.

to so much of the answer as is not directly responsive to the bill.[92] But an answer, although positive and directly responsive to the allegations in the bill, may be outweighed by circumstances, especially if the answer be respecting facts which, in the nature of things, cannot be within the personal knowledge of the defendant.[93] And a positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent, or from which fraud might be inferred.[94] Where the answer admits facts fraudulent *per se* in judgment of law,[95] or from which fraud follows as a natural and legal if not a necessary and unavoidable conclusion,[96] a general denial of fraud is unavailing. The complainant is entitled to the benefit of any admissions in the answer tending to establish fraud, although in the face of the general denial. They stand as admissions of record, whether the answer be under oath or not.[97] Failure to deny a material allegation amounts to an admission and no proof is required.[98]

Ill.—Merchants' Nat. Bank v. Lyon, 185 Ill. 343, 56 N. E. 1083.

Me.—Hartshorn v. Eames, 31 Me. 93.

Miss.—Hambrick v. Jones, 64 Miss. 240, 8 So. 176; Fulton v. Woodman, 54 Miss. 158; Berryman v. Sullivan, 13 Sm. & M. 65.

N. J.—Platt v. McClong (Ch. 1901), 49 Atl. 1125.

Where the answer and testimony of a single witness are in conflict, they balance each other; but a preponderance may be given to the latter by other circumstances detailed in the answer, or by its unreasonable or evasive statements. Jacks v. Nichols, 5 N. Y. 178.

92. Seitz v. Mitchell, *supra.*

93. Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386; Clark v. Van Riemsdyk, 9 Cranch, 153, 3 L. Ed. 688; Wilcoxson v. Darr, 139 Mo. 660, 41 S. W. 227.

94. Robinson v. Stewart, 10 N. Y. 189; Litchfield v. Pelton, 6 Barb. (N. Y.) 187; Stephenson v. Felton, 106 N. C. 114, 11 S. E. 255.

95. Cunningham v. Freeborn, 11 Wend. (N. Y.) 240.

96. Sayre v. Fredericks, 16 N. J. Eq. 205.

97. *Ala.*—Battle v. Reid, 68 Ala. 149.

Ill.—Miller v. Payne, 4 Ill. App. 112.

Ky.—Terrill v. Jennings, 58 Ky. 450.

N. J.—Levi v. Welsh, 45 N. J. Eq. 867, 19 Atl. 620.

Tenn.—Yost v. Hudiberg, 70 Tenn. 627.

98. Clark v. Olsen (Cal. 1893), 33 Pac. 274; Redhead v. Pratt, 72 Iowa, 99, 33 N. W. 382.

§ 28. **Replication.**—No replication or reply is required where the answer amounts to no more than a denial of plaintiff's allegations.[99] If the complainant intends to deny the truth of defendant's answer, it is his duty to do so by filing a replication which will put the cause at issue, and then defendant has the right to make out his defense by evidence.[1] But the cause may be set down for hearing by the complainant on bill and answer, which amounts to a demurrer to the answer, and then no testimony is taken on either side.[2] Where the cause is submitted for final decree on bill, answer, exhibits, and depositions, the filing of a replication will be considered as waived.[3] Allegations not responsive to the bill, if denied by a general replication, must be proved before becoming available to the party making them.[4]

§ 29. **Bills of particulars.**—Applications for bills of particulars are addressed wholly to the discretion of the court, and whether the application shall be granted or denied depends on the particular circumstances of each case.[5] Although neither party will be required to disclose the evidence by which he intends to establish his cause of action or defense at the trial, it has been held that the plaintiff may be compelled to furnish a bill of particulars stating what property was fraudulently conveyed or incumbered, and in what way,[6] and of the time and place of the acts or things which he intends to prove as showing the fraudulent intent, at least where it is uncontradicted that the defendants have no knowledge of such facts other than communicated by rumor, and are likely to be surprised at the trial, unless informed by a bill of particulars thereof.[7] And where the defendant sets

99. Jordan v. Buschmeyer, 97 Mo. 94, 10 S. W. 616.

1. Birdsall v. Welch, 6 D. C. 316; Higby v. Ayres, 14 Kan. 331.

2. Birdsall v. Welch, *supra.*

3. Demaree v. Driskill, 3 Blackf. (Ind.) 115.

4. Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51.

5. Passavant v. Cantor, 21 Abb. N. C. (N. Y.) 259, 1 N. Y. Supp. 574.

6. Harding v. Bunnell, 14 Pa. Co. Ct. 417.

7. Claflin v. Smith, 13 Abb. N. C. (N. Y.) 205, 66 How. Pr. (N. Y.) 168, 4 Civ. Proc. Rep. 240.

up an affirmative defense, he also may be required to furnish a bill of particulars so as to prevent surprise at the trial.[8] But a bill of particulars of the fraudulent acts relied on to prove fraudulent intent will not be granted when it appears that all the means of knowledge as to all the facts and circumstances with respect to such acts, and the disposition of the property, are peculiarly within reach of the party demanding the particulars.[9] And a bill of particulars will not be ordered as to merely collateral facts, averred argumentatively, or by way of evidence, in support of preceding denials of particular allegations, and which the party alleging them would not be permitted to prove in his own behalf.[10]

§ 30. **Venue.**—An action to set aside a fraudulent assignment or conveyance of real estate is a local action and must be brought and tried in the county in which the real estate or some portion of it is situated. Where an action affects an estate in real property it is essential that the property be within the territorial jurisdiction of the court.[11] A stipulation by the plaintiff in resisting a motion to change the place of trial to such county, that he will not attempt to reach the real estate or make any claim of title or interest therein or thereto, does not change the character of the action, or afford ground for a denial of such motion.[12] The Illinois statute requiring suits affecting land to be brought in the county where the land lies is only declaratory, and does not preclude the bringing of a suit to set aside a fraudulent conveyance in the county where the defendant is found. A court of equity having jurisdiction of the person of the fraudu-

8. Gilhooly v. American Surety Co., 87 Hun (N. Y.), 395, 34 N. Y. Supp. 347; Byrnes v. Lewis, 83 Hun (N. Y.), 310, 31 N. Y. Supp. 1028.

9. Fink v. Jetter, 38 Hun (N. Y.), 163; Faxon v. Bail, 21 N. Y. Supp. 737; Passavant v. Cantor, *supra*.

10. Byrnes v. Lewis, *supra*.

11. Acker v. Leland, 96 N. Y. 383; Wyatt v. Brooks, 42 Hun (N. Y.), 502; Moss v. Gilbert, 18 Abb. N. C. 202.

12. Wyatt v. Brooks, *supra*; Sweetser v. Smith, 5 N. Y. Supp. 373, 22 Abb. N. C. (N. Y.) 319.

lent grantee may compel him to convey property situated in a foreign jurisdiction. In such a case the decree operates on the person of the defendant and does not directly affect the property itself.[13]

§ 31. **Issues, proof, and variance generally.**—As a general rule the proofs should be addressed to the issues made by the pleadings,[14] and evidence of material facts not pleaded is always properly excluded.[15] Where a debtor's transfer of property is alleged by an attacking creditor to have been fraudulent, the debtor's intent is a material issue.[16] But where a bill to set aside a fraudulent conveyance proceeds solely on the ground of the debtor's insolvency, making no charge as to any actual fraudulent intent, no question of such an intent apart from alleged insolvency, arises.[17] If it is alleged that the grantee had knowledge of the grantor's insolvency and fraudulent intent, evidence to prove such facts is admissible, but not otherwise.[18] Where the defendant fails to allege in his answer fraud or fraudulent intent affecting plaintiff's title, he will not be permitted to prove it.[19] Where the only issue made by the pleadings is want of consideration for the conveyance, evidence is not admissible to show inadequacy of consideration.[20] Under an averment in general terms of an intent on the grantor's part to hinder, delay, and defraud his creditors, evidence of fraud is not admissible,

13. Johnson v. Gibson, 116 Ill. 294, 6 N. E. 205.

14. Meyer-Marx Co. v. Masters, 119 Ala. 186, 24 So. 506; Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; Morgan v. Taylor (Tenn. Ch. App. 1897), 42 S. W. 178.

15. Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Minzesheimer v. Doolittle, 56 N. J. Eq. 206, 39 Atl. 386.

16. Beuerlein v. O'Leary, 149 N. Y. 33, 43 N. E. 417; Garahy v. Bayley, 25 Tex. 294.

17. Cleveland v. Chamhliss, 64 Ga. 352; Johnston v. Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580, but evidence relating to the financial condition of the alleged fraudulent grantor is admissible.

18. Levyson v. Ward, 24 La. Ann. 158; Garesche v. McDonald, 103 Mo. 1, 15 S. W. 379.

19. Golden State, etc., Iron Works v. Angell, 89 Cal. 643, 27 Pac. 65; Powers v. Patten, 71 Me. 583.

20. Harper v. Trent (Tenn. Ch. App. 1899), 53 S. W. 245; Millhiser v. McKinley, 98 Va. 207, 35 S. E. 446.

as there is no allegation that the grantee knew of or participated in the debtor's fraudulent intent.[21] Whenever a disposition of property has been made which is alleged to be fraudulent as to creditors, the demand of the creditor or the actual indebtedness is not only in issue, but it is the primary fact in logical order for the party attacking the conveyance to establish, in order to determine that he has a right, as such creditor, to question the validity of the conveyance.[22] It is also important in its bearing upon the probable intent of the parties to the transfer, and the *bona fides* of the transaction cannot be properly tried without going into this subject.[23] The value of property included in a conveyance alleged to be fraudulent is a material subject of inquiry on the question of fraud.[24] Where a creditor claims the property as purchaser at a judicial sale the validity of his title is in issue.[25]

§ 32. **Under a general denial.**—In some jurisdictions it is the rule that in an action of replevin or trover against a sheriff or other officer who has seized property under an execution or writ of attachment, the defendant cannot show under a general denial that the transfer to the plaintiff was fraudulent as to creditors, but the facts constituting the alleged fraud must be specially pleaded.[26] The defense, however, is available if he pleads the

21. Meeker v. Harris, 19 Cal. 278, 79 Am. Dec. 215; Seeleman v. Hoagland, 19 Colo. 231, 34 Pac. 995.

22. Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597; Inman v. Mead, 97 Mass. 310; Cook v. Hopper, 23 Mich. 511.

23. Cook v. Hopper, 23 Mich. 511.

24. Weadock v. Kennedy, 80 Wis. 449, 50 N. W. 393; Murray v. Shoud, 13 Wash. 33, 42 Pac. 631.

25. Hiney v. Thomas, 36 Mo. 377; Tisch v. Utz, 142 Pa. St. 186, 21 Atl. 808.

26. *N. Y.*—Van Dewater v. Gear, 21 App. Div. 201, 47 N. Y. Supp. 503.

U. S.—Wise v. Jefferis, 51 Fed. 641, 2 C. C. A. 432.

Colo.—Seeleman v. Hoagland, 19 Colo. 231, 14 Pac. 995; Solomon v. Smith, 16 Colo. 293, 26 Pac. 811.

Conn.—Greenthal v. Lincoln, 67 Conn. 372, 35 Atl. 266.

Iowa.—J. V. Farwell Co. v. Zenor, 100 Iowa, 640, 65 N. W. 317, 69 N. W. 1030.

Mass.—Thrissell v. Page, 77 Mass. 394.

Mo.—Claflin v. Sommers, 39 Mo. App. 419.

fraud, and where the instrument of transfer is incorporated in the complaint, and is void on its face, the defendant may take advantage of that fact without pleading fraud.[28] In other jurisdictions it is held that where the plaintiff has alleged his ownership, without indicating the source thereof, the defendant may prove that plaintiff's title was fraudulent as to creditors under a denial of plaintiff's title,[29] and he need not specially plead such facts, but if he does proceed to set up the acts of fraud which he charges render plaintiff's title invalid, he must state facts which are sufficient in law to that end, and not aver fraud in general terms.[30] In an action by creditors to set aside a conveyance of realty alleged to have been made in fraud of their rights, the defendant may, under a general denial, give evidence of any fact tending to disprove the charge of fraud and show the good faith of the transaction.[31] He may show that the property was exempt and could not have been seized upon execution if it had been retained by the grantor.[32] But if he have an affirma-

Mont.—Botcher v. Berry, 6 Mont. 448, 13 Pac. 45.

Under a general denial defendant has no right to prove a defense founded on new matter. Weaver v. Barden, 49 N. Y. 286.

27. Beaty v. Swarthout, 32 Barb. (N. Y.) 293; Avery v. Mead, 12 St. Rep. (N. Y.) 749; Chapman v. James, 96 Iowa, 233, 64 N. W. 795. But see Carter v. Bowe, 41 Hun (N. Y.), 516, an allegation in the answer that the property belonged to the judgment debtor is sufficient to admit proof of the fraudulent transfer.

28. Dearing v. McKinnon Dash, etc., Co., 33 App. Div. (N. Y.) 31, 53 N. Y. Supp. 513.

29. *Kan.*—Miami County Nat. Bank v. Barkalow, 53 Kan. 68, 35 Pac. 796.

La.—Devonshire v. Gauthreaux, 32 La. Ann. 1132.

Minn.—Furman v. Tenny, 28 Minn. 77, 9 N. W. 172; Tupper v. Thompson, 26 Minn. 385, 4 N. W. 621.

S. C.—Archer v. Long, 38 S. C. 272, 16 S. E. 998; Paris v. Dupre, 17 S. C. 282.

Wis.—Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913; Blakeslee v. Rossman, 44 Wis. 553.

30. Eaton v. Metz (Cal. 1895), 40 Pac. 947; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310.

31. Ray v. Teahout, 65 Iowa, 157, 21 N. W. 497; Plummer v. Rohman, 62 Neb. 145, 87 N. W. 11.

32. Isgrigg v. Pauley, 148 Ind. 436, 47 N. E. 821; Furth v. March, 101 Mo. App. 329, 74 S. W. 147; Hibben v. Soyer, 33 Wis. 319.

tive defense he must allege the facts relied upon, or he will be precluded from introducing any evidence thereof.[33] Where a want of consideration is charged in the bill, defendant must set out the consideration in order to be permitted to prove a valuable consideration.[34] Where want of consideration for the conveyance or any other negative fact forms an essential part of the plaintiff's case or defendant's defense, it must be alleged in the pleading, although the burden of proof rest upon the other party.[35]

§ 33. **Confession and avoidance.**—Where an answer is put in issue, what is admitted by it need not be proved; but if defendant admits one fact, and insists upon a distinct fact by way of avoidance, he must prove the matter in avoidance.[36]

§ 34. **Variance.**—The material allegations in the bill and the proofs thereunder must agree or be in substantial accord in order to authorize a decree setting aside a fraudulent conveyance. Otherwise there is a variance which is fatal to recovery, since a party cannot sue on one cause of action and recover on another.[37] But while it is generally true that the case stated in a bill of equity must be sustained by the evidence, this rule will not prevent the court from granting the relief prayed for where

33. Robinson v. Moseley, 93 Ala. 70, 9 So. 372; Shaw v. Manchester, 84 Iowa, 246, 50 N. W. 985; Wang v. Finnerty, 32 La. Ann. 94; Hart v. Schenck, 32 N. J. Eq. 148.

34. Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Gorman v. Glenn, 25 Ky. L. Rep. 755, 78 S. W. 873.

35. Meyer-Marx Co. v. Masters, 119 Ala. 186, 24 So. 506.

36. Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Clements v. Nicholson, 73 U. S. 299, 18 L. Ed. 786; Clarke v. White, 37 U. S. 178, 9 L. Ed. 1046; Yost v. Hudibury, 70 Tenn. 627.

37. *N. Y.*—Bodine v. Edwards, 10 Paige, 504.

D. C.—Droop v. Ridenour, 11 App. Cas. 224.

Ind.—Mayer v. Feig, 114 Ind. 577, 17 N. E. 159.

Mich.—Bresnahan v. Nugent, 92 Mich. 76, 52 N. W. 735.

Miss.—Ferguson v. Bobo, 54 Miss. 121.

Mo.—Reed v. Bott, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089.

Neb.—Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036.

the case proved does not materially differ from the case stated.[38] An allegation in a creditors' bill that lands therein described are held in trust for the debtor will not be sustained by proof that the debtor purchased the lands with his own funds, and took the deed thereof in the name of his daughters as an absolute gift, and the complainant's debt was contracted previous thereto, and the debtor was insolvent at the time of the purchase.[39] And where it is alleged that conveyances of real estate were made to defraud existing creditors, and the proofs show such conveyances were executed and delivered prior to the incurring of the indebtedness, the petition under the proofs will not sustain a decree in favor of the plaintiff.[40] But where a complaint alleges that a conveyance was voluntary, and given and accepted with intent to defraud the grantor's creditors, the omission to show a want of consideration is not fatal where the deed on the other allegations of the complaint would be fraudulent even though there were a valuable consideration.[41]

§ 35. **Disclaimer.**—One who is without interest in a suit to set aside a fraudulent conveyance should file a disclaimer in order to protect himself against judgment, and should not appear and answer.[42] Where defendant husband and wife, in anticipation of plaintiff's action, conveyed land, the separate property of the wife, to a third party, and plaintiff, having levied on the land under attachment against the husband, purchased it, and sued

38. *U. S.*—Alabama Iron, etc., Co. v. Austin, 94 Fed. 897, 36 C. C. A. 536.

Ala.—Moog v. Barrow, 101 Ala. 209, 13 So. 665.

Conn.—Mallory v. Gallagher, 75 Conn. 665, 55 Atl. 209.

Ind.—Slagel v. Hoover, 137 Ind. 314, 36 N. E. 1099.

La.—Mackesy v. Shultz, 38 La. Ann. 385.

Mo.—Erfort v. Consalus, 47 Mo. 208.

Va.—Campbell v. Bowles, 30 Gratt. 652.

W. Va.—Keneweg Co. v. Schilansky, 47 W. Va. 287, 34 S. E. 773.

39. Bodine v. Edwards, 10 Paige (N. Y.), 504.

40. Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036.

41. Slagel v. Hoover, 137 Ind. 314, 36 N. E. 1099.

42. Tyler v. Davis (Ind. App. 1905), 75 N. E. 3.

for its possession against the husband and wife and such third person without consideration reconveyed to the wife, the disclaimer of such third person in the suit did not vest title in plaintiff.[43]

43. Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887.

CHAPTER XVII.

EVIDENCE.

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53. Knowledge and intent of grantee or purchaser from grantee.

Section 1. **Presumptions and burden of proof generally.**—The fact that the consideration for a transfer of property to one is paid by another, without other evidence, is presumptive proof of fraud, but it is not conclusive, and casts the burden upon the grantee to disprove a fraudulent intent in the defense of his title.[1] So, the fact that a conveyance by one indebted is voluntary,[2] the retention of possession of goods and chattels by the seller,[3] the fact that there are reservations and trusts for the grantor in the conveyance,[4] the fact that the relationship between the parties is husband and wife,[5] etc., creates a rebuttable presumption that the conveyance or transfer is fraudulent as to creditors, and throws upon those seeking to uphold the transaction the burden of showing that it was *bona fide* and without fraudulent intent. The statutory presumption of fraud where a sale of part or all of a stock of merchandise is made out of the regular course of business, where no inventory of the goods is made, and the purchaser does not make

1. Dunlap v. Hawkins, 59 N. Y. 342, *aff'g* 2 Thomps. & C. 292; Lanahan v. Caffrey, 40 App. Div. (N. Y.) 124, 57 N. Y. Supp. 724; Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Reich v. Reich, 26 Minn. 97, 1 N. W. 804. See also Purchase of property in name of third person, chap. II, § 5, *supra*.

2. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. Supp. 121; Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958. See Effect of want of consideration, chap. VIII, § 32, *supra*.

3. See Retention of possession or apparent title, chap. XII, *supra*.

4. See Reservations and trusts for grantor, chap. X, *supra*.

5. See Husband and wife, chap. IX, § 4, *supra*.

inquiry as to the creditors of the seller, is not a conclusive but a rebuttable presumption.[6] Where the grantor's insolvency is shown, the grantee then has the burden of showing that the conveyance was upon a good consideration, and that he had no knowledge of the grantor's fraudulent intent.[7] Since the law presumes that a resident householder will avail himself of his right to claim an exemption, where it appears that the debtor was a resident householder of the state, and that all the property owned by him at the time of the transfer in question did not exceed the statutory exemption, the transfer will not be set aside.[8] Where certain bankrupts made transfers of their property to various of their relatives, leaving themselves without sufficient means to satisfy their creditors, the transfers were *prima facie* fraudulent, and the burden was on the grantees to furnish strong proof that the transfers were made in good faith.[9]

§ 2. **Burden of proof under pleadings.**—It is the general rule that the burden of proof rests on the plaintiff or complainant to prove all the allegations of his complaint not admitted by the answer,[10] and that the burden rests on the defendant to prove affirmative defenses and matters of avoidance set up in the answer.[11] The burden of proving fraud is on the party alleging it, whether the allegation be negative or affirmative in form,[12] but a party interested to maintain a sale, which the vendor's creditor attacks

6. Hart v. Roney, 93 Md. 432, 49 Atl. 661.

7. Wadleigh v. Wadleigh, 111 App. Div. (N. Y.) 367, 97 N. Y. Supp. 1063.

8. Stark v. Lamb (Ind. 1907), 78 N. E. 668, 79 N. E. 895.

9. Horner-Gaylord Co. v. Miller & Bennett, 17 Am. B. R. 257, 147 Fed. 295.

10. Wright v. Wheeler, 14 Iowa, 8; Holmes Bros. v. Ferguson-McKinney Dry Goods Co. (Miss. 1905), 39 So. 70; Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; Hombs v. Corbin, 34 Mo. App. 393; Mawry Nat. Bank v. McAdams, 106 Tenn. 404, 61 S. W. 773.

11. Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 856; Robins v. Armstrong, 84 Va. 810, 6 S. E. 130.

12. Tompkins v. Nichols, 53 Ala. 197; Compton v. Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059, an allegation that the debt secured by a deed of trust was fictitious must be proved by the plaintiff.

as simulated because no price was paid, must prove its payment. The creditor cannot prove the negative.[13] So an allegation that a judgment has been obtained fraudulently and without evidence, made by a third person, involves a negative, and throws the burden of proof on the judgment creditor.[14] Where in a suit by a creditor, attacking what is alleged to be a voluntary conveyance of the debtor's land to a third person, such third person, a party defendant, answers, alleging that he is a *bona fide* purchaser thereof for value, the burden is on the complainant to establish the allegations of the bill.[15] In a suit to set aside a deed as in fraud of creditors, an answer by the grantee alleging that the property was purchased by the grantor with the grantee's money, and that the former took the title in his name without the latter's consent, and that he made the conveyance merely to discharge his trust, states matters provable under a general denial, and the burden of proving the issue of fraud remains on the plaintiff.[16] Where to a creditor's bill alleging that certain land conveyed by a husband to his wife was all the property he then had, he answered that he was then in good circumstances, with more than means enough to pay his debts, this was a mere statement of a legal conclusion, and did not relieve him of the burden of removing the presumption that the conveyance was fraudulent as to existing creditors.[17]

§ 3. **Fraudulent character of transaction in general.**—Fraud as against creditors is never to be presumed when the transaction may be fairly reconciled with honesty,[18] especially as to a creditor who becomes such many years afterwards,[19] or where it is alleged

13. Fisher v. Moore, 12 Rob. (La.) 95.

14. Judson v. Connolly, 5 La. Ann. 400; Fox v. Fox, 4 La. Ann. 135.

15. Verner v. Verner, 64 Miss. 184, 1 So. 52.

16. Bishop v. State, 83 Ind. 67.

17. Welcker v. Price, 70 Tenn. 666.

18. Tompkins v. Nichols, 53 Ala. 197; Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68, a purchase, by an attorney, of his client's land at execution sale in the proceedings in which the attorney is employed, is not presumptively fraudulent as to the client's creditors; Mey v. Gulliman, 105 Ill. 272; Dallam v. Renshaw, 26 Mo. 533.

19. Weckerly v. Taylor (Neb. 1905), 103 N. W. 1065.

to have occurred many years before the bringing of the suit.[20] Where the circumstances tending to show fraud, and those repelling them, are nearly equal, fraud will not be presumed.[21] Where the burden of proof is not governed by statute,[22] a creditor who assails a conveyance of his debtor for fraud must show the fraud. It cannot be presumed.[23] If the transaction is not fraudu-

20. Welton v. Baltezare, 25 Neb. 190, 41 N. W. 146.

21. Thompson v. Sanders, 29 Ky. 94.

22. Whelpley v. Stoughton, 119 Mich. 314, 78 N. W. 137, in suits in aid of execution the burden is on defendant to prove the transaction *bona fide*.

23. *N. Y.*—Remington Paper Co. v. O'Dougherty, 36 Hun, 79, *aff'd* 99 N. Y. 673; Talman v. Smith, 39 Barb. 390.

U. S.—Allen v. Smith, 129 U. S. 465, 9 Sup. Ct. 338, 32 L. Ed. 732.

Ala.—Smith v. Collins, 94 Ala. 394, 10 So. 334.

Ariz.—Rochester v. Sullivan, 2 Ariz. 75, 11 Pac. 58.

Ark.—Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

D. C.—McDaniel v. Parish, 4 App. Cas. 213; Birdsall v. Welch, 6 D. C. 316.

Ga.—Colquitt v. Thomas, 8 Ga. 258.

Ill.—Bowman v. Ash, 143 Ill. 649, 32 N. E. 486; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70; Pratt v. Pratt, 96 Ill. 184; O'Neal v. Boone, 82 Ill. 589; Klein v. Horine, 47 Ill. 430; Johnston v. Hirschberg, 85 Ill. App. 47; Flynn v. Todd, 77 Ill. App. 682; Hanchett v. Goetz, 25 Ill. App. 445; Chicago Stamping Co. v. Hanchett, 25 Ill. App. 198; Edey v. Fath, 4 Ill. App. 275.

Ind.—American Varnish Co. v. Reed, 154 Ind. 88, 55 N. E. 224; Personette v. Cronkhite, 140 Ind. 586, 40 N. E. 59; Fulp v. Beaver, 136 Ind. 319, 36 N. E. 250; Pennington v. Flock, 93 Ind. 378; Morgan v. Olvey, 53 Ind. 6; Pence v. Croan, 51 Ind. 336; Farmer v. Calvert, 44 Ind. 209; Stewart v. English, 6 Ind. 176.

Iowa.—Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483; Thompson v. Zuckmayer (1903), 94 N. W. 476; Shaffer v. Rhynders, 116 Iowa, 472, 89 N. W. 1099; Pidcock v. Voorhies, 84 Iowa, 705, 42 N. W. 646, 49 N. W. 1038; Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159; Craig v. Fowler, 59 Iowa, 200, 13 N. W. 116; Lillie v. McMillan, 52 Iowa, 463, 3 N. W. 601; Prichard v. Hopkins, 52 Iowa, 120, 2 N. W. 1028.

Kan.—Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698.

Ky.—Casteel v. Baugh, 13 Ky. L. Rep. 916, 18 S. W. 1023.

La.—Chaffe v. Lisso, 34 La. Ann. 310; Pierce v. Clark, 25 La. Ann. 111; Bridgeford v. Simonds, 18 La. Ann. 121; Hubbard v. Hobson, 14 La. 453; Gravier v. Brandt, 1 Mart. N. S. 165; Kenney v. Dow, 10 Mart. 577, 13 Am. Dec. 342.

Me.—Blaisdell v. Cowell, 14 Me. 370; Knight v. Kidder (1885), 1 Atl. 142.

Md.—Crooks v. Brydon, 93 Md. 640, 49 Atl. 921; Cooke v. Cooke, 43 Md. 522; Allein v. Sharp, 7 Gill & J. 96.

Mass.—Elliott v. Stoddard, 98

lent *per se*, the burden of showing fraud is on the party alleging it.[24] The maxim, "Fraud must be proven, and is never presumed," is to be understood as affirming that a contract or conduct apparently honest and lawful must be regarded as such, until shown to be otherwise by evidence either positive or circumstantial.[25] But where the facts appear sufficient to raise a presumption that a conveyance is in fraud of the grantor's creditors, the burden of showing good faith devolves upon the parties thereto.[26] Fraud, or any other fact, may be presumed, if there be

Mass. 145; Emmons v. Westfield Bank, 97 Mass. 230.

Minn.—McMillan v. Edfast, 50 Minn. 414, 52 N. W. 907.

Miss.—Holmes Bros. v. Ferguson-McKinney Dry Goods Co. (1905), 39 So. 70; McInnis v. Wiscasset Mills, 78 Miss. 52, 28 So. 725; Parkhurst v. McGraw, 24 Miss. 134.

Mo.—Thompson v. Cohen (1894), 24 S. W. 1023; Third Nat. Bank v. Cramer, 78 Mo. App. 476; Jacob Furth Grocery Co. v. May, 78 Mo. App. 323; Halderman v. Stillington, 63 Mo. App. 212; Deering v. Collins, 38 Mo. App. 73.

Neb.—Knapp v. Fisher, 58 Neb. 651, 79 N. W. 553; Landauer v. Mack, 39 Neb. 8, 57 N. W. 555.

N. H.—Jones v. Emery, 40 N. H. 348.

N. J.—Hemingway v. McDevitt, 4 N. J. L. 343.

N. C.—Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639.

Ohio.—Grote v. Meyer, 6 Ohio Dec. 1025, 9 Am. L. Rec. 623.

Pa.—Natalie Anthracite Coal Co. v. Ryon, 188 Pa. St. 138, 41 Atl. 462.

Tex.—Ellis v. Valentine, 65 Tex. 532; Martel v. Somers, 26 Tex. 551; Edwards v. Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555; Kosminsky v. Walter (Civ. App. 1898), 44 S. W. 540; Voorheis v. Waller (Civ. App. 1896), 35 S. W. 807; Reynolds v. Weinman (Civ. App. 1894), 25 S. W. 33; Greathouse v. Moore (Civ. App. 1893), 23 S. W. 226.

Utah.—Wilson v. Cunningham, 24 Utah, 167, 67 Pac. 118.

Va.—Fisher v. Dickenson, 84 Va. 318, 4 S. E. 737.

W. Va.—Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Cohn v. Ward, 32 W. Va. 34, 9 S. E. 41.

Wis.—Rice v. Jerenson, 54 Wis. 248, 11 N. W. 549.

24. Roberts v. Guernsey, 3 Grant Cas. (Pa.) 237.

25. Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Goshorn v. Snodgrass, 17 W. Va. 717.

26. *N. Y.*—Randall v. Parker, 3 Sandf. 69; Smith v. Reid, 11 N. Y. Supp. 739, 19 Civ. Proc. R. 363.

U. S.—Clements v. Nicholson, 6 Wall. 299, 18 L. Ed. 786.

Ark.—Leach v. Fowler, 22 Ark. 143.

Fla.—Neal v. Gregory, 19 Fla. 356.

Iowa.—Wick v. Hickey (1905), 103 N. W. 469; Fifield v. Gaston, 12 Iowa, 218, but the burden of proof is not shifted by the admission that, though apparently absolute, the conveyance was in fact a mortgage.

sufficient evidence of other facts to authorize the presumption; and to instruct the jury that "fraud cannot be presumed, but must be proved, like any other fact," is error.[27] The burden of proof is on the person attacking the conveyance as fraudulent not only in actions brought to set aside fraudulent conveyances but also in attachment suits,[28] or suits for the replevin of goods,[29] or in any other action by or against an officer who has levied process,[30] although the fraud is relied on as an affirmative defense.

§ 4. **Transactions between relatives generally.**—The rule in most jurisdictions is that a judgment creditor alleging a convey-

La.—King v. Atkins, 33 La. Ann. 1057.

Me.—Page v. Smith, 25 Me. 256.

Md.—Zimmer v. Miller, 64 Md. 296, 1 Atl. 858.

Mass.—Widgery v. Haskell, 5 Mass. 144, 4 Am. Dec. 41.

Mich.—Whitney v. Rose, 43 Mich. 27, 4 N. W. 557.

Mo.—State v. Smith, 31 Mo. 566; Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958.

Neb.—Plummer v. Rummel, 26 Neb. 142, 42 N. W. 336; Bartlett v. Cheesebrough, 23 Neb. 767, 37 N. W. 652.

N. C.—Grambling v. Dickey, 118 N. C. 986, 24 S. E. 671.

Pa.—Wilson v. Silkman, 97 Pa. St. 509; Redfield, etc., Mfg. Co. v. Dysart, 62 Pa. St. 62.

Tenn.—Hetterman Bros. Co. v. Young (Ch. App. 1898), 52 S. W. 532.

Tex.—Cooper v. Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581.

Vt.—Lyman v. Tarbell, 30 Vt. 463.

Va.—American Net, etc., Co. v. Mayo, 97 Va. 182, 33 S. E. 523.

W. Va.—Livey v. Winton, 30 W. Va. 554, 8 S. E. 451; Goshorn v. Snodgrass, 17 W. Va. 717.

Wis.—Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681; Horton v. Dewey, 53 Wis. 410, 10 N. W. 599.

27. Reed v. Noxon, 48 Ill. 323; Kendall v. Hughes, 46 Ky. 368; Schmick v. Noel, 72 Tex. 1, 8 S. W. 83.

28. *Colo.*—Riethmann v. Godsman, 23 Colo. 202, 46 Pac. 684.

Mo.—Mansur-Tebbetts Implement Co. v. Ritchie, 143 Mo. 587, 45 S. W. 634.

Mont.—Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

Pa.—Briggs v. Brown, 23 Pa. Super. Ct. 163.

Tex.—Compton v. Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059.

29. Hartman v. Hosmer, 65 Kan. 595, 70 Pac. 598; Magee v. Hartzell, 7 Kan. App. 489, 54 Pac. 129; Finch v. Kent, 24 Mont. 268, 61 Pac. 653; Ferree v. Cook, 119 N. C. 161, 25 S. E. 856, unless the instrument under which title is claimed is void on its face or enough appears therein to create a presumption of fraud.

30. Rein v. Kendall, 55 Neb. 583, 75 N. W. 1104, where an officer levies on mortgaged property; Reynolds v. Weinman (Tex. Civ. App. 1897), 40 S. W. 560.

ance made between relatives to be fraudulent must prove the fraud.[31] The mere fact that transactions between relatives, in which the interests of creditors are involved, show something out of the usual course of business does not compel those claiming under such transactions to show that they were *bona fide*.[32] The fact that a creditor preferred is a relative of the debtor does not cast the burden on him to show his good faith in the transaction.[33] In some jurisdictions, however, the fact of relationship between the parties to an alleged fraudulent conveyance creates a presumption of fraud which shifts the burden of proof to the defendant, who must show the *bona fides* of the transaction and that it was made on sufficient consideration.[34] Where a relative is preferred the burden of proving the existence of the debt which is the basis

31. *N. Y.*—Parks v. Murray, 2 St. Rep. 628.

Ill.—American Hoist, etc., Co. v. Hall, 208 Ill. 597, 70 N. E. 581; Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85; Rindskoph v. Kuder, 145 Ill. 607, 34 N. E. 484.

Ind.—Rockland Co. v. Sommerville, 139 Ind. 695, 39 N. E. 307.

Iowa.—Klay v. McKellar, 122 Iowa, 163, 97 N. W. 1091.

Kan.—Gilmore v. Swisher, 59 Kan. 172, 52 Pac. 426.

Ky.—Redd v. Redd, 23 Ky. L. Rep. 2379, 67 S. W. 367.

Me.—Augusta Sav. Bank v. Crossman (1886), 7 Atl. 396.

Minn.—Shea v. Hynes, 89 Minn. 423, 95 N. W. 214.

Tenn.—Williamson v. Williams, 79 Tenn. 355.

Va.—Johnson v. Lucas, 103 Va. 36, 48 S. E. 497.

32. Oberboltzer v. Hazen, 92 Iowa, 602, 61 N. W. 365.

33. Coan v. Morrison, 34 Ill. App. 352.

34. *Ala.*—Lipscomb v. McClellan, 72 Ala. 151.

Ky.—Lavelle v. Clark, 18 Ky. L. Rep. 759, 38 S. W. 481.

La.—Pruyn v. Young, 51 La. Ann. 320, 25 So. 125.

Neb.—Lusk v. Riggs (1904), 97 N. W. 1033; Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036, 62 Neb. 805, 87 N. W. 906; Lusk v. Riggs, 65 Neb. 258, 91 N. W. 243; Boldt v. First Nat. Bank, 59 Neb. 283, 80 N. W. 905; Plummer v. Rummel, 26 Neb. 142, 42 N. W. 336.

N. C.—Grambling v. Dickey, 118 N. C. 986, 24 S. E. 671; Hinton v. Greenleaf, 118 N. C. 7, 23 N. E. 924; Tredwell v. Graham, 88 N. C. 208; Reiger v. Davis, 67 N. C. 185; Black v. Caldwell, 49 N. C. 150; Satterwhite v. Hicks, 44 N. C. 105, 57 Am. Dec. 577.

Or.—Robson v. Hamilton, 41 Or. 239, 69 Pac. 651; Brown v. Case, 41 Or. 221, 69 Pac. 43; Goodale v. Wheeler, 41 Or. 190, 68 Pac. 753; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805.

W. Va.—Moore v. Gainer, 53 W. Va. 403, 44 S. E. 458.

of the preference, as well as good faith, is on the defendant.[35] The burden of exculpatory proof may be shifted to defendant where facts tending to show fraud have been proved by plaintiff,[36] as, for example, where the transfer is of all the debtor's property,[37] or where the consideration is inadequate.[38] In a creditor's bill to set aside a transfer of land from a parent to an infant son, where the consideration was alleged to have been the payment by the transferee of his wages to the parent, the burden of proving emancipation is on the defendant.[39]

§ 5. **Transactions between husband and wife.**—Purchases of real or personal property, made by the wife of an insolvent debtor during coverture, are justly regarded with suspicion, and in contests with creditors of her husband the general rule is that, if the wife claims ownership of the property by a purchase during coverture, the burden of proof is upon her to show affirmatively and distinctly that the purchase was for a valuable consideration paid by her out of her separate estate, or by some person other than the husband, or that she paid for it with funds not furnished by her husband.[40] Such is the community of interest between husband

35. *Ala.*—Thompson v. Tower Mfg. Co., 104 Ala. 140, 16 So. 116; Calhoun v. Hannan, 87 Ala. 277, 6 So. 291.

Neb.—Heffley v. Hunger, 54 Neb. 776, 75 N. W. 53; H. T. Clarke Drug Co. v. Boardman, 50 Neb. 687, 70 N. W. 248; National Bank of Commerce v. Chapman, 50 Neb. 484, 70 N. W. 39; Bartlett v. Cheesebrough, 23 Neb. 767, 37 N. W. 652; Marcus v. Leake, 4 Neb. (Unoff.) 354, 94 N. W. 100.

N. C.—Mitchell v. Eure, 126 N. C. 77, 35 S. E. 190.

Or.—Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; Colfax Bank v. Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

W. Va.—Stauffer v. Kennedy, 47 W. Va. 714, 3 S. E. 892.

36. Bredin v. Bredin, 3 Pa. St. 81.

37. Wilks v. Vaughan (Ark. 1904), 83 S. W. 913.

38. Farwell v. Meyer, 67 Mo. App. 566.

39. Crary v. Hoffman, 115 Iowa, 332, 88 N. W. 833; Kubic v. Zemke, 105 Iowa, 269, 74 N. W. 748; Love v. Hudson, 24 Tex. Civ. App. 377, 59 S. W. 1127.

40. *N. Y.*—Rider v. Hulse, 24 N. Y. 372.

U. S.—Seitz v. Mitchell, 94 U. S. 580, 25 L. Ed. 179; Curtis v. Wortsman, 25 Fed. 893; Simms v. Morse, 2 Fed. 325, 4 Hughes, 579.

Ala.—Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Collier v. Carlisle, 133 Ala. 478, 31 So. 970; Wimberly

and wife; such purchases are so often made a cover for a debtor's property; are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserv-

v. Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524; Watts v. Burgess, 131 Ala. 333, 30 So. 868; Southern Home Bldg., etc., Assoc. v. Riddle, 129 Ala. 562, 29 So. 667; Elyton Land Co. v. Vance, 119 Ala. 315, 24 So. 719; Kelley v. Connell, 110 Ala. 543, 18 So. 9; Robinson v. Mosely, 93 Ala. 70, 9 So. 372; Wedgworth v. Wedgworth, 84 Ala. 274, 4 So. 149; Gordon v. Tweedy, 71 Ala. 202.

D. C.—Turner v. Gottwals, 15 App. Cas. 43; Smith v. Cook, 10 App. Cas. 487.

Fla.—Southern Lumber, etc., Co. v. Verdier (1906), 40 So. 676; American Freehold Land, etc., Co. v. Maxwell, 39 Fla. 489, 22 So. 751; Kahn v. Weinlander, 39 Fla. 210, 22 So. 653; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628.

Ky.—Wiggington v. Minter, 28 Ky. L. Rep. 79, 88 S. W. 1082; Sikking v. Fromn, 112 Ky. 773, 66 S. W. 760, 23 Ky. L. Rep. 2138; Ruggles v. Robinson, 22 Ky. L. Rep. 437, 57 S. W. 619. See McKenzie v. Slayer, 19 Ky. L. Rep. 1414, 43 S. W. 450; Treadway v. Turner, 10 Ky. L. Rep. 949, 10 S. W. 816.

Me.—Eldridge v. Preble, 34 Me. 148.

Md.—Manning v. Carruthers, 83 Md. 1, 43 Atl. 254; Nicholson v. Condon, 71 Md. 620, 18 Atl. 812; Levi v. Rothschild, 69 Md. 348, 14 Atl. 535; Hinkle v. Wilson, 53 Md. 287.

Minn.—Minneapolis Stock Yards, etc., Co. v. Halonen, 56 Minn. 469, 57 N. W. 1135.

Miss.—Mangum v. Finucane, 38 Miss. 354.

Mo.—Gruner v. Scholz, 154 Mo. 415, 55 S. W. 441; Garrett v. Wagner, 125 Mo. 450, 28 S. W. 762; Patton v. Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730.

Mont.—Lewis v. Lindley, 19 Mont. 422, 48 Pac. 765.

Neb.—David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Schott v. Mochamer, 54 Neb. 514, 74 N. W. 854; Jansen v. Lewis, 52 Neb. 556, 72 N. W. 861; Kirchman v. Kratky, 51 Neb. 191, 70 N. W. 916; Glass v. Zutavern, 43 Neb. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Melick v. Varney, 41 Neb. 105, 59 N. W. 521; Carson v. Stevens, 40 Neb. 112, 58 N. W. 845, 42 Am. St. Rep. 661; Stevens v. Carson, 30 Neb. 544, 46 N. W. 655.

N. J.—Ruppert v. Hurley (Ch. 1900), 47 Atl. 280; Post v. Stiger, 29 N. J. Eq. 554; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594. See Adone v. Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817, *rev'g* 59 N. J. Eq. 231, 46 Atl. 543.

N. M.—First Nat. Bank v. McClellan, 9 N. M. 636, 58 Pac. 347.

N. C.—Redmond v. Candley, 119 N. C. 575, 26 S. E. 255; Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59; Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482.

Or.—Walker v. Harold, 44 Or. 205, 74 Pac. 705; Wright v. Craig, 40 Or. 191, 66 Pac. 807.

Pa.—Jack v. Kintz, 177 Pa. St. 571, 35 Atl. 867; Billington v. Sweeting, 172 Pa. St. 161, 33 Atl. 543; Bollinger v. Gallagher, 170 Pa. St. 84,

ing it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the

32 Atl. 569; Evans v. Kilgore, 147 Pa. St. 19, 23 Atl. 201; Wilson v. Silkman, 97 Pa. St. 509; Seeds v. Kahler, 76 Pa. St. 262; Earl v. Champion, 65 Pa. St. 191; Keeney v. Good, 21 Pa. St. 349; De Frehn v. Leitenberger, 2 Leg. Chron. 365, 7 Leg. Gaz. 69. See Parvin v. Capewell, 45 Pa. St. 89; Aurand v. Shaffer, 43 Pa. St. 363; Taylor v. Paul, 6 Pa. Super. Ct. 496; Brown v. Atkinson, 9 Kulp. 164.

S. D.—Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

Tenn.—Crump v. Johnson (Ch. App. 1896), 40 S. W. 73.

Tex.—New England L. & T. Co. v. Avery (Civ. App. 1897), 41 S. W. 673.

Va.—Kline v. Kline, 103 Va. 263, 48 S. E. 882; Rankin v. Goodwin, 103 Va. 81, 48 S. E. 521; Baker v. Watts, 101 Va. 702, 44 S. E. 929; Lee v. Willis, 101 Va. 188, 43 S. E. 354; Crowder v. Garber, 97 Va. 565, 34 S. E. 470; Noyes v. Carter (1895), 23 S. E. 1; Grant v. Sutton, 90 Va. 771, 19 S. E. 784; Massey v. Yancey, 90 Va. 626, 19 S. E. 184; Rixey v. Deitrick, 85 Va. 42, 6 S. E. 615; Robbins v. Armstrong, 84 Va. 810, 6 S. E. 130; Perry v. Ruby, 81 Va. 317; Finck v. Denny, 75 Va. 663.

Wash.—Bates v. Drake, 28 Wash. 447, 68 Pac. 961.

W. Va.—Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451; Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89; Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560; Hutchison v. Boltz, 35 W. Va. 754, 14 S. E. 267; Livey v. Winton, 30 W. Va. 554, 4 S. E. 451; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Maxwell v. Hanshaw, 24 W. Va. 405; Herzog v. Weiler, 24 W. Va. 199; Stockdale v. Harris, 23 W. Va. 499; McMasters v. Edgar, 22 W. Va. 673.

Wis.—Lesaulnier v. Krueger, 85 Wis. 214, 54 N. W. 774; Gettelmann v. Gitz, 78 Wis. 439, 47 N. W. 660; Brickley v. Walker, 68 Wis. 563, 32 N. W. 773; Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692; Semmens v. Walters, 55 Wis. 675, 13 N. W. 889; Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681; Horton v. Dewey, 53 Wis. 410, 10 N. W. 599; Stimson v. White, 20 Wis. 562; Stanton v. Kirsch, 6 Wis. 338. *Compare* Hooser v. Hunt, 65 Wis. 71, 28 N. W. 442.

Can.—Ripstein v. British Canadian Loan, etc., Co., 7 Manitoba, 189; Osborne v. Carey, 5 Manitoba, 237; Harris v. Rankin, 4 Manitoba, 115.

Contra.—Conn.—Fishel v. Motta, 76 Conn. 197, 56 Atl. 558.

Ga.—Richardson v. Subers, 82 Ga. 427, 9 S. E. 172.

Iowa.—Clark v. Ford, 126 Iowa, 460, 102 N. W. 421; Meredith v. Schaap (1901), 85 N. W. 628; Stubblefield v. Gadd, 112 Iowa, 681, 84 N. W. 917; Gilbert v. Glenny, 75 Iowa, 513, 39 N. W. 818, 1 L. R. A. 479; Stephenson v. Cook, 64 Iowa, 265, 20 N. W. 182. *Compare* Baldwin v. Tuttle, 23 Iowa, 66.

La.—Chaffe v. DeMoss, 37 La. Ann. 186; Farrell v. O'Neil, 22 La. Ann. 619.

Me.—Winslow v. Gilbreth, 50 Me. 90.

Miss.—Virden v. Dwyer, 78 Miss. 763, 30 Sp. 45.

Tenn.—Cox v. Scott, 68 Tenn. 305.

Va.—Stonebraker v. Hicks, 94 Va. 618, 27 S. E. 497.

creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof.[41] Where a husband prefers his wife as a creditor, the burden is on the wife to show that the preference was to pay or secure a subsisting and valid debt.[42] But while the burden of proof rests upon a wife who has received a conveyance from an insolvent husband to show a valuable consideration therefor, proof of such consideration paid out of her separate estate, or by some third person for her, shifts the burden to one seeking to set aside such conveyance to show that it was fraudulent.[43] The rule as to the purchase of property by the wife from the husband that, in a contest between her and his creditors, the burden of proof is upon her to show that it was in good faith and for a valuable consideration applies where creditors of the husband seek to reach improvements erected on the wife's land by the husband.[44] But the rule does not apply to the purchase of exempt property,[45] nor, according to some authorities, where the property is conveyed to the wife by a person other than her husband,[46] or where the conveyance is attacked by a

41. Yates v. Law, 86 Va. 117, 120, 9 S. E. 508.

42. *Ga.*—Cruger v. Tucker, 69 Ga. 557.

La.—Darcy v. Labennes, 31 La. Ann. 404; Brassae v. Ducros, 4 Rob. 335; Bostwick v. Gasquet, 11 La. 534.

Md.—Stockslager v. Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Al. 742.

Mich.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657, 80 N. W. 707.

Pa.—Wilson v. Silkman, 97 Pa. St. 509.

Va.—Fidelity Loan, etc., Co. v. Engleby, 99 Va. 168, 37 S. E. 957; Runkle v. Runkle, 98 Va. 663, 37 S. E. 279; Darden v. Ferguson (1897), 27 S. E. 435; Rixey v. Deitrick, 85 Va. 42, 6 S. E. 615.

W. Va.—Livey v. Winton, 30 W. Va. 554, 4 S. E. 451.

Wis.—Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692.

Can.—Rice v. Rice, 31 Ont. 59.

Contra.—Rhodes v. Wood, 93 Tenn. 702, 28 S. W. 294.

43. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59; Brickley v. Walker, 68 Wis. 563, 32 N. W. 773; Evans v. Rugee, 57 Wis. 623, 16 N. W. 49; Semmens v. Walters, 55 Wis. 675, 13 N. W. 889.

44. Seasongood v. Ware, 104 Ala. 212, 16 So. 51; Edwards v. Entwisle, 2 Mackey (D. C.), 43.

45. Allen v. Perry, 56 Wis. 178, 14 N. W. 3. See Exempt property, chap. IV, § 41, *supra*.

46. Rice v. Allen (Neb. 1903), 95 N. W. 704; Osborne v. Wilkes, 108 M. C. 651, 13 S. E. 285; Welsh v. Solenberger, 75 Va. 441, 8 S. E. 91; Arndt v. Harshaw, 53 Wis. 269, 10 N. W. 390.

subsequent creditor of the husband.[47] The burden is in the attacking creditor to prove that the acts of a wife in carrying on a business, or in employing her husband as her agent, were not in good faith; it cannot be held as a presumption of law.[48] A wife who turns remittances from her husband into a business which she carries on and out of which the family is supported, has the burden of proving, as against the husband's creditors, that their rights have not been injured thereby, and that an equivalent sum was properly and actually consumed by the husband's family.[49] The creditors of a husband who seek to set aside as fraudulent a conveyance to his wife, upon an averment, denied by an answer, that the recited consideration was fictitious and colorable,[50] or that it was the money of the husband,[51] are charged with the burden of proving such averment.

§ 6. **Plaintiffs' right to sue.**—In an action by a creditor to set aside an alleged fraudulent conveyance, the burden is on the creditor to show that he is a creditor, and to prove the existence of a subsisting debt to which the property alleged to have been fraudulently conveyed would be subject.[52] Creditor's claims will not.

47. See Intent to defraud subsequent creditors, chap. XVII, § 13, *infra.*

48. Woodworth v. Sweet, 51 N. Y. 8; Kluender v. Lynch, 2 Abb. Dec. (N. Y.) 538; Coyne v. Sayre, 54 N. J. Eq. 702, 36 Atl. 96. See Services rendered by husband for wife, chap. IV, § 13, *supra.*

49. Trefethen v. Lynam, 90 Me. 376, 38 Atl. 335, 38 L. R. A. 190.

50. Young v. Hurst (Tenn. Ch. App. 1898), 48 S. W. 365.

51. Walters v. Brown (Tenn. Ch. App. 1898), 46 S. W. 777.

52. *Ala.*—Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56; Lawson v. Alabama Warehouse Co., 73 Ala. 289; Pickett v. Pipkins, 64 Ala. 520.

Ark.—Clark v. Anthony, 31 Ark. 546.

Iowa.—State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62; Pidcock v. Voorhies, 84 Iowa, 705, 42 N. W. 646, 49 N. W. 1038.

La.—Hannay v. Maxwell, 24 La. Ann. 49; De Young v. De Young, 6 La. Ann. 786; Fink v. Martin, 1 La. Ann. 117; Lafleur v. Hardy, 11 Rob. 493.

Minn.—Bloom v. Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; Braley v. Byrnes, 20 Minn. 435.

Mo.—Davis v. Biscoe, 81 Mo. 27.

N. J.—Cocks v. Varney, 45 N. J. Eq. 72, 17 Atl. 108.

Tex.—Kerr v. Hutchins, 46 Tex. 384.

Wis.—Bogert v. Phelps, 14 Wis. 88.

without proof, be presumed to have existed at the time of a conveyance attacked as fraudulent.[53] Where a substitute note is accepted in satisfaction of a judgment, the presumption is that it was accepted in satisfaction of the debt represented by the judgment, so as to validate, as against the judgment, a settlement subsequently made by the judgment debtor on his wife and children.[54]

§ 7. **Nature and value of property conveyed.**—The burden of proof is upon the plaintiff, in an action to test the validity of a transfer of property alleged to have been fraudulent as to creditors, to establish that the property conveyed was liable to be subjected to the satisfaction of debts and therefore a subject for a transfer which might be fraudulent as to creditors.[55] But where defendant alleges that the property transferred was exempt as a homestead, the burden is on him to prove such fact,[56] and that the value of the property conveyed did not exceed the homestead exemption,[57] where the plaintiff made out a *prima facie* case of fraudulent conveyance. The burden of proving that the property alleged to have been fraudulently conveyed was of no substantial value is on the defendant, and it cannot be presumed in the absence of evidence.[58]

§ 8. **Solvency and insolvency of grantor.**—In an action to set aside a conveyance the debtor's insolvency, shown or conceded to exist at one time, will be presumed to have continued,[59] but proof that the debtor was insolvent some time after the sale or transfer will not raise a presumption of insolvency at the time of the sale or transfer, the presumption as to the continuance of things shown to exist not having any backward operation.[60] It has been

53. Tunison v. Chamblin, 88 Ill. 378.

54. Morriss v. Harveys, 75 Va. 726.

55. Furth v. March, 101 Mo. App. 329, 74 S. W. 147; Darling v. Ricker, 68 Vt. 471, 35 Atl. 376.

56. Pace v. Robbins, 67 Ark. 232, 54 S. W. 213; State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62.

57. Pace v. Robbins, *supra*.

58. Fryberger v. Bergen, 88 Minn. 311, 92 N. W. 1125.

59. Adams v. State, 87 Ind. 573; Burlington Protestant Hospital Assoc. v. Gerlinger, 111 Iowa, 293, 82 N. W. 765; Cozzens v. Holt, 136 Mass. 237.

60. Nevers v. Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Martin v. Fox, 40 Mo. App. 634.

held, however, that where a debtor is insolvent at the time judgment is rendered, his insolvency will be presumed to extend back beyond a voluntary conveyance made during his indebtedness.[61] A conveyance of land may not be condemned as a fraud upon creditors of the grantor merely because not founded upon a valuable consideration. That it was made with fraudulent intent must be proved, and the burden of showing that it was executed in bad faith and left the grantor insolvent, and without ample property to pay his existing debts and liabilities, is upon the plaintiff.[62] But the rule is generally maintained that a voluntary conveyance by one indebted at the time is presumptively fraudulent, and that where a conveyance not purporting to be based on a valuable consideration is attacked by a creditor, whose debt was in existence at the time of the transfer, the burden is on the defendant to prove that the grantor retained sufficient means to pay existing creditors.[63] Where the complaint alleges a conveyance of all the

61. Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74; Carlisle v. Rich, 8 N. H. 44.

62. Kain v. Larkin, 131 N. Y. 300, 30 N. E. 133; Lewis v. Boardman, 78 App. Div. (N. Y.) 394, 79 N. Y. Supp. 1014; Kalish v. Higgins, 70 App. Div. (N. Y.) 192, 75 N. Y. Supp. 397, *aff'd* 175 N. Y. 495, 67 N. E. 1084; American Forcite Powder Mfg. Co. v. Hanna, 31 App. Div. (N. Y.) 317, 52 N. Y. Supp. 547; Nevers v. Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Hogan v. Robinson, 94 Ind. 128; Bishop v. State, 83 Ind. 67; Greer v. Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

63. *N. Y.*—Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406; Hyde v. Wolf, 31 App. Div. 125, 52 N. Y. Supp. 764; Sands v. Hildreth, 14 Johns. 493.

Ark.—Norton v. McNutt, 55 Ark. 59, 17 S. W. 362.

Ga.—Cohen v. Parish, 100 Ga. 335, 28 S. E. 122; Cothran v. Forsyth, 68 Ga. 560.

Iowa.—Crary v. Kurtz (1906), 105 N. W. 590; Campbell v. Campbell (1906), 105 N. W. 583; Woods v. Allen, 109 Iowa, 484, 80 N. W. 540; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74; Elwell v. Walker, 52 Iowa, 256, 3 N. W. 64.

Md.—Dawson v. Waltemeyre, 91 Md. 328, 46 Atl. 994; Goodman v. Wineland, 61 Md. 449; Ellinger v. Crowl, 17 Md. 361; Glenn v. Grover, 3 Md. 212; Sewell v. Baxter, 2 Md. Ch. 447; Atkinson v. Phillips, 1 Md. Ch. 507.

Mich.—Wilcox v. Hammond, 128 Mich. 516, 87 N. W. 636.

Miss.—Golden v. Goode, 76 Miss. 400, 24 So. 905; Ames v. Dorroh, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; Young v. White, 25 Miss. 146.

Mo.—Clark v. Thias, 173 Mo. 628, 73 S. W. 616; Huffman v. Nolte, 127

grantor's real and personal estate and the answer denies this allegation and avers that the grantor after the conveyance was still seized and possessed of certain real estate abundantly sufficient to pay the claims of his creditors, the burden of proving the solvency of the grantor is on the defendant.[64] But where the conveyance is based on a valuable consideration, this rule as to burden of proof does not apply,[65] nor does it apply where a conveyance is attacked by a subsequent creditor.[66] Where, in order to rebut the presumption of fraud arising from having made a voluntary conveyance, the debtor alleges that his debt existing at the time was afterwards paid, the burden of sustaining the allegation is upon him.[67]

§ 9. **Consideration.**—It is the general rule that where a transfer purporting to be based on a valuable consideration is alleged, by a creditor whose debt existed at the time of the conveyance, to be fraudulent, because without consideration, the burden of proving the fraud and that the recitals of consideration in the deed are false is on the party alleging it,[68] and where the conveyance was to pay or secure a pre-existing

Mo. 120, 29 S. W. 847; American Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771.

N. M.—First Nat. Bank v. McClellan, 9 N. M. 636, 58 Pac. 347.

N. C.—Ricks v. Stancil, 119 N. C. 99, 25 S. E. 721.

Ohio.—Oliver v. Moore, 23 Ohio St. 473; Jones v. Leeds, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

Pa.—Appeal v. Woolston, 51 Pa. St. 452.

Tenn.—Carpenter v. Scales (Ch. App. 1907), 48 S. W. 249.

Tex.—Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567.

Va.—Taylor v. Mallory, 96 Va. 18, 30 S. E. 472.

Wyo.—First Nat. Bank v. Swan, 3 Wyo. 356, 23 Pac. 743.

Can.—Thompson v. Doyle, 16 Can. L. T. (Occ. Notes) 286; Brown v. Davidson, 9 Grant Ch. (U. C.) 439.

Eng.—Mackey v. Douglass, L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. Rep. N. S. 721; Crossley v. Elworthy, L. R. 12 Eq. 158, 40 L. J. Ch. 480, 24 L. T. Rep. N. S. 607.

64. Birely v. Saley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

65. Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483.

66. See Intent to defraud subsequent creditors, chap. XVII, § 13, *infra*.

67. Loeschigk v. Addison, 19 Abb. Pr. (N. Y.) 169.

68. *N. Y.*—Columbus Watch Co. v. Hodenpyl, 135 N. Y. 430, 32 N. E. 239, *aff'g* 61 Hun, 557, 16 N. Y. Supp. 337.

Conn.—Waterbury Lumber, etc.,

debt the same rule applies and the burden is upon the party alleging it to show that there was no such indebtedness, or that it was not *bona fide*.[69] But in some jurisdictions a different rule is maintained and it is held that where a creditor attacks as fraudulent a conveyance by his debtor, made subsequent to the debt, the burden is on the grantee or defendant to show that the consideration of such conveyance was *bona fide* and adequate.[70] The recitals in a deed are not evidence as to third persons,

Co. v. Hinckley, 75 Conn. 187, 52 Atl. 739.

Md.—Thompson v. Williams, 100 Md. 195, 60 Atl. 26; Totten v. Brady, 54 Md. 170.

Mass.—Foster v. Hall, 29 Mass. 89, 22 Am. Dec. 400; Boynton v. Rees, 25 Mass. 329, 19 Am. Dec. 326.

Mich.—Kipp v. Lamoreaux, 81 Mich. 299, 45 N. W. 1002.

Neb.—Citizens' State Bank v. Porter, 4 Neb. (Unoff.) 73, 93 N. W. 391.

S. C.—Steynmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Tex.—Martel v. Somers, 26 Tex. 551.

Can.—Sanders v. Malsburg, 1 Ont. 178.

69. *N. Y.*—Columbus Watch Co. v. Hodenpyl, *supra*.

Kan.—Hasie v. Connor, 53 Kan. 713, 37 Pac. 128.

La.—Metropolitan Bank v. Blaise, 109 La. 92, 33 So. 95.

Mich.—Brace v. Berdan, 104 Mich. 356, 62 N. W. 568.

Miss.—Brown v. Barter, 18 Miss. 268.

Mo.—State v. Cryts, 87 Mo. App. 440.

Pa.—Haldeman v. Michael, 6 Watts & S. 128, 40 Am. Dec. 546.

Tenn.—Warren v. Hinson (Ch. App. 1899), 52 S. W. 498.

Tex.—Compton v. Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; De Ware v. Bailey (Civ. App. 1897), 40 S. W. 323.

70. *U. S.*—Fisher v. Moog, 39 Fed. 665.

Ala.—Murphy v. Green, 128 Ala. 486, 30 So. 643; Ezzell v. Brown, 121 Ala. 150, 25 So. 832; Freeman v. Stewart, 119 Ala. 158, 24 So. 31; Martin v. Berry, 116 Ala. 233, 22 So. 493; Bailey v. Levy, 115 Ala. 565, 22 So. 449; Wooten v. Steele, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; Miller v. Rowan, 108 Ala. 98, 19 So. 9; McTeers v. Perkins, 106 Ala. 411, 17 So. 547; Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Schall v. Weil, 103 Ala. 411, 15 So. 829; Page v. Francis, 97 Ala. 379, 11 So. 736; Lehman v. Greenhut, 88 Ala. 478, 7 So. 299; Polak v. Searey, 84 Ala. 259, 4 So. 137; Moog v. Farley, 79 Ala. 246; Zelincker v. Brigham, 74 Ala. 598; Bolling v. Jones, 67 Ala. 508.

N. H.—Prescott v. Hayes, 43 N. H. 593; Belknap v. Wendell, 21 N. H. 175; Kimbal v. Fenner, 12 N. H. 248.

N. C.—Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639; Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

Ohio.—Ferguson v. Gilbert, 16 Ohio St. 88.

W. Va.—Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Knight v.

and when a fact put at issue by the pleadings is particularly within the knowledge of the defendant, such as the consideration of a conveyance or transfer made by him, the burden of proof is on him to show that fact.[71] The same rule applies where a subsequent creditor assails a deed as voluntary and fraudulent,[72] and also applies to preferences, so that the defendant has the burden of proving the existence of a debt not materially in excess of the value of the property conveyed.[73] Where a *prima facie* case of fraud is established by the plaintiff, the burden of proof, where it is on the plaintiff, may be shifted to the defendant.[74] Where plaintiff has shown the fraudulent intent of the grantor in making the conveyance, the burden is on the grantee or defendant to show that he was a purchaser for value and to prove actual payment of the consideration.[75] Where the

Nease, 53 W. Va. 50, 44 S. E. 414; Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Spence v. Smith, 34 W. Va. 697, 12 S. E. 828; Himan v. Thorn, 32 W. Va. 507, 9 S. E. 930; Cohn v. Ward, 32 W. Va. 34, 9 S. E. 41; Knight v. Capito, 23 W. Va. 639.

71. Lovell v. Payne, 30 La. Ann 511.

72. Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847.

73. Norwood v. Washington, 136 Ala. 657, 33 So. 869; Penney v. McCullough, 134 Ala. 580, 33 So. 665; Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56; Reeves v. Estes, 124 Ala. 303, 26 So. 935; Widgary v. Haskell, 5 Mass. 144, 4 Am. Dec. 41.

74. *N. Y.*—Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. Supp. 121; Bailey v. Fransioli, 101 App. Div. 140, 91 N. W. Supp. 852.

Ark.—Leonhard v. Flood, 68 Ark. 162, 56 S. W. 781; Foster v. Haglin, 64 Ark. 505, 43 S. W. 763; Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. 137.

Ky.—Duerrigan v. Bewe, 18 Ky. L. Rep. 1072, 38 S. W. 1089.

La.—Gourdain v. Baylies, 10 La. Ann. 691.

N. J.—Malcom Brewing Co. v. Wagner (Ch. 1900), 45 Atl. 260.

Ohio. — Ferguson v. Gilbert, 16 Ohio St. 88.

Pa.—Redfield, etc., Mfg. Co. v. Dysant, 62 Pa. St. 62.

75. *N. Y.*—Bolton v. Jacks, 29 N. Y. Super. Ct. 166.

Ark.—Foster v. Haglin, 68 Ark. 621, 58 S. W. 128; Leach v. Fowler, 22 Ark. 143.

Miss.—Richards v. Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322.

Mont.—Lewis v. Lindley, 19 Mont. 422, 48 Pac. 765.

Or.—Weber v. Rothchild, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

Tex.—Compton v. Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; Tillman v. Heller, 78 Tex.

consideration is future support and the defendant contends that the grantor has received certain sums for his support, since the date of the conveyance, equivalent to the value of the land, the burden of proving the payments to the grantor is on the defendant.[76] It cannot be assumed that property was purchased at less than its fair value, because the purchaser, after having improved it, has realized a large profit from the investment.[77] Where the consideration is paid in notes, the failure of the purchaser to produce the notes raises no presumption against the validity of the sale.[78] In an action by a creditor of the transferrer of corporate stock attacking the transfer on the ground of fraud, the burden of showing fraud rests upon the party asserting it, and a showing that the stock in question were transferred by indorsement of the certificates does not shift the burden to the transferee to prove the *bona fides* and full consideration of such transfer.[79]

§ 10. **Knowledge and intent of grantee.**—Fraud will never be imputed, when the facts upon which it is predicated may consist with honesty and purity of intention.[80] Where no presumption of fraud is raised by any relation between the parties to the transfer, the burden is on the attacking creditor to show fraudulent intent on the part of the grantor, and fraudulent intent in making a conveyance for value must be shown by the party alleging it by sufficient evidence, and will not be pre-

597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; King v. Russell, 40 Tex. 124; Cleveland v. Butts, 13 Tex. Civ. App. 272, 35 S. W. 804.

W. Va.—Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

76. State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62.

77. Andrews v. Jones, 10 Ala. 400.

78. Shealy v. Edwards, 78 Ala. 176.

79. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

80. *Ala.*—Stiles v. Lightfoot, 26 Ala. 443.

D. C.—McDaniel v. Parish, 4 App. Cas. 213.

Iowa.—Lyman v. Cessford, 15 Iowa, 229.

Mich.—Whitfield v. Stiles, 57 Mich. 410, 24 N. W. 119.

Mo.—Rumbolds v. Parr, 51 Mo. 592.

sumed.[81] The burden is on one seeking to set aside a conveyance as fraudulent to show also by a clear preponderance of credible proof that the grantee had actual notice of the fraudulent intent of the grantor, or knowledge of circumstances equivalent to such notice, or knowledge of facts which made it his duty to inquire whether such intent existed, and a suspicion of the *bona fides* of the transaction is not sufficient on which to rest a judgment setting it aside.[82] It is held in some jurisdictions,

81. *Ala.*—Jordan v. Collins, 107 Ala. 572, 18 So. 137; Howell v. Carden, 99 Ala. 100, 10 So. 640; Moag v. Farley, 79 Ala. 246.

Md.—Totten v. Brady, 54 Md. 170; Glenn v. Grover, 3 Md. Ch. 29.

Mass.—Hatch v. Bayley, 66 Mass. 27.

Minn.—Leqve v. Smith, 63 Minn. 24, 65 N. W. 121.

N. C.—Wachovia L. & T. Co. v. Forbes, 120 N. C. 355, 27 S. E. 43.

S. C.—Probert v. McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Tex.—Martin Brown Co. v. Cooper, 82 Tex. 242, 17 S. W. 1051; Tillman v. Haller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Weisiger v. Chisholm, 28 Tex. 780.

82. *N. Y.*—Wilmerding v. Jarmulowsky, 28 App. Div. 629, 53 N. Y. Supp. 583.

U. S.—Thompson v. McConnell, 107 Fed. 33, 46 C. C. A. 124; Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231.

Ala.—Allen v. Riddle (1904), 37 So. 680; Kellar v. Taylor, 90 Ala. 289, 7 So. 907.

Ark.—Stephens v. Oppenheimer, 45 Ark. 492.

Cal.—Casey v. Leggett, 125 Cal. 664, 58 Pac. 264.

Colo.—Smith v. Jensen, 13 Colo. 213, 22 Pac. 434.

Conn.—Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Ind.—American Varnish Co. v. Reed, 154 Ind. 88, 55 N. E. 224.

Iowa. — Atkinson v. McNider (1906), 105 N. W. 304.

Kan. — Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772.

Ky.—Diamond Coal Co. v. Carter Dry Goods Co., 20 Ky. L. Rep. 1444, 49 S. W. 438.

La.—Lesseps v. Wicks, 12 La. Ann. 739; Martin v. Drumm, 12 La. Ann. 494.

Md.—Crooks v. Brydon, 92 Md. 640, 49 Atl. 921.

Minn.—Hathaway v. Brown, 18 Minn. 414; Derby v. Gallup, 5 Minn. 119.

Miss.—Verner v. Verner, 64 Miss. 184, 1 So. 52.

Mo.—State v. Hope, 102 Mo. 410, 14 S. W. 985; King v. Richardson, 94 Mo. App. 670, 68 S. W. 752; Martin v. Fox, 40 Mo. App. 664; Pettingill v. Jones, 30 Mo. App. 280.

Neb.—Blumer v. Bennett, 44 Neb. 873, 63 N. W. 14.

Pa.—Miles v. Lewis, 115 Pa. St. 580; 10 Atl. 123.

Tenn.—Hetterman Bros. Co. v. Young (Ch. App. 1898), 52 S. W. 532.

Tex.—Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863; Wofford v. Far-

however, that when plaintiff has shown that a conveyance was made by the grantor with intent to delay, hinder, or defraud creditors, the burden is on the grantee or defendant to show that he was without notice of the fraudulent intent of the grantor.[83] There is no presumption from the known insolvency of the maker of a fraudulent deed that the assignee under the deed knew of the intent to defraud,[84] and the fact that a large amount of the purchase money was payable several years after the sale does not raise the presumption that the purchaser was aware of the vendor's insolvency.[85] Where the transfer is to a creditor to pay or secure his debt, the burden is on the plaintiff attacking the conveyance to show not only that the secured creditor had knowledge or notice of the fraudulent intent of the debtor, but also that he actually participated in the fraud.[86] But where facts are shown which should put the purchaser on inquiry, the burden is on him to show that he has used due diligence and failed to discover the fraud.[87] Where the attacking creditor

mer (Civ. App. 1897), 40 S. W. 739.

Eng.—In re Reis (1904), 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. Rep. N. S. 592, 11 Manson 229, 20 T. L. R. 547, 53 Wkly. Rep. 122.

83. Lawrence Bros. v. Heylman, 111 App. Div. (N. Y.) 848, 98 N. Y. Supp. 121; Richards v. Vaccaro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322; Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639; Tredwell v. Graham, 88 N. C. 208; Worthy v. Caddell, 76 N. C. 82; Wade v. Saunders, 70 N. C. 270; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

84. Cannon v. Young, 89 N. C. 264.

85. Borland v. Mayo, 8 Ala. 104.

86. *N. Y.*—Hyde v. Bloomingdale, 23 Misc. Rep. 728, 51 N. Y. Supp. 1025.

Ill.—Wood v. Clark, 121 Ill. 359, 12 N. E. 271.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679; Noyes v. Tootle, 2 Ind. T. 144, 48 S. W. 1031.

Iowa.—Smyth v. Hall 126 Iowa, 627, 102 N. W. 520.

Kan.—Bliss v. Couch, 46 Kan. 400, 26 Pac. 706.

Mo.—Wall v. Beedy, 161 Mo. 625, 61 S. W. 864.

Neb.—Grandin v. First Nat. Bank (1904), 98 N. W. 70; Steinberg v. Buffum, 61 Neb. 778, 86 N. W. 491.

N. C.—Nadal v. Britton, 112 N. C. 180, 16 S. E. 914.

Tex.—Reynolds v. Weinman (Civ. App. 1897), 40 S. W. 560.

Wis.—Shores v. Doherty, 65 Wis. 153, 26 N. W. 577; Evans v. Rugee, 57 Wis. 623, 16 N. W. 49; Semmens v. Walters, 55 Wis. 675, 13 N. W. 889; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296; James v. Van Duyn, 45 Wis. 512.

87. Klein v. Hoffheimer, 132 U. S. 367, 10 Sup. Ct. 130, 33 L. Ed. 373;

shows the grantor's fraudulent intent and the purchaser then shows a valuable consideration, the burden of proof again shifts to the attacking creditor to prove that the purchaser had knowledge or notice of the fraud at the time of paying the consideration.[88] When a mortgage is taken for more than is due from one known to be insolvent, it is incumbent on the mortgagee to show that it was executed in good faith, and to satisfactorily explain why the excess was thus secured.[89] If the conveyance is attacked by a subsequent creditor, the burden of proving fraudulent intent towards subsequent creditors by showing that it was made in contemplation of future indebtedness is on such subsequent creditor,[90] even though the conveyance is from hus-

Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242; Livesley v. Heise (Or. 1906), 85 Pac. 509; Houston, etc., R. Co. v. Shirley, 89 Tex. 95, 31 S. W. 291; Dodd v. Gaines, 82 Tex. 429, 18 S. W. 618; Blubaugh v. Loomis, 48 W. Va. 666, 37 S. E. 794; Dent v. Pickens, 46 W. Va. 378, 33 S. E. 303.

88. *N. Y.*—Starin v. Kelly, 88 N. Y. 418; Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. Supp. 852.

U. S.—Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374.

Ala.—Jordan v. Collins, 107 Ala. 572, 18 So. 137; Moog v. Farley, 79 Ala. 246.

Mich.—Beurmann v. Van Buren, 44 Mich. 496, 7 N. W. 67.

Mo. — Peters-Miller Shoe Co. v. Casebeer, 53 Mo. App. 640.

N. C.—Feimester v. McRorie, 34 N. C. 287.

Tex.—Martin Brown Co. v. Cooper, 82 Tex. 242, 17 S. W. 1051; Tillman v. Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Talcott v. Rose (Civ. App. 1901), 64 S. W. 1009.

89. *Ark.*—Henry v. Harrell, 57 Ark. 569, 22 S. W. 433.

Ind. T.—Daugherty v. Bogy, 3 Ind. T. 197, 53 S. W. 542.

Iowa.—Carson v. Byers, 67 Iowa, 606, 25 N. W. 826; Lombard v. Dows, 66 Iowa, 243, 23 N. W. 649.

La.—Worrell v. Vickers, 30 La. Ann. 202.

Minn.—Heim v. Chapel, 62 Minn. 338, 64 N. W. 825.

N. J.—Demarest v. Terhune, 18 N. J. Eq. 532.

90. *N. Y.*—Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360; Loeschigk v. Addison, 4 Abb. Prac. N. S. 219; U. S. Bank v. Housman, 6 Paige, 526.

Ala.—Stoutz v. Huger, 107 Ala. 248, 18 So. 126.

Cal.—Bush, etc., Co. v. Halbing, 134 Cal. 676, 66 Pac. 967.

Conn.—State v. Martin, 77 Conn. 142, 58 Atl. 745.

Ill.—Lamont v. Regan, 96 Ill. App. 359.

Ky.—O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

band to wife.[91] A subsequent creditor has the burden of proving actual fraud, where he seeks to impress a trust for his benefit on property conveyed to one person on consideration paid by another.[92]

§ 11. **Retention of possession.**—In a contest with creditors who seek to set aside as fraudulent a sale by the debtor, which was not followed by a change of possession, the burden of showing good faith is on the grantee or defendant.[93] The burden of

Miss.—Wynne v. Mason, 72 Miss. 424, 18 So. 422.

Neb.—Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036, 62 Neb. 805, 87 N. W. 906.

N. J.—Kinsey v. Eeller, 64 N. J. Eq. 367, 51 Atl. 485; Hagerman v. Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; Claflin v. Mess, 30 N. J. Eq. 211; Carpenter v. Carpenter, 27 N. J. Eq. 502.

S. C.—Gentry v. Lanneau, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814.

Tex.—Searcy v. Gwaltney, 30 Tex. Civ. App. 158, 81 S. W. 576.

W. Va.—Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847.

91. Lyman v. Cessford, 15 Iowa, 229; Jansen v. Lewis, 52 Neb. 556, 72 N. W. 861; Webb v. Robb, 9 Ohio St. 430; O'Neal v. Clymer (Tex. Civ. App. 1900), 61 S. W. 545. But see Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036.

92. State Bank of Chase v. Chatten, 69 Kan. 435, 77 Pac. 96.

93. *N. Y.*—Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275; Carr v. Johnson, 12 N. Y. Supp. 799.

Ala.—Teague v. Bass, 131 Ala. 422, 31 So. 4; Blocker v. Burness, 2 Ala. 354.

Ark.—Field v. Simco, 7 Ark. 269; Cocke v. Chapman, 7 Ark. 107, 44 Am. Dec. 536.

Ga.—Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318, the rule is applicable both to voluntary conveyances and to sales for a valuable consideration.

Ind.—Rose v. Colter, 76 Ind. 590; Kane v. Drake, 27 Ind. 29.

Kan.—Phillips v. Reitz, 16 Kan. 396.

La.—Baldwin v. Bond, 45 La. Ann. 1012, 13 So. 742; Yale v. Bond, 45 La. Ann. 997, 13 So. 587.

Me.—Hartshorn v. Eames, 31 Me. 93.

Mich.—Angell v. Pickard, 61 Mich. 561, 28 N. W. 680; Jackson v. Dean, 1 Dougl. 519.

Miss.—Comstock v. Rayford, 12 Sm. & M. 369.

Mo.—Albert v. Besel, 88 Mo. 150; Hartman v. Vogel, 41 Mo. 570.

Neb.—Snyder v. Dangler, 44 Neb. 600, 63 N. W. 20; Miller v. Morgan, 11 Neb. 121, 7 N. W. 755; Densmore v. Tomer, 11 Neb. 118, 7 N. W. 535. See Stevens v. Carson, 30 Neb. 544, 46 N. W. 655.

N. J.—Runyon v. Groshon, 12 N. J. Eq. 86.

Tenn.—Grubbs v. Greer, 45 Tenn. 160; Darwin v. Handley, 11 Tenn.

showing payment of a valuable consideration is also on the grantee or defendant.[94] But one purchasing property from a mortgagee and taking possession after forfeiture of the condition of the mortgage, at a time when no creditor of the mortgagor had secured a judgment against him, is not bound in the first instance to explain the possession of the mortgagor prior to breach of the mortgage, but the burden is on the mortgagor's creditor to show that the mortgage was fraudulent.[95] To sustain a conveyance by a husband, when insolvent, to his wife, of his business, which he subsequently carries on ostensibly in his own name, the wife, as against creditors of the husband, must show that the transaction was fair and honest.[96] Where the evidence tends to show a concurrent possession by the judgment debtor and the alleged purchaser, the burden of rebutting the presumption of fraud arising therefrom, rests upon the purchaser.[97] One claiming title to personal property under a sale, unaccompanied by delivery and change of possession, is not, however, required by the statute of frauds as against the creditors of the vendor, in addition to good faith, to show a valid excuse for leaving the property in the vendor's possession.[98]

§ 12. **Reservations and trust for grantor.**—In an action attacking a sale made by an insolvent debtor in payment of an

502; Maney v. Killough, 15 Tenn. 440.

Tex.—Mills v. Walton, 19 Tex. 271.

Va.—Curd v. Miller, 7 Gratt. 185.

W. Va.—Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. 171.

Wis.—Kayser v. Hartnett, 67 Wis. 250, 30 N. W. 363; Williams v. Porter, 41 Wis. 422. But see Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33.

94. *N. Y.*—Groat v. Rees, 20 Barb. 26; Randall v. Parker, 3 Sandf. 69.

Fla.—Neal v. Gregory, 19 Fla. 356.

Me.—Hartshorn v. Eames, 31 Me. 93.

Mo.—State v. Smith, 31 Mo. 566.

W. Va.—Bartlett v. Cleavenger, 35 W. Va. 719, 14 S. E. 273.

Wis.—Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

95. Talman v. Smith, 39 Barb. (N. Y.) 390.

96. Manning v. Carruthers, 83 Md. 1, 34 Atl. 254.

97. Jones v. O'Brien, 36 N. Y. Super. Ct. 58.

98. Mitchell v. West, 55 N. Y. 107; Hanford v. Artcher, 4 Hill (N. Y.), 271.

indebtedness, the purchaser having offered evidence tending to show a *bona fide* indebtedness not materially less than the reasonable value of the property, the burden is shifted to the creditor to prove that a benefit was reserved to the debtor by the transaction.[99] On the contrary it has been held that where an insolvent makes a sale of his property for the purpose of preferring certain of his creditors, it is incumbent on him to show that the sale was *bona fide,* and not on any secret trust.[1]

§ 13. **Intent to defraud subsequent purchasers.**—Where a conveyance has been made and there has been no change of possession, the burden is on those claiming under the conveyance as against a subsequent purchaser, to show that the transfer was made in good faith for a sufficient consideration and without any intent to defraud subsequent purchasers.[2] A subsequent sale, by a person who has made a voluntary conveyance or settlement, to a purchaser without notice, is presumptive evidence of fraud, which throws on those claiming under such conveyance or settlement the burden of proving that it was made *bona fide* and without fraudulent intent.[3]

§ 14. **Good faith of purchasers from grantee.**—Where property is conveyed in fraud of creditors, and by the grantee to a third person the burden in the first instance is upon the one who alleges that the conveyance was fraudulent to prove that the purchaser from the fraudulent grantee was not a purchaser in good faith.[4] But when the fraudulent character of the original

99. Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; Morrow v. Campbell, 118 Ala. 330, 24 So. 852; Cook v. Thornton, 109 Ala. 523, 20 So. 14; Roswald v. Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

1. Stanton v. Green, 34 Miss. 576.

2. Groat v. Rees, 20 Barb. (N. Y.) 26; Brown v. Wilmerding, 12 N. Y. Super. Ct. 220.

3. Brown v. Burke, 22 Ga. 574; Enders v. Williams, 58 Ky. 346; Cooke v. Kell, 13 Md. 469; Footman v. Pendergrass, 3 Rich. Eq. (S. C.) 33.

4. Maddox v. Reynolds, 69 Ark. 541, 64 S. W. 266; Thornton v. Hook, 36 Cal. 223; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590.

transaction has been shown, the burden of proof is on the purchaser claiming title under a grantee whose title is fraudulent to show that he was a *bona fide* purchaser for value without notice of the fraud.[5] A creditor taking a mortgage on real estate from a grantee of his debtor to secure his debt with knowledge that the land was conveyed to defraud creditors has the burden, as against other creditors existing at the time of the fraudulent conveyance, of showing the existence of his debt before such conveyance.[6]

§ 15. **Presumption from failure to testify or produce evidence.** —The failure of the parties to the transaction, in actions to set aside fraudulent conveyances, to appear and testify in denial of a charge of fraud as to the circumstances under which the transaction was made, being peculiarly within their own knowledge, and to explain suspicious matters relating thereto,[7] or to produce documentary evidence in their possession,[8] raises a presumption that they refrain from testifying because the truth would not aid their contention and affords strong evidence of the fraud. An unfavorable inference is created from the failure to call a disinterested person, available as a witness to show good faith in the transaction.[9] But failure of one party to call

5. *Colo.*—Harrington v. Johnson, 7 Colo. App. 483, 44 Pac. 368.

Ga.—Kelly v. Simmons, 73 Ga. 716.

Iowa.—Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367; Throckmorton v. Rider, 42 Iowa, 84.

Mich.—Durrell v. Richardson, 119 Mich. 592, 78 N. W. 650; Schaible v. Ardner, 98 Mich. 70, 56 N. W. 1105.

Or.—McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

Wis.—Horton v. Dewey, 53 Wis. 410, 10 N. W. 599.

6. Rilling v. Schultze, 95 Tex. 372, 67 S. W. 401.

7. *U. S.*—Alexander v. Todd, 1 Fed. Cas. No. 175, 1 Bond, 175.

Ill.—Schumacher v. Bell, 164 Ill. 181, 45 N. E. 428.

Md.—Downs v. Miller, 95 Md. 602, 53 Atl. 445; Dawson v. Waltemeyer, 91 Md. 328, 46 Atl. 994.

Mo.—Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 22 So. 623, 38 Am. St. Rep. 656.

S. D.—Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

8. National Bank of Republic v. Hobbs, 118 Fed. 626; Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397.

9. Fowler v. Hendry, 7 U. C. C. P. 350.

a witness who is equally accessible to the other party is not a circumstance which can be considered against him.[10]

§ 16. **Admissibility and relevancy of evidence in general.** —In investigations of alleged fraudulent conveyances large latitude of inquiry should be permitted as to the conduct of the parties, the circumstances of the transaction, the consideration of the purchase, and the means of the vendee, and where a transfer is attacked by the creditors of the transferrer as fraudulent, all material facts and circumstances bearing on the transaction and on the relationship of the parties tending to prove the fraud may be considered. The intent is seldom disclosed on the face of the transaction. It is generally concealed under legal forms. It can seldom be proved by direct evidence. It must in most cases be established by inference from a variety of facts and circumstances.[11] Many items of evidence may be intro-

10. Nelms v. Steiner, 113 Ala. 562, 22 So. 435.

11. *N. Y.*—Beuerlien v. O'Leary, 149 N. Y. 33, 43 N. E. 417, *rev'g* 28 N. Y. Supp. 1133; Sweeney v. Cohen, 23 App. Div. 94, 48 N. Y. Supp. 569. And see McCabe v. Brayton, 38 N. Y. 196; Persse, etc., Paper Works v. Willett, 24 N. Y. Super. Ct. 131.

U. S.—Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492; Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310; Brittain v. Crowther, 54 Fed. 295, 4 C. C. A. 341.

Ala.—Nelms v. Steiner, 113 Ala. 562, 22 So. 435; Rice v. Less, 105 Ala. 298, 16 So. 917; Howell v. Bowman, 99 Ala. 100, 10 So. 640; Smith v. Collins, 94 Ala. 394, 10 So. 334; Moog v. Benedicks, 49 Ala. 512.

Ark.—Hiner v. Hawkins, 59 Ark. 303, 27 S. W. 65; Dyer v. Taylor, 50 Ark. 314, 7 S. W. 258.

Cal.—Roberts v. Burr (1898), 54 Pac. 849.

Colo.—Kaufman v. Burchinell, 15 Colo. App. 520, 63 Pac. 786.

Fla.—Volusia County Bank v. Bigelow (1903), 33 So. 704.

Ga.—Cohen v. Parish, 105 Ga. 339, 31 S. E. 205; Coulter v. Lumpkin, 100 Ga. 784, 28 S. E. 459; Robinson v. Woodmansee, 80 Ga. 249, 4 S. E. 497; Trice v. Rose, 79 Ga. 75, 3 S. E. 701; Smith v. Wellborn, 75 Ga. 799; Woodruff v. Wilkinson, 73 Ga. 115.

Ida.—Ferbrache v. Martin, 3 Ida. 573, 32 Pac. 252.

Ill.—Fabian v. Traeger, 117 Ill. App. 176, *aff'd* 215 Ill. 220, 74 N. E. 131; Anglo-American Packing, etc., Co. v. Baier, 31 Ill. App. 653; Huschler v. Morris, 31 Ill. App. 545.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

Iowa. — Dunning v. Bailey, 120 Iowa, 729, 95 N. W. 248; Meyer v.

duced which, standing detached and alone, would be immaterial, but which in connection with others may tend to illustrate and shed light upon the character of the transaction, to show the position in which the parties stand, and their motives, conduct, and relations to each other. All such circumstances are properly submitted to the jury when accompanied by instructions that

Baird, 120 Iowa, 597, 94 N. W. 1129; Gevers v. Farmer, 109 Iowa, 468, 80 N. W. 535; Picket v. Garrison, 76 Iowa, 347, 41 N. W. 38, 14 Am. St. Rep. 220.

Kan.—Douglass v. Hill, 29 Kan. 527.

La.—Ray v. Harris, 7 La. Ann. 138; Reels v. Knight, 8 Mart. N. S. 267, 19 Am. Dec. 184.

Md.—Main v. Lynch, 54 Md. 658; Cooke v. Cooke, 43 Md. 522.

Mass.—O'Donnell v. Hall, 157 Mass. 463, 32 N. E. 666; Sleeper v. Chapman, 121 Mass. 404.

Mich.—Gumberg v. Treusch, 103 Mich. 543, 61 N. W. 872; Rosenthal v. Bishop, 98 Mich. 527, 57 N. W. 573; Angell v. Pickard, 61 Mich. 651, 28 N. W. 680; Carew v. Matthews, 49 Mich. 302, 13 N. W. 600; Fury v. Strohecker, 44 Mich. 337, 6 N. W. 834; Cummings v. Feary, 44 Mich. 39, 6 N. W. 98.

Minn.—Adler v. Apt, 31 Minn. 348, 17 N. W. 950.

Mo.—Erfort v. Consalus, 47 Mo. 208; Field v. Liverman, 17 Mo. 218; New York Stove Mercantile Co. v. West, 107 Mo. App. 254, 80 S. W. 923; Meyberg v. Jacobs, 40 Mo. App. 128.

Neb.—Tolerton, etc., Co. v. First Nat. Bank, 63 Neb. 674, 88 N. W. 865; Bennett v. McDonald, 60 Neb. 47, 80 N. W. 826, 82 N. W. 110.

N. H.—Blake v. White, 13 N. H. 267.

N. C.—Perry v. Hardison, 99 N. C. 21, 5 S. E. 230.

Pa.—Poundstone v. Jones, 182 Pa. St. 574, 38 Atl. 714; Halser v. McGrath, 58 Pa. St. 458; Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Garrigues v. Harris, 17 Pa. St. 344; Helfrich v. Stein, 17 Pa. St. 143; Zerbe v. Miller, 16 Pa. St. 488, the question is whether the evidence can throw light on the transaction, or whether it is irrelevant; King v. Grannis, 29 Pa. Super Ct. 367.

R. I.—Sarle v. Arnold, 7 R. I. 582.

S. C.—Drake v. Steadman, 46 S. C. 474, 24 S. E. 458.

Tex.—Houston, etc., R. Co. v. Shirley, 89 Tex. 95, 31 S. W. 291; Gilmour v. Heinze, 85 Tex. 76, 19 S. W. 1075; Miller v. Jannett, 63 Tex. 82; Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553; Wade v. Odle (Civ. App. 1898), 46 S. W. 887, 47 S. W. 407; Wright v. Solomon (Civ. App. 1898), 43 S. W. 58; Sonnentheil v. Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945.

Vt.—Huse v. Preston, 51 Vt. 245.

Va.—Hughes v. Kelly (1898), 30 S. E. 387.

Wash.—Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

Wis.—Weadock v. Kennedy, 80 Wis. 449, 50 N. W. 393; Winner v. Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

Eng.—In re Holland (1902), 2 Ch.

inferences are to be drawn from them, not singly, but as a whole. It is the bearing, not the independent force, of the particular fact or circumstance upon which relevancy depends.[12] The question is whether the evidence can throw light on the transaction, or whether it is irrelevant.[13] In questions of this kind objections to testimony as irrelevant are not favored, since the force of circumstances depends so much upon their number and connection,[14] and it is a question which the law confides largely to the sound discretion of the trial court.[15] Fraudulent intent may be proved by any kind of evidence by which fraud in any other case may be proved.[16] Parol evidence is admissible to establish fraud and when fraud is thus proved it renders inoperative the formal transactions which have been adopted by the parties in order to carry out the fraudulent purpose.[17] While a wide range of investigation is permitted as to relevant facts, evidence that is wholly irrelevant is no more admissible in trying questions of fraud than in any other investigation or trial of civil actions at law.[18] To show that a sale was fraudulent as to a creditor of the vendor, evidence is not admissible that other creditors sued out an attachment when they heard of the sale.[19] In an action to set aside fraudulent conveyances of the property of one of several judgment debtors, deeds tending to show that some of the other judgment debtors had made conveyances of

360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson, 259, 50 Wkly. Rep. 575.

12. *Ala.*—Nelms v. Steiner, 113 Ala. 562, 22 So. 435.

Mass.—Stebbins v. Miller, 94 Mass. 591.

Mo.—Blue v. Penniston, 27 Mo. 272.

Pa.—Baltimore, etc., R. Co. v. Hoge, 34 Pa. St. 214.

Tex.—Cox v. Trent, 1 Tex. Civ. App. 639, 20 S. W. 1118.

13. Volusia County Bank v. Bigelow (Fla. 1903), 33 So. 704; Cooke v. Cooke, 43 Md. 522; Zerbe v. Miller, 16 Pa. St. 488.

14. Nelms v. Steiner, 113 Ala. 562, 22 So. 435; Blue v. Penniston, 27 Mo. 272; Sarle v. Arnold, 7 R. I. 582.

15. Sweetser v. Bates, 117 Mass. 466.

16. McLane v. Hamilton, 43 Vt. 48.

17. Robinson v. Bliss, 121 Mass. 428; Hills v. Eliot, 12 Mass. 26, 7 Am. Dec. 26; Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

18. Wessels v. Beeman, 87 Mich. 481.

19. Miner v. Phillips, 42 Ill. 123.

their property are inadmissible, unless defendant is in some way connected therewith.[20] Evidence that, before the transfer attacked as fraudulent as to creditors, the debtor endeavored to sell the stock of goods transferred to another person, is inadmissible.[21] To prove a sale of a stock of goods fraudulent as to creditors, testimony showing the ordinary profits on such goods, amount of capital required to carry on the business, and the custom and terms of sale, is too remote.[22] Where an assignment is attacked as fraudulent, the judgment roll in an action between other parties, in which the same assignment was found to be fraudulent, is inadmissible.[23] Evidence of the value of the land in dispute, without specifications as to time, or of its value at the time of the trial, the conveyance in question having been made years before, is not admissible.[24] Various other items of evidence have been held to be irrelevant in the cases cited in the note below.[25] Where a contract of sale is alleged to be fraudulent as against creditors, evidence of all that was said and done between the parties at and before the agreement is competent, not

20. Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262.

21. Flood v. Clemence, 106 Mass. 299; McCuin v. Merchants' Grocery Co. (Ark. 1906), 93 S. W. 563, when too remote as to time.

22. Derby v. Gallup, 5 Minn. 119.

23. Mower v. Hanford, 6 Minn. 535.

24. Zerbe v. Miller, 16 Pa. St. 488.

25. *N. Y.*—Persse, etc., Paper Works v. Willett, 24 N. Y. Super. Ct. 131.

U. S.—Repauno Chemical Co. v. Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

Ark.—Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

Cal.—Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Roberts v. Burr (1898), 54 Pac. 849.

Ill.—Nelson v. Leiter, 93 Ill. App. 176, *aff'd* 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

Kan.—Gilmore v. Butts, 58 Kan. 51, 48 Pac. 590.

Mass.—Jaquith v. Rogers, 179 Mass. 192, 60 N. E. 486.

Mich.—Long v. Evening News Assoc., 113 Mich. 261, 71 N. W. 492; Lewis v. Rice, 61 Mich. 97, 27 N. W. 867.

Miss.—Wilkerson v. Moffett-West Drug Co. (1897), 21 So. 564.

Mo.—Lillard v. Johnson, 148 Mo. 23, 49 S. W. 889.

Pa.—Bell v. Throop, 140 Pa. St. 641, 21 Atl. 408.

S. C.—Bomar v. Means, 53 S. C. 232, 31 S. E. 234, mental competency of third person through whom conveyance was made to grantor's children.

Tex.—Gonzales v. Adoue, 94 Tex. 120, 58 S. W. 951; Searcy v. Gwalt-

only to show fraud, but to rebut it.[26] As a rule reasonable liberality must be allowed to the person charged with the fraud in his attempt to disprove or rebut it, such a charge being a serious accusation affecting not only his property but his reputation.[27] The general rule is that he is entitled to introduce evidence of any state of facts inconsistent with a fraudulent intent.[28] Evidence that the debtor intended to use the proceeds to pay debts is admissible on his behalf to disprove fraudulent intent.[29] Evidence that the vendor was in poor health and needed a change of climate is admissible to show good faith.[30] Evidence as to what was done with a mortgage after its execution and the circumstances under which it was given is competent and material upon the question of the grantor's intent.[31] Testimony of the grantor or mortgagor as to threats of personal violence at or about the

ney, 36 Tex. Civ. App. 158, 81 S. W. 576.

26. Angell v. Pickard, 61 Mich. 561, 28 N. W. 680.

27. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285; Heath v. Slocum, 115 Pa. St. 549, 9 Atl. 259.

28. Angell v. Pickard, *supra;* Mower v. Hanford, 6 Minn. 535; Filley v. Register, 4 Minn. 391, 77 Am. Dec. 522.

Evidence held admissible under the rule stated in the text.—

N. Y.—Stacy v. Deshaw, 7 Hun, 449; Persse, etc., Works v. Willett, 24 N. Y. Super. Ct. 131; Ackerman v. Salmon, 31 How. Pr. 259.

Ala.—Troy Fertilizer Co. v. Norman, 107 Ala. 667, 18 So. 201; Goodgame v. Clifton, 13 Ala. 583; Graham v. Lockhart, 8 Ala. 9.

Cal.—Byrne v. Reed, 75 Cal. 277, 17 Pac. 201.

Ill.—Martin v. Duncan, 181 Ill. 120, 54 N. E. 908.

Iowa.—Wilson v. Hillhouse, 14 Iowa, 199.

Minn.—Tunell v. Larson, 39 Minn. 269, 39 N. W. 628.

N. H.—Smyth v. Carlisle, 16 N. H. 464.

R. I.—Austin v. A. & W. Sprague Mfg. Co., 14 R. I. 464.

Evidence held irrelevant.—Wadsworth v. Marsh, 9 Conn. 481; Tufts v. Bunker, 55 Me. 178, grantor's previous offer to sell to other persons.

The testimony of an attorney who drew a bill of sale, to the effect that he regarded the transaction as an honest one, is inadmissible. Sweet v. Wright, 62 Iowa, 215, 17 N. W. 468. But testimony of an attorney that he advised the transaction is admissible. Dittman v. Weiss (Tex. Civ. App. 1895), 31 S. W. 67.

29. Norton v. Billings, 4 Fed. 623, 9 Biss. 528; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

30. Vyn v. Keppel, 108 Mich. 244, 65 N. W. 966.

31. Nugent v. Jacobs, 103 N. Y. 125, 8 N. E. 367.

time of the execution of the transfer is admissible to show his motives and as a part of the *res gestae*.[32] Where a conveyance from husband to wife is attacked as fraudulent, evidence that the property had formerly belonged to the wife and had been transferred to the husband with the understanding that it should be restored to the wife on demand, and that the transfer sought to be set aside was in pursuance of this agreement is admissible.[33] So it is proper to prove that before the conveyance and before the accrual of the plaintiff's claim the grantor had promised his wife to convey the property to her.[34] But, in accordance with the general rule of evidence excluding proof of character and reputation in civil actions, evidence of the grantor's reputation for honesty and fair dealing is inadmissible.[35] In an action against a grantor and grantee to set aside a conveyance as in fraud of creditors, it is proper to admit evidence which is competent as against the grantor, although it is not competent as against the grantee, where the court expressly limits the effect thereof to the grantor. Such evidence should be received and its bearing limited and explained to the jury.[36]

§ 17. **Financial condition of parties.**—The financial means and ability of the parties to a conveyance or transfer alleged to be fraudulent as against creditors shortly before and shortly after the conveyance or transfer are as a general rule regarded as relevant facts permissible to be proved by evidence which is otherwise com-

32. Wright v. Solomon (Tex. Civ. App. 898), 46 S. W. 58. *Compare* Solomon v. Wright, 8 Tex. Civ. App. 565, 28 S. W. 414.

33. Fitzpatrick v. Fox, 80 App. Div. (N. Y.) 345, 80 N. Y. Supp. 677.

34. Evans v. Lewis, 30 Ohio St. 11.

35. Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 281.

36. Carver v. Barker, 73 Hun (N. Y.), 416, 26 N. Y. Supp. 919; Treusch v. Ottenburg, 54 Fed. 867, 4 C. C. A. 629; Smith v. Collins, 94 Ala. 394, 10 So. 334; Pickett v. Garrison, 76 Iowa, 347, 41 N. W. 38, 14 Am. St. Rep. 220; Spaulding v. Adams, 63 Iowa, 437, 19 N. W. 341; Sax v. Wilkerson, 6 Kan. App. 203, 51 Pac. 299; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

petent.[37] Evidence of the general reputation, as to credit and pecuniary responsibility, of all the parties to the transaction is admissible.[38] But evidence that one of the parties to the transaction is a first class business man is irrelevant and inadmissible to show his financial condition.[39] Evidence of the insolvency of a debtor at the time he sold his property is admissible as tending to show that the sale was fraudulent.[40] Evidence of solvency at the time of the conveyance is admissible for the purpose of showing good faith.[41] In some jurisdictions evidence of insolvency occurring subsequent to the conveyance has been held admissible as tending to show the condition of the grantor at the time the conveyance was made,[42] especially where no great interval of time had elapsed and when the business had suffered no considerable reverse by flood, fire, or other casualty.[43] But in other jurisdictions evidence of insolvency a considerable time after the conveyance has been held to be inadmissible.[44]

37. *U. S.*—Brittain v. Crowther, 54 Fed. 295, 4 C. C. A. 341.

Ala.—Smith v. Collins, 94 Ala. 394, 10 So. 334. Evidence to show the insolvency of a trustee to whom a husband had transferred a note for the benefit of his wife held inadmissible. Rowland v. Plummer, 50 Ala. 182.

Cal.—Willows Bank v. Small, 144 Cal. 709, 78 Pac. 263.

Ida.—Febrache v. Martin, 3 Ida. 573, 32 Pac. 252.

Okla.—Marriman v. Knight, 7 Okla. 419, 54 Pac. 656.

Pa.—Helfrich v. Stem, 17 Pa. St. 143; Quigley v. Swank, 11 Pa. Super. Ct. 602.

S. C.—De Loach v. Sarratt (1899), 33 S. E. 365.

Tex.—Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

38. Sweetser v. Bates, 117 Mass. 466; Cook v. Mason, 87 Mass. 212. *Compare* Freiberg v. Freiburg, 74 Tex. 122, 11 S. W. 1123.

39. Arnold v. Harris (Mich. 1906), 105 N. W. 744, 12 Det. L. N. 721, 848.

40. White's Bank v. Farthing, 10 St. Rep. (N. Y.) 830; Whittle v. Bailes, 65 Mich. 640, 32 N. W. 874; Belt v. Raquet, 27 Tex. 471; Jack v. El Paso Fuel Co. (Tex. Civ. App. 1896), 38 S. W. 1139.

41. Hinde v. Longworth, 11 Wheat. (U. C.) 199, 6 L. Ed. 454; Smyth v. Carlisle, 16 N. H. 464; McGee v. Wells, 52 S. C. 472, 30 S. E. 602.

42. King v. Poole, 61 Ga. 373; Dumangue v. Daniels, 154 Mass. 483, 28 N. E. 900; Lane v. Kingsbury, 11 Mo. 402.

43. Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868.

44. Seaman v. Bisbee, 163 Ill. 91, 45 N. E. 208; Jones v. Snyder, 117 Ind. 229, 20 N. E. 140; Hathaway v. Brown, 18 Minn. 414; Martin v. Fox, 40 Mo. App. 664.

§ 18. **Pendency or threat of action.**—In an action to set aside a conveyance as in fraud of creditors, evidence of the pendency of an action or that suit was threatened against the grantor at the time of the conveyance, is admissible as bearing on the alleged fraudulent intent and tending to prove the fraud.[45] Evidence of an attempt on the part of the debtor's attorney to delay the recovery of judgment in the pending action is admissible on the question of motive and the debtor may be presumed to have had notice of the proceedings of his attorney.[46] Pleadings and decrees in the suit in which the attacking creditor recovered judgment are admissible,[47] but evidence that bankruptcy proceedings had been previously instituted against the debtor and an order issued therein restraining him from making any disposition of his property is not admissible in a suit brought by a creditor in a state court to set aside a conveyance as fraudulent as against creditors, since such a preferential transfer is permitted by the state statute.[48]

§ 19. **Declarations and acts of grantor.**—The acts and declarations of the grantor at or about the time of the alleged fraudulent conveyance are admissible to show fraudulent intent and to prove the conveyance fraudulent as to creditors.[49] But where a convey-

45. *N. Y.*—Wright v. Nostrand, 94 N. Y. 31.

Cal.—Eppinger v. Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

Ga.—Barber v. Terrell, 54 Ga. 146.

Ind.—Evans v. Hamilton, 56 Ind. 34.

Iowa.—Pickett v. Garrison, 76 Iowa, 347, 41 N. W. 38, 14 Am. St. Rep. 220.

Mass.—Dumangue v. Daniels, 154 Mass. 483, 28 N. E. 900.

Mo.—Jamison v. Bagot, 106 Mo. 240, 16 S. W. 697; Hisey v. Goodwin, 90 Mo. 366, 2 S. W. 566.

46. Evans v. Hamilton, 56 Ind. 34; Jamison v. Bagot, 106 Mo. 240.

47. Wright v. Nostrand, 94 N. Y. 31.

48. Talcott v. Harder, 119 N. Y. 536, 23 N. E. 1056.

49. *N. Y.*—Potts v. Hart, 99 N. Y. 168, 1 N. E. 605.

U. S.—Freese v. Kemplay, 118 Fed. 428, 55 C. C. A. 258.

Colo.—Wilcoxen v. Morgan, 2 Colo. 473.

Conn.—Merrill v. Meachum, 5 Day, 341.

Ga.—Cohen v. Parish, 105 Ga. 339, 31 S. E. 205.

ance is impeached for fraud as to creditors, the declarations of the parties to it, made at the time of its execution, are not admissible in evidence in favor of the parties charged with the fraud to show that it was not made with fraudulent intention.[50] Where an execution is returned *nulla bona* and in proceedings supplemental to execution the defendant is examined as to his property, his testimony, so given, has been held competent against him in a subsequent creditor's suit to set aside a sale of his property as fraudulent, the testimony amounting to declarations of a party to the action.[51] But such evidence is not admissible as against the grantee, where the transfer of title and possession had taken place prior to the giving of the testimony, being declarations of the grantor, made after transfer of both title and possession.[52] To prove a fraudulent sale by the grantor, his conduct and declarations before the sale are competent and admissible to show his fraudulent intent, but must be followed by proving knowledge of the fraud in the grantee before the sale can be set aside.[53]

Kan.—Burlington Nat. Bank v. Beard, 55 Kan. 773, 42 Pac. 320; La Clef v. Campbell, 3 Kan. App. 756, 45 Pac. 461.

La.—Smalley v. Lawrence, 9 Rob. 210.

Md.—McDowell v. Goldsmith, 2 Md. Ch. 370.

Mich.—Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 847.

N. H.—Badger v. Story, 16 N. H. 168.

N. C.—Satterwhite v. Hicks, 44 N. C. 105, 57 Am. Dec. 577.

Or.—Robson v. Hamilton, 41 Or. 239, 69 Pac. 651.

Pa.—Helfrich v. Stein, 17 Pa. St. 143. *Compare* Curry v. Curry, 8 Pa. Cas. 247, 11 Atl. 198.

S. C.—Paris v. Du Pre, 17 S. C. 282.

Tex.—Solomon v. Wright, 8 Tex. Civ. App. 565, 28 S. W. 414.

50. Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868; Gruber v. Boyles, 1 Brev. (S. C.) 266, 2 Am. Dec. 665. *Compare* Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863.

51. Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

52. Lent v. Shear, 160 N. Y. 462, 55 N. E. 2, *rev'g* 20 App. Div. 624, 46 N. Y. Supp. 1095.

53. *U. S.*—Freese v. Kemplay, 118 Fed. 428, 55 C. C. A. 258; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

Cal.—Landecker v. Houghtaling, 7 Cal. 391.

Conn.—Tibbals v. Jacobs, 31 Conn. 428.

Iowa.—Spaulding v. Adams, 63 Iowa, 437, 19 N. W. 341.

Md.—Cooke v. Cooke, 43 Md. 522.

Mass.—Bridge v. Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

§ 20. **Statements of debtor as to financial condition.**—Statements of the debtor as to his financial condition, made to creditors at the time of the purchase of property alleged to have been afterwards fraudulently transferred, or made for the purpose of obtaining credit for property purchased prior to the conveyance alleged to be fraudulent, are admissible as bearing on the question of the debtor's intent to defraud his creditors.[54] It is not necessary that such statements should have been made in the presence of the grantee, for they tend to show fraud on the debtor's part, and the grantee's connection with the fraud may be subsequently shown.[55] To prove a sale of goods fraudulent as to creditors, and the intent of the seller, it is competent to show the manner in which he obtained the goods from his creditors, as well as the manner in which he disposed of them.[56]

§ 21. **Other and separate fraudulent conveyances and transactions.**—In an action by a creditor seeking to impeach a conveyance of property as fraudulent as to creditors, it is competent for plaintiff to show other instances of transfers of property, made by the grantor at or about the same time to defeat creditors, to show a fraudulent intent in making the conveyance in controversy, though they do not bear on the intent of the grantee in the trans-

Mich.—Heath v. Koon, 130 Mich. 54, 89 S. W. 559.

N. H.—Badger v. Story, 16 N. H. 168.

N. C.—Ward v. Sanders, 28 N. C. 382.

Or.—Robson v. Hamilton, 41 Or. 239, 69 Pac. 651.

Pa.—Painter v. Drum, 40 Pa. St. 467.

54. *N. Y.*—Beuerlien v. O'Leary, 149 N. Y. 33, 43 N. E. 417.

U. S.—Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Treuch v. Ottenberg, 54 Fed. 867, 4 C. C. A. 629, false statements to a commercial agency as to assets and liabilities; Brittian v. Crowther, 54 Fed. 295, 4 C. C. A. 341.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

Iowa.—Goldstein v. Morgan, 122 Iowa, 27, 96 N. W. 897; Spaulding v. Adams, 63 Iowa, 437, 19 N. W. 341.

Mo.—Kramer v. Wilson, 22 Mo. App. 173, statement made to a commercial agency.

Wis.—Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

55. Treuch v. Ottenburg, 54 Fed. 867, 4 C. C. A. 629.

56. Lockwood v. Doane, 107 Ill. 235; Gray v. St. John, 35 Ill. 222.

action in question.[57] Acts and declarations of the parties relating to similar contemporaneous transactions with other parties are admissible in evidence.[58] But evidence as to such other transactions is inadmissible in the absence of evidence that such other transactions were fraudulent,[59] or that they were in some way connected in point of time or otherwise with the subsequent trans-

57. N. Y.—Beuerlin v. O'Leary, 149 N. Y. 33, 43 N. E. 417, *rev'g* 77 Hun, 607, 28 N. Y. Supp. 1133; Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928, *aff'g* 54 Hun, 473, 7 N. Y. Supp. 717; Angrave v. Stone, 45 Barb. 35, 25 How. Pr. 167; Amsden v. Manchester, 40 Barb. 158.

U. S.—Wilson v. Prewett, 30 Fed. Cas. No. 17,828, 3 Woods, 631, *rev'd* on other grounds 103 U. S. 22, 26 L. Ed. 360.

Ala.—Davidson v. Kahn, 119 Ala. 364, 24 So. 583; Sandlin v. Robbins, 62 Ala. 477; Dent v. Portwood, 21 Ala. 588.

Ark.—Dyer v. Taylor, 50 Ark. 314, 7 S. W. 258.

Conn.—Thomas v. Beck, 39 Conn. 241.

Fla.—Einstein v. Munnerlyn, 32 Fla. 381, 13 So. 926.

Ga.—Smith v. Wellborn, 75 Ga. 799; Engraham v. Pate, 51 Ga. 537.

Ind.—Hoffman v. Henderson, 145 Ind. 613, 44 N. E. 629; Huntsinger v. Hofer, 110 Ind. 390, 11 N. E. 463.

Ind. T.—Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 1 Ind. T. 314, 37 S. W. 103.

Iowa.—Kelliher v. Sutton, 115 Iowa, 632, 89 N. W. 26; Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa, 364, 55 N. W. 496.

Kan.—Wallach v. Wylie, 28 Kan. 138.

Me.—Phinney v. Holt, 50 Me. 570; Howe v. Reed, 12 Me. 515.

Mass.—Stockwell v. Silloway, 113 Mass. 384; Lynde v. McGregor, 95 Mass. 172; Mansir v. Crosby, 72 Mass. 334.

Mich.—Krolik v. Graham, 64 Mich. 226, 31 N. W. 307.

Minn.—Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1.

Miss.—Bernheim v. Dibrell, 66 Miss. 199, 5 So. 693.

Mo.—Kramer v. Wilson, 22 Mo. App. 173.

N. H.—Hills v. Hoitt, 18 N. H. 603; Blake v. White, 13 N. H. 267.

N. C.—Brink v. Black, 77 N. C. 59.

Pa.—Deakers v. Temple, 41 Pa. St. 234.

R. I.—Sarle v. Arnold, 7 R. I. 582.

S. C.—McElwee v. Sutton, 2 Bailey, 128.

Tex.—Horstman v. Little (Civ. App. 1906), 88 S. W. 286; Day v. Stone, 59 Tex. 612; Belt v. Raguet, 27 Tex. 471.

58. Lincoln v. Claflin, 74 U. S. 132, 19 L. Ed. 106; Kellogg v. Clyne, 54 Fed. 696, 4 C. C. A. 554; Covanhovan v. Hart, 21 Pa. St. 495.

59. Hardy v. Moore, 62 Iowa, 65, 17 N. W. 200; Sloan v. Wherry, 51 Neb. 703, 71 N. W. 744; McAulay v. Earnhart, 46 N. C. 502; Farr v. Swigart, 13 Utah, 150, 44 Pac. 711.

Evidence in rebuttal is admissible to show that the other transactions were not fraudulent. Frost v. Rosecrans, 66 Iowa, 405, 23 N. W. 895.

action in controversy.[60] Where an insolvent debtor's transfer of goods is assailed by a creditor as fraudulent, evidence that the insolvent fraudulently transferred to a relative all his remaining property is admissible, as bearing on the question of the debtor's intent to defraud creditors.[61] Evidence of other fraudulent transactions by the debtor is, however, inadmissible to prove the fraudulent intent towards creditors in making the conveyance attacked, where there is nothing to connect the grantee with the transaction.[62] But evidence of such other transactions when competent to show a fraudulent intent in the grantor and when offered for that purpose only are not to be excluded because they do not bear also upon the intent of the grantee or his knowledge of the fraudulent intent of the grantor. It is not necessary that the same fact offered in evidence should prove both intents. If it proves the grantor's intent alone, but is a kind of evidence competent against the grantee, it is admissible. It would tend to prove one branch of the issue, leaving the other to be met in some different way.[63] Where the transfer in controversy is shown to have been made in payment of a just

60. *Ala.*—Moog v. Farley, 79 Ala. 246.

Iowa.—Bixby v. Carskaddon, 70 Iowa, 726, 29 N. W. 626; Clark v. Reiniger, 66 Iowa, 507, 24 N. W. 16; Hardy v. Moore, 62 Iowa, 65, 17 N. W. 200.

Me.—Staples v. Smith, 48 Me. 470; Flagg v. Willington, 6 Me. 386.

Mass.—Williams v. Rohbins, 81 Mass. 590.

Mich.—Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483.

Miss.—Cocke v. Carrington Shoe Co. (1895), 18 So. 683.

Pa.—Barnhart v. Grantham, 197 Pa. St. 502, 47 Atl. 866; Huntsinger v. Harper, 44 Pa. St. 204.

S. C.—Thorpe v. Thorpe, 12 S. C. 154.

Tex.—Boehm v. Calisch (1887), 3 S. W. 293.

61. Beuerlien v. O'Leary, 149 N. Y. 33, 43 N. E. 417; Taylor v. Robinson, 84 Mass. 562; Whittle v. Bailes, 65 Mich. 640, 32 N. W. 874.

62. *N. Y.*—Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

Ill.—Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70.

Me.—Howe v. Reed, 12 Me. 515; Blake v. Howard, 11 Me. 202.

Mich.—Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483.

N. H.—Blake v. White, 13 N. H. 267.

Pa.—Wolf v. Kohr, 133 Pa. St. 13, 19 Atl. 284.

63. Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928, *aff'g* 54 Hun, 473, 7 N. Y. Supp. 717; Foster v. Hall, 29 Mass. 89, 22 Am. Dec. 400; Blake v. White, 13 N. H. 267. See also Pomeroy v. Bailey, 43 N. H. 118.

debt, evidence that the grantor at or about the same time made fraudulent transfers of other property is inadmissible.[64]

§ 22. **Subsequent conduct of parties and persons interested.**—Although a conveyance which at the time of its execution is fair and valid as against creditors cannot become fraudulent and void by matters occurring afterwards, yet, in determining the intent with which it was executed, it is competent, as against the parties to it, to introduce evidence of the fraudulent acts of the parties after the execution to show fraud in its inception.[65] Evidence of the fraudulent use subsequently made of a deed or mortgage may be shown to prove the fraudulent intent with which the instrument was made and that its execution was in fraud of creditors,[66] but not for the purpose of showing the fraudulent use as an independent fact, as the creditors are not injured by the latter act.[67] Evidence of the grantor's subsequent conduct may likewise be admissible to prove that a conveyance was made in good faith,[68] and to rebut proof tending to show a fraudulent design it is proper to show that the entire proceeds of the sale were immediately applied in payment of the debts of the grantor.[69] But the acts of the parties subsequent to the execution of the conveyance are in some instances not admissible evidence to prove it fraudulent.[70] Evidence of conveyances of all their property by sureties to defraud the creditor is irrelevant upon the issue between such creditor and a vendee of the principal debtor as to the fraudulency of the sale of his prop-

64. Bratt v. Catlin, 47 Barb. (N. Y.) 404.

65. Nixon v. Goodwin (Cal. App. 1906), 85 Pac. 169; Kelliher v. Sutton, 115 Iowa, 632, 89 N. W. 26; Main v. Lynch, 54 Md. 658; Blue v. Penniston, 27 Mo. 272; Furth Grocery Co. v. May, 78 Mo. App. 323; Sonnentheil v. Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945.

66. Constantine v. Twelves, 29 Ala. 607; Kelliher v. Sutton, 115 Iowa, 632; Shipman v. Seymour, 40 Mich. 274.

67. Kelliher v. Sutton, *supra*.

68. Cleveland v. Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055.

69. Bedell v. Chase, 34 N. Y. 386; Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863.

70. Foote v. Cobb, 18 Ala. 585; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458.

erty by the latter, in the absence of knowledge by either the vendor or vendee of the guilty purpose of the sureties.[71]

§ 23. **Testimony of parties as to their motive, purpose, or intent.**—Where a conveyance is alleged to be fraudulent as to creditors, as a general rule, the grantor may testify as to his good faith and intentions and that he had no intention of defrauding his creditors, such intent as to him being neither a conclusion of law nor a mere inference.[72] But while a grantor in a purported fraudulent conveyance may testify as to whether or not he made the conveyance with intent to hinder, delay, or defraud creditors, the question as to what was his intention in executing the papers is an improper form of inquiry. The first form of inquiry goes to the very issue; the second, if permitted, might open up matters foreign to it, that is, lead to false issues.[73] If the necessary consequence of a conceded transaction was defrauding another, then, as a party must be presumed to have seen and intended the necessary

71. Sonnenschein v. Bantels, 41 Neb. 703, 60 N. W. 10.

72. N. Y.—Forbes v. Waller, 25 N. Y. 430; Griffin v. Marquardt, 21 N. Y. 121; Seymour v. Wilson, 14 N. Y. 567; Blaut v. Gabler, 8 Daly, 48; aff'd 77 N. Y. 461; Durfee v. Bump, 51 Hun, 637, 3 N. Y. Supp. 505.

Colo.—Brown v. Potter, 13 Colo. App. 512, 58 Pac. 785; Love v. Tomlinson, 1 Colo. App. 516, 29 Pac. 666, both the vendor and his agent who made the sale may testify as to the intent.

Conn.—Hallock v. Alvord, 61 Conn. 194, 23 Atl. 131.

Ind.—Sedgwick v. Tucker, 90 Ind. 271.

Kan.—Bice v. Rogers, 52 Kan. 207, 34 Pac. 796; Gardom v. Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310.

Mass.—Thacher v. Phinney, 89 Mass. 146.

Mont.—Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

Neb.—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

N. C.—Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

Ohio.—Pierce v. White, 10 Ohio Dec. 552, 22 Wkly. L. Bul. 98.

S. C.—McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567.

Tex.—Robertson v. Gourley, 84 Tex. 575, 19 S. W. 1006; Sweeney v. Conley, 71 Tex. 543, 9 S. W. 548; Brown v. Lessing, 70 Tex. 544, 7 S. W. 783; Dittman v. Weiss (Civ. App. 1895), 30 S. W. 381. *Compare* Schneick v. Noel, 72 Tex. 1, 8 S. W. 83.

73. Vilas Nat. Bank v. Newton, 25 App. Div. (N. Y.) 62, 48 N. Y. Supp. 1009.

consequences of his own act, the transaction itself is conclusive evidence of a fraudulent intent, for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act.[74] In such cases the oath of the grantor that his motives were pure would be idle, and could not affect the determination one way or the other.[75] So where the case is one in which the grantor's intent is not a material element, as where the issue is the wrongful suing out of an attachment based upon the alleged sale of property to defraud creditors. the testimony of the attachment defendant as to the intent with which he disposed of his property is not admissible.[76] The grantee under a fraudulent conveyance cannot testify directly as to grantor's intention in making the conveyance, such testimony being the mere conclusion of the witness. He may, however, testify to circumstances tending to establish it.[77]

§ 24. **Fraudulent instrument or conveyance.**—A conveyance or an instrument of transfer which is fraudulent and void as to creditors of the grantor is not admissible in evidence against them to establish title under it,[78] but, although void, it is admissible as evidence of the intention of the parties thereto.[79] In an action in which a deed of trust is attacked by a creditor of the grantor, the deed of trust, and the note which it purports to secure, are admissible in evidence, where independent evidence of the existence of a valuable consideration to support such instrument is subsequently introduced.[80] On the trial of the right of property seized on execu-

74. Babcock v. Eckler, 24 N. Y. 623.

75. Seymour v. Wilson, 14 N. Y. 567; Garrett v. Wagner, 125 Mo. 450, 28 S. W. 762, where it is shown that an insolvent husband made voluntary conveyances to his wife, his testimony that he did not intend thereby to defraud his creditors is incompetent. Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

76. Selz v. Belden, 48 Iowa, 451.

77. Roberts v. Miller (Tex. Civ. App. 1895), 30 S. W. 381; Numsen v. Ellis, 3 Tex. Civ. App. Cas., § 134.

78. Baldwin v. Flash, 58 Miss. 593; Dewart v. Clement, 48 Pa. St. 413.

79. Nixon v. Goodwin (Cal. App. 1906), 85 Pac. 169; Baldwin v. Flash, 58 Miss. 593; Oliver v. Reading Iron Co., 170 Pa. St. 396, 32 Atl. 1088.

80. Howell v. Bowman, 99 Ala. 100, 10 So. 640.

tion, the bill of sale, upon which the claimant bases his title, is admissible in evidence, though there is evidence that it was fraudulent as against plaintiff, no fraud appearing on the face of the instrument.[81] A judgment by confession constructively fraudulent as to creditors for defects in the affidavit, though valid between the parties, has no operation against third persons, and cannot be read in evidence, even in mitigation of damages, in an action of trespass by vendees of the judgment debtor.[82]

§ 25. **Admissibility of pleadings in evidence.**—In suits in equity to set aside conveyances or transfers of property alleged to have been made in fraud of creditors, the admissibility of the pleadings, or the allegations, admissions, and denials contained therein, in evidence is governed by the general principles and rules of equity,[83] except where such rules have been abrogated or changed by statute.[84]

§ 26. **Nature and forms of transactions.**—Evidence tending to show the real nature and purpose of the transaction alleged to be fraudulent is admissible.[85] The seller may testify whether the sale was absolute and whether there was any reservation outside of it.[86] Circumstantial evidence may be given, in case of alleged fraud, to show that a receipt purporting to be given for one purpose was in reality intended for a different transaction, that it

81. Hill v. Rutledge, 83 Ala. 162, 4 So. 135. And see Greer v. Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

82. Sheppard v. Sheppard, 10 N. J. L. 250.

83. *Ala.*—Danner Land, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184; Thames v. Rembert, 63 Ala. 561.

Ill.—Clark v. Wilson, 127 Ill. 449, 19 N. E. 860, 11 Am. St. Rep. 143, *aff'g* 27 Ill. App. 610.

Mich.—Whitfield v. Stiles, 57 Mich. 410, 24 N. W. 119.

Va.—Yates v. Law, 86 Va. 117,9 S. E. 508; Rixey v. Deitrick, 85 Va. 42, 6 S. E. 615; Fink v. Denny, 75 Va. 663.

84. Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

85. Nelms v. Steiner, 113 Ala. 562, 22 So. 435; Robinson v. Bliss, 121 Mass. 428; Hills v. Eliot, 12 Mass. 26, 7 Am. Dec. 26; Cain v. Mead, 66 Minn. 195, 68 N. W. 840; Wade v. Odle (Tex. Civ. App. 1898), 46 S. W. 887, 47 S. W. 407.

86. Angell v. Pickard, 61 Mich. 561, 28 N. W. 680.

was to operate as a cover of a mere conditional sale.[87] Where a transaction was in form a sale of a partner's share in the business, and he was subsequently employed by the firm as a clerk, the fact that his salary as a clerk was much less than the actual value of his services is relevant as tending to show whether he had some interest in the business aside from his contract of employment, and thus to show the real purpose for which the sale was made.[88] Where a debtor's conveyance is attacked by creditors as fraudulent, extrinsic evidence that the instrument of transfer, while absolute on its face, was in fact intended only as a mortgage or security, is admissible to sustain the charge of fraud.[89] For example, declarations to that effect by the grantor,[90] and a chattel mortgage shown to have been made by the vendor to the vendee on the same day as the alleged sale,[91] are admissible as tending to show that the sale was not absolute. But such evidence, although admissible on behalf of the attacking creditor, is not admissible on behalf of the grantee.[92] Where the defendants offer to prove a state of facts tending to show that the real ownership of the property has not been changed, it is error to refuse to consider such evidence.[93]

§ 27. **Plaintiff's right to sue — Adjudication of creditor's claim.**—To establish the creditorship of the plaintiff and to prove the exhaustion of his legal remedies, the judgment obtained by the attacking creditor against the alleged fraudulent grantor,[94] or a

87. Baltimore, etc., R. Co. v. Hoge, 34 Pa. St. 214.

88. Howard v. Stoddard, 9 St. Rep. (N. Y.) 429. But where a stock of goods is transferred by itemized bill of sale which does not include the good will of the seller's business, evidence of the value of the good-will is inadmissible. Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417.

89. McClusky v. Cubbison, 8 Kan. App. 857, 57 Pac. 496; Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

90. Badger v. Story, 16 N. H. 168.

91. Huschle v. Morris, 31 Ill. App. 545. See also Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725.

92. Hartshorn v. Williams, 31 Ala. 149.

93. Fitzpatrick v. Fox, 80 App. Div. (N. Y.) 345, 80 N. Y. Supp. 677.

94. Baxter v. Hebberd, 5 St. Rep. (N. Y.) 854, deficiency judgment in foreclosure; Hamilton v. Wagner, 9 Ky. 333. But the allowance of a

transcript thereof,[95] is admissible in evidence. A mortgage alone, without the production of the notes secured by it, is evidence of title and the mortgage debt. It is the mortgagor's admission to that effect. Whether sufficient and satisfactory or not depends upon the accompanying circumstances.[96] So plaintiff's ownership of the judgment against the grantor may be established by the admission of the grantor while he was in the possession of the property conveyed.[97] The note on which the plaintiff's judgment was rendered is admissible to show the existence of the debt before the date of the deed,[98] upon proof of the execution of the note,[99] but a note not shown to be connected with the judgment, and signed not by the grantor, but by a partnership of which he was a member, is not admissible to show the date of the indebtedness to plaintiff.[1] Plaintiff may go into the particulars of a trade of personal property for land, and a modification of that trade afterwards, in order to show that he is a creditor.[2] In an action against a sheriff by a claimant of personal property which is attached as the property of the mortgagor, the papers in the attachment suit are not competent evidence in the sheriff's behalf of the mortgagor's debt to the attaching creditor.[3] Where it appears that the debt upon which plaintiff's judgment was recovered was created subsequently to the conveyance, plaintiff can assail the conveyance by the debtor only by showing that it was given with a view of continuing in business and creating debts, and saving his property

claim against the estate of a decedent is not evidence of the validity of the claim, as against grantees of the decedent in an alleged fraudulent conveyance. Willett v. Malli, 65 Iowa, 675, 22 N. W. 922.

95. Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463; Dameron v. Williams, 7 Mo. 138, to show himself a judgment creditor in order to contest a deed, plaintiff in an execution issued on a judgment of a justice must produce the whole transcript of the justice's docket.

96. Powers v. Patten, 71 Me. 583.

97. Martel v. Somers, 26 Tex. 552.

98. Helm v. Newland, 2 Blackf. (Ind.) 233.

99. Ezzell v. Brown, 121 Ala. 150, 25 So. 832.

1. Hand v. Hitner, 140 Pa. St. 166, 21 Atl. 260.

2. Holmesly v. Hogue, 47 N. C. 391.

3. Smith v. Collins, 94 Ala. 394, 10 So. 334; Braley v. Byrnes, 20 Minn. 435, *distinguishing* Hall v. Stryker, 27 N. Y. 596.

from them, or for the purpose of defrauding his future creditors. It is therefore competent for the defendant to show that the grantor did not in fact carry on any business on his own account or actually contemplate the creation of future debts, but that he in fact had acted as agent for another and contracted the debt on behalf of another.[4]

§ 28. **Attack on plaintiff's right to sue.**—In an action by a judgment creditor to set aside a deed, testimony tending to invalidate the note upon which the judgment was recovered is admissible, although it constitutes a collateral attack upon the judgment, when fraud is charged against the parties thereto,[5] but otherwise it is inadmissible.[6] Evidence of the defendant that he did not owe the amount of the judgment is properly excluded, since the judgment is conclusive evidence of his liability, in the absence of evidence on his behalf tending to show fraud, accident, mistake, or satisfaction.[7] Where plaintiff's judgment was recovered in an action of trespass, the right to recover for the trespass is fixed by the judgment, and evidence that the defendant instructed his employees not to commit the acts constituting the trespass is irrelevant.[8] But under proper allegations in the pleadings the grantee may show that the judgment of the plaintiff was collusively rendered upon a fictitious claim for the purpose of defeating the grantee's title, and declarations and admissions of the parties are admissible for this purpose.[9]

§ 29. **Proof of date of plaintiff's claim.**—In an action by a creditor to set aside a conveyance by his debtor for actual fraud as to creditors, a judgment against the debtor, recovered by him after the date of the conveyance, is competent evidence of the existence

4. Teed v. Valentine, 65 N. Y. 471.

5. Sullivan v. Ball, 55 S. C. 343, 33 S. E. 486.

6. Suber v. Chandler, 36 S. C. 344, 15 S. E. 426.

7. Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

8. Cole v. Terrell, 71 Tex. 549, 9 S. W. 668.

9. Pomeroy v. Bailey, 43 N. H. 118.

of the debt at the time when the judgment was rendered, and establishes the creditor's right to attack the conveyance.[10] But where the conveyance is alleged to be only voluntary and constructively fraudulent, if the attacking creditor would use the judgment to the prejudice of the grantee, there must be independent evidence of facts showing that the cause of action which authorized the rendition of the judgment antedates the conveyance.[11] The record of a judgment rendered after the conveyance in issue is not admissible in evidence, as against the grantee, to prove an indebtedness to the plaintiff prior to its rendition, unless other evidence be offered to show that fact.[12] But the judgment creditor may show by the pleadings and proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyance,[13] notwithstanding the objection that such evidence is *res inter alios acta* as to the grantee.[14] Where the claim of the attacking creditor is evidenced by a note given after the conveyance, he is entitled to show that the note was given for a debt that existed before the date of the execution of the conveyance.[15] Where the plaintiff's judgment was rendered on a note, the conveyance having been made after the date of the note and before the rendition of judgment, the note is admissible to show the existence of the debt before the date of the conveyance.[16]

§ 30. **Indebtedness of grantor.**—Where a conveyance by a debtor is attacked as fraudulent as to creditors, evidence of the

10. Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

11. Yeend v. Weeks, *supra;* Coles v. Allen, 64 Ala. 98.

12. Marshall v. Croom, 60 Ala. 121; Snodgrass v. Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Martin v. Duncan, 181 Ill. 120, 54 N. E. 908, *aff'g* 79 Ill. App. 527; Hoerr v. Meihofer, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 666.

13. Holladay v. Case, 27 Fed. 830; Jamison v. Bagot, 106 Mo. 240, 16 S. W. 697.

14. Jamison v. Bagot, *supra. Compare* Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614.

15. Stout v. Stout, 77 Ind. 537; Blue v. Penniston, 27 Mo. 272.

16. Helm v. Newland, 2 Blackf. (Ind.) 233.

indebtedness of the grantor at the time he made the transfer is material and admissible,[17] and the exclusion of evidence tending to show such indebtedness constitutes reversible error.[18] Whenever the financial condition of the debtor is material, any evidence which throws light on it at the time of the conveyance in question is admissible,[19] as, for example, the grantor's liability as an accommodation indorser, though the note was not then dishonored.[20] But the evidence offered to prove the indebtedness must have a legitimate tendency to establish the fact. Evidence that, prior to the conveyance, a lawyer had a claim for collection against the debtor, is inadmissible, since it does not follow that he owed the claim.[21] To prove the indebtedness of the grantor at the time of the execution of a deed alleged to be void as to creditors, his notes for the payment of money, due previous to that period, are admissible evidence.[22] Records of judgments rendered against a debtor before and shortly after the conveyance are competent and admissible to show his indebtedness at the time of the conveyance,[23] and it is immaterial that the grantee was not a party to the actions in which the judgments were obtained.[24] In an action against the grantor and grantee to set aside a deed as in fraud of creditors, it is proper to admit evidence of the grantor's circumstances, where the court expressly limits the effect thereof to the grantor.[25] Where the judgment of the attacking creditor was rendered after the alleged fraudulent conveyance, evidence that the grantor did not owe plain-

17. Hinde v. Longworth, 24 U. S. 199, 6 L. Ed. 454; Smith v. Collins, 94 Ala. 394, 10 So. 334; Stewart v. Fenner, 81 Pa. St. 177; Helfrich v. Stem, 17 Pa. St. 143; Mills v. Howeth, 19 Tex. 257, 70 Am. Dec. 331.

18. Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868.

19. Smith v. Collins, 94 Ala. 394, 10 So. 334.

20. Hamet v. Dundass, 4 Pa. St. 178.

21. Clark v. Chamberlain, 95 Mass. 257.

22. High v. Nelms, 14 Ala. 350.

23. Hinde v. Longworth, 24 U. S. 199, 6 L. Ed. 454; Hardy v. Moore, 62 Iowa, 65, 17 N. W. 200; Meyberg v. Jacobs, 40 Mo. App. 128; McMichael v. McDermott, 17 Pa. St. 353, 55 Am. Dec. 560.

24. Hinde v. Longworth, *supra*.

25. Carver v. Barker, 73 Hun (N. Y.), 416, 26 N. Y. Supp. 919.

tiff anything at the time of the sale is relevant.[26] And any testimony which shows that the grantor had, or supposed he had, at the time of the execution of the conveyance, claims against the creditor sufficient to meet the demand of the creditor against him, notwithstanding no claim of offset was made by the grantor at the time the creditor recovered his judgment against him, has a direct tendency to rebut the presumption of any fraudulent intent in the grantor to avoid the rights of that creditor.[27]

§ 31. **Solvency or insolvency of grantor.**—Evidence of the general reputation of the insolvency of the grantor is admissible,[28] as well as the general reputation of the grantee as to pecuniary responsibility,[29] on the issue as to whether a conveyance is fraudulent as to creditors. To determine the validity of a conveyance as against creditors, every circumstance tending to show the pecuniary condition of the grantor at the time of such conveyance is admissible,[30] but evidence as to what the negotiable paper of a firm was offered for by brokers without the firm's knowledge pending the organization of a corporation is inadmissible to show the insolvency of the firm.[31] Evidence of the return of an execution against the grantor unsatisfied is admissible for the purpose of showing the grantor's insolvency.[32] The records in attachment suits are admissible in evidence as tending to show the debtor's insolvency at the time of the con-

26. Finch v. Kent, 24 Mont. 268, 61 Pac. 653. See Hoerr v. Meihofer, 77 Minn. 228.

27. Warner v. Percy, 22 Vt. 155.

28. Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737. And see Cook v. Mason, 87 Mass. 212.

29. Sweetser v. Bates, 117 Mass. 466.

30. Lane v. Kingsberry, 11 Mo. 402.

31. Persse, etc., Paper Works v. Willett, 24 N. Y. Super Ct. 131. See Nixon v. Goodwin (Cal. 1906), 85 Pac. 169, evidence as to the value of stock of another company, held by a corporation, a year prior to the conveyance, is inadmissible to prove the solvency of the corporation at the time of an alleged fraudulent conveyance by it to its president.

32. Fuller v. Brown, 76 Hun (N. Y.), 557, 28 N. Y. Supp. 189; Fryberger v. Berven, 88 Minn. 311, 92 N. W. 1125.

veyance.[33] The debtor's books of account,[34] and tax lists made out by the debtor,[35] are admissible for that purpose. Evidence that the checks of a firm were dishonored by the banks on which they were drawn,[36] that, prior to the conveyance alleged to be fraudulent, a lawyer, who had a claim for collection against the debtor, on inquiry could find no property attachable,[37] that the grantor had notes outstanding at the time of the conveyance and a judgment had been rendered on one of such notes,[38] evidence of the register of deeds that he had found that there was no other property standing in the name of the debtor,[39] proof that the remainder of the debtor's property had been sold on judgments without satisfying his debts,[40] and that shortly after the sale a large amount of judgments were obtained against the debtor for debts due before the sale,[41] evidence that at the time of the conveyance the property was under actual attachment, though by reason by a defect in the service it created no lien,[42] is admissible to show the insolvency of the debtor. The fact that the grantor's executor had petitioned for the sale of the grantor's real estate on account of an alleged deficiency of personal assets is admissible evidence to show insolvency of the grantor, at the time of the making of a voluntary conveyance.[43] Where, however, the insolvency of the grantor is not seriously disputed, the admission of proof of judgments against him, recovered after the commencement of an action to set his conveyance aside, is error as

33. Eureka Iron, etc., Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834; Bucks v. Moore, 36 Mo. App. 529.

34. Smith v. Collins, 94 Ala. 394, 10 So. 334; Kells v. McClure, 69 Minn. 60, 71 N. W. 827.

35. Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868; Towns v. Smith, 115 Ind. 480, 16 N. E. 811.

36. Hudson v. Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

37. Clark v. Chamberlain, 95 Mass. 257.

38. Beeson v. Wiley, 28 Ala. 575.

39. Bristol County Sav. Bank v. Keavy, 128 Mass. 298.

40. Helfrich v. Stem, 17 Pa. St. 143.

41. Helfrich v. Stem, *supra*. See Nixon v. Goodwin (Cal. App. 1906), 85 Pac. 169.

42. Stamford Bank v. Ferris, 17 Conn. 259.

43. Manhattan Co. v. Osgood, 15 Johns. (N. Y.) 162, *rev'd* on other grounds 3 Cow. (N. Y.) 612, 15 Am. Dec. 304.

to the grantee.[44] Evidence that the debtor, several months previous to the conveyance, obtained an extention of his notes about to fall due by representations that he would be unable to pay them at maturity, is admissible as tending to prove that he knew himself to be insolvent at the time of the conveyance.[45] But evidence of the value of a tract of land adjoining that retained by the donor in a deed of gift is incompetent to show that he did not retain property fully sufficient and available to satisfy existing debts.[46]

§ 32. **Consideration in general.**—To prove consideration, the grantee is not confined to proof of such of his transactions with the grantor as occurred in the presence of the attacking creditors.[47] As a general rule, the sufficiency or insufficiency of the consideration for a conveyance or transfer alleged to be fraudulent as to creditors may be shown by any evidence tending to establish the facts which is material and competent under the general rules of evidence.[48] Evidence held admissible to show

44. Lapham v. Marshall, 51 Hun (N. Y.), 36, 3 N. Y. Supp. 601.

45. Marsh v. Hammond, 93 Mass. 483.

46. Warren v. Makely, 85 N. C. 12.

47. Fleming v. Yost, 137 Ind. 95, 36 N. E. 705.

48. *N. Y.*—Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. Supp. 121; Knoch v. Bernheim, 14 App. Div. 410, 43 N. Y. Supp. 926; Gilmore v. Ham, 55 Hun, 613, 10 N. Y. Supp. 48.

Ala.—McLendon v. Grice, 119 Ala. 513, 24 So. 846.

Conn.—Lesser v. Brown, 75 Conn. 491, 54 Atl. 205.

Ind.—Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

Iowa.—Price v. Mahoney, 24 Iowa, 582.

Md.—Stockbridge v. Fahnestock, 87 Md. 127, 39 Atl. 95.

Mass.—Rogers v. Abbott, 128 Mass. 102; Treat v. Curtis, 124 Mass. 348.

Mich.—Ismond v. Scougale, 120 Mich. 353, 79 N. W. 489; Jansen v. McQueen, 112 Mich. 254, 70 N. W. 552.

Mo.—Stam v. Smith, 183 Mo. 464, 81 S. W. 1217.

Neb.—Karll v. Kuhn, 38 Neb. 539, 57 N. W. 379.

N. J.—Claflin v. Freudenthal, 58 N. J. Eq. 298, 43 Atl. 529, *aff'd* 50 N. J. Eq. 483, 46 Atl. 1100.

Pa.—Heath v. Slocum, 115 Pa. St. 549, 9 Atl. 259; Baltimore, etc., R. Co. v. Hoge, 34 Pa. St. 214.

Tex.—Barnes v. Krause (Civ. App. 1899), 53 S. W. 92.

consideration, and evidence held inadmissible,[49] may be found in the cases cited in the notes below. For the purpose of establishing a consideration and the *bona fide* character of the transaction, evidence of the payment or assumption by the grantee of an indebtedness or liability on the part of the grantor may likewise be material and admissible.[50] In the same way evidence tending to establish or negative a pre-existing indebtedness or liability on the part of the grantor to the grantee, which is relied upon as constituting the consideration for the conveyance or transfer attacked as fraudulent as to creditors, is admissible.[51] But evidence of a pre-existing indebtedness is properly excluded where it does not appear that it was in any way connected with the consideration expressed in the conveyance sought to be set aside,[52] and the fact that a portion of the indebtedness was barred by limitations is admissible in evidence, to be considered on the

49. Nixon v. Goodwin (Cal. App. 1906), 85 Pac. 169; Morse v. Powers, 17 N. H. 286; Hinson v. Walker, 65 Tex. 103; Voorheis v. Waller (Tex. Civ. App. 1896), 35 S. W. 807.

50. *N. Y.*—Merchants' Bank v. Thalheimer, 50 Hun, 600, 2 N. Y. Supp. 328.

Ala.—Howell v. Bowman, 99 Ala. 100, 10 So. 640; Watson v. Tool, 36 Ala. 13.

Ind.—McCormick v. Smith, 127 Ind. 230, 26 N. E. 825.

Md.—Waters v. Riggin, 19 Md. 536.

N. C.—Watts v. Warren, 108 N. C. 514, 13 S. E. 232.

51. *N. Y.*—Knoch v. Bernheim, *supra;* Goldenson v. Lawrence, 15 Misc. Rep. 489, 37 N. Y. Supp. 194, *aff'd* 16 Misc. Rep. 570, 38 N. Y. Supp. 99; Gilmore v. Ham, *supra.*

Ala.—Clewis v. Malone, 119 Ala. 312, 24 So. 767.

Cal.—Byrne v. Weed, 75 Cal. 277, 17 Pac. 201.

Conn.—Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 492; Cowles v. Coe, 21 Conn. 220.

Iowa.—Conry v. Benedict (1898), 76 N. W. 840; Bussard v. Bullitt, 95 Iowa, 736, 64 N. W. 658.

Md.—Stockbridge v. Fahnstock, 87 Md. 127, 39 Atl. 95.

Mass.—Knowlton v. Moseley, 105 Mass. 136.

Mich.—Winfield v. Adams, 34 Mich. 437; Sweetzer v. Mead, 5 Mich. 107.

N. J.—Claflin v. Freudenthal, *supra.*

N. C.—Allen v. McLendon, 113 N. C. 321, 18 S. E. 206.

Pa.—Connelly v. Walker, 45 Pa. St. 449.

Tex.—Barnett v. Vincent, 69 Tex. 685, 7 S. W. 525, 5 Am. St. Rep. 98; Cooper v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; Wright v. Soloman (Civ. App. 1898), 46 S. W. 58.

52. Rousseau v. Bleau, 60 Hun (N. Y.), 259, 14 N. Y. Supp. 712.

question of good faith.[53] On an issue as to whether a conveyance was made with intent to defraud the creditors of the grantor, evidence of the grantee's pecuniary condition at the time of the conveyance or transfer is admissible, as bearing on his ability to purchase at a fair price, and for the purpose of showing whether the consideration named in the conveyance was or was not in fact paid.[54] The source from which the grantee secured the money with which he purchased the property in controversy may be shown.[55] The reputation of the grantee in the community as to having property or means, in some cases, is held to be admissible,[56] in others not.[57] On the question of the adequacy of the consideration and the good faith of the transaction, the question of the value of the property or interest conveyed or transferred is material, and any competent evidence tending to establish the fact is admissible.[58] But where the question of the value of the property is material on an issue as

53. Vansickle v. Wells, 105 Fed. 16.

54. *N. Y.*—Amsden v. Manchester, 40 Barb. 158. See also Raynor v. Page, 2 Hun, 652.

Ala.—Waxelbaum v. Ball, 91 Ala. 331, 8 So. 571; Borland v. Mayo, 8 Ala. 104.

Conn.—Olmsted v. Hoyt, 11 Conn. 376; Cook v. Swan, 5 Conn. 140.

Ill.—Ragland v. McFall, 137 Ill. 81, 27 N. E. 75, *aff'g* 36 Ill. App. 135; Rhoades, etc., Co. v. Smith, 43 Ill. App. 400.

Iowa.—Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

La.—Hyman v. Bailey, 13 La. Ann. 450.

Mass.—Stebbins v. Miller, 94 Mass. 591.

Mo.—Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745.

N. H.—Demeritt v. Miles, 22 N. H. 523.

Pa.—Hirsh v. Wenger, 182 Pa. St. 246, 38 Atl. 135; Hannis v. Hazlett, 54 Pa. St. 133.

Tex.—Belt v. Raguet, 27 Tex. 471; Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 380, 23 S. W. 520.

Wis.—Brickley v. Walker, 68 Wis. 563, 32 N. W. 773.

55. Ragland v. McFalls, 137 Ill. 91; Hannis v. Hazlett, 54 Pa. St. 133; Hamilton-Brown Shoe Co. v. Whitaker, 4 Tex. Civ. App. 480; Rindskopf v. Myers, 71 Wis. 639, 38 N. W. 185; Brickley v. Walker, 68 Wis. 563.

56. Stebbins v. Miller, 94 Mass. 591; Covanhovan v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

57. Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863.

58. *N. Y.*—Bier v. Kibbe, 52 Hun, 612, 5 N. Y. Supp. 152.

U. S.—Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642.

to whether a conveyance was in fraud of creditors, evidence offered may be inadmissible for the purpose of showing such value.[59]

§ 33. **Statements of parties; books of account.**—The declarations of the parties to a conveyance attacked by creditors as fraudulent are in some cases held to be admissible as evidence upon the question of the sufficiency of the consideration therefor, either as forming a part of the *res gestae,* as constituting admissions, or as falling within some general rule of evidence authorizing their admission.[60] But in other cases they have been held inadmissible as being in the party's own interest, or as hav-

Ala.—Howell v. Carden, 99 Ala. 100, 10 So. 640; Borland v. Mayo, 8 Ala. 104.

Ark.—Bowden v. Spellman, 59 Ark. 251, 27 S. W. 602, declarations of the seller.

Ill.—Welsch v. Werschem, 92 Ill. 115.

Iowa.—Goldstein v. Morgan, 122 Iowa, 27, 96 N. W. 897.

Mich.—Long v. Evening News Assoc., 113 Mich. 261, 71 N. W. 492; Bedford v. Penny, 58 Mich. 424, 25 N. W. 381; West v. Russell, 48 Mich. 74, 11 N. W. 812.

Minn.—Baze v. Arper, 6 Minn. 220.

Tex.—City Nat. Bank v. Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523; Harris v. Schuttler (Civ. App. 1893), 24 S. W. 989.

59. *N. Y.*—Commercial Bank v. Bolton, 87 Hun, 547, 35 N. Y. Supp. 138.

Ala.—H. B. Claflin Co. v. Rodenberg, 101 Ala. 213, 13 So. 272.

Neb.—Rogers v. Thurston, 24 Neb 326, 38 N. W. 834.

Pa.—Zerbe v. Miller, 16 Pa. St. 488.

Tex.—Oppenheimer v. Halff, 68 Tex. 409, 4 S. W. 562; Goldfrank v. Halff (Civ. App. 1894), 26 S. W. 778 (1899), 49 S. W. 1095.

Wis.—Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

60. *N. Y.*—Legg v. Olney, 1 Den. 202.

U. S.—Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

Ala.—Pearce v. Nix, 34 Ala. 183; Goodgame v. Cole, 12 Ala. 77.

Ind.—Fleming v. Yost, 137 Ind. 95, 36 N. E. 705; Benjamin v. McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

Iowa.—Moss v. Dearing, 45 Iowa, 530.

Miss.—English v. Friedman, 70 Miss. 457, 12 So. 252.

Mo.—State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390.

Pa.—Reitanbach v Reitanbach, 1 Rawle, 362, 18 Am. Dec. 638.

Tex.—Titus v. Johnson, 50 Tex. 224; Cooper v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

ing been made when the grantees were in possession, or as not competent to affect the title of the grantees or beneficiaries.[61] Where the consideration is denied, the grantee's entries against the grantor on his books of account are competent for the purpose of showing that the consideration of the conveyance was the indebtedness shown therein and to corroborate the grantee's assertion that the consideration was made up from such charges.[62] So where the consideration of a transfer is claimed to be an indebtedness from the grantor to the grantee, a creditor attacking the conveyance may introduce in evidence the books of account of the grantor or grantee, kept in the regular order of business, to show that they contained no entry of the debt, or that the alleged indebtedness was largely fictitious.[63]

§ 34. **Recitals in instrument of transfer.**—Where a creditor of the grantor seeks to impeach the conveyance on the ground of fraud, a recital in the deed is not evidence of a consideration.[64] On an issue as to whether a deed is fraudulent as against

61. *N. Y.*—Rousseau v. Bleau, 60 Hun, 259, 14 N. Y. Supp. 712; Tifft v. Barton, 4 Den. 171.

Ga.—Hicks v. Sharp, 89 Ga. 311, 15 S. E. 314.

Ill.—Meacham v. Hahn, 46 Ill. App. 144.

Iowa.—Harwick v. Weddington, 73 Iowa, 300, 34 N. W. 868.

Mich.—Blanchard v. Moors, 85 Mich. 380, 48 N. W. 542.

Tex.—Blair v. Finlay, 75 Tex. 210, 12 S. W. 983.

Va.—Thornton v. Gaar, 87 Va. 315, 12 S. E. 753; Keagy v. Trout, 85 Va. 390, 7 S. E. 329.

62. Fleming v. Yost, 137 Ind. 95, 36 N. E. 705; Stockbridge v. Fahnestock, 87 Md. 127, 39 Atl. 95; Archer v. Long, 38 S. C. 272, 16 S. E. 998.

63. White v. Benjamin, 150 N. Y. 258, 44 N. E. 956; Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

64. *N. Y.*—Tifft v. Barton, 4 Den. 171.

Ala.—Ezzell v. Brown, 121 Ala. 150, 25 So. 832; Schall v. Weil, 103 Ala. 411, 15 So. 829; Howell v. Carden, 99 Ala. 100, 10 So. 640; Chipman v. Glennon, 98 Ala. 263, 13 So. 822; Bolling v. Jones, 67 Ala. 508; Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756; Pool v. Cummings, 20 Ala. 563; Decatur Branch Bank v. Jones, 5 Ala. 487.

Ark.—Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. 137.

N. H.—Vogt v. Ticknor, 48 N. H. 242; Prescott v. Hayes, 43 N. H. 593.

Pa.—Redfield, etc., Mfg. Co. v. Dysart, 62 Pa. St. 62.

Va.—Flynn v. Jackson, 93 Va. 341, 25 S. E. 1; De Farges v. Ryland, 87

the grantor's creditors the real consideration may be shown by extrinsic evidence to be different from that recited in the deed, and a judgment creditor has a right to rebut the *prima facie* evidence of a recital of payment of a valuable consideration by parol evidence to show that the sum specified in the deed was not paid.[65] It is held by some authorities that one claiming under a deed attacked as fraudulent may show a consideration different from that recited in the instrument,[66] if the consideration expressed is not a contract stipulation.[67] But, according to other authorities, a person claiming under a deed which is attacked as fraudulent cannot sustain its validity by parol proof of a consideration other than that expressed in the instrument,[68] unless such consideration is consistent with, or of the same general character as, the consideration recited in the conveyance.[69]

§ 35. **Knowledge and intent of grantee generally.**—The declarations of the grantee or vendee are competent and admissible as evidence upon the issue as to the grantee's knowledge and intent at the time of taking the conveyance.[70] In determining the

Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659.

W. Va.—Butler v. Thompson, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; Himan v. Thorn, 32 W. Va. 507, 9 S. E. 930; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847.

65. Amsden v. Manchester, 40 Barb. (N. Y.) 158; Myers v. Peck, 2 Ala. 648; Leach v. Shelly, 58 Miss. 681.

66. Ferguson v. Harrison, 41 S. C. 340, 19 S. E. 619; Jackson v. Lewis, 32 S. C. 593, 10 S. E. 1074; Featherston v. Dagnell, 29 S. C. 45, 6 S. E. 897; Casto v. Fry, 33 W. Va. 449, 10 S. E. 799.

67. Finn v. Krut, 13 Tex. Civ. App. 36, 34 S. W. 1013.

68. Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756; Carmack v. Lovett, 44 Ark. 180; Glenn v. McNeal, 3 Md. Ch. 349; Stolz v. Vanatta, 32 Wkly. L. Bul. (Ohio) 100; Ogden State Bank v. Barker, 12 Utah, 13, 40 Pac. 765.

69. Gordon v. Tweedy, 71 Ala. 202; Hubbard v. Allen, 59 Ala. 283; Diggs v. McCullough, 69 Md. 592, 16 Atl. 453; Cole v. Albers, 1 Gill. (Md.) 412; Harris v. Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Clagett v. Hall, 9 Gill & J. (Md.) 80; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564; Grote v. Meyer, 6 Ohio Dec. 1025, 9 Am. L. Rec. 623.

70. *Conn.*—Lesseb v. Brown, 75 Conn. 491, 54 Atl. 205.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

Iowa.—McNorton v. Akers, 24 Iowa, 369.

grantee's knowledge and intent, where the issue is as to whether or not a conveyance was fraudulent as to creditors, evidence is also admissible as to the use which the parties made of the conveyance,[71] as to whether the grantee knew at the time of the purchase that the property had been invoiced at night or anything about it,[72] as to the grantee's intoxication at the time of the conveyance,[73] that he acted upon the advice of counsel,[74] or that he had notice of a suit pending against the grantor,[75] or any other fact which, under the general rules of evidence, tends to prove or disprove such knowledge or intent.[76] Evidence as to the conduct of third persons, alleged to have been parties to the fraud, is admissible, although the grantee was not connected with them.[77] But evidence as to declarations of the fraudulent grantor is inadmissible to charge the vendee or grantee with a fraudulent intent, since although it might prove fraud on the part of the grantor, it is only hearsay as to the intent of the grantee,[78] unless there is other evidence connecting the grantee

Mass.—Foster v. Thompson, 71 Mass. 453.

Tenn.—Harton v. Lyons, 97 Tenn. 180, 36 S. W. 851.

Wis.—Gillet v. Phelps, 12 Wis. 392.

71. Constantine v. Twelves, 29 Ala. 607.

72. Hodges v. Coleman, 76 Ala. 103.

73. Bendetson v. Moody, 100 Mich. 553, 59 N. W. 252.

74. Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Whether the grantee had sufficient notice is not affected by the fact that after the purchase he submitted the papers to an attorney for examination and advice. C. Aultman & Co. v. Utsey, 34 S. C. 559, 13 S. E. 848.

75. Coulter v. Lumpkin, 100 Ga. 784, 28 S. E. 459.

76. *U. S.*—Treusch v. Ottenberg, 54 Fed. 867, 4 C. C. A. 629.

Conn.—Smith v. Brockett, 69 Conn. 492, 38 Atl. 57.

Mich.—Ganong v. Green, 71 Mich. 1, 38 N. W. 661.

N. C.—Perry v. Hardison, 99 N. C. 21, 5 S. E. 230.

Wis.—Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

The record of a prior suit against the grantor, in which part of the property was attached just after the grantee took possession, is inadmissible, where it appears that when the attachment was levied the grantee had given his note for the price, and his grantor credited on such note the value of the property seized. Mix v. Ege, 67 Minn. 116, 69 N. W. 703.

77. Pohalski v. Ertheiler, 18 Misc. Rep. (N. Y.) 33, 41 N. Y. Supp. 10.

78. *N. Y.*—Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928, *aff'g* 54 Hun,

with the fraud.[79] The grantor cannot testify as to whether anything transpired between him and the grantee whereby he gave the latter to understand that the transaction was for an improper purpose,[80] or whether the notes given in part consideration were made in good faith.[81] Evidence of the grantee's good character, and of his reputation for honesty and fair dealing, is not admissible on the question of his intent or to rebut proof of fraud.[82]

§ 36. **Knowledge of grantor's indebtedness or insolvency.**—On an issue as to whether a conveyance or transfer of property was fraudulent as to creditors, evidence going to show the debtor's circumstances, and the grantee's connection with him and means of information about him, and tending to show that the grantee knew of the grantor's indebtedness or insolvency at the time of the conveyance, is admissible, as relevant to the question of the good faith of the grantee.[83] As tending to show knowledge on the part of the grantee of the grantor's indebtedness or insolvency, evidence of the general reputation of the grantor as to pecuniary responsibility,[84] of declarations of the grantee prior to the conveyance,[85] of previous transfers from the grantor to the grantee during the existence of an alleged indebtedness to the grantee claimed to be the consideration for

473, 7 N. Y. Supp. 717; Spaulding v. Keyes, 125 N. Y. 113, 26 N. E. 15; Orr v. Gilmore, 7 Lans. 345.

Colo.—Smith v. Jensen, 13 Colo. 213, 22 Pac. 434.

Conn.—Tibbals v. Jacobs, 31 Conn. 428, declarations previous to conveyance.

Ill.—Guebert v. Zick, 31 Ill. App. 390.

Me.—Smith v. Tarbox, 70 Me. 127.

Pa.—Farren v. Mintzer, 10 Pa. Cas. 610, 14 Atl. 267.

Tex.—Ward v. Wofford (Civ. App. 1894), 26 S. W. 321.

Wis.—Bogert v. Phelps, 14 Wis. 88.

79. Lesser v. Brown, 75 Conn. 491, 54 Atl. 205; Bender v. Kingman, 64 Neb. 766, 90 N. W. 886.

80. Blaut v. Gabler, 77 N. Y. 461, *aff'g* 8 Daly, 48.

81. Schmick v. Noel, 72 Tex. 1. 8 S. W. 83.

82. Simpson v. Westenberger, 28 Kan. 756, 42 Am. Rep. 195; Dawkins v. Gault, 5 Rich. (S. C.) 151.

83. Hallock v. Alvord, 61 Conn. 194, 23 Atl. 131; Robinson v. Woodmansee, 80 Ga. 249, 4 S. E. 497; O'Donnell v. Hall, 157 Mass. 463, 32 N. E. 666; Stadtler v. Wood, 24 Tex. 622.

the conveyance in controversy,[86] is admissible. A letter written by the grantee, suggesting to the grantor to make false representations for the purpose of obtaining a fictitious credit, and offering to assist therein, is competent as tending to show knowledge of the grantor's insolvency.[87] But evidence that proceedings in bankruptcy were instituted against both the debtor and the creditor but a few days after the execution of an assignment and bill of sale is not admissible to show that at the date of such assignment the creditor knew of the debtor's insolvency.[88] Nor is evidence admissible as to what a mortgagee was told by his counsel in reference to his right to make a mortgage loan to the mortgagor.[89] That a mortgagee loaned money and sold goods to his mortgagor, after the execution of the deed of mortgage, and took notes for the payment of his debt in semi-monthly installments, is evidence that he did not know his debtor to be in an insolvent condition.[90]

§ 37. **Testimony of grantee as to his own knowledge or intent.**—Where a conveyance is alleged to be fraudulent towards creditors, the grantee may testify as to his good faith, purpose, and intention in taking the conveyance,[91] and as to whether he

84. Hudson v. Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Price v. Mazange, 31 Ala. 701; Sweetser v. Bates, 117 Mass. 466; Metcalf v. Munson, 92 Mass. 491; Whitcher v. Shattuck, 85 Mass. 319; Hahn v. Penney, 60 Minn. 487, 62 N. W. 1129; Goldberg v. McCracken (Tex. 1888), 8 S. W. 676; Hooks v. Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991.

Testimony of a witness to his belief that it was generally known that the vendor was in debt is, however, not admissible against the vendee, since it does not prove fraud in the vendee. Scott v. Heilager, 14 Pa. St. 238.

85. Hunsinger v. Hoffer, 110 Ind. 390, 11 N. E. 463; Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

86. Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 492.

87. Clark v. Finn, 12 Mo. App. 583.

88. Ecker v. McAlister, 54 Md. 362.

89. Bicknell v. Mallett, 160 Mass. 328, 35 N. E. 1130.

90. Cole v. Albers, 1 Gill (Md.) 412.

91. *N. Y.*—Starin v. Kelly, 88 N. Y. 418, *aff'g* 47 N. Y. Super. Ct. 288; Bedell v. Chase, 34 N. Y. 386; Sperry v. Baldwin, 46 Hun, 120; Durfee v. Bump, 51 Hun, 637, 3 N. Y. Supp. 505.

Cal.—Byrne v. Reed, 75 Cal. 277, 17 Pac. 201.

had any knowledge of his grantor's fraudulent intent,[92] subject to the exception that such testimony is not competent to vary the terms of the conveyance.[93] A vendee may show by his agent who made the purchase, that his purpose in making it was to collect the vendee's demands against the vendor.[94]

§ 38. **Participation in fraudulent intent.**—The acts of the grantor in an alleged fraudulent conveyance and his declarations and admissions, made to a third person, in respect to such transaction, are not competent evidence to show the grantee's knowledge of the grantor's fraudulent intent or participation therein.[95] Fraud, or knowledge of or participation in fraudulent designs or transactions, is provable by facts and circumstances, and as a general rule any lawful evidence, other than acts and declarations of the grantor, as to facts and circumstances which would tend to disclose the real purpose and intent of the grantee is admissible,[96] and the exclusion of such evidence, when it tends

Colo.—Brown v. Potter, 13 Colo. App. 512, 58 Pac. 785.

Ind.—South Bend Iron Works Co. v. Duddleson (App. 1891), 27 N. E. 312; Wilson v. Clark, 1 Ind. App. 182, 27 N. E. 310.

Iowa.—Frost v. Rosencrans, 66 Iowa, 405, 23 N. W. 895.

Kan.—Gentry v. Kelley, 49 Kan. 82, 30 Pac. 186.

Mass.—Snow v. Paine, 114 Mass. 520.

Mich.—Angell v. Picard, 61 Mich. 561, 28 N. W. 680; Bedford v. Penny, 58 Mich. 424, 25 N. W. 381.

Minn.—Hathaway v. Brown, 18 Minn. 414.

Mont.—Finch v. Kent, 24 Mont. 268, 61 Pac. 653.

Neb.—Campbell v. Holland, 22 Neb. 587, 45 N. W. 871.

N. H.—Woodman v. Clay, 59 N. H. 53.

Tex.—Hamburg v. Wood, 66 Tex. 168, 18 S. W. 623; Wright v. Solomon (Civ. App. 1898), 46 S. W. 58; Numsen v. Ellis, 3 Tex. App. Civ. Cas., § 134. *Compare* Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231, 13 U. S. App. 222.

92. Richolson v. Freeman, 56 Kan. 463, 43 Pac. 772; Lincoln v. Wilbur, 125 Mass. 249; Filley v. Register, 4 Minn. 391, 77 Am. Dec. 522.

93. Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154.

94. Blankenship, etc., Co. v. Willis, 1 Tex. Civ. App. 657, 20 S. W. 952.

95. Bogert v. Hess, 50 App. Div. (N. Y.) 253, 63 N. Y. Supp. 977; Cuyler v. McCartney, 33 Barb. (N. Y.) 165; Guebert v. Zick, 31 Ill. App. 390. *Compare* Bredin v. Bredin, 3 Pa. St. 81.

96. *N. Y.*—McCabe v. Brayton, 38 N. Y. 196.

to establish fraud, is error.[97] Books of account of the mortgagor which failed to show some of the alleged debts secured by an alleged fraudulent mortgage,[98] letters written by the mortgagee or by a relative of the mortgagee,[99] the latter being properly connected therewith, are admissible as tending to show participation and collusion. Declarations and admissions of the grantee or transferee tending to show his fraudulent knowledge or purpose in taking the conveyance or transfer are admissible against him.[1]

§ 39. **Separate conveyances or transactions.**—On an issue as to the fraudulent character of a conveyance, evidence of other and separate conveyances and transactions of the grantor of a similar fraudulent character, although admissible to establish the fraudulent intent of the grantor, without evidence to connect the grantee with such transactions,[2] is inadmissible, as against the grantee, except where there is other evidence tending to show his knowledge of or connection with the same under circumstances indicative of fraudulent collusion between him and the debtor in a general fraudulent scheme, in which case it is competent on the question

Ala.—Little v. Lichkoff, 98 Ala. 321, 12 So. 429.

Iowa.—Chapman v. James, 96 Iowa, 233, 64 N. W. 795; Craig v. Fowler, 59 Iowa, 200, 13 N. W. 116.

La.—Wolff v. Wolff, 47 La. Ann. 548, 17 So. 126.

Minn.—Benson v. Nash, 75 Minn. 341, 77 N. W. 991, failure to investigate the character of the grantor's title, against which a chattel mortgage was recorded at the time of his conveyance.

N. H.—Lee v. Lamprey, 43 N. H. 13.

Ohio.—Raymond v. Whitney, 5 Ohio St. 201.

Pa.—Snyder v. Perger, 3 Pa. Cas. 318, 6 Atl. 733.

Wash.—Adams v. Dempsey, 29 Wash. 155, 69 Pac. 738.

97. Craig v. Fowler, 59 Iowa, 200, 13 N. W. 116.

98. Cluett v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446.

99. First Nat. Bank v. Marshall, 56 Kan. 441, 43 Pac. 774; Krolik v. Graham, 64 Mich. 226, 31 N. W. 307.

1. Bernard v. Guidry, 109 La. 451, 33 So. 558; Field v. Livermore, 17 Mo. 218; Altschuler v. Coburn, 38 Neb. 881, 57 N. W. 836.

2. See Other and separate fraudulent conveyances and transactions, chap. XVII, § 21, *supra*.

of the good faith of the grantee in the transaction in question.[3] But it has been held that evidence that one who has taken property in payment of his debt had previously taken a chattel mortgage, alleged to be fraudulent on its face, on the property to secure his debt, and had made a sale thereunder, is irrelevant.[4] Evidence as to other property purchased from the grantor at the same time as the property in question is admissible in order to show fraud towards creditors in the latter transaction.[5]

§ 40. **Good faith of purchaser from grantee.**—Evidence tending to prove whether a purchaser from a fraudulent grantee had or had not notice that the first sale was fraudulent is relevant and admissible, subject to the general rules of evidence, to show his fraudulent intent or good faith in taking the conveyance.[6] The fact that the purchaser had a lien on the property is admissible on the question of his good faith in taking the conveyance from the fraudulent grantee.[7] Where the *bona fides* of the subsequent purchaser is in issue, statements of a witness regarding the financial condition of a former vendor are misleading and irrelevant.[8] The testimony of the assignee of a mortgage that he knew

3. *N. Y.*—McCabe v. Brayton, 38 N. Y. 196; Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

Ala.—Reed v. Smith, 14 Ala. 380.

Ill.—Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70.

Iowa.—Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483; Craig v. Fowler, 59 Iowa, 200, 1 N. W. 116.

Me.—Grant v. Libby, 71 Me. 427; Glake v. Howard, 11 Me. 202.

Mich.—Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483; Burrill v. Kimball, 65 Mich. 217, 31 N. W. 842.

Mo.—Lane v. Kingsberry, 11 Mo. 402.

N. H.—Whittier v. Varney, 10 N. H. 291.

Pa.—Miller v. McAlister, 178 Pa. St. 140, 35 Atl. 594; Kline v. First Nat. Bank (1888), 15 Atl. 433; Welsh v. Cooper, 3 Am. L. J. (N. S.) 30.

Tex.—Cook v. Greenberg (Civ. App. 1896), 34 S. W. 687; Fant v. Willis (Civ. App. 1893), 23 S. W. 99.

4. Ragland v. McFall, 137 Ill. 81, 27 N. E. 75, *aff'g* 36 Ill. App. 135.

5. Lillie v. McMillan, 52 Iowa, 463, 3 N. W. 601.

6. Hodges v. Coleman, 76 Ala. 103; Rice v. Bancroft, 28 Mass. 469; Kichline v. Labach, 125 Pa. St. 295, 17 Atl. 432.

7. Park v. Snyder, 78 Ga. 571, 3 S. E. 557.

8. Rindskopf v. Myers, 71 Wis. 639, 38 N. W. 185.

nothing of any understanding that the mortgagor was to remain in possession, or of any purpose on the part of either party to defraud the mortgagor's creditors, is competent.[9] And to repel any inference of fraud arising from the assignee of a mortgage leaving the mortgage in the mortgagee's possession, the mortgagee's testimony that, having contracted the debt and being acquainted with the mortgagor, he was better able to collect it, is admissible.[10]

§ 41. **Title to or control of property.**—In an action to reach property conveyed, as belonging to the grantor, for the purpose of showing or rebutting fraud in the conveyance, evidence of the grantor's conduct or statements after the conveyance while in possession as to his ownership of the property and tending to explain the character of his possession is admissible,[11] but declarations made before the conveyance are not admissible.[12] Statements by the party in possession of certain property that the business was his and only run in the name of another for protection are inadmissible on an issue of fraudulent transfer, as being something more than merely explanatory of the possession.[13] In the trial of the right of property attached, the claimant may put in evidence the declaration of the defendant to the officer, at the time of the levy, that the property did not belong to him.[14] Subject to the general rules of evidence, any fact tending to show whether or not there has been a change of possession of personal property sold is admissible;[15] or, if the vendor has retained possession, any fact

9. Phifer v. Erwin, 100 N. C. 59, 6 S. E. 672.

10. Phifer v. Erwin, *supra*.

11. Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 260; Taylor Commission Co. v. Bell, 62 Ark. 26, 34 S. W. 80; Walcott v. Keith, 22 N. H. 196, declarations of the parties to the transfer, made after the contract and while the grantor is still in possession, are admissible; Askew v. Reynolds, 18 N. C. 367. *Compare* Demeritt v. Miles, 22 N. H. 523. And see Waters v. Riggan, 19 Md. 536, conversations between the parties to the conveyance explanatory of the grantor's continued possession admissible.

12. Taylor Commission Co. v. Bell, *supra*.

13. Sweet v. Wright, 57 Iowa, 510, 10 N. W. 870.

14. Wright v. Smith, 66 Ala. 514.

15. Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Springer v. Kruger, 3 Colo. App. 487, 34 Pac.

explaining his possession is admissible to rebut the inference of fraud arising therefrom.[16]

§ 42. **Retention or change of apparent title or control.**—Where property has been or is about to be subjected as belonging to the grantor, any facts or circumstances which tend, under the general rules of evidence, to show whether the grantor or another has had the apparent title to or exercised control or management over the property since the conveyance is admissible, as bearing on the *bona fides* of a claimant's title to the property.[17] Evidence is admissible that the grantor subsequent to the conveyance used, disposed of, or otherwise treated the property as his own,[18] or that the grantee did so,[19] or that the grantee replenished a stock of goods, which was the subject of the transfer, with his own money or on his own credit.[20] Evidence that after a sale the property sold was taxed to the vendor, with his knowledge and without

269; Rule v. Bolles, 27 Or. 368, 41 Pac. 691.

16. Easley v. Dye, 14 Ala. 158; Laird v. Davidson, 124 Ind. 412, 25 N. E. 7; Foley v. Knight, 4 Blackf. (Ind.) 420; Benjamin v. McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362; Seavey v. Dearborn, 19 N. H. 351; Harrell v. Elliott, 1 N. C. 86.

17. *Cal.*—Freeman v. Hensley (1892), 30 Pac. 792.

Colo.—Butler v. Howell, 15 Colo. 249, 25 Pac. 313.

Ky.—Kendall v. Hughes, 46 Ky. 368.

Mich.—Partlow v. Swigart, 90 Mich. 61, 51 N. W. 270.

Minn.—Christian v. Klein, 77 Minn. 116, 79 N. W. 602; Laib v. Brandenburg, 34 Minn. 367, 25 N. W. 803; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

Mo.—Franklin v. Gummersell, 11 Mo. App. 306.

N. H.—Blake v. White, 13 N. H. 267.

Pa.—Helfrich v. Stem, 17 Pa. St. 143.

Tex.—See O'Neal v. Clymer (Tex. Civ. App. 1900), 61 S. W. 545.

S. C.—Owens v. Gentry, 30 S. C. 490, 9 S. E. 525.

18. *N. Y.*—Persse, etc., Paper Works v. Willett, 1 Rob. 131.

U. S.—McClellan v. Pyeatt, 50 Fed. 686, 4 U. S. App. 319, 1 C. C. A. 613.

Md.—Cecil Bank v. Snively, 23 Md. 253.

Mo.—Blue v. Penniston, 27 Mo. 272.

Neb.—Cox v. Einspahr, 40 Neb. 411, 58 N. W. 941.

19. Shealy v. Edwards, 75 Ala. 411; Martin v. Duncan, 181 Ill. 120, 54 N. E. 908, *aff'g* 79 Ill. App. 527.

20. Butler v. Howell, 15 Colo. 249, 25 Pac. 313; Helfrich v. Stein, 17 Pa. St. 143. *Compare* Flood v. Clemence, 106 Mass. 299.

objection, is admissible as tending to show that the conveyance was fraudulent.[21] So evidence is admissible that after the conveyance the grantee did not return the property for taxation,[22] or that property mortgaged was not taxed to the mortgagor after the execution of the mortgage.[23] But evidence as to whether the grantee of personal property gave in to the assessor the realty on which the personalty was as his property is properly excluded.[24] The payment of taxes on land by one in possession, who was also the owner of an undivided half interest therein, is not evidence of the *bona fides* of the deed from his co-tenant for the other half, under which he holds.[25]

§ 43. **Weight and sufficiency of evidence generally.**—A fair preponderance of evidence is sufficient to establish fraud in a conveyance attacked by creditors, and the degree of certainty demanded in criminal cases is not required.[26] There is nothing in

21. Judge v. Vogel, 38 Mich. 569; Lamprey v. Donacour, 58 N. H. 376. *Compare* Woodman v. Clay, 59 N. H. 53; O'Neal v. Clymer (Tex. Civ. App. 1900), 61 S. W. 545. But see Eherke v. Hecht, 96 Iowa, 96, 64 N. W. 652.

22. Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328.

23. Osborn v. Ratliff, 53 Iowa, 748, 5 N. W. 746.

24. Asbill v. Standley (Cal. 1892), 31 Pac. 738.

25. Traverse v. Tate, 82 Cal. 170, 22 Pac. 1082.

26. *N. Y.*—Saugerties Bank v. Mack, 35 App. Div. 398, 54 N. Y. Supp. 950; Howe v. Sommers, 22 App. Div. 417, 48 N. Y. Supp. 162.

Ill.—American Hoist, etc., Co. v. Hall, 208 Ill. 597, 70 N. E. 581, *aff'g* 110 Ill. App. 463; Carter v. Gunnels, 67 Ill. 270.

Ind.—Laird v. Davidson, 124 Ind. 412, 25 N. E. 7, *distinguishing* Rowell v. Klein, 44 Ind. 291.

Iowa.—Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483; Russell v. Huiskamp, 77 Iowa, 727, 42 N. W. 525; McCreary v. Skinner, 75 Iowa, 411, 39 N. W. 674; Bixby v. Carskaddon, 55 Iowa, 533, 8 N. W. 354.

La.—Bridgeford v. Simonds, 18 La. Ann. 121.

Mich.—Gumberg v. Trensch, 103 Mich. 543, 61 N. W. 872; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809.

Mo.—Boon County Nat. Bank v. Newkirk, 144 Mo. 472, 46 S. W. 606.

Ohio.—Dougherty v. Schlotman, 1 Cinc. Super. Ct. 292; Rine v. Hall, 187 Pa. St. 264, 40 Atl. 1088; Meyers v. Meyers, 24 Pa. Super Ct. 603.

S. C.—McGee v. Wells, 52 S. C. 472, 30 S. E. 602.

Tex.—Schmick v. Noel, 72 Tex. 1, 8 S. W. 83.

Wash.—Adams v. Dempsey, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933.

the nature or improbability of fraud towards creditors which calls for a greater quantity of proof to establish it than that which is required to establish a fact in any civil action.[27] The proof need not establish fraud beyond all doubt.[28] But the jury are not permitted to guess or suspect, or presume fraud, but must find it from the evidence, as they would any other fact.[29] Fraud as to creditors must be proved as an affirmative fact by clear and satisfactory evidence. It is a well established principle of law that fraud will not be presumed, but must be proved, and the proof must be of such a positive and definite character as to convince the mind of the court. If there is a doubt about it the presumption of innocence should prevail, and evidence as consistent with innocence as with wrongdoing is insufficient to prove fraudulent intent.[30] Cases are cited for reference in the notes below where the evidence was held to be sufficient to warrant the setting aside of the convey-

W. Va.—Knight v. Nease, 53 W. Va. 50, 44 S. E. 414; Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112.

27. Skipper v. Reeves, 93 Ala. 332, 8 So. 804; Bowman v. Ash, 143 Ill. 649, 32 N. E. 486, *aff'g* 36 Ill. App. 115.

28. Jones v. Lossiter, 29 Ky. L. Rep. 514, 93 S. W. 657; Wiggington v. Minter, 28 Ky. L. Rep. 79, 88 S. W. 1082.

29. Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70, *aff'g* 16 Ill. App. 590.

30. Huber v. Wiman, 18 Misc. Rep. 107, 41 N. Y. Supp. 834; Hildreth v. Sands, 2 Johns. Ch. 35.

U. S.—Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

Ala.—Allen v. Riddle (1904), 37 So. 680.

Ill.—Eickstaedt v. Moses, 105 Ill. App. 634.

Ind.—American Varnish Co. v. Reed, 154 Ind. 88, 55 N. E. 224.

Iowa.—Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Schofield v. Blind, 33 Iowa, 175.

Ky.—Combs v. Davis, 24 Ky. L. Rep. 648, 69 S. W. 765.

Mass.—Hatch v. Bayley, 66 Mass. 27.

Mich.—Pogodzinski v. Kruger, 44 Mich. 79, 6 N. W. 116.

Minn.—Aretz v. Kloos, 89 Minn. 432, 95 N. W. 216, 769.

Miss.—McInnis v. Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Mo.—Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; Robinson v. Dryden, 118 Mo. 534, 24 S. W. 448; Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Dallam v. Renshaw, 26 Mo. 533.

S. C.—Clark v. Bailey, 2 Strob. Eq. 143.

Va.—Taylor v. Mallory, 96 Va. 18, 30 S. E. 472.

Wash.—Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

Wis.—Shepard v. Ostertag, 106 Wis. 82, 81 N. W. 1103.

ance on the ground of fraud,[31] and other cases where the evidence was held insufficient to establish fraud in the conveyance.[32]

§ 44. **Circumstantial evidence.**—Fraud may be established as well by circumstantial, as by direct evidence. A conveyance by a debtor may be shown by circumstances attending the transaction to be fraudulent.[33] Fraud may be legally inferred from facts and

31. *N. Y.*—Fox v. Erbe, 100 App. Div. 343, 91 N. Y. Supp. 832, *aff'd* 184 N. Y. 542, 76 N. E. 1095.

Ala.—Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

Ga.—Banks v. McCandless, 119 Ga. 793, 47 S. E. 332.

Ill.—Highley v. American Exch. Nat. Bank, 86 Ill. App. 48, *aff'd* 185 Ill. 565, 57 N. E. 436.

Ind. T.—Foster v. McAlester, 3 Ind. T. 307, 58 S. W. 679.

Iowa.—Yetzer v. Yetzer, 112 Iowa, 162, 83 N. W. 889.

Mich.—Adams v. Bruske, 135 Mich. 339, 97 N. W. 766.

Minn.—McCarval v. Wood, 68 Minn. 104, 70 N. W. 871.

Mo.—Swinford v. Teegarden, 159 Mo. 635, 60 S. W. 1089.

Neb.—David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

N. J.—Ruppert v. Hurley (Ch. 1900), 47 Atl. 280.

Tex.—Bruce v. Koch (Civ. App. 1900), 58 S. W. 189.

32. *N. Y.*—Castleman v. Meyer, 55 App. Div. 515, 67 N. Y. Supp. 229.

Ala.—Steiner v. Atlanta Woodenware Co., 127 Ala. 261, 28 So. 527.

D. C.—McDaniel v. Parish, 4 App. D. C. 213.

Ill.—Merchants' Nat. Bank v. Lyon, 185 Ill. 343, 56 N. E. 1083, *aff'g* 82 Ill. App. 598; Dobson v. More, 171 Ill. 271, 49 N. E. 490, *aff'g* 70 Ill. App. 89.

Kan.—Bliss v. Conch, 46 Kan. 400, 26 Pac. 706.

Mo.—Holloway v. Holloway, 103 Mo. 274, 15 S. W. 536.

Neb.—Greenwood v. Ingersoll, 61 Neb. 785, 86 N. W. 476.

Or.—Sauers v. Beechler, 38 Or. 228, 63 Pac. 195.

Tenn.—Walters v. Brown (Ch. App. 1898), 46 S. W. 777.

Wash.—Troy v. Bickford, 24 Wash. 159, 64 Pac. 152.

Can.—Merchants Bank v. Clarke, 18 Grant Ch. (U. C.) 594; Attorney General v. Harmer, 16 Grant Ch. (U. C.) 533; Morrison v. Steer, 32 U. C. Q. B. 182.

33. *N. Y.*—Ham v. Gilmore, 7 Misc. Rep. 596, 28 N. Y. Supp. 126.

U. S.—Kempner v. Churchill, 8 Wall. 362, 19 L. Ed. 461; Thompson v. Crane, 73 Fed. 327.

Ala.—Putney v. Wolberg, 127 Ala. 124, 28 So. 741; Skipper v. Reeves, 93 Ala. 332, 8 So. 804; Pickett v. Pipkin, 64 Ala. 520.

Del.—Brown v. Dickerson, 2 Marv. 119, 42 Atl. 421.

D. C.—Droop v. Ridenour, 11 App. Cas. 224.

Ga.—Colquitt v. Thomas, 8 Ga. 258.

Ill.—Bowman v. Ash, 143 Ill. 649, 32 N. E. 486; Strauss v. Kranert, 56 Ill. 254.

circumstances which are such as to convince a reasonable man that the conveyance was made with intent to hinder, delay, or defraud creditors.[34] Where fraud is charged express proof is not required, but it may be inferred from strong presumptive circumstances.[35] But while fraud must usually be gathered from circumstances, yet the finding of its existence must not result from mere suspicion, but from testimony sufficient to overcome the presumption of fair dealing.[36] The evidence to prove the fraud, though it may be cir-

Ind.—Heaton v. Shanklin, 115 Ind. 595, 18 N. E. 172; Wright v. Nipple, 92 Ind. 310; Farmer v. Calvert, 14 Ind. 209; De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Iowa.—Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520; Turner v. Younker, 76 Iowa, 258, 41 N. W. 10; McCreary v. Skinner, 75 Iowa, 411, 39 N. W. 674.

Ky.—Bradley v. Buford, 2 Ky. Dec. 12, 2 Am. Dec. 703.

La.—Succession of Dickson, 37 La. Ann. 795; King v. Atkins, 33 La. Ann. 1057; Fass v. Rice, 30 La. Ann. 1278.

Md.—Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Miss.—Pope v. Andrews, Sm. & M. Ch. 135.

Mo.—Gentry v. Field, 143 Mo. 399, 45 S. W. 286; New York Store Mercantile Co. v. West, 107 Mo. App. 254, 80 S. W. 923; Renney v. Williams, 89 Mo. 139, 1 S. W. 227; Burgert v. Borchert, 59 Mo. 80.

N. H.—McConihe v. Sawyer, 12 N. H. 396.

Pa.—Kaine v. Weigley, 22 Pa. St. 179.

S. C.—McGee v. Wells, 52 S. C. 472, 30 S. E. 602; Hudnal v. Wilder, 4 McCord 294, 17 Am. Dec. 744.

Tex.—Burch v. Smith, 15 Tex. 219, 65 Am. Dec. 154; Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Jack v. El Paso Fuel Co. (Civ. App. 1896), 38 S. W. 1139.

W. Va.—Knight v. Nease, 53 W. Va. 50, 44 S. E. 414; Vandervoort v. Fouse, 52 W. Va. 214, 43 S. E. 112; Stauffer v. Kennedy, 47 W. Va. 714, 35 S. E. 892.

Wis.—Kaufer v. Walsh, 88 Wis. 63, 59 N. W. 460; Breslauer v. Geilfuss, 65 Wis. 377, 27 N. W. 47.

Eng.—Thompson v. Webster, 28 L. J. Ch. 700, 7 Wkly. Rep. 648.

34. Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. 267; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Livesay v. Beard, 22 W. Va. 585; Goshorn v. Snodgrass, 17 W. Va. 717; Hunter v. Hunter, 10 W. Va. 321.

35. Parkhurst v. McGraw, 24 Miss. 134; Rinkle v. Nichols, 7 Mo. App. 591; Tognini v. Kyle, 15 Nev. 464.

36. *Ala.*—Smith v. Collins, 94 Ala. 394, 10 So. 334.

D. C.—McDaniel v. Parish, 4 App. D. C. 213.

Iowa.—Smyth v. Hall, 126 Iowa, 627, 102 N. W. 520.

Ky.—Thomas v. Whitaker, 7 Ky. L. Rep. 43; Walker v. Smith, 6 Ky. L. Rep. 457.

cumstantial and presumptive, must be strong and cogent, clear and satisfactory, such as will satisfy a man of sound judgment of the fact.[37] A finding that a conveyance was made with intent to defraud creditors is warranted where the general bearing of the evidence indicates fraud, although no one distinct fact proves it.[38]

§ 45. **Evidence of plaintiff's right to sue.**—Where a party attempts, as a creditor, to impeach a conveyance as fraudulent, clear and convincing proof of the existence and good faith of his claim is necessary in order to enable him to set the conveyance aside.[39] Evidence of an attachment suit and the papers and proceedings therein is not sufficient to prove that plaintiff is in fact a creditor and therefore entitled to contest the validity of a transfer alleged to be in fraud of creditors,[40] in the absence of proof of a

Miss.—White v. Trotter, 22 Miss. 30, 53 Am. Dec. 112.

Mo.—Farmers' Bank v. Worthington, 145 Mo. 91, 46 S. W. 745; Waddington v. Loker, 55 Mo. 132, 100 Am. Dec. 260.

N. H.—Jones v. Emery, 40 N. H. 348.

37. *N. Y.*—Henry v. Henry, 8 Barb. 588.

Ala.—Chamberlain v. Dorrance, 69 Ala. 40.

Ariz.—Costello v. Friedman (1903), 71 Pac. 935.

Ill.—Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70.

La.—Summers v. Clarke, 32 La. Ann. 670.

Utah.—Wilson v. Cunningham, 24 Utah, 167, 67 Pac. 118.

38. Harwick v. Weddington, 73 Iowa, 300, 24 N. W. 868; McDaniels v. Perkins, 64 Iowa, 174, 19 N. W. 902; Lehmer v. Herr, 1 Duv. (Ky.) 360.

39. *N. Y.*—Wright v. Douglass, 2 N. Y. 373, *rev'g* 3 Barb. 554; O'Connor v. Docen, 50 App. Div. 610, 64 N. Y. Supp. 206; Meyer v. Mohr, 24 N. Y. Super. Ct. 333.

Conn.—Lesser v. Brown, 75 Conn. 491, 54 Atl. 205.

Ill.—Gibson v. Gibson, 82 Ill. 61.

Iowa.—State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62.

Miss.—Hughston v. Cornish, 59 Miss. 372.

Mo.—Hiney v. Thomas, 36 Mo. 377.

Mont.—Shepherd v. First Nat. Bank, 16 Mont. 24, 40 Pac. 67.

N. J.—Perrine v. Perrine (Ch. 1901), 50 Atl. 694.

Tex.—Lewis v. Castleman, 27 Tex. 407.

Va.—Waller v. Johnson, 82 Va. 966, 7 S. E. 382.

W. Va.—Adams v. Irwin, 44 W. Va. 740, 30 S. E. 59.

40. *Cal.*—Brown v. Cline, 109 Cal. 156, 41 Pac. 862; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772; Sexey v. Adkinson, 34 Cal. 346, 91 Am. Dec. 698.

judgment, or of the existence of a debt for which judgment is demanded.[41]

§ 46. **Adjudication of creditor's claim.**—As a general rule, where a judgment creditor attacks his debtor's conveyance as fraudulent, the judgment or decree is *prima facie* evidence only, and not conclusive, of the validity of the claim, and that the claimant is a *bona fide* creditor entitled to impeach the conveyance.[42] But on a bill by a judgment creditor to set aside an alleged fraudulent conveyance antedating the judgment, the judgment is not even *prima facie* evidence that the debt existed at the time of the conveyance.[43] In an action to set aside a conveyance or assignment as a fraud upon creditors, judgments against the assignor are no evidence against the assignee or other strangers of the previous existence of the indebtedness on which they are founded.[44]

Ill.—Currier v. Ford, 26 Ill. 488.

Kan.—Morris v. Trumbo, 1 Kan. App. 150, 41 Pac. 974.

Ky.—Sharp v. Wickliffe, 13 Ky. 10, 14 Am. Dec. 37.

Mass.—Damon v. Bryant, 19 Mass. 411.

Wis.—Jones v. Lake, 2 Wis. 210.

41. Chatterton v. Mason, 86 Md. 236, 37 Atl. 960; Wright v. Crockett, 7 Mo. 125.

42. *N. Y.*—Dewey v. Moyer, 9 Hun, 473; New York, etc., R. Co. v. Kyle, 18 N. Y. Super Ct. 587.

Ala.—Lawson v. Alabama Warehouse Co., 73 Ala. 289.

Ark.—Clark v. Anthony, 31 Ark. 546.

Cal.—Hills v. Sherwood, 48 Cal. 386.

Ill.—Weightman v. Hatch, 17 Ill. 281.

Ky.—Alexander v. Quigley, 65 Ky. 399; Harlan v. Barnes, 35 Ky. 219.

La.—Dumas v. Lefebvre, 10 Rob. 399; Lopez v. Bergel, 12 La. 197. See, Fink v. Martin, 1 La. Ann. 117.

Me.—Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597.

Mass.—Inman v. Mead, 97 Mass. 310; Reid v. Davis, 33 Mass. 388.

N. C.—Hafner v. Irwin, 26 N. C. 529.

Vt.—Church v. Chapin, 35 Vt. 223.

Contra.—Faber v. Matz, 86 Wis. 370, 67 N. W. 39.

43. *Ala.*—Means v. Hicks, 65 Ala. 241; Marshall v. Croom, 60 Ala. 121.

Ill.—Sweet v. Dean, 43 Ill. App. 650.

Minn.—Bloom v. Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; Hartman v. Weiland, 36 Minn. 223, 30 N. W. 815; Olmstead County v. Barbour, 31 Minn. 256, 17 N. W. 473, 944; Braley v. Byrnes, 20 Minn. 435; Bruggerman v. Hoerr, 7 Minn. 337, 82 Am. Dec. 97.

Mo.—Eddy v. Baldwin, 23 Mo. 588.

Vt.—Warner v. Percy, 22 Vt. 155.

44. Burton v. Platter, 53 Fed. 901, 4 C. C. A. 95, 10 U. S. App. 657.

§ 47. **Pleadings.**—Where the complainant proceeds to a hearing on the bill and answer, or on bill, answer, and exhibits, all well pleaded averments of the answer, whether responsive to the allegations of the bill or in avoidance, are admitted to be true, and, in the absence of a statutory rule to the contrary, where the answer is responsive to the charges contained in the bill or complaint, it must be taken to be true, unless proven to be false by the evidence.[45] But, under the statute, a positive denial of fraud, in the answer to a bill to set aside an assignment as fraudulent, is not conclusive at a hearing upon bill and answer because of complainant's omission to reply, if it appears plainly upon the face of the assignment that it was intended to hinder and delay creditors.[46] The facts may raise such a presumption of fraud as to overcome the answer of defendants,[47] but a decree for complainant on no other evidence than the grantor's answer is erroneous.[48] A deed may be decreed fraudulent over the denial of the maker in his sworn answer.[49] Where a legal presumption of fraud is raised by the bill and it appears from the defendant's answer that the evidence is peculiarly within the defendant's power, the conveyance must be proved to be good by other evidence than the answer.[50]

45. *N. Y.*—Cunningham v. Freeborn, 1 Edw. Ch. 256.

Ala.—Pattison v. Bragg, 95 Ala. 55, 10 So. 257; Tompkins v. Nichols, 53 Ala. 197; Carter v. Happel, 49 Ala. 539; Smith v. Rogers, 1 Stew. & P. 317.

Ill.—Greenman v. Greenman, 107 Ill. 404.

Iowa.—Culbertson v. Luckey, 13 Iowa, 12.

Ky.—Hardin v. Baird, 16 Ky. 340; Bradley v. Buford, 2 Ky. 12, 2 Am. Dec. 703.

Me.—Hartshorn v. Eames, 31 Me. 93; Page v. Smith, 25 Me. 256.

Miss.—Berryman v. Sullivan, 13 Sm. & M. 65.

N. J.—Evans v. Evans (Ch. 1904), 59 Atl. 564; Stoutenbourgh v. Konkle, 15 N. J. Eq. 33.

N. C.—Hawkins v. Alston, 39 N. C. 137.

Va.—Keagy v. Trout, 85 Va. 390, 7 S. E. 329.

46. Cunningham v. Freeborn, 1 Edw. Ch. (N. Y.) 456.

47. Vandall v. Vandall, 13 Iowa, 247.

48. Shirley v. Shields, 8 Blackf. (Ind.) 273.

49. English v. King, 57 Tenn. 666.

50. Callan v. Stratham, 64 U. S. 477, 16 L. Ed. 532. See also McCorkle v. Montgomery, 11 Rich. Eq. (S. C.) 114.

§ 48. **Nature and circumstances of transaction generally.**—In a suit to set aside a conveyance as fraudulent as to creditors, the fraudulent character of the transaction may be established by various facts and circumstances, such as appear in the cases cited in the note below.[51] The assignment by a debtor of his book accounts,[52] or wages,[53] may be shown to be fraudulent by attending circumstances. The fact that articles of personalty were conveyed without inventory, measurement, or count,[54] secrecy in the trans-

51. *N. Y.*—Robinson v. Hawley, 45 App. Div. 287, 61 N. Y. Supp. 138; Iselin v. Goldstein, 35 Misc. Rep. 489, 71 N. Y. Supp. 1069; Watson v. Dealy, 26 Misc. Rep. 20, 55 N. Y. Supp. 563; Home Bank v. J. P. Brewster, 17 Misc. Rep. 442, 41 N. Y. Supp. 203; Angrave v. Stone, 25 How. Pr. 167; Hendricks v. Robinson, 2 Johns. Ch. 283, *aff'd* 17 Johns. 438.

U. S.—McDonald v. First Nat. Bank, 116 Fed. 129, 53 C. C. A. 533.

Ala.—Murphy v. Green, 128 Ala. 486, 30 So. 643.

Ga.—Banks v. McCandless, 119 Ga. 793, 47 S. E. 332.

Ill.—Whitley v. Scroggin, 95 Ill. App. 530.

Ind.—Fitch v. Rising Sun Bank, 99 Ind. 443.

Iowa.—Jordan v. Crickett, 123 Iowa, 576, 99 N. W. 163.

Kan.—Wing v. Miller, 40 Kan. 511, 20 Pac. 119.

Ky.—Harrison v. Calvert, 23 Ky. L. Rep. 890, 64 S. W. 521.

Md.—Wise v. Pfaff, 98 Md. 576, 56 Atl. 815.

Mich.—Desbecker v. Mendelson, 117 Mich. 293, 75 N. W. 621.

Minn.—Solberg v. Peterson, 27 Minn. 431, 8 N. W. 144.

Mo.—Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685; Snell v. Harrison, 104 Mo. 158, 16 S. W. 152; Hungerford v. Greengard, 95 Mo. App. 653, 69 S. W. 602.

Neb.—Pennett v. Warner, 53 Neb. 780, 74 N. W. 261.

N. J.—Levy v. Levy (Ch. 1904), 57 Atl. 1011; Union Square Nat. Bank v. Simmons (Ch. 1899), 42 Atl. 489.

Or.—Craig v. California Vineyard Co. (1896), 46 Pac. 421.

Pa.—De Wolf v. McNabb, 1 Pa. Cas. 156, 1 Atl. 440.

Tenn.—Berry v. Sofge (Ch. App. 1907), 46 S. W. 456.

Tex.—Frost v. Mason, 17 Tex. Civ. App. 465, 44 S. W. 53.

Wash.—Mosley v. Donnell (1906), 85 Pac. 259.

Wis.—Sheboygan Boot, etc., Co. v. Miller, 99 Wis. 527, 75 N. W. 87.

52. Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

53. O'Connor v. Meehan, 47 Minn. 247, 49 N. W. 982.

54. *Ind.*—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347; Fitch v. Rising Sun Bank, 99 Ind. 443.

Iowa.—Redhead v. Pratt, 72 Iowa, 99, 33 N. W. 382.

Kan.—Roberts v. Radcliff, 35 Kan. 502, 11 Pac. 406.

Tenn.—Phillips-Buttorff Mfg. Co. v. Williams (1900), 63 S. W. 185.

Tex.—Blossman v. Friske, 33 Tex. Civ. App. 191, 76 S. W. 73.

action,[55] undue haste in closing the transaction,[56] the failure of the transferee to include the property in his subsequent assessment lists,[57] are suspicious circumstances. That the relations of the parties are intimate is a fact to be considered in weighing the evidence.[58] The character of the evidence is to be considered, and if the evidence in support of the transaction is vague, confused, contradictory, inconsistent, or evasive, it is entitled to little, if any, weight.[59] Destruction, fabrication, suppression or non-production of evidence is a fact to be taken into consideration against the party guilty thereof in weighing the evidence.[60] Want of

55. Bush, etc., Co. v. Helbing, 134 Cal. 676, 66 Pac. 967; Shelton v. Blake, 115 Ill. 275, 6 N. E. 409. See Secrecy or haste, chap. VI, § 17, *supra*.

56. Kempner v. Churchill, 75 U. S. 362, 19 L. Ed. 461; Roberts v. Radcliff, 35 Kan. 502; Gage v. Trawick, 94 Mo. App. 307, 68 S. W. 85. *Compare* Magruder v. Clayton, 29 S. C. 407, 7 S. E. 844.

57. Wilcoxson v. Darr, 139 Mo. 660, 41 S. W. 227; Boyer v. Tucker, 70 Mo. 457; Anonymous, 2 Desaus. Eq. (S. C.) 304.

58. Blaut v. Gabler, 77 N. Y. 461, *aff'g* 8 Daly, 48; Appeal of Bardwell, 1 Lanc. Bar (Pa.) Dec. 18, 1869.

59. *Ala.*—Shepherd v. Reeves, 114 Ala. 281, 21 So. 956.

Ark. — Slayden-Kirksey Woolen Mills v. Anderson, 66 Ark. 419, 50 S. W. 994.

Colo.—Kelly v. Atkins, 14 Colo. App. 208, 59 Pac. 841.

Iowa.—Gaar v. Stolte, 115 Iowa, 139, 88 N. W. 334; Romans v. Maddux, 77 Iowa, 203, 41 N. W. 763.

Ky.—Perkins v. Mann, 19 Ky. L. Rep. 575, 41 S. W. 1.

Mo.—Lohmann v. Stocke, 94 Mo. 672, 8 S. W. 9; Hamill v. England, 57 Mo. App. 106.

Neb.—Lewis v. Holdrege, 55 Neb. 173, 75 N. W. 549.

Nev.—Tognini v. Kyle, 15 Nev. 464.

Tenn.—Byler v. Adams (Ch. App. 1901), 62 S. W. 21.

Wash.—Budlong v. Budlong, 32 Wash. 672, 73 Pac. 783; Bates v. Drake, 28 Wash. 447, 68 Pac. 961.

Wyo.—Sterling v. Wagner, 3 Wyo. 5, 31 Pac. 1032.

60. *U. S.*—McRea v. Alabama Branch Bank, 19 How. 376, 15 L. Ed. 688.

Ala.—Martin v. Berry, 116 Ala. 233, 22 So. 493. See Elyton Land Co. v. Vance, 119 Ala. 315, 24 So. 719.

Iowa.—Corn Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268.

Ky.—Pullins v. Pullins, 23 Ky. L. Rep. 313, 62 S. W. 865.

La.—Goothye v. Delatour, 111 La. 766, 35 So. 896.

Mass.—Smith v. Whitman, 88 Mass. 562.

Mich.—Rosenthal v. Bishop, 98 Mich. 527, 57 N. W. 573.

Neb.—Millard v. Parsell, 57 Neb. 178, 77 N. W. 390.

N. J.—Gardner v. Kleinke, 40 N. J. Eq. 90, 18 Atl. 457.

Or.—Walker v. Harold, 44 Or. 205, 74 Pac. 705.

notice to creditors as provided by statute, of the sale of a stock of merchandise in bulk is presumptive evidence of fraud.[61] The conveyance by a trader in goods or merchandise of his entire stock in trade,[62] the failure to record the instrument of transfer or withholding it from record, or unreasonable delay in recording it,[63] the reservation by the debtor of some secret benefit in the property conveyed,[64] the retention of possession or control of the property by the debtor after the transfer,[65] or the treating of it as his own,[66]

Pa.—Lesser v. Driesen, 2 Lack. Leg. N. 343.

Tenn.—Shapira v. Paletz (Ch. App. 1900), 59 S. W. 774.

Wash.—Banner v. May, 2 Wash. 221, 26 Pac. 248. See Reckers v. Allmond, 29 Wash. 238, 69 Pac. 734.

W. Va.—Martin v. Rexroad, 15 W. Va. 512.

61. Fisher v. Herrman, 118 Wis. 424, 95 N. W. 392.

62. *Iowa.*—Redhead v. Pratt, 72 Iowa, 99, 33 N. W. 382.

Kan.—Elerck v. Braden, 38 Kan. 83, 15 Pac. 887.

Mo.—Gage v. Trawick, 94 Mo. App. 307, 68 S. W. 85.

Pa.—Lesser v. Driesen, 2 Lanc. Leg. N. 343.

Tex.—Blossman v. Friske, 33 Tex. Civ. App. 191, 76 S. W. 73.

63. *U. S.*—Williams v. Simons, 70 Fed. 40, 16 C. C. A. 628, but failure to record does not vitiate the transfer in the absence of a fraudulent intent.

Ala.—Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Mobile Sav. Bank v. McDonnell, 87 Ala. 736.

Cal.—Bush, etc., Co. v. Helbing, 134 Cal. 676, 66 Pac. 967.

Colo.—Walton v. First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200.

Ga.—Kea v. Epstein, 87 Ga. 115, 13 S. E. 312.

Ill.—Shelton v. Blake, 115 Ill. 275, 6 N. E. 409.

Ind.—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.—Snouffer v. Kinley, 96 Iowa, 102, 64 N. W. 770.

Mo.—Snell v. Harrison, 104 Mo. 158, 16 S. W. 152.

Tex.—Tinsley v. Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910.

Wash.—Keith v. Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333. See Montesano Nat. Bank v. Graham, 40 Wash. 490, 82 Pac. 881, transfer under absolute contract need not be recorded.

W. Va.—Hunter v. Hunter, 10 W. Va. 321.

64. Sparks v. Mack, 31 Ark. 666; Elerick v. Braden, 38 Kan. 83, 15 Pac. 887; Appeal of Bardwell, 1 Lanc. Bar (Pa.) Dec. 18, 1869.

Proof insufficient to show a secret trust.—Miller v. Rowan, 108 Ala. 598, 19 So. 9; Sawyer v. Bradshaw, 125 Ill. 440, 17 N. E. 812.

65. *N. Y.*—Blaut v. Gabler, 77 N. Y. 461, *aff'g* 8 Daly, 48; MacDonald v. MacDonald, 57 Hun, 594, 11 N. Y. Supp. 248; Home Bank v. Brewster, 17 Misc. Rep. 442, 41 N. Y. Supp. 203; Hildreth v. Sands, 2 Johns. Ch. 35.

are facts which taken separately or together, or in connection with each other or with other facts and circumstances, are sufficient to establish fraud and justify setting aside a conveyance as fraudulent as to creditors. To rebut appearances of fraud the change of possession must be clearly established by direct evidence,[67] and the absence of acts of ownership or possession by the seller is not conclusive of the change of ownership, where the property apparently remained after the sale under the control of the seller.[68] Cases where the evidence was held to show a change of possession,[69]

U. S.—McRea v. Alabama Branch Bank, 19 How. 376, 15 L. Ed. 688; Venable v. U. S. Bank, 2 Pet. 107, 7 L. Ed. 364.

Ala.—Mauldin v. Mitchell, 14 Ala. 814.

Ark.—Bryan-Brown Shoe Co. v. Block, 52 Ark. 458, 12 S. W. 1073.

Colo.—LaFitte v. Rups, 13 Colo. 207, 22 Pac. 309.

Ind.—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.—Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572.

Kan.—Roberts v. Radcliffe, 35 Kan. 502, 11 Pac. 406.

Ky.—Charles v. Matney, 24 Ky. L. Rep. 1384, 71 S. W. 511.

La.—Pruyn v. Young, 51 La. Ann. 320, 25 So. 125.

Me.—Rollins v. Mooers, 25 Me. 192.

Mich.—People v. Rice, 79 Mich. 354, 44 N. W. 790.

Minn.—Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

Mo.—Frank v. Reuter, 116 Mo. 517, 22 S. W. 812.

Neb.—Steinkraus v. Kroth, 44 Neb. 777, 62 N. W. 1110.

N. H.—Seavy v. Dearborn, 19 N. H. 351.

Pa.—Fidelity Ins., etc., Co. v. Madden, 14 Mont. Co. L. Rep. 210; Bastian v. Dougherty, 3 Phila. 30.

Tenn.—Berry v. Sofge (Ch. App. 1897), 46 S. W. 456.

Tex.—Rives v. Stephens (Civ. App. 1894), 28 S. W. 707.

Wash.—Keith v. Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

W. Va.—Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. 267. *Compare* Griffis v. Griffis, 89 Ga. 142, 15 S. E. 23; Fuller v. Brewster, 53 Md. 358; Magruder v. Clayton, 29 S. C. 407, 7 S. E. 844; Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392; Norris v. Persons, 49 Wis. 101, 5 N. W. 224.

66. *Ark.*—May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

Iowa.—Parlin, etc., Co. v. Daniels (1900), 82 N. W. 1015; Maish v. Crangle, 80 Iowa, 650, 45 N. W. 578.

Mich.—Webber v. Jackson, 79 Mich. 175, 44 N. W. 591, 19 Am. St. Rep. 165.

Mo.—Boyer v. Tucker, 70 Mo. 457.

S. C.—Anonymous, 2 Desans. Eq. 304. *Compare* Martin v. Rexwad, 15 W. Va. 512.

67. Grove v. Gilbert, 5 Phila. (Pa.) 135.

68. Boothby v. Brown, 40 Iowa, 104.

69. Butler v. Howell, 15 Colo. 249, 25 Pac. 313; Howe v. Keeler, 27 Conn. 538; Martin v. Duncan, 47 Ill. App. 84; Norse v. Velzy, 123 Mich. 532, 82

where the evidence was held not sufficient to rebut the presumption of fraud arising from the retention of possession by the seller,[70] and where the presumption of fraud was held to have been overcome by the evidence,[71] are cited in the notes below. The mere fact that the transaction in question is prejudicial to creditors does not render it fraudulent and void. Fraud must be shown either by direct evidence of a credible kind or by just inferences from the circumstances disclosed. The evidence must be of such character and decree as will justify reasonable men in concluding that the fraud existed, and evidence that merely casts suspicion on the transaction is not sufficient to vitiate it.[72] The absence of a

N. W. 225; Johnson v. Lucas, 103 Va. 36, 48 S. E. 497.

70. *N. Y.*—Wallace v. Nodine, 57 Hun (N. Y.), 239, 10 N. Y. Supp. 919.

Ala.—Ward v. Shirley, 131 Ala. 568, 32 So. 489.

Ark.—Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. 137.

La.—Emswiler v. Burham, 6 La. Ann. 710.

N. H.—Cutting v. Jackson, 56 N. H. 253.

S. C.—Fulmore v. Burrows, 2 Rich. Eq. (S. C.) 95.

Wis.—Mayer v. Webster, 18 Wis. 393.

71. Payne v. Buford, 106 La. 83, 30 So. 263; Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147; Houck v. Heinzman, 37 Neb. 463, 55 N. W. 1062.

72. *N. Y.*—Truesdell v. Bourke, 145 N. Y. 612, 40 N. E. 83, *rev'g* 80 Hun, 55, 29 N. Y. Supp. 849; King v. Simmons, 36 App. Div. 623, 55 N. Y. Supp. 173.

U. S.—Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157; McCartney v. Earle, 115 Fed. 462, 53 C. C. A. 392, *aff'g* 112 Fed. 372; Edward P. Allis Co. v. Standard Nat. Bank, 110 Fed. 47; Neal v. Foster, 36 Fed. 29.

Ala.—First Nat. Bank v. Steele, 98 Ala. 85; 12 So. 783.

Ark.—Davis v. Arkansas F. Ins. Co., 63 Ark. 412, 39 S. W. 258.

Iowa.—First Nat. Bank v. Garrettson, 107 Iowa, 196, 77 N. W. 856.

Md.—Fuller v. Brewster, 53 Md. 358.

Miss. — Frank v. Stephenson (1897), 21 So. 778.

Mo.—Burnham v. Boyd, 167 Mo. 185, 96 S. W. 1088; Meyer Bros. Drug Co. v. White, 165 Mo. 136, 65 S. W. 295; Parker v. Roberts, 116 Mo. 657, 22 S. W. 914.

Neb.—Farmers', etc., Nat. Bank v. Mosher, 63 Neb. 130, 88 N. W. 552.

N. J.—Emerald, etc., Brewing Co. v. Sutton, 68 N. J. L. 246, 56 Atl. 302.

S. C.—Jerkowski v. Marco, 57 S. C. 302, 35 S. E. 750.

Wash.—Rickers v. Allmond, 29 Wash. 238, 69 Pac. 734.

Wis.—Norris v. Persons, 49 Wis. 101, 5 N. W. 224.

Eng.—Marlow v. Orgill, 8 Jur. N. S. 829.

Preference to creditor held not to be fraudulent. Priest v. Brown,

motive for disguise,[73] and the fact that the grantee's title has long remained unquestioned,[74] are weighty circumstances against simulation. The rules applicable to evidence in civil actions generally govern and determine the weight and sufficiency of evidence to show that a debtor has bought property or procured a conveyance in the name of another, for the purpose of hindering, delaying, and defrauding his creditors, and to thus establish a trust in favor of the debtor so as to render the property liable for his debts.[75] The same rules apply to evidence offered to prove that a debtor is conducting business in the name of another,[76] or to prove the fraudulency of legal proceedings,[77] mortgage or judicial sales,[78] attachments,[79] and judgments.[80]

100 Cal. 626, 35 Pac. 323; Teitig v. Boesman, 12 Mont. 404, 31 Pac. 371; Southern Flour Co. v. McIver, 109 N. C. 120, 13 S. E. 905.

73. Smith v. Hall, 19 Ky. L. Rep. 1662, 44 S. W. 125; Todd v. Larkin, 38 La. Ann. 762.

74. Todd v. Larkin, *supra;* Frank v. Stephenson (Miss. 1907), 21 So. 778.

75. *Ala.*—Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

Ky.—Lewis v. Kash, 25 Ky. L. Rep. 1241, 77 S. W. 697; Carroll v. Ward, 15 Ky. L. Rep. 699, 25 S. W. 6.

Neb.—Kearney County Bank v. Dullenty, 4 Neb. (Unoff.) 753, 96 N. W. 169.

N. C.—Stephenson v. Felton, 106 N. C. 114, 11 S. E. 255.

S. D.—Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

Va.—Crowder v. Garber, 97 Va. 565, 34 S. E. 470; Martin v. Warner, 34 W. Va. 182, 12 S. E. 477.

Evidence insufficient to establish a trust.—*Iowa.*—Vandercook v. Gere, 69 Iowa, 467, 29 N. W. 448.

Mo.—Hoeller v. Haffner, 155 Mo. 589, 56 S. W. 312.

Pa.—Savits v. Speck, 21 Pa. Super. Ct. 608.

S. C.—De Loach v. Sarratt (1899), 33 S. E. 365.

Va.—Kinnier v. Woodson, 94 Va. 711, 27 S. E. 457; Terry v. Fontaine, 83 Va. 451, 2 S. E. 743.

W. Va.—Enslow v. Sliger, 51 W. Va. 405, 41 S. E. 173.

76. Evidence held not to show fraud.—McCabe v. Brayton, 38 N. Y. 196; Kluender v. Lynch, 2 Abb. Dec. (N. Y.) 538, 4 Keyes, 361; Aberholtzer v. Hazen, 92 Iowa, 602, 61 N. W. 365.

Evidence held to show fraud.—Farmers' Bank v. Marshall, 18 Ky. L. Rep. 249, 35 S. W. 912; Wedgewood v. Withers, 35 Neb. 583, 53 N. W. 576.

77. Allen v. Smith, 129 U. S. 465, 9 Sup. Ct. 338, 32 L. Ed. 732; Platt-Barber Co. v. Groves, 193 Pa. St. 475, 44 Atl. 571; Alexander v. Hemrich, 4 Wash. 727, 31 Pac. 21.

78. Whitly v. Scroggin, 95 Ill. App. 530; Morrison v. Harrington, 120 Mo.

§ 49. **Transactions between relatives.**—The mere fact of relationship between the parties to a transaction which is prejudicial to the interests of creditors does not establish fraud. A debtor may deal with his relatives the same as with strangers, and business dealings between them are to be treated as are the transactions of other people, where the circumstances are not so unequivocal as to compel an inference of fraud, but could exist consistently with an innocent intent and honest purpose.[81] In some cases it is held that no stronger degree of proof of the validity of a transaction between relatives is required than if it was between strangers,[82] but other cases hold to the contrary.[83] It is held by the weight of authority, however, that the fact of relationship may cast suspicion on the transaction and lend credence to the claim that it was the result

665, 25 S. W. 568; Woodard v. Martin, 106 Mo. 324, 17 S. W. 308; Snell v. Harrison, 104 Mo. 158, 16 S. W. 152.

79. Attachments held fraudulent as against debtor's other creditors.—H. T. Simon-Gregory Dry Goods Co. v. Newman, 50 La. Ann. 338, 23 So. 329; Craig v. California Vineyard Co., 30 Or. 43, 46 Pac. 421; Zadik v. Schafer, 77 Tex. 501, 14 S. W. 153.

Attachments held not fraudulent.—Adair v. Feder, 133 Ala. 620, 32 So. 165; Cartwright v. Bamberger, 99 Ala. 622, 14 So. 477.

80. Judgment held to be fraudulent as against other creditors.—Walton v. First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 763; Lesser v. Driesen, 2 Lack. Leg. N. 343; Douglass v. Ward, 11 Grant Ch. (U. C.) 39.

Judgment held not to be fraudulent.—Sackett v. Stone, 115 Ga. 466, 41 S. E. 564; Citizens' F., etc., Ins. Co. v. Wallis, 23 Md. 173; Green v. Huggins (Tenn. Ch. App. 1898), 52 S. W. 675; Snowball v. Neilson, 16 Can. Sup. Ct. 719; Powell v. Boulton, 2 U. C. Q. B. 487.

81. *N. Y.*—Jackson v. Badger, 109 N. Y. 632, 16 N. E. 208; Nichols v. Nichols, 40 Misc. Rep. 9, 81 N. Y. Supp. 156.

U. S.—Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157.

Ala.—Wilkinson v. Buster, 115 Ala. 578, 22 So. 34.

Ill.—Nott v. Shutts, 87 Ill. App. 341.

Iowa.—King v. Babcock, 40 Iowa, 690.

Ky.—Warden v. Fulkerson, 22 Ky. L. Rep. 184, 56 S. W. 717; First Nat. Bank v. Lancaster, 12 Ky. L. Rep. 541, 14 S. W. 536.

Mo.—Ettlinger v. Kahn, 134 Mo. 492, 36 S. W. 37; Shotwell v. McElhinney, 101 Mo. 677, 14 S. W. 754.

N. C.—Southern Flour Co. v. McIver, 109 N. C. 120, 13 S. E. 905.

Va.—Terry v. Fontaine, 83 Va. 451, 2 S. E. 743.

82. Clewis v. Malon, 119 Ala. 312, 24 So. 767; Teague v. Lindsey, 106 Ala. 266, 17 So. 538.

83. Fisher v. Moog, 39 Fed. 665; Burt v. Timmons, 29 W. Va. 441.

of a conspiracy by or collusion between the parties thereto to defraud creditors, since relatives may be presumed to be on terms of intimacy, and to have a natural and strong motive to protect each other at the expense of creditors, and more likely than other persons to lend aid to each other in case of pecuniary difficulty; and where a transaction between relatives is shown to have been attended by suspicious circumstances such as are pointed out in the preceding section as tending to show fraud, the evidence is sufficient to establish the invalidity of the transfer or conveyance as fraudulent as to creditors.[84] The same rule is generally applied to transactions between husband and wife,[85] and transactions be-

84. *N. Y.*—Evans v. Sims, 82 Hun, 396, 31 N. Y. Supp. 259; Fox v. Bronson, 35 Misc. Rep. 431, 71 N. Y. Supp. 980; Nichthauser v. Lehman, 17 Misc. Rep. 336, 39 N. Y. Supp. 1091.

U. S.—McRea v. Branch Bank, 60 U. S. 376, 15 L. Ed. 688; Venable v. Bank of U. S., 27 U. S. 107, 7 L. Ed. 364.

Ark.—Smith v. Goodrich (1905), 87 S. W. 125; Bryan-Brown Shoe Co. v. Block, 52 Ark. 458, 12 S. W. 1073.

Colo.—Walton v. First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765; La Fitte v. Rups, 13 Colo. 207, 22 Pac. 309.

Iowa.—Smith v. Bigelow (1904), 99 N. W. 590; Corn Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268; Maish v. Crangle, 80 Iowa, 650, 14 N. W. 578; King v. Arnold, 52 Iowa, 712, 2 N. W. 955.

Mich.—Desbecker v. Mendelson, 117 Iowa, 293, 75 N. W. 621; People v. Rice, 79 Mich. 354, 44 N. W. 790; Webber v. Jackson, 79 Mich. 175, 44 N. W. 591, 19 Am. St. Rep. 165.

Minn.—Kells v. McClure, 69 Minn. 60, 71 N. W. 827.

Mo.—Baum v. Sauer, 117 Mo. 460, 23 S. W. 147; Lohmann v. Stocke, 94 Mo. 672, 8 S. W. 9.

Neb.—First Nat. Bank v. Tompkins, 3 Neb. (Unoff.) 328, 91 N. W. 551.

N. J.—Miller v. Jamison, 26 N. J. Eq. 404.

Pa.—Bastin v. Dougherty, 3 Phila. 30.

S. D.—Watt v. Morrow (1905), 103 N. W. 45.

Tenn.—Phillips-Buttorf Mfg. Co. v. Williams (1900), 63 S. W. 185.

Tex.—Zadick v. Schafer, 77 Tex. 501, 14 S. W. 153; Tinsley v. Corbett, 27 Tex. Civ. App. 633, 66 S. W. 910.

Wash.—Adams v. Dempsey, 35 Wash. 80, 76 Pac. 538; Keith v. Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

W. Va.—Ballard v. Chewning, 49 W. Va. 508, 39 S. E. 170; Parker v. Valentine, 27 W. Va. 677.

Wyo.—Stirling v. Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

85. Evidence sufficient to show fraud.—*N. Y.*—Multz v. Price, 91 App. Div. 116, 86 N. Y. Supp. 480; Nichthauser v. Lehman, 17 Misc. Rep. 336, 39 N. Y. Supp. 1091.

Ala.—Noble v. Gilliam, 136 Ala. 618, 33 So. 861; Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

tween parent and child,[86] whereby property is conveyed or transferred, and to conveyances by husband to wife through third

Ark.—Smith v. Goodrich (1905), 87 S. W. 125; Slayden-Kirksey Woolen Mills v. Anderson, 66 Ark. 419, 50 S. W. 994.

Colo.—Kelly v. Atkins, 14 Colo. App. 208, 59 Pac. 841.

Ga.—Gregory v. Gray, 88 Ga. 172, 14 S. E. 187.

Ill.—Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703, *rev'g* 111 Ill. App. 524; Hauk v. Van Ingen, 97 Ill. App. 642, *aff'd* 196 Ill. 20, 63 N. E. 705.

Iowa.—Gaar v. Stolte, 115 Iowa, 139, 88 N. W. 334; Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572; Wasson v. Millsap, 77 Iowa, 762, 42 N. W. 528.

Kan.—Dresher v. Corson, 23 Kan. 313.

Ky.—Scott v. Powers, 25 Ky. L. Rep. 1640, 78 S. W. 408.

La.—Goothye v. Delatour, 111 La. 766, 35 So. 896.

Md.—Downs v. Miller, 95 Md. 602, 53 Atl. 445.

Mich.—Gruner v. Brooks, 126 Mich. 465, 85 N. W. 1085.

Minn.—Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

Mo.—Ettlinger v. Kahn, 134 Mo. 492, 36 S. W. 37.

Neb.—Kearney County Bank v. Dullenty (1901), 96 N. W. 169.

N. C.—Stephenson v. Felton, 106 N. C. 114, 11 S. E. 255.

Okla.—Jenks v. McGowan, 9 Okla. 306, 60 Pac. 239.

Or.—Walker v. Harold, 44 Or. 205, 74 Pac. 705.

S. C.—Mitchell v. Mitchell, 42 S. C. 475, 20 S. E. 405.

S. D.—Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

Tenn.—Shapira v. Paletz (Ch. App. 1900), 59 S. W. 774.

Tex.—Rives v. Stephens (Civ. App. 1894), 28 S. W. 707.

Va.—Crowder v. Garber, 97 Va. 565, 34 S. E. 470.

Wash.—Bates v. Drake, 28 Wash. 447, 68 Pac. 961.

W. Va.—Brooks v. Applegatt, 37 W. Va. 373, 16 S. E. 585; Martin v. Warner, 34 W. Va. 182, 12 S. E. 477.

Evidence not sufficient to show fraud.—*N. Y.*—Kalish v. Higgins, 175 N. Y. 495, 67 N. E. 1084, *aff'g* 70 App. Div. 192, 75 N. Y. Supp. 397; Wilbur v. Fradenburgh, 52 Barb. 474; Glaser v. Carroll, 20 N. Y. Supp. 766.

Ala.—Elyton Land Co. v. Yance, 119 Ala. 315, 24 So. 719.

Colo.—Vote v. Karrick, 13 Colo. App. 388, 58 Pac. 333.

Ga.—Sackett v. Stone, 115 Ga. 466, 41 S. E. 564.

Ill.—Tyberandt v. Raucke, 96 Ill. 71; Cooke v. Peter, 93 Ill. App. 1.

Iowa.—Pieter v. Bales, 126 Iowa, 170, 101 N. W. 865; Belden v. Younger, 76 Iowa, 567, 41 N. W. 317.

Ky.—Berry v. Ewen, 27 Ky. L. Rep. 467, 85 S. W. 227.

Mich.—First Nat. Bank v. Condon, 122 Mich. 457, 81 N. W. 341.

Minn.—Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137.

Miss.—Virden v. Dwyer, 78 Miss. 763, 30 So. 45.

Mo.—Citizens' Bank v. Burrus, 178 Mo. 716, 77 S. W. 748.

Neb.—Kimbro v. Clark, 17 Neb. 403, 22 N. W. 788.

Or.—Wright v. Craig, 40 Or. 191, 66 Pac. 807.

persons.[87] A preponderance of evidence is all that is necessary to

Pa.—Moore v. Moore, 165 Pa. St. 464, 30 Atl. 932.

S. C.—De Loach v. Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

Tex.—O'Neal v. Clymer (Civ. App. 1900), 61 S. W. 545.

Va.—Kinnier v. Woodson, 94 Va. 711, 27 S. E. 457.

Wash.—Budlong v. Budlong, 32 Wash. 672, 73 Pac. 783.

W. Va.—Enslow v. Sliger, 51 W. Va. 405, 41 S. E. 173.

Can.—Snowball v. Neilson, 16 Can. Sup. Ct. 719.

Conducting business in wife's name held to be in fraud of creditors. Farmers' Bank v. Marshall, 18 Ky. L. Rep. 249, 35 S. W. 912; Wedgewood v. Withers, 35 Neb. 583, 53 N. W. 576. But see Kluender v. Lynch, 2 Abb. Dec. (N. Y.) 538, 4 Keyes, 361.

86. Evidence sufficient to show fraud.—*N. Y.*—Merchants' Nat. Bank v. Chapin, 61 Hun, 620, 15 N. Y. Supp. 427; Nichols v. Morrow, 58 Hun, 606, 11 N. Y. Supp. 878; McDonald v. McDonald, 57 Hun, 594, 11 N. Y. Supp. 248.

U. S.—Walker v. Houghteling, 120 Fed. 928, 57 C. C. A. 218.

Ala.—Martin v. Berry, 116 Ala. 233, 22 So. 493.

Iowa.—Hunt v. Johnston, 105 Iowa, 311, 75 N. W. 103.

Ky.—Zimmerman v. McMasters, 25 Ky. L. Rep. 456, 76 S. W. 5.

La.—Pruyn v. Young, 51 La. Ann. 320, 25 So. 125.

Me.—Rollins v. Mooers, 25 Me. 192.

Mass.—Smith v. Whitman, 88 Mass. 562.

Mich.—Kastl v. Arthur, 135 Mich. 278, 97 N. W. 711.

Mo.—Spratt v. Early, 169 Mo. 357, 69 S. W. 13; Van Raalte v. Harrington, 101 Mo. 602, 20 Am. St. Rep. 626, 14 S. W. 710, 11 L. R. A. 424.

Neb.—Steinkraus v. Korth, 44 Neb. 777, 62 N. W. 1110.

N. J.—Perrine v. Perrine (Ch. 1901), 50 Atl. 694; Gardner v. Klienke, 46 N. J. Eq. 90, 18 Atl. 457.

N. D.—Soly v. Aasen, 10 N. D. 108, 86 N. W. 108.

Or.—Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805.

Pa.—Fidelity Ins., etc., Co. v. Madden, 14 Montg. Co. Rep. 210.

S. C.—Fulmore v. Burrows, 2 Rich. Eq. 95.

Va.—Hazlewood v. Forrer, 94 Va. 703, 27 S. E. 507.

Wash.—Keith v. Kreidel, 4 Wash. 544, 30 Pac. 638, 31 Pac. 333.

W. Va.—Knight v. Nease, 53 W. Va. 50, 44 S. E. 414.

Can.—Douglass v. Ward, 11 Grant Ch. (U. C.) 39.

Evidence not sufficient to show fraud.—*N. Y.*—Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105, *rev'g* 17 N. Y. Supp. 223; Parks v. Murray, 2 St. Rep. 628.

U. S.—Allen v. Smith, 129 U. S. 465, 9 Sup. Ct. 338, 32 L. Ed. 732; Blackmort v. Parks, 81 Fed. 899, 26 C. C. A. 670.

Ala.—Morrow v. Campbell, 118 Ala. 330, 24 So. 852.

Colo.—Otis v. Rose, 9 Colo. App. 449, 48 Pac. 967.

Conn.—Hallock v. Alvord, 61 Conn. 194, 23 Atl. 131.

Ga.—Griffis v. Griffis, 89 Ga. 142, 15 S. E. 23.

Iowa.—Walker v. Kynett, 36 Iowa, 694.

establish the validity, as against creditors, of a conveyance from husband to wife.[88] In the notes below are cited cases in which the indebtedness of the husband to his wife has been held to have been established by the evidence,[89] and others in which it has been held not established,[90] and cases where the wife's ownership of property sought to be subjected to the husband's debts has been held to have

Ky.—McMillan v. Stephens, 20 Ky. L. Rep. 1528, 49 S. W. 778.

Md.—Zahn v. Smith (1889), 18 Atl. 865.

Mich.—Woodhull v. Whittle, 63 Mich. 575, 30 N. W. 368.

Mo.—Glietz v. Schuster, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461.

Mont.—Wilson v. Harris, 19 Mont. 69, 47 Pac. 1101, 21 Mont. 374, 54 Pac. 46.

Neb.—Houck v. Heinzman, 37 Neb. 463, 55 N. W. 1062.

N. C.—Southern Flour Co. v. McIver, 109 N. C. 120, 13 S. E. 905.

Ohio.—First Nat. Bank v. Rice, 22 Ohio Cir. Ct. 183, 12 Ohio Cir. Dec. 121.

Va.—Bresee v. Bradfield, 99 Va. 331, 38 S. E. 196.

W. Va.—Piedmont Bank v. Bowman, 39 W. Va. 622, 20 S. E. 593.

87. Conveyance held fraudulent.—*N. Y.*—Cole v. Tyler, 65 N. Y. 73; Simmons v. Johnson, 48 Hun, 131; Emmerich v. Hefferan, 58 N. Y. Super. Ct. 217, 9 N. Y. Supp. 801.

Ala.—Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50.

Ill.—Frank v. King, 121 Ill. 250, 12 N. E. 720.

Iowa.—Shaffer v. Mink, 60 Iowa, 754, 14 N. W. 126.

Mo.—Hoffman v. Nolte, 127 Mo. 120, 29 S. W. 1006.

Ohio.—Zieverink v. Kemper, 10 Ohio Dec. 455.

W. Va.—Hutchinson v. Boltz, 35 W. Va. 754, 14 S. E. 267.

Conveyance held valid.—*N. Y.*—Carter v. Meisch, 18 N. Y. Supp. 804.

Mo.—National Brewery Co. v. Linsday, 72 Mo. App. 591.

Neb.—Blair State Bank v. Bunn, 61 Neb. 464, 85 N. W. 527.

S. C.—De Loach v. Sarratt (1899), 33 S. E. 365.

88. Stevens v. Carson, 30 Neb. 544, 46 N. W. 655; Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731; Evans v. Rugee, 57 Wis. 623, 16 N. Y. 49. See, however, California Bank v. Cowan, 75 Fed. 145, 21 C. C. A. 279.

89. Ellis v. Myers, 4 Silv. Sup. (N. Y.) 323, 8 N. Y. Supp. 139; McCormick Harvesting Mach. Co. v. Griffin, 116 Iowa, 397, 90 N. W. 84; Lehman v. Coulon, 105 La. 431, 29 So. 879.

90. *U. S.*—California Bank v. Cowan, 75 Fed. 145, 21 C. C. A. 279.

Ala.—Shepherd v. Reeves, 114 Ala. 281, 21 So. 956.

Ark.—Waters v. Merrit Pants Co. (1905), 88 S. W. 879.

Iowa.—Woods v. Allen, 109 Iowa, 484, 80 N. W. 540.

Tenn.—Byler v. Adams (Ch. App. 1901), 62 S. W. 21.

Va.—Kline v. Kline, 103 Va. 263, 48 S. E. 882.

91. A. T. Albro & Co. v. Fountain, 162 N. Y. 498, 57 N. E. 72, *rev'g* 15 App. Div. 351, 44 N. Y. Supp. 150;

been established by the evidence,[91] and others in which the ownership of the wife has been held not established.[92]

§ 50. **Indebtedness and insolvency of the grantor.**—A debtor is insolvent, within the meaning of the statutes against conveyances fraudulent as to creditors, when he is unable to pay his debts as they mature and become due and payable in the ordinary course of business, and whenever such a condition of a debtor's affairs is shown to exist by a preponderance of evidence, in an action to set aside a fraudulent conveyance or transfer of property, the insolvency of the debtor is sufficiently proven.[93] Recovery of a judgment by default in an action on dishonored notes and the return of an execution unsatisfied is *prima facie* evidence of insolvency.[94] Evidence of facts held to be sufficient to prove the insolvency of a debtor,[95] may be found in the cases

Reeves v. Estes, 124 Ala. 303, 26 So. 935; Mt. Sterling Nat. Bank v. Bowen, 19 Ky. L. Rep. 1416, 43 S. W. 483; Metz v. Blackburn, 9 Wyo. 481, 65 Pac. 857.

92. American Freehold Land, etc., Co. v. Maxwell, 39 Fla. 489, 22 So. 751; Gaar v. Stolte, 115 Iowa, 139, 88 N. W. 334; Smith v. Curd, 24 Ky. L. Rep. 1960, 72 S. W. 744; Perkins v. Mann, 19 Ky. L. Rep. 575, 41 S. W. 1; Orchard v. Collier, 171 Mo. 390, 71 S. W. 677; Wolfsberger v. Mort, 104 Mo. App. 257, 78 S. W. 817; Kinsey v. Feller (N. J. Ch. 1901), 50 Atl. 680; Kimble v. Wotring, 48 W. Va. 412, 37 S. E. 606.

93. Cunningham v. Norton, 125 U. S. 77, 8 Sup. Ct. 804, 31 L. Ed. 624; Chipman v. McClellan, 159 Mass. 363, 34 N. E. 379.

94. Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Maxwell v. Conklin, 41 App. Div. (N. Y.) 211, 58 N. Y. Supp. 474; Calkins v. Howard (Cal. App. 1905), 83 Pac. 280. But the return of *nulla bona* five years after the alleged fraudulent conveyance is not sufficient to establish insolvency at the time of the conveyance. Windhaus v. Bootz (Cal. 1890) 25 Pac. 404.

95. *N. Y.*—Continental Nat. Bank v. Moore, 83 App. Div. 419, 82 N. Y. Supp. 302.

Ala.—Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56.

Cal.—Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868.

Colo.—Walton v. First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.

Ind.—Towns v. Smith, 115 Ind. 480, 16 N. E. 811.

Iowa.—O'Melia v. Hoffmeyer, 119 Iowa, 444, 93 N. W. 497.

La.—Thorn v. Morgan, 4 Mart. N. S. 292, 16 Am. Dec. 173.

referred to in the notes below, as well as evidence which the courts have held to be insufficient to establish that fact.[96]

§ 51. **Consideration.**—The general rules as to the weight and sufficiency of evidence are applicable to evidence as to the consideration of a conveyance or transfer of property alleged to have been made by a debtor in fraud of his creditors.[97] The application of these rules will be seen in a consideration of the cases cited in the notes below wherein the evidence has been held sufficient to establish a consideration,[98] and those wherein it was

Md.—Milholland v. Tiffany, 64 Md. 455, 2 Atl. 831.

Mich.—Walker v. Cady, 106 Mich. 21, 63 N. W. 1005.

Minn.—Fryberger v. Berven, 88 Minn. 311, 92 N. W. 1125.

N. C.—Manney v. Hamilton, 132 N. C. 295, 43 S. E. 901.

S. C.—McGahan v. Crawford, 47 S. C. 566, 25 S. E. 123.

Wis.—Mason v. Pierron, 69 Wis. 585, 34 N. W. 921.

96. *N. Y.*—Lewis v. Boardman, 78 App. Div. 394, 79 N. Y. Supp. 1014; Clarkson v. Dunning, 4 N. Y. Supp. 430.

U. S.—Williams v. Simons, 70 Fed. 40, 16 C. C. A. 628.

Ill.—Ackerman v. Arbaugh, 97 Ill. App. 155.

Iowa.—Baxter v. Pritchard, 113 Iowa, 422, 85 N. W. 633.

Neb.—Johnson v. Johnson, 36 Neb. 700, 55 N. W. 217.

Or.—Brown v. Case, 41 Or. 221, 69 Pac. 43.

Wis. — Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876.

97. *N. Y.*—Kell v. Isaacs, 58 Hun, 610, 12 N. Y. Supp. 536.

Ark.—Morris v. Fletcher, 67 Ark. 105, 56 S. W. 1072, 77 Am. St. Rep. 87.

Ind.—McConnell v. Citizens' State Bank, 130 Ind. 127, 27 N. E. 616.

Iowa.—Banning v. Purinton, 105 Iowa, 642, 75 N. W. 639.

Me.—Miller v. Hilton, 88 Me. 429, 34 Atl. 266.

Mich.—Wheeler v. Lasch (1906), 106 N. W. 689, 12 Det. L. N. 987.

Miss.—McInnis v. Wiscassett Mills, 78 Miss. 52, 28 So. 725; Lowenstein v. Abramsohn, 76 Miss. 890, 25 So. 498.

Mont.—Wilson v. Harris, 19 Mont. 69, 47 Pac. 1101.

Neb.—Selz v. Hocknell, 63 Neb. 503, 88 N. W. 767, 62 Neb. 101, 86 N. W. 905; Darnell v. Mack, 46 Neb. 740, 65 N. W. 805.

N. C.—Slingluff v. Hall, 124 N. C. 397, 32 S. E. 739.

Tex.—Ratto v. Bluestein, 84 Tex. 57, 19 S. W. 338.

Va.—Merchants' Bank v. Belt (1898), 30 S. E. 467.

98. *Ala.*—Green v. Emens, 135 Ala. 563, 33 So. 540.

Ark.—Fly v. Screeton, 64 Ark. 184, 41 S. W. 764.

Cal.—Polk v. Boggs, 122 Cal. 114, 54 Pac. 536.

held insufficient to show a consideration.[99] As to the weight and sufficiency of evidence as to the value of property transferred,[1] and as to the financial ability of the grantee,[2] cases are cited in the notes below. The recital of the payment of the purchase money in a conveyance attacked by the grantor's creditors as fraudulent is not sufficient evidence that a consideration was in fact received[3]. The consideration expressed in a deed from husband to wife is not of itself sufficient evidence of a purchase for a valuable consideration paid by her or some one in her

Colo.—Krippendorf-Dittman Co. v. Trenoweth (1906), 84 Pac. 805; Otis v. Rose, 9 Colo. App. 449, 48 Pac. 967.

Ill.—Oliver v. McDowell, 100 Ill. App. 45.

Ky.—Commonwealth v. Cremeans, 11 Ky. L. Rep. 985, 13 S. W. 884.

Minn.—Nichols, etc., Co. v. Gerlich, 84 Minn. 483, 87 N. W. 1120.

N. J.—Withrow v. Warner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501.

Or.—Brown v. Case, 41 Or. 221, 69 Pac. 43.

Pa.—In re Fritz, 160 Pa. St. 156, 28 Atl. 642.

99. *N. Y.*—Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. Supp. 852; Multz v. Price, 91 App. Div. 116, 86 N. Y. Supp. 480; Partridge v. Stokes, 66 Barb. 586; Amgrave v. Stone, 25 How. Pr. 167.

Ala.—Sides v. Scharff, 93 Ala. 106, 9 So. 228; Pyron v. Lemon, 67 Ala. 458.

Ga.—Kea v. Epstein, 87 Ga. 115, 13 S. E. 312.

Ill.—Croarkin v. Hutchinson, 187 Ill. 633, 58 N. E. 678, *rev'g* 87 Ill. App. 557.

Ky.—McAdams v. Mitchell, 10 Ky. L. Rep. 856, 10 S. W. 812.

La.—Pressler v. Joffrion, 39 La. Ann. 1116, 2 So. 795.

Mich.—Harrington v. Upton, 78 Mich. 28, 43 N. W. 1089.

Mo.—Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021, 167 Mo. 325, 66 S. W. 933.

Neb.—Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; Butts v. Hunter, 33 Neb. 119, 49 N. W. 940.

N. J.—Malcom Brewing Co. v. Wagner (Ch. 1900), 45 Atl. 260.

Or.—Beers v. Aylsworth, 41 Or. 251, 69 Pac. 1025.

Pa.—Hammett v. Harrison, 1 Phila. 349.

S. C.—Anonymous, 2 Desaus. Eq. 304.

Va.—Slater v. Moore, 86 Va. 26, 9 S. E. 419.

1. Crooks v. Brydon, 93 Md. 640, 49 Atl. 921; Jolly v. Kyle, 27 Or. 95, 39 Pac. 999; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

2. Talkington v. Parish, 89 Ind. 202; Billgery v. Schnell, 26 La. Ann. 467; Boyer v. Tucker, 70 Mo. 457.

3. Whitaker v. Garnett, 66 Ky. 402; Oldham v. McClanahan, 63 Ky. 416; Kimball v. Fenner, 12 N. H. 248; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133; Horton v. Dewey, 53 Wis. 410, 10 N. W. 599.

behalf, as against prior creditors of the husband seeking to set aside the conveyance.[4] The recital in the debtor's deed to his children that it was made for a nominal consideration is conclusive against him in an action by creditors to set aside the deed for fraud.[5] Ordinarily the recital of a consideration in a conveyance attacked as fraudulent towards creditors is regarded as *prima facie* evidence of a consideration, which may be met and overcome by opposing presumptions as well as by direct proof.[6] Whether the fact that the consideration for property which it is sought to subject to the claims of creditors was furnished by a person other than the debtor,[7] or whether the existence and *bona fides* of a pre-existing debt or liability alleged to have been the

4. Minneapolis Stock-Yards, etc., Co. v. Halonen, 56 Minn. 469, 57 N. W. 1135.

5. Ogden State Bank v. Barker, 12 Utah, 13, 40 Pac. 765.

6. *Ill.*—Cassell v. First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Md.—Stockslager v. Mechanics' Loan, etc., Inst., 87 Md. 232, 39 Atl. 742; Stockett v. Holliday, 9 Md. 480.

N. J.—O'Connor v. Williams (Ch. 1902), 53 Atl. 550.

Pa.—Clark v. Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Appeal of Bardwell, 1 Lanc. Bar, 18; Depew v. Clark, 1 Phila. 432.

Va.—Strayer v. Long, 86 Va. 557, 10 S. E. 574.

7. *N. Y.*—Kamp v. Kamp, 46 How. Pr. 143.

D. C.—McDaniel v. Parish, 4 App. Cas. 213.

Ill.—Cassell v. First Nat. Bank, 169 Ill. 380, 48 N. E. 701.

Iowa.—Iseminger v. Criswell, 98 Iowa, 382, 67 N. W. 289; Smith v. Utesch, 85 Iowa, 381, 52 N. W. 343; Stoddard v. Rowe, 74 Iowa, 670, 38 N. W. 84; Sims v. Moore, 74 Iowa, 497, 38 N. W. 374; Weed v. Harris, 54 Iowa, 747, 6 N. W. 138; Connolly v. Rogers, 51 Iowa, 704, 1 N. W. 700.

Ky.—Farmers' Bank v. Stapp, 97 Ky. 432, 30 S. W. 1000, 17 Ky. L. Rep. 290; Ashland Coal, etc., R. Co. v. McKenzie, 14 Ky. L. Rep. 636, 21 S. W. 232.

Md.—Levi v. Rothschild, 69 Md. 348, 14 Atl. 535.

Minn.—Farnham v. Trussell, 28 Minn. 365, 10 N. W. 20.

Mo.—Jamison v. Baggot, 106 Mo. 240, 16 S. W. 697; Mott v. Purcell, 98 Mo. 247, 11 S. W. 564.

Neb.—Brownell v. Stoddard, 42 Neb. 177, 60 N. W. 380; Morse v. Raben, 27 Neb. 145, 42 N. W. 901; Thompson v. Loenig, 13 Neb. 386, 14 N. W. 168; First Nat. Bank v. Bartlett, 8 Neb. 319, 1 N. W. 199.

N. J. — Second Nat. Bank v. O'Rourke, 40 N. J. Eq. 92.

Pa.—Silliman v. Haas, 151 Pa. St. 52, 25 Atl. 72; Conrad v. Shomo, 44 Pa. St. 193.

S. C.—Jackson v. Lewis, 34 S. C. 1, 12 S. E. 560.

Tenn.—Montgomery v. Clark (Ch. App. 1898), 46 S. W. 466.

consideration of a transfer,[8] is sufficiently established are to be determined in accordance with the general rules as to the weight and sufficiency of evidence. To sustain the claim of payment of consideration on a conveyance in fraud of creditors, where the amounts are large, testimony of the grantee, if uncorroborated by documentary evidence, must be clear and consistent with other

8. Evidence sufficient to prove pre-existing liability.—*N. Y.*—Merchants' Bank v. Thalheimer, 50 Hun, 600, 2 N. Y. Supp. 328.

U. S.—Libby v. Crossley, 31 Fed. 647.

Ala.—Blumenthal v. Magnus, 97 Ala. 530, 13 So. 7.

Ill.—Caldwell v. Dvorak, 70 Ill. App. 547.

Mich.—Smith v. Lee, 79 Mich. 465, 44 N. W. 933.

Miss.—Taylor v. Watkins (1893), 13 So. 811.

Mo.—St. Louis Nat. Bank v. Field, 154 Mo. 368, 55 S. W. 461; Bangs Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923.

N. J.—Taylor v. Dawes (Ch. 1888), 13 Atl. 593.

S. C.—Steinmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Tex.—Linz v. Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

Evidence not sufficient to prove pre-existing liability.—*N. Y.*—Gennerich v. Voigt, 46 App. Div. 622, 61 N. Y. Supp. 620.

U. S.—Clay v. McCally, 5 Fed. Cas. No. 2,869, 4 Woods, 605.

Ala.—Thompson v. Tower Mfg. Co., 104 Ala. 140, 16 So. 116; Page v. Francis, 97 Ala. 379, 11 So. 736; Owens v. Hobbie, 82 Ala. 467, 3 So. 145; Gordon v. McAlwain, 82 Ala. 247, 2 So. 671.

Ark.—Catchings v. Harcrow, 49 Ark. 20, 3 S. W. 884.

Iowa.—Blanchard v. Glasier, 64 Iowa, 675, 21 N. W. 134.

Kan.—Smith v. Parry Mfg. Co., 9 Kan. App. 877, 61 Pac. 966.

Ky.—Harrison v. Campbell, 36 Ky. 263; Seiler v. Walz, 17 Ky. L. Rep. 301, 29 S. W. 338, 31 S. W. 729.

La.—Forstell v. Larche, 39 La. Ann. 286, 1 So. 650; Friedlander v. Brooks, 35 La. Ann. 741; Carson v. Johnson, 11 La. Ann. 757.

Me.—Augusta Sav. Bank v. Crossman (1886), 7 Atl. 396.

Mich.—Winslow v. Putnam, 130 Mich. 359, 90 N. W. 43; First Nat. Bank v. Tyler, 55 Mich. 297, 21 N. W. 353.

Mo.—Summers v. Akers, 85 Mo. 213.

Neb.—Jones v. Bivin, 36 Neb. 821, 55 N. W. 248; Omaha Hardware Co. v. Duncan, 31 Neb. 217, 47 N. W. 846.

Or.—Scoggin v. Schloath, 15 Or. 380, 15 Pac. 635.

Pa.—Ditchburn v. Jermyn, etc., Co-operative Assoc., 3 Pa. Dist. 635, 13 Pa. Co. Ct. 1.

S. C.—Younger v. Massey, 39 S. C. 115, 17 S. E. 711.

Tenn.—Madisonville Bank v. McCoy (Ch. App. 1897), 42 S. W. 814.

Va.—Moore v. Ullman, 80 Va. 307.

Wis.—Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. Rep. 422.

Sufficiency of evidence as to amount of debt.—Buford v. Shannon, 95 Ala. 205, 10 So. 263; Bates

evidence offered by him.[9] The fact that a mother was indebted to her son, at the time of giving him a deed voluntary upon its face, is not sufficient in the absence of other evidence, to show that it was given in payment of the debt.[10] Where the consideration of a conveyance or transfer by a husband to his wife is alleged to be an antecedent debt of the husband to his wife, if the validity of the indebtedness is questioned by creditors, the proof thereof need only be clear and satisfactory.[11] The rule which requires proof in support of a wife's claim of title as against her husband's creditors to be clear, convincing and indubitable, applies to cases in which specific property is claimed, the title to which is involved in doubt.[12] Cases in which the evidence has been held sufficient to show that the relation of debtor and creditor existed between husband and wife and to establish the existence of a debt which could be regarded as a consideration for the conveyance,[13] and cases in which the evidence has been held insufficient to establish such indebtedness from husband and wife,[14] are cited in the notes below. Where

County Bank v. Gailey, 177 Mo. 181, 75 S. W. 646.

9. Colston v. Miller (W. Va. 1904), 47 S. E. 268; Graham v. O'Keefe, 16 Ir. Ch. 1.

10. Jackson v. Lewis, 34 S. C. 1, 12 S. E. 560.

11. Rine v. Hall, 187 Pa. St. 264, 40 Atl. 1088; Binson v. Maxwell, 105 Pa. St. 274.

12. Rine v. Hall, *supra.*

13. *N. Y.*—Willis v. Willis, 79 App. Div. 9, 79 N. Y. Supp. 1028; Birdsall, etc., Mfg. Co. v. Schwartz, 26 App. Div. 343, 49 N. Y. Supp. 782; Ellis v. Myers, 4 Silv. Sup. 323, 8 N. Y. Supp. 139.

Ala.—Seasongood v. Ware, 104 Ala. 212, 16 So. 51; Murray v. Heard, 103 Ala. 400, 15 So. 565.

Iowa.—Muir v. Miller, 103 Iowa, 127, 72 N. W. 409; Gilbert v. Glenny, 75 Iowa, 513, 39 N. W. 818, 1 L. R. A. 479.

Mich.—Hicks v. McLachlan, 94 Mich. 278, 53 N. W. 1107; Dull v. Merrill, 69 Mich. 49, 36 N. W. 677.

N. J.—Dresser v. Zabriskie (Ch. 1898), 39 Atl. 1066; Minzesheimer v. Doolittle, 56 N. J. Eq. 206, 39 Atl. 386.

14. *N. Y.*—Clinton Bank v. Colligmon, 83 Hun, 467, 31 N. Y. Supp. 1116, 24 Civ. Proc. R. 279.

Ala.—Robert Graves Co. v. McDade, 108 Ala. 420, 19 So. 86; Wedgworth v. Wedgworth, 84 Ala. 274, 4 So. 149.

Ga.—Booher v. Worrill, 57 Ga. 235.

Ill.—Wesselhoeft v. Cudahy Packing Co., 44 Ill. App. 128.

Iowa.—Letz v. Smith, 94 Iowa, 301, 62 N. W. 745; Jons v. Campbell, 84 Iowa, 557, 51 N. W. 37; Iowa City

a husband and wife are the only witnesses in a suit to set aside a transfer made by the husband to his wife, and both testify that the transfer was made in payment of a pre-existing debt, and that the value of the property does not exceed such debt, it has been held that the transfer must stand, although there are some suspicious circumstances.[15] On the contrary it has been held that, as against her husband's creditors seeking to set aside a conveyance to his wife, a debt from him cannot be proved by the uncorroborated testimony of the husband and wife.[16] The fact that compound interest is added to such a debt according to agreement does not show fraud.[17] The fact that an unusually right rate of interest is added to the principal may, however, be considered by the jury in determining the *bona fides* of the debt.[18] On the issue of the validity, as against creditors of a husband, of a post-nuptial settlement alleged to have been made pursuant to an ante-nuptial agreement, declarations of the husband, made during coverture, are not sufficient to establish such agreement.[19] That a conveyance of lands by a debtor to his wife was in consideration of prior loans by her to him, and therefore valid as against other creditors, is not necessarily disproved by the want of any written evidence of, or any obligation to repay, the debt.[20]

§ 52. **Intent of grantor to defraud creditors.**—The fraudulent intent of a debtor in making a conveyance or transfer of

Bank v. Weber, 72 Iowa, 137, 33 N. W. 606; Eisfeld v. Dill, 71 Iowa, 442, 32 N. W. 420; Triplett v. Graham, 58 Iowa, 135, 12 N. W. 143.

Ky.—Carter v. Strange, 12 Ky. L. Rep. 642, 14 S. W. 837.

Mich.—Felker v. Chubb, 90 Mich. 24, 51 N. W. 110; Keam v. Conkwright, 78 Mich. 58, 43 N. W. 1093.

Pa.—Sweeting v. Sweeting, 172 Pa. St. 161, 33 Atl. 543.

Va.—McConville v. National Valley Bank, 98 Va. 9, 34 S. E. 891.

15. Farmers' Nat. Bank v. Warner, 68 Iowa, 147, 26 N. W. 47.

16. Sanford v. Allen (Tenn. Ch. App. 1897), 42 S. W. 183.

17. Frost v. Steele, 46 Minn. 1, 48 N. W. 413.

18. Hollis v. Rodgers, 106 Ga. 13, 31 S. E. 783.

19. Satterthwaite v. Emley, 4 N. J. Eq. 489, 43 Am. Dec. 618.

20. Allen v. Antisdale, 38 Mich. 229.

his property may be gathered from the instrument of conveyance or transfer, from the acts of the parties, and from the surrounding circumstances, and need not necessarily be proven as an independent fact.[21] The fraudulent intent of the debtor must be established by a preponderance of evidence. The quality and weight of evidence must be satisfactory. The evidence must be sufficiently strong and cogent to satisfy a person of sound judgment of the truth of the charge that the conveyance was made with intent to defraud creditors. The facts must naturally and logically indicate fraud and must be of a character to warrant the inference, and it should not be left to mere inference from suspicious circumstances.[22] It is unnecessary that

21. *N. Y.*—Kain v. Larkin, 131 N. Y. 300, 31 N. E. 105, *rev'g* 62 Hun, 621, 17 N. Y. Supp. 223; Continental Nat. Bank v. Moore, 83 App. Div. 419, 82 N. Y. Supp. 302; Gould Paper Co. v. Frank, 56 N. Y. Supp. 747.

Ga.—Cohen v. Parish, 100 Ga. 335, 28 S. E. 122.

Ill.—Bowden v. Bowden, 75 Ill. 143.

Iowa.—Doxsee v. Waddick (1904), 98 N. W. 110; Davenport v. Cummings, 15 Iowa, 219.

Ky.—Huffman v. Leslie, 23 Ky. L. Rep. 1981, 66 S. W. 822.

Md.—Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. 582, 53 Atl. 148; Zimmer v. Miller, 64 Md. 296, 1 Atl. 858; Powles v. Dilley, 2 Md. Ch. 119; Stewart v. Union Bank, 2 Md. Ch. 58.

Mich.—Scandinavian Sveas Benev. Soc. v. Linquist, 133 Mich. 91, 94 N. W. 592; Smith v. Brown, 34 Mich. 455.

Minn.—Nichols, etc., Co. v. Gerlich, 84 Minn. 483, 87 N. W. 1120; Benson v. Nash, 75 Minn. 341, 77 N. W. 991; Hicks v. Stone, 13 Minn. 434; Blackman v. Wheaton, 13 Minn. 326.

Mo.—State v. Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321; Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Burgert v. Borchert, 59 Mo. 80.

S. C.—Greig v. Rice, 66 S. C. 171, 44 S. E. 729; McGee v. Wells, 52 S. C. 472, 30 S. E. 602.

Tex.—Weisiger v. Chisholm, 28 Tex. 780.

W. Va.—Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112; Reynolds v. Gorthorp, 37 W. Va. 3, 16 S. E. 364; Hunter v. Hunter, 10 W. Va. 321; Lockhard v. Beckley, 10 W. Va. 87.

22. Carter v. Meisch, 63 Hun (N. Y.), 635, 18 N. Y. Supp. 604; Robinson v. Von Doleke, 3 Ohio Dec. 107, 1 Ohio N. P. 429.

Evidence held sufficient.—*N. Y.*—New York County Nat. Bank v. American Surety Co., 174 N. Y. 544, 67 N. E. 1086; Walworth Mfg. Co. v. Burton, 82 App. Div. 637, 81 N. Y. Supp. 873; Carver v. Barker, 73 Hun, 416, 26 N. Y. Supp. 919.

U. S.—Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535.

Ariz.—Roundtree v. Marshall (1899), 59 Pac. 109.

the fraudulent intent be proven beyond doubt, but it is enough if a case of reasonable probability be established, not readily explanable on any other hypothesis.[23] Stronger evidence of fraudulent intent is required to avoid a sale alleged to have been made to defraud subsequent creditors than in the case of existing creditors.[24] A voluntary conveyance by one indebted at the time is presumptively fraudulent and is *prima facie* evidence of a fraudulent intent,[25] and where the facts and circumstances are such as to make a *prima facie* case of an intent to hinder, delay, or defraud creditors, they are to be taken as conclusive evidence of

Cal.—Banning v. Marleau, 133 Cal. 485, 65 Pac. 964.

Ind.—Dart v. Stewart, 17 Ind. 21; Ruffing v. Tilton, 12 Ind. 259.

Iowa.—Kerr v. Kennedy, 119 Iowa, 239, 93 N. W. 353.

Ky.—Arnold v. Eastin, 116 Ky. 686, 76 S. W. 855, 25 Ky. L. Rep. 895.

Mo.—Allen v. Berry, 40 Mo. 282; New York Store Mercantile Co. v. West, 107 Mo. App. 254, 80 S. W. 923.

Neb.—Bokhoof v. Stewart, 2 Nebr. (Unoff.) 714, 89 N. W. 759.

N. J.—Gardner v. Kleinke, 46 N. J. Eq. 90, 18 Atl. 457.

S. D.—Probert v. McDonald, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796.

Evidence held insufficient.—*N. Y.*—Van Slyck v. Woodruff, 118 App. Div. 47, 103 N. Y. Supp. 139, transfer of property of a corporation; Castleman v. Mayer, 55 App. Div. 515, 67 N. Y. Supp. 229; Perry v. Bedell, 59 Hun, 619, 13 N. Y. Supp. 487.

U. S.—Micou v. First Nat. Bank, 104 U. S. 530, 26 L. Ed. 834; Atlas Nat. Bank v. Abram French Sons Co., 123 Fed. 746.

Ark.—Blass v. Goodbar, 65 Ark. 511, 47 S. W. 630; Fly v. Screeton, 64 Ark. 184, 41 S. W. 764.

Colo.—Homestead Min. Co. v. Reynolds, 30 Colo. 330, 70 Pac. 422.

Fla.—Alvarez v. Bowden, 39 Fla. 450, 22 So. 718.

Ga.—Rouse v. Frank, 84 Ga. 623, 11 S. E. 147.

Ill.—Martin v. Duncan, 47 Ill. App. 84.

Ky.—Hanson v. Power, 38 Ky. 91.

Mass.—Winchester v. Charter, 94 Mass. 606.

Minn.—Donahue v. Campbell, 81 Minn. 107, 83 N. W. 469; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544.

Mo.—Stead v. Mahon, 70 Mo. App. 400.

N. J.—Waln v. Hance, 35 N. J. Eq. 660, 32 Atl. 169, 35 Atl. 1130.

N. C.—Guggenheimer v. Brookfield, 90 N. C. 232.

S. C.—Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Gentry v. Lannean, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814.

23. Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112.

24. Zeliff v. Schuster, 31 Mo. App. 493. *Compare* Hunter v. Hunter, 10 W. Va. 321.

25. Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082, *aff'g* 11 N. Y. Supp. 1139, 19 Civ. Proc. R. 363; Bullett v. Worthington, 3 Md. Ch. 99.

such intent, in the absence of any explanation thereof or unless rebutted by other facts and circumstances.[26] The intrinsic evidence of an intention to hinder, and delay creditors by a conveyance of property consumable in the use is repelled by a reservation of the rights of creditors to the property conveyed.[27] Although a party may testify as to the intent with which he made an alleged fraudulent transfer, yet such testimony is not conclusive, and does not necessarily outweigh the evidence of facts and circumstances tending to contradict such negative testimony.[28] The court will regard professions of good faith and denials of fraud by the parties to the transaction impeached as but their own estimate of their conduct, which cannot relieve them from showing a reasonable and just explanation of the facts.[29] The fact that, in a suit to set aside a fraudulent conveyance, the testimony of one of the defendants, who was a party to the conveyance, tending to show that it was without fraudulent intent is not believable, is not a circumstance from which such intent can be found.[30]

§ 53. **Knowledge and intent of grantee or purchaser from grantee.**—The general rules as to the weight and sufficiency of evidence apply, in actions to set aside a fraudulent conveyance, to evidence offered to prove that the grantee had knowledge or notice of the grantor's fraudulent intent,[31] or that he participated

26. Smith v. Reid, *supra;* Parker v. Valentine, 27 W. Va. 677; Livesay v. Beard, 22 W. Va. 585.

27. Hunter v. Foster, 23 Tenn. 211.

28. Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Gardner v. Kreinke, 46 N. J. Eq. 90, 18 Atl. 457; Bleiler v. Moore, 99 Wis. 486, 75 N. W. 953.

29. Pickett v. Pipkin, 64 Ala. 520.

30. Kalish v. Higgins, 175 N. Y. 495, 67 N. E. 1084, *aff'g* 70 App. Div. 192, 75 N. Y. Supp. 397.

31. *N. Y.*—Pollock v. Van Camp, 74 Hun, 332, 26 N. Y. Supp. 231.

U. S.—Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492, *aff'g* 75 Fed. 350, 21 C. C. A. 390; In re Hines, 16 Am. B. R. 495, 144 Fed. 543; Parker v. Black (U. S. D. C. N. Y.), 16 Am. B. R. 202, 143 Fed. 560; Erdhouse v. Hickenlooper, 9 Fed. Cas. No. 4,509, 2 Bond, 392.

Ala.—Allen v. Riddle (1904), 37 So. 680; Norwood v. Washington, 136 Ala. 657, 33 So. 869; Mary Lee Coal.

therein,[32] and plaintiff must establish by a preponderance of evidence, not only the fraudulent intent of the grantor, but also the knowledge of that intent by the grantee, or that he participated therein. Evidence as to the good faith of a purchaser from

etc., Co. v. Knox, 110 Ala. 632, 19 So. 67.

Ariz. — Roundtree v. Marshall, (1899), 59 Pac. 109.

Ga.—Palmour v. Johnson, 84 Ga. 91, 10 S. E. 500.

Ida.—First Nat. Bank v. Van Ness, 4 Ida. 539, 43 Pac. 59.

Ill.—Cowling v. Estes, 15 Ill. App. 255.

Iowa.—Picket v. Garrison, 76 Iowa, 347, 41 N. W. 38, 14 Am. St. Rep. 220; Draper v. Andrews, 49 Iowa, 637; Greeley v. Sample, 22 Iowa, 338.

Ky.—Brite v. Guy, 28 Ky. L. Rep. 57, 88 S. W. 1069; Merrifield v. Williams, 17 Ky. L. Rep. 8, 29 S. W. 332, 31 S. W. 142.

Md.—Hart v. Roney, 93 Md. 432, 49 Atl. 661.

Mich.—Durrell v. Richardson, 119 Mich. 592, 78 N. W. 560.

Minn.—Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1.

Mo.—Bates County Bank v. Gailey, 177 Mo. 181, 75 S. W. 646.

Neb.—Coffield v. Parmenter, 2 Neb. (Unoff.) 42, 96 N. W. 283.

N. C.—Haynes v. Rogers, 111 N. C. 228, 16 S. E. 416.

Tenn.—Overall v. Parker (Ch. App. 1899), 58 S. W. 905.

Tex.—Cooper v. Martin-Brown Co., 78 Tex. 219, 14 S. W. 577; Edmundson v. Silliman, 50 Tex. 106.

Va.—Wheby v. Moir, 102 Va. 875, 47 S. E. 1005; Flook v. Armentrout, 100 Va. 638, 42 S. E. 686; Alsop v. Catlett, 97 Va. 364, 34 S. E. 48.

Wis.—Whiting v. Hogland, 127 Wis. 135, 106 N. W. 391; Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

32. *N. Y.*—Nugent v. Jacobs, 103 N. Y. 125, 8 N. E. 367; Devoe v. Brandt, 53 N. Y. 462, *rev'g* 58 Barb. 493; Moyer v. Bloomingdale, 38 App. Div. 227, 56 N. Y. Supp. 991; Wallace v. Nodine, 57 Hun, 239, 10 N. Y. Supp. 919; Noyes v. Morris, 56 Hun, 501, 10 N. Y. Supp. 561; Higgins v. Curtis, 63 Hun, 630, 17 N. Y. Supp. 793.

U. S.—Fisher v. Moog, 39 Fed. 665; The Holladay Case, 27 Fed. 830.

Ala.—Penney v. McCulloch, 134 Ala. 580, 33 So. 665.

Colo.—Smith v. Jensen, 13 Colo. 213, 22 Pac. 434.

Ill.—American Hoist, etc., Co. v. Hall, 208 Ill. 597, 70 N. E. 581, *aff'g* 110 Ill. App. 463; Treadwell v. McEwen, 123 Ill. 253, 13 N. E. 850, *aff'g* 23 Ill. App. 111; Youngs v. Sexton Nat. Bank, 59 Ill. App. 152.

Iowa.—Shaw v. Manchester, 84 Iowa, 246, 50 N. W. 985; Searing v. Berry, 58 Iowa, 20, 11 N. W. 708.

Ky.—Meyer v. Specker, 10 Ky. L. Rep. 116.

La.—Blanchet v. Hellebrant, 4 La. 439.

Md.—Hart v. Roney, 93 Md. 432, 49 Atl. 661; McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Mass.—Carr v. Briggs, 156 Mass. 78, 30 N. E. 470.

Mich.—Schloss v. Estey, 114 Mich. 429, 72 N. W. 264; Showman v. Lee, 86 Mich. 556, 49 N. W. 578.

the grantee is also subject to the same general rules.[33] Fraudulent intent in a purchaser of property from a debtor need not be proven by positive evidence, but may be inferred from the facts and circumstances surrounding the entire transaction.[34] Where the circumstances connected with a conveyance fraudulent as to the grantor plainly establish the complicity of the grantee in the fraudulent intent, it is not necessary to show by direct and positive proof notice to the grantee of such intent.[35] Mere suspicion, however, in the minds of the jury that the grantee purchased with knowledge of the debtor's fraudulent intent is not sufficient to justify a verdict against his title, as fraud must always be distinctly proved by a clear preponderance of testimony.[36] Where it is shown that the purchaser of property had no knowledge of the existence of a judgment against the seller,

Mo.—Stokes v. Burns, 132 Mo. 214, 33 S. W. 460; Thompson v. Cohen (1894), 24 S. W. 1023.

Pa.—Ferry v. McKenna, 9 Pa. Co. Ct. 17.

Tenn. — Hendly v. Hendly, (Ch. App. 1897), 46 S. W. 1016.

Vt.—Eaton v. Cooper, 29 Vt. 444.

Va.—Johnson v. Lucas, 103 Va. 36, 48 S. E. 497.

W. Va.—Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

Wis.—Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

33. Fults v. Paul, 63 Hun (N. Y.), 635, 18 N. Y. Supp. 524; Freiburg v. Dreyfus, 135 U. S. 478, 10 Sup. Ct. 716, 34 L. Ed. 206, *aff'g* 26 Fed. 824; Pease v. Bridge, 49 Conn. 58; Throckmorton v. Rider, 42 Iowa, 84.

34. *N. Y.*—Gowing v. Warner, 30 Misc. Rep. 593, 62 N. Y. Supp. 797.

Md.—Dawson v. Waltemeyer, 91 Md. 328, 46 Atl. 994; Cooke v. Cooke, 43 Md. 522.

Mo.—Fredrick v. Allgaier, 88 Mo. 598.

S. C.—Means v. Feaster, 4 S. C. 249.

W. Va.—White v. Perry, 14 W. Va. 66; Murdock v. Baker (1899), 32 S. E. 1009.

35. *Ark.*—Mente v. Townsend, 68 Ark. 391, 59 S. W. 41.

Ill.—Hank v. Van Ingen, 196 Ill. 20, 63 N. E. 705, *aff'g* 97 Ill. App. 642.

Iowa.—Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483.

Ky.—Huffman v. Leslie, 23 Ky. L. Rep. 1981, 66 S. W. 822.

Minn.—Benson v. Nash, 75 Minn. 341, 77 N. W. 991.

W. Va.—Reynolds v. Gawthorp, 37 W. Va. 3, 16 S. E. 364; Core v. Cunningham, 27 W. Va. 206.

36. Truesdell v. Bourke, 145 N. Y. 612, 40 N. E. 83, *rev'g* 80 Hun, 55, 29 N. Y. Supp. 849; Wilson v. Welsh, 41 Fed. 570; Tuteur v. Chase, 66 Miss. 476, 6 So. 241, 14 Am. St. Rep. 577, 4 L. R. A. 832; Hettermân v. Young (Tenn. Ch. App. 1898), 52 S. W. 532.

or that he was otherwise embarrassed, any inference of fraud on the part of the buyer is negatived.[37] In a suit to set aside conveyances alleged to be fraudulent as against the grantor's creditors, if the grantees testify positively as to the good faith of the conveyances, and there is nothing to overcome their testimony, the conveyances must stand.[38]

37. Erdhouse v. Hickenlooper, Fed. Cas. No. 4,509, 2 Bond. 392.

38. Sawyer v. Moyer, 109 Ill. 461; DeLoach v. Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

CHAPTER XVIII.

TRIAL.

Section 1. Trial; mode and conduct in general.
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3. Reference and accounting.
4. Questions for jury; questions of law and fact; fraudulent intent in general.
5. Nature and form of transaction.
6. Sufficiency of transfer of possession to vendee.
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8. Indebtedness and insolvency.
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10. Existence of creditors; secrecy; preferences; withholding instrument from record.
11. Submission of case to jury.
12. Instructions; province of court and jury.
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14. Requests for instructions.
15. Verdict and findings generally.
16. Special interrogatories and findings by jury.
17. Findings by court.
18. New trial.

Section 1. **Trial — Mode and conduct in general.**—Where on the trial of a cause, a party, seeking to avoid a conveyance, admits that there is no actual fraud in the transaction, the court will not look into the question of fraud, even after verdict, and where a case is made subject to the opinion of the court.[1] In replevin, on an issue whether plaintiff's purchase of the property was in fraud of his vendor's creditors, it is proper to withdraw from the jury evidence that the vendor fraudulently contracted the debts, where there is no evidence connecting the plaintiff with such fraud.[2] In an action by attachment creditors of an insolvent firm to set aside prior judgments of other creditors entered upon offers

1. Jackson v. Peck, 4 Wend. (N. Y.) 300.

2. Mathews v. Reinbardt, 149 Ill. 635, 37 N. E. 85, *aff'g* 43 Ill. App. 169.

to allow judgments, the court will not adjourn the trial to allow plaintiffs first to procure judgments.[3] As a general rule, the rules applicable to the course and conduct of trials in civil actions generally govern trials in actions in which it is sought to set aside conveyances as fraudulent as against creditors.[4]

§ 2. **Submission of issues to jury.**—Though the form of an issue framed for the jury whether a conveyance was made with intent to hinder, delay, or defraud the creditors of the debtor including plaintiff, can hardly be construed as obliging plaintiff to show that the debtor, in making the conveyance, had in mind the fraudulent intent to defraud this particular plaintiff, still, to avoid possible objection, the inquiry should be: (1) Was the conveyance made with intent to hinder, delay, or defraud the then existing creditors of the debtor, or (2) subsequent creditors of the debtor.[5] Notwithstanding a statute makes the question of fraudulent intent a question of fact, a court of equity may determine such question without the aid of a jury. It is the province of the court and not of the jury to pass upon the legal effect of an assignment, where the question is whether the provisions of the instrument are such as render it void for fraud against creditors under the statute, and it is error to submit to the jury the question what was the intent of the parties in making it.[6] Where, in an action against a husband and wife to set aside an antenuptial deed of marriage settlement on the ground that the same was given with

3. Columbus Watch Co. v. Hodenpyl, 61 Hun (N. Y.), 557, 16 N. Y. Supp. 337.

4. *U. S.*—United States v. Griswold, 8 Fed. 556, 7 Sawy. 311.

Iowa. — Bixby v. Carskaddon, 70 Iowa, 726, 29 N. W. 626, right to open and close.

Mo.—Leeper v. Bates, 85 Mo. 224, overruling defendant's demurrer to plaintiff's evidence.

Pa.—Heath v. Slocum, 115 Pa. St. 549, 9 Atl. 259, rejecting offer of testimony.

Va.—Cronie v. Hart, 18 Gratt. 739, directing inquiry.

5. Miller v. Cobb, 64 Hun (N. Y.), 637, 19 N. Y. Supp. 442; Clement v. Cozart, 112 N. C. 412, 17 S. E. 486; Rouse v. Bowers, 108 N. C. 182, 12 S. E. 985.

6. Cunningham v. Freeborn, 11 Wend. (N. Y.) 241; Sheldon v. Dodge, 4 Den. (N. Y.) 217; Goodrich v. Downs, 6 Hill (N. Y.), 438. And see Dorwin v. Patton (Minn. 1907), 112 N. W. 266.

intent to defraud the creditors of the husband, and that the wife had connived at the fraud, the testimony showed that the wife, before marriage, had no knowledge of any fraud, the court properly refused a request to direct an issue out of chancery to try the question of fraud.[7] Where a judgment by confession is attacked as fraudulent as to other creditors of the judgment debtor, and the evidence merely tends to prove circumstances of suspicion, an issue is properly refused.[8]

§ 3. **Reference and accounting.**—The court is not compelled, in an action to set aside a conveyance as in fraud of creditors, always to decide the question of fraud in advance, but may, if necessary, refer the case for the determination of certain facts before decreeing the conveyance void.[9] Where it is provided by statute that the question of fraudulent intent shall be deemed one of fact and not of law, a referee to whom has been referred the issue of the good faith of a debtor's transfer of property as to other creditors is to determine such question as if he were a jury, and, if there is evidence reasonably tending to support the referee's findings, they should not be disturbed.[10] Where a judgment debtor, being the owner of certain shares of stock, assigned them to his wife, it is necessary, to enable the creditor in a creditor's suit to sell such shares and apply them on his judgment that a finding that the wife's title was fraudulent and inoperative against him should be made by the referee, though the shares were not transferred to the wife on the books of the company issuing them.[11] Where a creditor seeks to vacate a conveyance from a husband to his wife, who claims that it was made to satisfy a debt due her from her husband, an account is properly taken to ascertain the amount of this debt, although no account was prayed for.[12] Where a creditor's bill prayed the setting aside of a deed and bond for

7. Noble v. Davies (Va. 1887), 4 S. E. 206.

8. Hagy v. Poike, 3 Pa. Dist. 792, *aff'd* 169 Pa. St. 522, 28 Atl. 846.

9. First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554.

10. Vose v. Stickney, 19 Minn. 367.

11. Vail v. Craig, 13 St. Rep. (N. Y.) 448.

12. Hester v. Thomson, 58 Miss. 108.

a deed made in alleged fraud of creditors, and the sale of the property, and the grantee answered, alleging that the two instruments constituted a mortgage securing a *bona fide* debt, a decree holding that the instruments did constitute a mortgage, and that the grantee was entitled to a prior lien on the property, properly directed an accounting to determine the amount due the grantee, although he filed no cross bill.[13]

§ 4. **Questions for jury — Questions of law and fact — Fraudulent intent in general.**—Where the fraudulent intent in making a transfer of a debtor's property is to be determined by evidence collateral to the writing, such question is determinable alone by the jury, and usually the question of fraudulent intent is, by statute or by general rule of law, one of fact to be determined by the jury.[14] Where, however, there is no dispute about the

13. Callahan v. Ball, 197 Ill. 318, 64 N. E. 295.

14. *N. Y.*—Bristol v. Hull, 166 N. Y. 59, 59 N. E. 698; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421; Babcock v. Eckler, 24 N. Y. 623; New York County Nat. Bank v. American Surety Co., 69 App. Div. 153, 74 N. Y. Supp. 692; Vogedes v. Beakes, 38 App. Div. 380, 56 N. Y. Supp. 662; Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854; Bennett v. McGuire, 58 Barb. 625; Peck v. Crouse, 46 Barb. 151; Groat v. Rees, 20 Barb. 26; Bishop v. Cook, 13 Barb. 326; Brace v. Gould, 1 Thomps. & C. 226; Colby v. Peabody, 52 N. Y. Super. Ct. 394; Blaut v. Gabler, 8 Daly, 48, *aff'd* 77 N. Y. 461; Rheinfeldt v. Dahlman, 19 Misc. Rep. 162, 43 N. Y. Supp. 281; White's Bank v. Farthing, 10 St. Rep. (N. Y.) 830; Hyatt v. Dusenbury, 12 Civ. Proc. R. 152; Murray v. Burtis, 15 Wend. 212.

U. S.—Warner v. Norton, 20 How. 448, 15 L. Ed. 950; McLaughlin v. Potomac Bank, 7 How. 220, 12 L. Ed. 675; Fleischman v. Bowser, 62 Fed. 259, 10 C. C. A. 370; Hills v. Stockwell, etc., Furniture Co., 23 Fed. 432; Means v. Montgomery, 23 Fed. 421; Morse v. Riblet, 22 Fed. 501; Howe Mach. Co. v. Claybourn, 6 Fed. 438; Sedgwick v. Place, 21 Fed. Cas. No. 12, 621, 12 Blatchf. 163.

Ala.—Davidson v. Kahn, 119 Ala. 364, 24 So. 583; Bank of Commerce v. Eureka Brick, etc., Co., 108 Ala. 89, 18 So. 600; Howell v. Carden, 99 Ala. 100, 10 So. 640; Johnson v. Thweatt, 18 Ala. 741; Thomas v. De Graffenreid, 17 Ala. 602; Planters', etc., Bank v. Borland, 5 Ala. 531.

Cal.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Harris v. Burns, 50 Cal. 140; Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Miller v. Stewart, 24 Cal. 502; Roberts v. Burr (1898), 54 Pac. 849.

Fla.—Gibson v. Love, 4 Fla. 217.

Ga.—Kiser v. Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184; Powell v. Westmoreland, 60 Ga. 572, 59 Ga. 256; Nicol v. Crittenden, 55

facts, the question whether they constitute fraud is one of law.[15]

Ga. 497; Hobbs v. Davis, 50 Ga. 213.

Ill.—Bushnell v. Wood, 85 Ill. 88; Hayes v. Bernard, 38 Ill. 297; Hargadine-McKittrick Dry Goods Co. v. Belt, 74 Ill. App. 581.

Ind.—Carnahan v. Schwab, 127 Ind. 507, 26 N. E. 67; Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146; Neisler v. Harris, 115 Ind. 560, 18 N. E. 39; Jarvis v. Banta, 83 Ind. 528; Bishop v. State, 83 Ind. 67; Goff v. Rogers, 71 Ind. 459; Hardy v. Mitchell, 67 Ind. 485; Pence v. Croan, 51 Ind. 336; Parton v. Yates, 41 Ind. 456; Church v. Drummond, 7 Ind. 17; Stewart v. English, 6 Ind. 176.

Iowa.—Sweet v. Wright, 62 Iowa, 215, 17 N. W. 468.

Kan.—Jones v. Johnson, 7 Kan. App. 616, 52 Pac. 464.

Me.—Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240; Hall v. Sands, 52 Me. 355; Rich v. Reed, 22 Me. 28.

Mass.—Winchester v. Charter, 102 Mass. 272; Marden v. Babcock, 43 Mass. 99; Boyd v. Brown, 34 Mass. 453; Harrison v. Phillips Academy, 12 Mass. 456.

Mich.—Gordon v. Alexander, 122 Mich. 107, 80 N. W. 978; Bedford v. Penney, 65 Mich. 667, 32 N. W. 888; Bagg v. Jerome, 7 Mich. 145; Oliver v. Eaton, 7 Mich. 108.

Minn.—Filley v. Register, 4 Minn. 391, 77 Am. Dec. 522.

Miss.—Wilson v. Kohlheim, 46 Miss. 346; Harney v. Pack, 4 Sm. & M. 229.

Mo.—First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; State v. Merritt, 70 Mo. 275; Potter v. McDowell, 31 Mo. 62; Middleton v. Hoof, 15 Mo. 415; Lane v. Kingsberry, 11 Mo. 402; White v. Million, 114 Mo. App. 70, 89 S. W. 599; Hungerford v. Greegard, 95 Mo. App. 653, 69 S. W. 602; Sevier v. Allen, 80 Mo. App. 187; Graham Paper Co. v. St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.

Neb.—Bender v. Kingman, 64 Neb. 766, 90 N. W. 886; Boldt v. First Nat. Bank, 59 Neb. 283, 80 N. W. 905; Oak Creek Valley Bank v. Helmer, 59 Neb. 176, 80 N. W. 891; Sloan v. Thomas Mfg. Co., 58 Neb. 713, 79 N. W. 728; Adler v. Hellman, 55 Neb. 266, 75 N. W. 877; Omaha Coal, etc., Co. v. Suess, 54 Neb. 379, 74 N. W. 620; Harris v. Weir-Shugart Co., 51 Neb. 483, 70 N. W. 1118; Campbell v. Farmers', etc., Bank, 49 Neb. 143, 68 N. W. 344; Goldsmith v. Erickson, 48 Neb. 48, 66 N. W. 1029; Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. 741; Hewitt v. Commercial Banking Co., 40 Neb. 820, 59 N. W. 693; Houck v. Heinzman, 37 Neb. 463, 55 N. W. 1062; Connelly v. Edgerton, 22 Neb. 82, 34 N. W. 76.

N. C.—Beasley v. Bray, 98 N. C. 266, 3 S. E. 497; Hardy v. Simpson, 35 N. C. 132; Leadman v. Harris, 14 N. C. 144; Smith v. Niel, 8 N. C. 341.

N. D.—Stevens v. Myers (1905), 104 N. W. 529.

Or.—Weaver v. Owens, 16 Or. 301, 18 Pac. 579.

Pa.—White v. Gunn, 205 Pa. St. 229, 54 Atl. 901; Gray v. Trent (1888), 16 Atl. 107; Barr v. Boyles, 96 Pa. St. 31; Ferris v. Irons, 83 Pa. St. 179; Mullen v. Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; Vallance v. Miners L. Ins. Co., 42 Pa. St. 441; Graham v. Smith, 25 Pa. St. 323; Avery v. Street, 6 Watts, 247.

S. C.—Perkins v. Douglass, 52 S. C.

And where a conveyance is fraudulent on its face, there is nothing for the jury to pass upon.[16] The New York statute relating to fraudulent transfers and conveyances, which declares that the question of fraudulent intent arising thereunder shall be deemed a question of fact and not of law, does not, as now interpreted, interfere with the prerogative of the court to direct a verdict, provided the fraudulent intent is conclusively established on the face of the instrument of transfer, or by the uncontradicted verbal evidence.[17]

129, 29 S. E. 400; Pringle v. Rhame, 10 Rich. 72, 67 Am. Dec. 560; Hamilton v. Greenwood, 1 Bay, 173, 1 Am. Dec. 607.

Tenn.—Charlton v. Lay, 24 Tenn. 496; Hoskins v. Carroll, 15 Tenn. 505.

Tex.—Van Bibber v. Mathis, 52 Tex. 406; Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Moore v. Robinson (Civ. App. 1903), 75 S. W. 890; Schuster v. Farmers', etc., Nat. Bank, 23 Tex. Civ. App. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93; McGregor v. White, 15 Tex. Civ. App. 299, 39 S. W. 1024; Kruschell v. Anders (Civ. App. 1894), 26 S. W. 249.

Vt.—Fish v. Field, 19 Vt. 141.

Wash.—Adams v. Dempsey, 22 Wash. 284, 60 Pac. 649, 70 Am. St. Rep. 933; Ephraim v. Kelleher, 4 Wash. 243, 29 Pac. 985, 1 L. R. A. 604.

Wis.—Kaufer v. Walsh, 88 Wis. 63, 59 N. W. 460; Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692; Hooser v. Hunt, 65 Wis. 71, 26 N. W. 442; Evans v. Rugee, 63 Wis. 31, 23 N. W. 24; Trowbridge v. Sickler, 54 Wis. 306, 11 N. W. 581; Barkow v. Sanger, 47 Wis. 500, 3 N. W. 16; Hyde v. Chapman, 33 Wis. 391; Bond v. Seymour, 2 Pinn. 105, 1 Chandl. 40.

15. *N. Y.*—Jackson v. Mather, 7 Cow. 301.

Cal.—Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493; Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319.

Colo.—People v. Colorado Ct. App. (1901), 65 Pac. 42; Curran v. Rothchild, 14 Colo. App. 497, 60 Pac. 1111.

Mass.—Gerrish v. Mace, 75 Mass. 235.

Mich.—Edwards v. Edwards, 54 Mich. 347, 19 N. W. 164.

Minn.—Burt v. McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Neb.—Bender v. Kingman, 62 Neb. 469, 87 N. W. 142.

N. C.—Rea v. Alexander, 27 N. C. 644.

Okla.—Walters v. Ratliff, 10 Okla. 262, 61 Pac. 1070.

Tex.—Ellis v. Valentine, 65 Tex. 532.

16. *N. Y.*—Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532.

Ala.—Johnson v. Thweatt, 18 Ala. 741.

Md.—Green v. Trieber, 3 Md. 11.

Minn.—Burt v. McKinstry, *supra;* Chophard v. Bayard, 4 Minn. 533.

Mo.—Bigelow v. Stringer, 40 Mo. 195; Jacob Furth Grocery Co. v. May, 78 Mo. App. 323.

Pa.—Lyon v. Hampton, 20 Pa. St. 46.

Tex.—Peiser v. Peticolas, 50 Tex. 638, 32 Am. Rep. 621.

17. Bulger v. Rose, 119 N. Y. 459, 24 N. E. 853; Ford v. Williams, 24

The court should be very cautious in finding fraud in a written instrument as a matter of law, and, where presumptions of fraud arise upon the face of the deed, the parties are entitled to introduce evidence to explain suspicious transactions and rebut even strong legal presumptions of fraud; and in cases at law such questions must be determined by the jury.[18] Where the court cannot clearly see that a deed is fraudulent on its face, it may submit to the consideration of the jury the suspicious provisions of the deed, as well as the evidence that may be adduced to explain them or to show the fraudulent intent.[19] Whether a voluntary conveyance is fraudulent or not, as against creditors, is in most jurisdictions a question of fact for the jury.[20] It is within the province of the jury to inquire whether in point of fact a judgment by confession was fraudulent.[21] A bill of sale of property absolute in terms, but given as security for a present debt and future advances, is not fraudulent as against creditors as a matter of law.[22] Where the facts concerning a conveyance claimed to be fraudulent as to creditors of the grantor are ascertained and determined by the trial court, the conclusion to be drawn from the facts so found, including the determination of the existence of constructive fraud and of a valuable consideration, is a question of law.[23] The question of intent in an alleged fraudulent conveyance of property,

N. Y. 359; Edgell v. Hart, 9 N. Y. 243, 59 Am. Dec. 532.

18. Means v. Montgomery, 23 Fed. 421.

19. Johnson v. Thweatt, 18 Ala. 741.

20. Jackson v. Timmerman, 7 Wend. (N. Y.) 436; French v. Holmes, 67 Me. 186; Thacher v. Phinney, 89 Mass. 146; Pomeroy v. Bailey, 43 N. H. 118. See Effect of want of consideration, chap. VIII, § 32, *supra*.

21. Wilhelmi v. Leonard, 13 Iowa, 330. See Confession of judgment, chap. II, § 11, *supra*.

22. McCarmick Harvesting Mach. Co. v. Citizens' Bank (N. D. 1906), 106 N. W. 122.

23. Clarke v. Black, 78 Conn. 467, 62 Atl. 757.

24. *N. Y.*—Woodworth v. Sweet, 51 N. Y. 8, *aff'g* 44 Barb. 268; Merritt v. Lyon, 3 Barb. 110.

Ind.—Holman v. Martin, 12 Ind. 553.

Mass.—O'Donnell v. Hall, 154 Mass. 429, 28 N. E. 349.

Neb.—Monteith v. Bax, 4 Neb. 166.

N. J.—Reford v. Cramer, 30 N. J. L. 250.

Pa.—Conley v. Bentley, 87 Pa. St. 40.

between husband and wife,[24] parent and child,[25] brothers,[26] and other near relatives,[27] is generally one of fact for the jury.

§ 5. **Nature and form of transaction.**—It is a question for the jury whether a contract for the transfer of property which by its terms was absolute was intended to be such, or was intended as an assignment creating a trust, so as to render it fraudulent as to creditors.[28] Whether the nature of a transfer is such as to render it fraudulent;[29] whether it was entered into with an honest intent that it should have effect according to its apparent purpose, or for the fraudulent purpose of protecting the property of the debtor against his creditors;[30] whether the sale of goods was a real sale intended to pass title;[31] whether the instrument of conveyance was intended to pass title;[32] whether two mortgages or other instruments were parts of the same transaction, so that infirmities in one vitiated both;[33] whether the sale was in the ordinary course of business;[34] whether the execution of a bill of sale of property subsequently alleged to have been transferred to defraud creditors was part of the fraudulent scheme;[35] and whether the re-execution of an instrument at first illegally executed was made in good faith,[36] have been held to be questions of fact to be determined by the jury. In proceedings to determine the title to a stock of goods,

S. C.—Burckmyer v. Mairs, Riley, 208.

Wis.—Barker v. Lynch, 75 Wis. 624, 44 N. W. 826.

25. Merrill v. Merrill, 105 Ill. App. 5; Chambers v. Spencer, 5 Watts (Pa.), 404; Chase v. Elkins, 2 Vt. 290.

26. Wessels v. Beeman, 66 Mich. 343, 33 N. W. 510; Craver v. Miller, 65 Pa. St. 456.

27. Heilner v. Walsh, 47 N. Y. Super. Ct. 269; Reiger v. Davis, 67 N. C. 185.

28. Hine v. Bowe, 114 N. Y. 350, 21 N. E. 733.

29. Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; Carter v. Acker (Tex. Civ. App. 1894), 27 S. W. 502.

30. Haynes v. Ledyard, 33 Mich. 319.

31. Guyton v. Chasen (Tex. Civ. App. 1907), 101 S. W. 290.

32. Cole v. Call, 79 Mich. 159, 44 N. W. 344.

33. Bowling v. Searles, 57 Kan. 174, 45 Pac. 584.

34. Stevens v. Pierce, 147 Mass. 510, 18 N. E. 411.

35. White v. Million, 114 Mo. App. 70, 89 S. W. 599; Oliver v. Reading Iron Co., 170 Pa. St. 396, 32 Atl. 1088.

36. Hoffer v. Gladden, 75 Ga. 532.

the question whether the inquiry by the purchaser required by the statute relating to sales of stock of merchandise and fixtures in bulk was made in good faith, is for the jury.[37]

§ 6. **Sufficiency of transfer of possession to vendee.**—In an action to impeach a sale as fraudulent as to creditors of the vendor, if the facts are undisputed, it is a question of law whether these facts constitute a continued and exclusive possession in the vendee.[38] If the facts as to transfer of possession are doubtful, a jury must pass upon the question.[39] What facts constitute an

37. Feingold v. Steinberg, 33 Pa. Super. Ct. 39.

38. *Cal.*—Hodgkins v. Hook, 23 Cal. 581.

Conn.—Mead v. Noyes, 44 Conn. 487.

Mo.—Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292; Knoop v. Nelson Distilling Co., 26 Mo. App. 333.

Mont.—O'Gara v. Lowry, 5 Mont. 427, 5 Pac. 583.

Okla.—Walters v. Ratliff, 10 Okla. 262, 61 Pac. 1070.

Pa.—Barr v. Boyles, 96 Pa. St. 31; Garman v. Cooper, 72 Pa. St. 32; Milne v. Henry, 40 Pa. St. 352; Chase v. Ralston, 30 Pa. St. 539; Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522; Leech v. Shantz, 2 Phila. 310; Platt v. McQuown, 20 Pa. Co. Ct. 401.

Vt.—White v. Miller, 46 Vt. 65; Burrows v. Stebbins, 26 Vt. 659.

39. *N. Y.*—Menken v. Baker, 166 N. Y. 628, 60 N. E. 1116; Bristol v. Hull, 166 N. Y. 59, 59 N. E. 698; Woodworth v. Hodgson, 56 Hun, 236, 9 N. Y. Supp. 750; Schidlower v. McCafferty, 85 App. Div. 493, 83 N. Y. Supp. 391.

Cal.—Hesthal v. Myles, 53 Cal. 623; Cahoon v. Marshall, 25 Cal. 197.

Conn.—Lake v. Morris, 30 Conn. 201; Potter v. Mather, 24 Conn. 551.

Ida.—Rapple v. Hughes (1904), 77 Pac. 722; Simons v. Daly (1903), 72 Pac. 507.

Iowa.—Wessels v. McCann, 85 Iowa, 424, 52 N. W. 346.

Me.—Sawyer v. Nichols, 40 Me. 212.

Mich.—McLaughlin v. Lange, 42 Mich. 81, 3 N. W. 267.

Mo.—Tennent-Stribling Shoe Co. v. Rudy, 53 Mo. App. 196; Simmons Hardware Co. v. Pfeil, 35 Mo. App. 256; Leeser v. Boekhoff, 33 Mo. App. 223.

Pa.—White v. Gunn, 205 Pa. St. 229, 54 Atl. 901; Buffalo Hardware Co. v. Hackenberg, 144 Pa. St. 107, 22 Atl. 875; Pressel v. Bice, 142 Pa. St. 263, 21 Atl. 813; Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Gray v. Trent (1888), 16 Atl. 107; Barr v. Reitz, 53 Pa. St. 256; McAlevy v. McElroy, 10 Pa. Cas. 364, 14 Atl. 242; Schwab v. Woods, 24 Pa. Super. Ct. 433; Staller v. Kirkpatrick, 1 Mona. 486.

Vt.—Stephenson v. Clark, 20 Vt. 624; Hall v. Parsons, 17 Vt. 271.

Wis.—Tuckwood v. Hanthorn, 67 Wis. 326, 30 N. W. 705.

actual, substantial, and continued change of possession must necessarily depend upon the circumstances of each case. It is always a question of fact, and if there is any evidence in the case tending to show such a change of possession, it should, under proper instructions, be submitted to the jury. It is only in cases where there is no conflict in the evidence, or where, admitting all to be true which the testimony tends to show, the facts would be legally insufficient, that the court is justified in withdrawing the subject matter from the consideration of the jury, and passing upon it as a matter of law.[40] What is delivery in a reasonable time under a statute is ordinarily for the jury to determine.[41] Where there has been no assumption of ownership, it is the duty of the court to pronounce a mere symbolical delivery of personalty to be insufficient, as against creditors of the seller; but, where there is evidence of such assumption of control, it is for the jury to say whether it was in good faith or merely colorable, and whether it was enough to give notice to the world.[42] Where there is on one side the presumption against the legality of the transaction which the statute makes, and on the other the vendee seeking by his own oral testimony alone to repel that presumption, the matter may not be taken from the jury and passed upon by the court as a question of law.[43] Whether the question of fraudulent intent, as based on the debtor's retention of possession of the property transferred by him, is one of law or fact, has been discussed under that heading in a previous chapter.[44]

§ 7. **Nature, source, and sufficiency of consideration.**—Whether the consideration for which a conveyance alleged to be fraudulent is alleged to have been executed is *bona fide,* or merely colorable to defraud creditors,[45] or so inadequate as to constitute a

40. Rothchild v. Rowe, 44 Vt. 389.

41. Leeser v. Boekhoff, 38 Mo. App. 445; State v. Hellman, 20 Mo. App. 304.

42. Rex v. Jones, 6 Pa. Co. Ct. 401.

43. Tilson v. Terwilliger, 56 N. Y. 273.

44. See Retention of possession, chap. XII, §§ 2, 3, *supra.*

45. *N. Y.*—Bristol v. Hull, 166 N. Y. 59, 59 N. E. 698.

U. S.—Hinchman v. Parlin, etc., Co., 81 Fed. 157, 26 C. C. A. 323.

Ga.—Planter's, etc., Bank v. Wil-

badge of fraud and show a fraudulent intent,[46] is a question of fact which should be left to the jury upon the whole evidence in the case. The good faith of a preference made to a creditor, where the property transferred exceeds the amount of the claim secured, is one of fact for the jury.[47] Whether a deed executed by a parent to his child in consideration of natural love and affection is fraudulent, or not, as against creditors, is a question of fact for the jury.[48] Where a conveyance of land is in consideration of future maintenance,[49] or a deed of trust is made to secure an antecedent debt,[50] the question of fraud is for the jury. A sale by one in embarrassed circumstances to an infant, partly on credit, is not void in law as against the creditor, but the question of fraud is for the jury.[51] The sale of all the debtor's property, with credit for the greater portion of the purchase price, does not establish fraud as a legal conclusion, but the question of intent must be left to the jury.[52] A mortgage is not necessarily fraudulent because executed for a larger sum than is actually due from the mortgagor to the mortgagee. If the amount is materially larger than that due, this is merely a badge of fraud, and the question of fraud is one of fact for the jury.[53] Whether a chattel mortgage given to

leo Cotton Mills, 60 Ga. 168; Booker v. Worrill, 55 Ga. 332; Williams v. Kelsey, 6 Ga. 365.

Mich.—Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721.

N. H.—Pomeroy v. Bailey, 43 N. H. 118.

N. C.—Black v. Caldwell, 49 N. C. 150.

Pa.—Ferris v. Irons, 83 Pa. St. 179; Keen v. Kleckner, 42 Pa. St. 529; King v. Besson, 5 Pa. Cas. 59, 8 Atl. 198.

46. *N. Y.*—Gowing v. Warner, 30 Misc. Rep. 593, 62 N. Y. Supp. 797.

Ga.—Williams v. Kelsey, 6 Ga. 365.

Kan.—Dodson v. Cooper, 50 Kan. 680, 32 Pac. 370.

Mo.—State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Stern, etc., Co. v. Mason, 16 Mo. App. 473.

N. C.—Southern L. & T. Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

47. Birdsall v. Walsh, 6 D. C. 316; Hand v. Hitner, 140 Pa. St. 166, 21 Atl. 260.

48. Jackson v. Timmerman, 7 Wend. (N. Y.) 436.

49. Hennon v. McClane, 88 Pa. St. 219.

50. Harvey v. Pack, 12 Miss. 229.

51. Matthews v. Rice, 31 N. Y. 457.

52. Clark v. Wise, 46 N. Y. 612, *rev'g* 57 Barb. 416; Harris v. Burns, 50 Cal. 140.

53. Wooley v. Fry, 30 Ill. 158; Goff v. Rogers, 71 Ind. 459.

secure future advances as well as an existing debt is fraudulent as to other creditors is a question of fact, not of law, although the mortgage does not state that the excess above the debt is for future advances.[54] Whether a mortgage was made in good faith to cover future advances, or is a pretended security, is a question for the jury.[55] It is a question for the jury whether the presumption of law that the sale of property, the consideration of which was paid by a third party, is fraudulent as against creditors of the person paying the consideration, has been rebutted by the evidence in the case.[56] Where it is necessary to prove, as distinct facts, that a mortgage of personal property was made in good faith, and without any intent to defraud creditors or subsequent purchasers, and there is an admission that the mortgage was given for a good and valid consideration, it is proper to submit to the jury to decide whether such admission does not tend to prove the absence of fraudulent intent.[57]

§ 8. **Indebtedness and insolvency.**—The question whether a deed made by a person indebted is fraudulent is for the jury.[58] The circumstance that a man was insolvent at the time of executing a conveyance is a matter to be left to the jury, as tending to influence them in finding that the deed was fraudulent.[59] It is the province of the jury, and not of the court, to draw the inference of fraud from such facts.[60] A gift by a husband or father, while indebted, to his wife or child, is presumably fraudulent, yet fraud may be disproved, and whether fraudulent or not is a question of fact for the jury.[61] Under a statute pro-

54. Wood v. Franks, 67 Cal. 32, 7 Pac. 50.

55. Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

56. Foster v. Berkey, 8 Minn. 351.

57. Groat v. Rees, 20 Barb. (N. Y.) 26.

58. Thacher v. Phinney, 89 Mass. 146; Filley v. Register, 4 Minn. 391, 77 Am. Dec. 522; Lutton v. Hesson, 18 Pa. St. 109; Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522.

59. *Cal.*—Knox v. Moses, 104 Cal. 502, 38 Pac. 318; Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576.

Ky.—McConnell v. Brown, 16 Ky. 459.

Miss.—Ladnier v. Ladnier, 64 Miss. 368, 1 So. 492.

60. Kerr v. Hutchins, 46 Tex. 384.

61. French v. Holmes, 67 Me. 186.

viding that a debtor shall not disable himself from meeting his debts by voluntary alienations of his property, the question as to the value of the property retained and whether it is sufficient is for the jury.[62]

§ 9. **Knowledge and participation of grantee.**—In a suit by creditors to set aside their debtor's conveyance as fraudulent, the question of the grantee's or vendee's participation in, or knowledge of, the fraudulent intent of the grantor or vendor is one of fact for the jury.[63] If the purchaser has knowledge that the effect of the sale is to deprive the vendor's creditors of the means of collecting their debts, it is a question of fact whether such knowledge does not give him notice of the fraudulent intent of the vendor.[64] Notice of fraud in a transfer is a question of fact for the jury.[65] The question whether a vendee had knowledge of facts calculated to arouse his suspicion and to stimulate inquiry as to the vendor's financial condition is one of fact for

62. Worthy v. Brady, 108 N. C. 440, 12 S. E. 1034, *aff'g* 91 N. C. 265.

63. *N. Y.*—New York County Nat. Bank v. American Surety Co., 174 N. Y. 544, 67 N. E. 1086, *aff'g* 69 App. Div. 153, 74 N. Y. Supp. 692; Mahler v. Schloss, 7 Daly, 291.

U. S.—Browning v. De Ford, 178 U. S. 196, 20 Sup. Ct. 876, 44 L. Ed. 1033; Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 85 Fed. 417, 29 C. C. A. 239.

Ala.—Smith v. Kaufman, 100 Ala. 408, 14 So. 111.

Conn.—Knower v. Cadden Clothing Co., 57 Conn. 202, 17 Atl. 580.

Ga.—Planters', etc., Bank v. Willeo Cotton Mills, 60 Ga. 168.

Ind.—Leasure v. Coburn, 57 Ind. 274.

Ky.—Brown v. Force, 46 Ky. 357, 46 Am. Dec. 519.

La.—Carrollton Bank v. Cleveland, 15 La. Ann. 616.

Md.—Ecker v. McAllister, 45 Md. 290.

N. H.—Martin v. Livingston, 68 N. H. 562, 39 Atl. 432.

N. C.—Osborne v. Wilkers, 108 N. C. 651, 13 S. E. 285.

Pa.—Weber v. Aschbacker, 205 Pa. St. 558, 55 Atl. 534; Helser v. McGrath, 58 Pa. St. 458; Bredin v. Bredin, 3 Pa. St. 81; Snyder v. Berger, 3 Pa. Cas. 318, 6 Atl. 733.

S. C.—Aultman v. Utsey, 34 S. C. 559, 13 S. E. 848.

Tex.—Hines v. Perry, 25 Tex. 443.

64. Greenwald v. Wales, 174 N. Y. 140, 66 N. E. 665, *rev'g* 67 App. Div. 628.

65. Van Raalte v. Harrington, 101 Mo. 602, 14 S. W. 710, 20 Am. St. Rep. 626, 11 L. R. A. 424.

the jury.[66] A buyer's good faith is not conclusively established by his uncontradicted testimony. The question is for the jury.[67] In an action by a trustee in bankruptcy to recover the value of property transferred as a preference, whether defendant had reasonable cause to believe that the bankrupt was insolvent at the time of the transfer, within the meaning of the act, is a question of fact.[68]

§ 10. **Existence of creditors; secrecy; preferences; withholding instrument from record.**—It is for the law to determine whether there were creditors or not, so as to render a conveyance fraudulent.[69] The existence of an unusual degree of secrecy in a sale of a stock of goods by an insolvent, so as to constitute a badge of fraud, is a question of fact for the jury.[70] It is for the jury to determine whether or not a debtor's secret conveyance was made in fraud of his creditors.[71] The question whether a mortgage given by an insolvent to a creditor was intended as a security or as a preferential transfer of the property is a question of fact.[72] Whether an insolvent debtor is guilty of actual fraud in preferring a creditor is a question for the jury.[73] Where the evidence is conflicting, the question whether there was an agreement not to record a conveyance is for the jury.[74]

§ 11. **Submission of case to jury.**—In actions involving the validity or fraudulency of conveyances or transfers of property by a debtor, where there is evidence tending to show a design on

66. Smith v. Collins, 94 Ala. 394, 10 So. 334.

67. Molitor v. Robinson, 40 Mich. 200.

68. Jackman v. Eau Claire Nat. Bank, 125 Wis. 478, 104 N. W. 98, *aff'd* 17 Am. B. R. 675.

69. Day v. Lown, 51 Iowa, 364, 1 N. W. 786.

70. Fishel v. Lockard, 52 Ga. 632.

71. Hartley v. Millard, 167 Pa. St. 322, 31 Atl. 641.

72. Porter v. Stricker, 33 S. C. 183, 21 S. E. 635.

73. Murry Nelson & Co. v. Leiter, 190 Ill. 414, 60 N. E. 851; John V. Farwell Co. v. Wright, 38 Neb. 445, 56 N. W. 984; Kilpatrick-Koch Dry Goods Co. v. McPheely, 37 Neb. 800, 56 N. W. 389.

74. Kohn v. Johnston, 97 Iowa, 99, 66 N. W. 76.

the part of a debtor to hinder, delay, or defraud his creditors, or circumstances which are calculated to excite suspicion in the mind of a reasonable person that the transaction was not entirely fair and honest, the case should be submitted to the jury.[75] When such circumstances are shown it is error for the court to take the question from the jury by non-suit, dismissal, direction of verdict, or instruction.[76] The direction of a verdict is only justified where the court would be bound to set a contrary verdict aside as against the evidence.[77] Where the evidence is conflicting as to the character of the transaction the case must be submitted to the jury.[78] But where there is no evidence tending to show that the transaction was entered into with intent to defraud creditors, there is no evidence which justifies the sub-

75. *N. Y.*—Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853; Voss v. Smith, 87 App. Div. 395, 84 N. Y. Supp. 471; Milwaukee Harvester Co. v. Culver, 89 Hun, 598, 35 N. Y. Supp. 289; Del Valle v. Hyland, 61 Hun, 625, 15 N. Y. Supp. 901; Bier v. Kibbe, 52 Hun, 612, 5 N. Y. Supp. 152.

U. S.—Batavia v. Wallace, 102 Fed. 240, 42 C. C. A. 310.

D. C.—Bokel, etc., Co. v. Costello, 22 App. Cas. 81.

Ill.—Bradley v. Coolbaugh, 91 Ill. 148.

Iowa.—Crawford v. Nolan, 70 Iowa, 97, 30 N. W. 32.

Kan.—Schuster v. Kurtz, 47 Kan. 255, 27 Pac. 994.

Mass.—Plimpton v. Goodell, 143 Mass. 365, 9 N. E. 791; Allen v. Wheeler, 70 Mass. 123.

Minn.—Heim v. Heim, 90 Minn. 497, 97 N. W. 379; Dyer v. Rowe, 82 Minn. 223, 84 N. W. 797.

Miss.—May v. Taylor, 62 Miss. 500.

Mo.—Mears v. Gage (1904), 80 S. W. 712; Hanna v. Finley, 33 Mo. App. 645; Desberger v. Harrington, 28 Mo. App. 632.

N. C.—Haynes v. Rogers, 111 N. C. 228, 16 S. E. 416.

Pa.—Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065; Cover v. Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588; Baltimore, etc., R. Co. v. Hoge, 34 Pa. St. 214; Snyder v. Berger, 3 Pa. Cas. 318, 6 Atl. 733.

Tex.—Haas v. Kraus, 75 Tex. 106, 12 S. W. 394; Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Scott v. Alford, 53 Tex. 82; Matula v. Lane (Civ. App. 1900), 56 S. W. 112.

76. *N. Y.*—Bulger v. Rosa, *supra;* Del Valle v. Hyland, *supra.*

Mass.—Plimpton v. Goodell, *supra.*

N. C.—Haynes v. Rogers, *supra.*

Tex.—Matula v. Lane, *supra.*

77. Bulger v. Rosa, 119 N. Y. 459, 24 N. E. 853.

78. C. B. Rogers Co. v. Meinhardt, 37 Fla. 480, 19 So. 878; Steininger v. Donalson, 94 Ga. 514, 20 S. E. 420; Vickers v. Woodruff, 78 Iowa, 400, 43 N. W. 266; Kerr v. Hutchins, 46 Tex. 384.

mission of the case to the jury.[79] Where the evidence tends to prove merely slight circumstances of suspicion,[80] or is conclusive of the existence or non-existence of fraud,[81] or facts are proven from which the inference of fraud is so necessary and inevitable that a verdict to the contrary would not be endured,[82] the question should not be submitted to the jury, but becomes one of law for the court.

§ 12. **Instructions; province of court and jury.**—Where a proper case is made for the consideration of the jury and it is within the province of the jury to determine whether there was an intent to defraud creditors, the court must submit the question to them with proper instructions.[83] The jury should not be

79. *N. Y.*—Truesdell v. Bourke, 145 N. Y. 612, 40 N. E. 83, *rev'g* 80 Hun, 55, 29 N. Y. Supp. 849.

Mich.—Clark v. Phelps, 76 Mich. 564, 43 N. W. 591; Folkerts v. Standish, 55 Mich. 463, 21 N. W. 891.

N. C.—Messick v. Fries, 128 N. C. 450, 39 S. E. 59.

Pa.—Snayberger v. Fahl, *supra.*

Vt.—Tinker v. Cobb, 39 Vt. 483.

Wash.—Berlin v. Van de Vanter, 25 Wash. 465, 65 Pac. 756.

80. Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Simmons Clothing Co. v. Davis, 3 Ind. T. 374, 58 S. W. 653; State v. O'Neill, 151 Mo. 67, 52 S. W. 240; Baker, etc., Co. v. Schneider, 85 Mo. App. 412; Hagy v. Poike, 160 Pa. St. 522, 28 Atl. 846, *aff'g* 2 Pa. Dist 792.

81. Prentiss Tool, etc., Co. v. Schirmer, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737; Fish v. McDonnell, 42 Minn. 519, 44 N. W. 535.

82. Inglehart v. Thousand Island Hotel Co., 109 N. Y. 454, 17 N. E. 358.

83. *N. Y.*—Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Cohen v. Kelly, 35 N. Y. Super. Ct. 42; Topping v. Lynch, 2 Rob. 484.

U. S.—Norris v. McCanna, 29 Fed. 757.

Ala.—Bank of Commerce v. Eureka Brick, etc., Co., 108 Ala. 89, 18 So. 600; Carlton v. King, 1 Stew. & P. 472, 23 Am. Dec. 295.

Ga.—Kiser v. Dozier, 102 Ga. 429, 30 S. E. 967, 66 Am. St. Rep. 184.

Ill.—Merrill v. Merrill, 105 Ill. App. 5.

Me.—Weeks v. Hill, 88 Me. 111, 33 Atl. 778; Hall v. Sands, 52 Me. 355.

Mass.—Jaquith v. Rogers, 179 Mass. 192, 60 N. E. 486.

Minn.—Walkow v. Kingsley, 45 Minn. 283, 47 N. W. 807.

Mo.—National Bank of Commerce v. Brunswick Tobacco Works Co., 155 Mo. 602, 56 S. W. 283; National Tube Works Co. v. Ring Refrigerator, etc., Co., 118 Mo. 364, 22 S. W. 947; Blom-Collier Co. v. Martin, 98 Mo. App. 596, 73 S. W. 729.

Neb.—Thompson v. Benner, 33 Neb. 193, 49 N. W. 1116.

left to determine without direction whether a transaction is fraudulent.[84] The court should instruct the jury as to the nature and effect of legal fraud, and not leave the evidence to them without direction to find whether a sale was fraudulent or not.[85] What is termed fraud in law is distinct from fraud in fact, and it is the duty of the judge to instruct the jury that their conclusions from facts must be regulated by the character and import given to these facts by necessary legal implication. Where the legal effect of a conveyance is to hinder, delay, or defraud creditors, no matter what the actual intention may have been, the court is bound to declare it fraudulent in law.[86] The court should not invade the province of the jury by assumptions as to facts,[87] or by instructions in the nature of commentaries on the weight and sufficiency of the evidence.[88] Specific mention of sus-

Pa.—Montgomery-Webb Co. v. Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Widdall v. Garsed, 125 Pa. St. 358, 17 Atl. 418; Jordan v. Frink, 3 P. St. 442.

S. C.—McGee v. Wells, 52 S. C. 472, 30 S. E. 602.

Tex.—Dosche v. Nette, 81 Tex. 265, 16 S. W. 1013; City Nat. Bank v. Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523; Blankenship v. Willis, 1 Tex. Civ. App. 657, 20 S. W. 952.

Vt.—Hall v. Parsons, 15 Vt. 358.

Wash.—Adams v. Dempsey, 22 Wash. 284, 60 Pac. 649, 79 Am. St. Rep. 933.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758.

Instructions held not to withdraw the question of fraud from the jury.—Deere v. Wolf, 77 Iowa, 115, 41 N. W. 588; Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240.

84. Williams v. White, 7 Kan. App. 664, 53 Pac. 890; Potter v. McDowell, 31 Mo. 62; Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Martin-Brown Co. v. City Nat. Bank (Civ. App. 1897), 41 S. W. 524; Maffi v. Stephens (Tex. Civ. App. 1906), 93 S. W. 158.

85. Cadbury v. Nolen, 5 Pa. St. 320.

86. Gibson v. Love, 4 Fla. 217.

87. *Ala.*—Smith v. Collins, 94 Ala. 394, 10 So. 334, assumption as to knowledge and intent of grantee.

Dak.—Young v. Harris, 4 Dak. 367, 32 N. W. 97.

Mich.—Hutchinson v. Poyer, 78 Mich. 337, 44 N. W. 327.

Mo.—First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; Kurtz v. Troll, 86 Mo. App. 649.

Neb.—Powell v. Yeazel, 46 Neb. 225, 64 N. W. 695, characterizing a sale as a "pretended sale."

Nev.—Tognini v. Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442.

Tex.—Schmick v. Connellee (Tex. Civ. App. 1894), 26 S. W. 738, assumption as to nature of transfer.

88. *N. Y.*—Hoffman v. Gundrum, 15 N. Y. Supp. 98.

picious circumstances in a charge and an instruction that a jury may consider them in connection with all other circumstances as bearing on the question of intent is not erroneous.[89] In the absence of proof or presumption of fraud it is not error to instruct that the matters in proof do not make out a case of fraud.[90] But where the jury are instructed that certain circumstances would justify the conclusion that a conveyance was fraudulent in fact, in a case where there is no presumption of law to guide them, this is a summing up of the evidence and not an instruction on a question of law.[91] Where the facts are clear and undisputed, the court may charge directly, without hypothesis, and instruct the jury as to the legal effect of the evidence, if true.[92]

§ 13. **Form and sufficiency of instructions.**—The instructions or charge of the court to the jury must fully submit the cause, and fully and clearly state and define all the questions to be considered by the jury, and instructions which ignore or omit questions whereby a party is prejudiced, or which do not sufficiently submit the facts to the jury, are erroneous.[93] An in-

Ala.—Bank of Commerce v. Eureka Brick, etc., Co., 108 Ala. 89.

Ga.—Trounstine v. Irving, 91 Ga. 92, 16 S. E. 310.

Ind.—Kane v. Drake, 27 Ind. 29.

Miss.—Alexander v. Dulaney (1894), 16 So. 355.

Mo.—Mears v. Gage (App. 1904), 80 S. W. 712.

Neb.—Davis v. Getchell, 32 Neb. 792, 49 N. W. 776.

Pa.—Painter v. Drum, 40 Pa. St. 467.

Tex.—City Nat. Bank v. Martin-Brown Co., 20 Tex. Civ. App. 52, 48 S. W. 617, 49 S. W. 523.

Wash.—Adams v. Dempsey, *supra.*

Wis.—Rindskopf v. Myers, 87 Wis. 80, 57 N. W. 967.

89. Wolf v. Anderson, 118 N. C. 890, 24 S. E. 671.

90. Hopkins v. Scott, 20 Ala. 179.

91. McDermott v. Barnum, 19 Mo. 204.

92. Henderson v. Mabry, 13 Ala. 713, where the question was whether a sale of chattels was fraudulent or not, and the evidence, offered to explain the fact that a part were left in the possession of the vendor, sufficiently repelled the inference of fraud, the court might instruct the jury that the evidence, if true, afforded an explanation.

93. *Ill.*—Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142; Grieb v. Caraker, 57 Ill. App. 678; Kuhlenbeck v. Hotz, 53 Ill. App. 675.

struction that the controlling question is whether the conveyance was or was not fraudulent as to creditors is proper where such question is the only really debatable one.[94] As a rule, the court is not required to submit a mere abstract proposition, unconnected with any suggestion giving it application to the case, or to any question of fact requiring the consideration of the jury.[95] The instructions must be applicable to the issues.[96] Where the solvency of the vendor is a material issue in a transaction alleged to have been made with intent to hinder, delay, or defraud creditors, the court may properly inform the jury when a person, within legal contemplation, is deemed insolvent.[97] Reference may be had to cases cited in the notes below as to the applicability of instructions where the consideration of the conveyance,[98] and

Iowa—Hall v. Carter, 74 Iowa, 364, 37 N. W. 956; Bickler v. Kandall, 66 Iowa, 703, 24 N. W. 518.

Kan.—Winfield Nat. Bank v. Johnson, 8 Kan. App. 830, 57 Pac. 855.

Me.—Brown v. Osgood, 25 Me. 505.

Mich.—Partlow v. Swigart, 90 Mich. 61, 51 N. W. 270.

Mo.—First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; Alberger v. White, 117 Mo. 347, 23 S. W. 92; Fink v. McCue (App. 1907), 100 S. W. 549; Mott v. Coughlan, 68 Mo. App. 229.

Neb.—Liming v. Kyle, 31 Neb. 649, 48 N. W. 470; Lewis v. Connolly, 29 Neb. 222, 45 N. W. 622.

Nev.—Tognini v. Kyle, 15 Nev. 464; Thomas v. Sullivan, 13 Nev. 242.

N. M.—Smith v. Montoya, 3 N. M. 39, 1 Pac. 175.

Or.—Stanley v. Smith, 15 Or. 505, 16 Pac. 174.

Tex.—Cross v. McKinley, 81 Tex. 332, 16 S. W. 1023; Dosch v. Nette, 81 Tex. 265, 16 S. W. 1013; Hadock v. Hill, 75 Tex. 193, 12 S. W. 974; Jackson v. Harby, 70 Tex. 410, 8 S. W. 71; Randolph v. Hudson (Civ. App. 1899), 50 S. W. 128; Baxter v. Howell, 7 Tex. Civ. App. 198, 26 S. W. 453; Houston, etc., R. Co. v. Shirley (Civ. App. 1894), 24 S. W. 809.

Wash.—Adams v. Dempsey, 29 Wash. 155, 69 Pac. 738.

Wis.—Wheeler v. Konst, 46 Wis. 398, 1 N. W. 96.

94. Sedgwick v. Tucker, 90 Ind. 271.

95. Hine v. Bowe, 114 N. Y. 350, 21 N. E. 733.

96. *N. Y.*—Spiegel v. Hays, 118 N. Y. 660, 22 N. E. 1105.

Ga.—Hobbs v. Greenfield, 103 Ga. 1, 30 S. E. 257.

Ill.—Anderson v. Warner, 5 Ill. App. 416.

Tex.—Blair v. Finlay, 75 Tex. 210, 12 S. W. 983.

Vt.—Smith v. Kinne, 19 Vt. 564.

97. Friedberg v. Elliott (Tex. 1888), 8 S. W. 832.

98. Reeves v. Skipper, 94 Ala. 407, 10 So. 309; Studebaker Bros. Mfg. Co. v. Key, 99 Ga. 144, 25 S. E. 14; Ganong v. Green, 71 Mich. 1, 38 N. W. 661.

where the knowledge and intent of the grantee,[99] is a material issue. The instructions of the court must also be applicable to the facts which are admitted or which the evidence tends to prove.[1] The applicability of instructions to the evidence as to consideration,[2] as to knowledge and intent of grantee,[3] as to indebtedness and insolvency,[4] as to change of possession,[5] and as to relationship of parties,[6] is considered in the cases cited in the notes below. In the absence of evidence showing fraud, it has been held not error to charge that fraud cannot be presumed as an existing fact,[7] or that the evidence does not warrant a finding that the conveyance was fraudulent at its inception.[8] Where

99. Hall v. Carter, 74 Iowa, 364, 37 N. W. 956; First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348.

1. *N. Y.*—Spiegel v. Hays, 118 N. Y. 660, 22 N. E. 1105.

Ala.—Cottingham v. Greely Barnham Grocery Co., 137 Ala. 149, 34 So. 956.

Cal.—Ballow v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

Ga.—Hollis v. Sales, 103 Ga. 75, 29 S. E. 482.

Ind.—Ewing v. Gray, 12 Ind. 64.

Kan.—McKluskey v. Cubbison, 8 Kan. App. 857, 57 Pac. 496.

Md.—Stockbridge v. Fahnstock, 87 Md. 127, 39 Atl. 95.

Mass.—Stebbins v. Miller, 94 Mass. 591.

Minn.—Cain v. Mead, 66 Minn. 195, 68 N. 840.

Mo.—Deere Plow Co. v. Sullivan, 158 Mo. 440, 59 S. W. 1005.

N. C.—Southern L. & T. Co. v. Benbow, 131 N. C. 413, 42 S. E. 896; Feree v. Cook, 119 N. C. 161, 25 S. E. 856; Glover v. Flowers, 101 N. C. 34, 7 S. E. 579.

Tex.—Robertson v. Gourley, 84 Tex. 575, 19 S. W. 1006; Wallis v. Schneider, 79 Tex. 479, 15 S. W. 492; Halff v. Goldfrank (Civ. App. 1899), 49 S. W. 1095.

Wis.—Stevens v. Breem, 75 Wis. 595, 44 N. W. 645.

2. *Colo.*—Hill v. Corcoran, 15 Colo. 270.

Ga.—Almond v. Gairdner, 76 Ga. 699.

Mo.—State v. Hope, 102 Mo. 410, 14 S. W. 985; State v. Aebly, 9 Mo. App. 55.

Tex.—Willis v. Whitsitt, 67 Tex. 673, 4 S. W. 253; Cooper v. Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581; Taylor v. Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466.

Wis.—Pilling v. Otis, 13 Wis. 495.

3. Ernest v. Merritt, 107 Ga. 61, 32 S. E. 898; Le Page v. Slade, 79 Tex. 473, 15 S. W. 496; Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718.

4. New v. Driver, 89 Ga. 434, 15 S. E. 535; Heflin v. Kiser, 88 Ga. 306, 14 S. E. 585; Saar v. Foller, 71 Iowa, 425, 32 N. W. 405; Carson v. Golden, 36 Kan. 705, 14 Pac. 166.

5. Reynolds v. Weinman (Tex. Civ. App. 1897), 40 S. W. 560.

6. Goldberg v. Cohen, 119 N. C. 59, 25 S. E. 707.

7. Sedgwick v. Tucker, 90 Ind. 271.

8. Hyde v. Shank, 93 Mich. 535, 53 N. W. 787.

the title to real estate is made a material question by the course which the testimony takes, it is error to refuse an instruction, by which refusal the jury is left to determine unaided the preliminary inquiry as to who owned the real estate.[9] An instruction to consider surrounding facts and circumstances, so far as is known by the parties at the time of the conveyance, is not erroneous as giving the jury authority to consider circumstances not in evidence.[10] Where a sale is made under circumstances that are a departure from the usual course of business, and is a badge of fraud, an instruction that a sale made out of the usual course of business is evidence of fraud is not impertinent or erroneous.[11] Instructions must not be argumentative,[12] contradictory,[13] or misleading.[14] The rules of law applicable to the

9. Jansen v. McQueen, 105 Mich. 199, 63 N. W. 73.

10. Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102.

11. Gallober v. Martin, 33 Kan. 252, 6 Pac. 257.

12. Smith v. Collins, 94 Ala. 394, 10 So. 334; Murry Nelson & Co. v. Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

13. Weber v. Mick, 131 Ill. 520, 23 N. E. 646; Gonzales v. Adoue, 94 Tex. 120, 58 S. W. 951; Meyer Bros. Drug Co. v. Durham, 35 Tex. Civ. App. 71, 79 S. W. 860; Frost v. Mason, 17 Tex. Civ. App. 465, 44 S. W. 53.

14. *N. Y.*—Griswold v. Sheldon, 4 N. Y. 581; Hanford v. Artcher, 4 Hill, 271.

U. S.—Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Short v. Hepburn, 75 Fed. 113, 21 C. C. A. 252.

Ark.—Wallace v. Bernheim, 63 Ark. 108, 37 S. W. 712; Norton v. McNutt, 55 Ark. 59, 17 S. W. 362.

Ill.—Dempsey v. Bowen, 25 Ill. App. 192.

Iowa.—McCreary v. Skinner, 75 Iowa, 411, 39 N. W. 674.

Kan.—Morse v. Ryland, 58 Kan. 250, 48 Pac. 957.

Md.—Franklin v. Claflin, 49 Md. 24.

Mass.—Jaquith v. Rogers, 179 Mass. 192, 60 N. E. 486.

Mich.—Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Clark v. Lee, 78 Mich. 221, 44 N. W. 260; Watkins v. Wallace, 19 Mich. 57.

Mo.—National Bank of Commerce v. Brunswick Tobacco Works Co., 155 Mo. 602, 56 S. W. 283; State v. Hellman, 20 Mo. App. 304; Erhardt v. Estel, 6 Mo. App. 6.

Nev.—Mendes v. Kyle, 16 Nev. 369.

Okla.—Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330.

Pa.—Connelly v. Walker, 45 Pa. St. 449.

S. C.—McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 75 Am. St. Rep. 567.

Tex.—Panhandle Nat. Bank v. Foster, 74 Tex. 514, 12 S. W. 223; Wylie v. Posey, 71 Tex. 34, 9 S. W. 87; Wood v. Chambers, 20 Tex. 247, 70 Am. Dec. 382.

Va.—Hughes v. Kelly (1898), 30 S. E. 387.

various issues submitted to the jury must be correctly stated,[15] as, for example, as to the knowledge and intent of the grantee,[16] as to the relationship of the parties,[17] as to the consideration,[18] as to the retention and change of possession,[19] as to reservations

Wis.—Bleiler v. Moore, 99 Wis. 486, 75 N. W. 953; Button v. Metcalf, 80 Wis. 193, 49 N. W. 809.

Instructions not misleading.—*Iowa.*—Riegelman v. Todd, 77 Iowa, 696, 42 N. W. 517; Miller v. Bryan, 3 Iowa, 58.

Mich.—Jansan v. McQueen, 105 Mich. 199, 63 N. W. 73.

Pa.—Mulley v. Shoemaker, 180 Pa. St. 585, 37 Atl. 94.

Tex.—Ratto v. Bluestein, 84 Tex. 57, 19 S. W. 338; Gwaltney v. Searcy (Civ. App. 1902), 68 S. W. 304.

Wis.—Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N. W. 825.

15. McCreary v. Skinner, 75 Iowa, 411, 39 N. W. 674; Frankenthal v. Goldstein, 44 Mo. App. 189; Bruce v. Koch, 94 Tex. 192, 59 S. W. 540, *rev'g* 58 S. W. 189; Seligson v. Brown, 61 Tex. 180.

16. *U. S.*—Treusch v. Ottenburg, 54 Fed. 867, 4 C. C. A. 629.

Ala.—Schaungut v. Udell, 93 Ala. 302, 9 So. 550; Harris v. Russell, 93 Ala. 59, 9 So. 541.

Dak.—Young v. Harris, 4 Dak. 367, 32 N. W. 97.

Ga.—Lamkin v. Clary, 103 Ga. 631, 30 S. E. 596.

Ill.—Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85.

Iowa.—Headington v. Langland, 65 Iowa, 276, 21 N. W. 650.

Kan.—Morse v. Ryland, 58 Kan. 250, 48 Pac. 957.

Me.—King v. Ward, 74 Me. 349.

Mass.—Carroll v. Hayward, 124 Mass. 120.

Tex.—Hargadine v. Davis (Tex. Civ. App. 1894), 26 S. W. 424; Freiberg v. Johnson, 71 Tex. 558, 9 S. W. 455; Traders' Nat. Bank v. Day, 7 Tex. Civ. App. 569, 27 S. W. 264.

Wash.—Eicholtz v. Holmes, 8 Wash. 71, 35 Pac. 607.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758; Evans v. Rugee, 57 Wis. 623, 16 N. W. 49.

17. *U. S.*—Shauer v. Alterton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286.

Ala.—Smith v. Collins, 94 Ala. 394, 10 So. 334.

Ark.—Norton v. McNutt, 55 Ark. 59, 17 S. W. 362.

Ga.—Hicks v. Sharp, 89 Ga. 311, 15 S. E. 314.

Ill.—Merrill v. Merrill, 105 Ill. App. 5.

Iowa.—Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

N. C.—Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

18. Ogleshy v. Walton, 118 Ga. 203, 44 S. E. 990.

19. *N. Y.*—McCarthy v. McQuade, 1 Sweeny, 387.

U. S.—Shauer v. Alterton, *supra.*

Ill.—Rapp v. Rush, 96 Ill. App. 356.

Mich.—Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Mo.—Scully v. Albers, 89 Mo. App. 118.

and trusts for the grantor,[20] as to preference of creditors,[21] and other issues.[22] A statement of law merely technically incorrect is not prejudicially erroneous, where by the use of proper words the legal result would be the same.[23] An instruction which requires a higher degree of proof than is ordinarily required by law is erroneous.[24] The court may properly refuse to instruct the jury that in the absence of express evidence to establish the fraud the plaintiff will be bound by the evidence of the defendant, which shows that the conveyance was made in good faith and for a valuable consideration.[25] A charge defining fraudulent conveyances in the language of the statute,[26] or substantially so,[27] is sufficient. Where the statute requires that the intent be

20. Hill v. Rutledge, 83 Ala. 162, 4 So. 135.

21. Archer v. Long, 38 S. C. 272, 16 S. E. 998; Sonnentheil v. Texas Guaranty, etc., Co., 10 Tex. Civ. App. 274, 30 S. W. 945.

22. Fearey v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440, duty to define "fraudulent;" Hudson v. Willis (Tex. Civ. App. 1894), 28 S. W. 913, understanding of the seller as determining the question of ownership; Hoffer v. Gladden, 75 Ga. 532, what would excite suspicion that a transaction was unfair need not be stated to the jury.

23. Masters v. Teller, 7 Okla. 668, 56 Pac. 1067.

24. *N. Y.*—Newman v. Cordell, 43 Barb. 448.

U. S.—Baer v. Rooks, 50 Fed. 898, 2 C. C. A. 76, an instruction that fraud is never presumed hut must be proved is correct, although it fails to mention that fraud, like any other fact, may be proved by circumstantial evidence.

Ala.—Nelms v. Steiner, 113 Ala. 562, 22 So. 435.

Ill.—Silvis v. Oltmann, 53 Ill. App. 392.

Iowa.—Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

Kan.—Morse v. Ryland, 58 Kan. 250, 48 Pac. 957; McCluskey v. Cubbison, 8 Kan. App. 857, 57 Pac. 496, to refuse to charge that fraud may be shown by proof of circumstances from which the inference of fraud is natural and irresistible is erroneous.

Mich.—Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

Miss. — Hirsch v. Richardson (1890), 7 So. 323.

Tex.—Schmick v. Noel, 72 Tex. 1, 8 S. W. 83; Sparks v. Dawson, 47 Tex. 138.

Wis.—Kaufer v. Walsh, 88 Wis. 63, 59 N. W. 460.

25. Newman v. Cordell, 43 Barb. (N. Y.) 448.

26. Hanford v. Artcher, 1 Hill (N. Y.), 347; Banning v. Marleau, 121 Cal. 240, 53 Pac. 692; Rutledge v. Hudson, 80 Ga. 266, 5 S. E. 93; Hoffer v. Gladden, 75 Ga. 532.

27. Boise v. Henney, 32 Ill. 130.

to hinder, delay, *or* defraud, it is erroneous to instruct that the conveyance to be void must be made with intent to hinder, delay, *and* defraud.[28] Where a transaction falls within a particular paragraph of a statute, the court may give in its charge to the jury not only such paragraph but also another paragraph of such statute, where they serve to illustrate each other.[29] The charge must be construed in connection with the subject matter to which it relates,[30] and if an instruction has a clear and definite meaning when applied to the only question before the jury it is sufficient.[31] Instructions are to be construed as a whole, and the fact that one portion of them considered separately might be open to objection does not constitute error, if the charge is correct when taken as a whole.[32]

§ 14. **Requests for instructions.**—Parties are entitled to instructions correctly stating the law of the case and correctly applying the law to the facts of the case,[33] but the court need not submit a request to charge that is sufficiently covered by

28. Evans v. Coleman, 101 Ga. 152, 28 S. E. 645; Coon v. McClure, 53 Neb. 622, 74 N. W. 65; Cook v. Greenberg (Tex. Civ. App. 1896), 34 S. W. 687; Pilling v. Otis, 13 Wis. 495. See also Burgert v. Borchert, 59 Mo. 80; Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59; Norwegian Plow Co. v. Hawthorn, 71 Wis. 529, 37 N. W. 825.

29. Cribb v. Bagley, 83 Ga. 105, 10 S. E. 194.

30. Peck v. Carmichael, 17 Tenn. 325.

31. Lockwood v. Nelson, 16 Ala. 294; Lillie v. McMillan, 52 Iowa, 463, 3 N. W. 601.

32. *Ind. T.*—Swofford Bros. Dry Goods Co. v. Smith McCord Dry Goods Co., 1 Ind. T. 314, 37 S. W. 103.

Iowa. — Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909; Sunberg v. Babcock, 66 Iowa, 515, 24 N. W. 19.

Mo.—Fearey v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440; Mansur-Tebbetts Implement Co. v. Ritchie, 143 Mo. 587, 45 S. W. 634.

Nev.—Tognini v. Kyle, 15 Nev. 464.

Tex.—Bruce v. Koch (Civ. App. 1900), 58 S. W. 189; Houston, etc., R. Co. v. Shirley (Civ. App. 1894), 24 S. W. 809.

Wash.—Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

Wis.—Rindskopf v. Myers, 87 Wis. 80, 57 N. W. 967; Barkow v. Sanger, 47 Wis. 500, 3 N. W. 16.

33. McCormick v. Smith, 127 Ind. 230, 26 N. E. 825; City of Baltimore v. Williams, 6 Md. 235; Warren v. Carpenter, 99 Mich. 287, 58 N. W. 308; Fink v. McCue (Mo. App. 1907), 100 S. W. 549.

the general instructions,[34] and, where from the circumstances of the case a requested instruction is unnecessary, the court may refuse to give it.[35] Where the charge given is correct, it cannot be objected to on the ground that it does not contain a particular instruction unless there has been a request therefor.[36] As a general rule a proper request need not be given in its exact language, but it is sufficient if it is covered by the instruction as given.[37] An error in refusing to give a particular instruction asked correctly applying the law to the facts is not cured by a subsequent general charge on the subject.[38]

§ 15. **Verdict and findings generally.**—Where the evidence is insufficient to rebut the statutory presumption of fraud, and the jurors appear to have been too indulgent in their consideration of the transactions of fraudulent debtors, justice can be obtained by setting aside the verdict.[39] A verdict finding no intent to defraud but an intent to delay is not void for inconsistency.[40] Where the verdict of the jury is not necessarily contrary to the direction of the court, a judgment affirming such verdict will not be disturbed.[41] As a rule, the rules as to verdicts and findings which obtain in civil actions generally apply in actions to set aside transfers by debtors as fraudulent as against creditors.[42]

34. Wallis v. Schneider, 79 Tex. 479, 15 S. W. 492; Reynolds v. Weinman (Tex. Civ. App. 1897), 40 S. W. 560; Traders' Nat. Bank v. Fry, 14 Tex. Civ. App. 403, 37 S. W. 672.

35. McClure v. Sheek, 68 Tex. 426, 4 S. W. 552.

36. Mayer v. Walker, 82 Tex. 222, 17 S. W. 505.

37. Winchester v. Charter, 102 Mass. 272; State v. William Barr Dry Goods Co., 45 Mo. App. 96.

38. McCormick v. Smith, *supra*.

39. Hollacher v. O'Brien, 5 Hun (N. Y.) 277.

40. Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176.

41. Caswell v. Harris (Cal. 1887), 13 Pac. 166.

42. *U. S.*—Doss v. Tyack, 14 How. 297, 14 L. Ed. 428, the court will not set aside a verdict on the affidavits of some of the jurors as to what they meant by their verdict.

Ga.—Cain v. Langston, 99 Ga. 89, 24 S. E. 892.

Pa.—Oliver v. Reading Iron Co., 170 Pa. St. 396, 32 Atl. 1088.

§ 16. **Special interrogatories and findings by jury.**—A special verdict must find all the facts necessary to support a judgment, and where the jury renders a special verdict, in which it fails to find that at the time of the conveyance the alleged fraudulent debtor had no property subject to execution, the verdict is defective, and insufficient to support a judgment,[43] Where the answers to special interrogatories submitted to the jury are inconsistent and contradictory, or the special interrogatories are insufficient, the findings of the jury will not support a judgment.[44] Where from the instructions the jury could not have failed to understand that the material question was whether or not the conveyance was fraudulent, a special interrogatory is not erroneous in using the word "defeating" instead of "defrauding."[45] Where goods seized on execution were claimed by the debtor's brother under a bill of sale from the debtor, which defendant alleged was fraudulent, it was error, in taking a special verdict, to refuse to submit questions as to the consideration for the bill of sale.[46]

§ 17. **Findings by court.**—The findings by the court must be applicable to the issues and the evidence.[47] Where, in an action to set aside a conveyance by a debtor as fraudulent, there is a special finding of facts, the fraudulent intent must be found, or the conveyance will not be set aside.[48] The failure to find that

43. Line v. State, 131 Ind. 468, 30 N. E. 703; Holman v. Elliott, 65 Ind. 78.

44. Forepaugh v. Pryor, 30 Minn. 35, 14 N. W. 61; Fick v. Mulholland, 48 Wis. 310, 4 N. W. 527.

45. First Nat. Bank v. Fenn, 75 Iowa, 221, 39 N. W. 278.

46. Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758.

47. Wallen v. Montague, 121 Ala. 287, 25 So. 773; Stephens v. Hallstead, 58 Cal. 193; Galentine v. Burbaker, 147 Ind. 458, 46 N. E. 903, findings insufficient; Clow v. Brown (Ind. App. 1904), 72 N. E. 534, findings sufficient; Kells v. McClure, 69 Minn. 60, 71 N. W. 827.

48. *N. Y.*—Vail v. Craige, 13 St. Rep. (N. Y.) 448.

Cal.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576.

Ind.—State Bank v. Backus (App. 1903), 66 N. E. 475, *aff'd* 160 Ind. 682, 67 N. E. 512; Owens v. Gascho, 154 Ind. 225, 56 N. E. 224; Morgan v. Worden, 145 Ind. 600, 32 N. E. 783; Sickman v. Wilhelm, 130 Ind. 480, 29

there was a fraudulent intent is equivalent to a finding that there was no such intent.[49] But a special finding of facts is sufficient if the intent to defraud is a necessary conclusion of law from the facts found,[50] and the findings of the court may be sufficient to negative the charge of fraud.[51] A finding by the court that a husband conveyed land to his wife to keep it from his creditors is sufficient to negative the payment by her of any consideration.[52] A finding that a transfer of property was not solely in consideration of a pre-existing debt, but chiefly as a gift, is in effect a finding that there was a valuable consideration, which was, however, in the opinion of the court, inadequate, and brings the transaction within the rule that inadequacy of consideration is not of itself sufficient, even as against creditors of an insolvent debtor, to authorize a court to find fraud as a conclusion of law.[53] In an action to set aside a deed for fraud, a finding by the court that the paper was signed, sealed, and acknowledged, and caused to be recorded by the grantor, and that the grantee was ignorant of the existence of the deed until several years after it was recorded, is insufficient to support a judgment against the grantee, where there is no finding that the deed was delivered to him.[54] Where the court made special findings of facts, and stated conclusions of law thereon, a failure to find that the

N. E. 908; Fletcher v. Martin, 126 Ind. 55, 25 N. E. 886; Citizens' Bank v. Bolen, 121 Ind. 301, 23 N. E. 146; Stout v. Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Mo.—Robinson v. McCune, 128 Mo. 577, 30 S. W. 156.

Va.—Fisher v. Dickinson, 84 Va. 318, 4 S. E. 737.

49. State Bank v. Backus, *supra;* Selz v. Mayer, 151 Ind. 422, 51 N. E. 485.

50. Corbin v. Goddard, 94 Ind. 419; Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876; Jordan v. Buschmeyer, 97 Mo. 94, 10 S. W. 616.

A conclusion of law that a conveyance was fraudulent is a *non squintur*, where the fact is found to be that the debtor's intention was to insure the payment of as much of his indebtedness as possible. Jarvis v. Banta, 83 Ind. 528. See also Zacharia v. Swanson, 34 Tex. Civ. App. 1, 77 S. W. 627.

51. Fredericks v. Clarke, 3 Mont. 258; Hargadine v. Davis (Tex. Civ. App. 1896), 34 S. W. 342.

52. Wilson v. Spear, 68 Vt. 145, 34 Atl. 429.

53. Jamison v. King, 50 Cal. 132.

54. Holmes v. Little, 86 Hun (N. Y.), 226, 33 N. Y. Supp. 225.

grantor had no property other than alleged to have been fraudulently conveyed, out of which the creditor's claim might have been made at the time of the conveyance or of the trial, is fatal to a judgment in the creditor's favor.[55] Where the court finds that a conveyance, at the time it was made, and at the time of the trial, operated to defraud the creditors of the grantor, this finding will be construed to mean that the grantor was insolvent from the date of the conveyance to the date of the trial.[56] A finding that a mortgage was made in good faith to secure a contemporaneous loan, and without any fraudulent intent, shows that the mortgagee was a *bona fide* purchaser for value.[57] Where by statute the burden is imposed on the purchaser of personal property unaccompanied by an actual and continued change of possession to show his good faith, a finding by the trial court of the *bona fides* of such purchaser is necessary to uphold his title in that respect as against a subsequent innocent purchaser.[58] A judgment setting aside an assignment by an insolvent as not made in good faith is not erroneous for want of a specific finding that defendant was insolvent at the date thereof, where his fraudulent intent is found as a fact.[59] In a suit to set aside a mortgage as fraudulent, a finding that the mortgagee took the mortgage with full knowledge of the claims of creditors and of the fact that the same would render the mortgagor insolvent is not a finding that the execution of the mortgage, on the date thereof, left the mortgagor insolvent, and without property sufficient to pay plaintiff's judgment.[60]

§ 18. **New trial.**—A new trial will be granted where the verdict is against the weight of the evidence,[61] but not where

55. Hartlepp v. Whiteley, 129 Ind. 576, 28 N. E. 535, 31 N. E. 203.

56. Crow v. Garver, 133 Ind. 260, 32 N. E. 569.

57. Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572. See also White v. Wise, 134 Cal. 613, 66 Pac. 959.

58. Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761.

59. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277, *rev'g* 85 App. Div. 57, 82 N. Y. Supp. 969.

60. Dinius v. Lahr (Ind. App. 1905), 74 N. E. 1033.

61. *N. Y.*—Jackson v. Mather, 7 Con. 301.

the verdict is sustained by sufficient evidence,[62] or the findings as to fraudulent intent are sufficient to support a verdict.[63] If the jury pronounce a sale to be fair and valid which, by the very terms of the statute relative to fraudulent conveyances, is a naked fraud, the court will grant a new trial.[64] A new trial will not be granted because of the erroneous admission of testimony which is not of much practical importance but may possibly have a bearing on the question at issue.[65] Under a statute providing that the court may disregard an error in the admission of evidence, if substantial justice appears to have been done, a new trial will not be granted where the fact, to establish which the evidence is erroneously admitted, is not seriously disputed.[66]

Ga.—Trice v. Rose, 79 Ga. 75, 3 S. E. 701.

Me.—Eveleth v. Harmon, 33 Me. 275.

Mont.—Kendall v. O'Neal, 16 Mont. 303, 40 Pac. 599.

N. C.—Darden v. Skinner, 4 N. C. 259.

Compare Depew v. Clark, 1 Phila. (Pa.) 432.

A new trial cannot be demanded as a matter of right in an action to set aside a conveyance as fraudulent towards creditors. Truitt v. Truitt, 37 Ind. 514.

62. Foy v. East Dallas Bank (Tex. Civ. App. 1894), 28 S. W. 137.

63. Schwab v. Owens, 11 Mont. 473, 29 Pac. 190.

64. Stevens v. Fisher, 19 Wend. (N. Y.) 181.

65. Cook v. Mason, 87 Mass. 212.

66. Lapham v. Marshall, 51 Hun (N. Y.), 36, 3 N. Y. Supp. 601.

CHAPTER XIX.

JUDGMENT OR DECREE AND ENFORCEMENT THEREOF.

Section 1. Judgment or decree; requisites and validity in general.
2. Nature of relief granted.
3. Conformity of judgment to pleadings.
4. Judgment under prayer for general relief.
5. Amount of recovery.
6. Setting aside conveyance.
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12. Sales and conveyances under order of court.
13. Disposition of property and proceeds; subjection to claims of creditors.
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15. Mortgages and other liens.
16. Liens and priorities of creditors.
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21. Discovery.
22. Injunction to restrain fraudulent conveyance by debtor.
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24. Injunction to restrain sale under fraudulent judgment or mortgage.
25. Violation of injunction and punishment.
26. Appointment of receiver.
27. Appeal and review.

Section 1. **Judgment or decree — Requisites and validity in general.**—A judgment in an action to set aside a conveyance as fraudulent as against creditors, which is interlocutory in character and not a final judgment from which appeal may be taken, is erro-

neous.[1] A decree cannot be sustained which professes to state the proofs, when there is no proof shown of the fraud or that there were any creditors at the time of the execution of the conveyance.[2] A decree is not complete which omits matters which are of import in the cause and necessary to its complete adjudication.[3] A decree in adjudging a mortgage fraudulent as to a creditor is not erroneous, because leaving the mortgagee in possession until the premises are sold, the security being ample for both claims.[4] A decree declaring conveyances void as to creditors need not contain an express proviso as to rights that are protected by statute.[5] Where a judgment creditor brings his action simply to set aside a transfer as fraudulent, it is sufficient that the judgment declares the instrument fraudulent and void as against the plaintiff's judgment, as all he can claim in the action is the removal or annulment of the transfer so far as it obstructs the enforcement of his judgment.[6] Where it appears that there is nothing which could be applied on the judgment, even if the conveyance was vacated, a judgment in favor of the creditors is erroneous.[7] In an action by creditors to set aside a fraudulent conveyance, and asking judgment for the amount of plaintiff's claims against the grantor, the court may enter a finding against defendants at one term of court, and assess damages and render the proper decree at a subsequent term.[8]

§ 2. **Nature of relief granted.**—Where an action is brought by a judgment creditor to reach real estate fraudulently conveyed, the

1. Wood v. Hunt, 28 Barb. (N. Y.) 302.

2. Kennedy v. Merriam, 70 Ill. 228.

3. Oliver Finnie Grocery Co. v. Bodenheimer, 77 Miss. 415, 27 So. 613. See Norberg v. Ricords, 84 Md. 568, 36 Atl. 116.

4. Schultz v. Schultz (Tex. Civ. App. 1901), 66 S. W. 56.

5. Mitchell v. Sawyer, 115 Ill. 650, 5 N. E. 109.

6. Belgard v. McLaughlin, 44 Hun (N. Y.), 557.

7. Jackson v. Sayler, 30 Ind. App. 72, 63 N. E. 881.

8. Doherty v. Holiday, 137 Ind. 282, 32 N. E. 315. See United States v. Ingate, 48 Fed. 251, as to mode and time of rendering judgment in a suit in equity to set aside fraudulent conveyances by a delinquent for public money or his sureties, and subject their property to the payment of the amount due the United States.

proper judgment to enter is to direct that the fraudulent conveyances shall be set aside, so far as they are an obstruction to the plaintiff's judgment, and that he shall be permitted to issue execution, and sell the property upon the execution in the usual way. The courts have held that the appointment of a receiver, to whom the debtor would be compelled to convey, to sell the property fraudulently conveyed, and pay the judgment out of the proceeds, is not improper, but this conclusion was reached after considerable vacillation, and in spite of the serious inconveniences which necessarily resulted to all parties from taking that course.[9] But where an action is brought to reach personal property or equitable assets which have been disposed of with intent to defraud creditors, the appointment of a receiver is not only proper, but necessary, because it is only when a receiver has been appointed, and has taken the property into his possession, that the creditors acquire an equitable lien upon the assets sought to be reached, and in no other way than by a sale through a receiver can those assets be reduced to money, and applied to the payment of the execution.[10] A court of equity has the power not only to set aside a fraudulent conveyance so as to disembarrass complainant's remedy by execution at law, but also, where the property cannot be reached by execution, to subject the property fraudulently assigned directly to the payment of complainant's debt under its own jurisdiction.[11] Where a grantor files a bill to secure satisfaction either out of property conveyed by the debtor or out of the grantee's note given in consideration therefor, and afterwards consents that the decree be made out of the note, instead of from the property itself, the

9. Bryer v. Foerster, 14 App. Div. (N. Y.) 315, 43 N. Y. Supp. 801. See also Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347, wherein the inconveniences which may result from a resort to a receiver are fully set forth; Union Nat. Bank v. Warner, 12 Hun (N. Y.), 306; Van Wyle v. Baker, 10 Hun (N. Y.), 39; McCaffray v. Hickey, 66 Barb. (N. Y.), 489; Hendrickson v. Winne, 3 How. Pr. (N. Y.) 127. *Compare* Receiver, chap. XIX, § 26, *infra*.

10. Bryer v. Foerster, *supra;* Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494. See Receiver, chap. XIX, § 26, *infra*.

11. Catching v. Manlove, 39 Miss. 655.

validity of the conveyance will not be determined.[12] In a proceeding in equity, by a purchaser of land deriving title under a sheriff's sale, to set aside a prior conveyance by the original owner as fraudulent, the court will at most only set aside the conveyance. It will not decree a delivery of possession to the complainant, nor any account of rents and profits.[13] The court, on setting aside a conveyance executed in fraud of judgments afterwards recovered and held by plaintiff, may enter a decree in favor of plaintiff for the aggregate amount of the judgments, with interest and costs, instead of simply declaring the property subject to the judgments, and directing that they be enforced by execution.[14] Where an action is brought against the grantee of a deceased debtor to set aside a conveyance on the ground that it was made to hinder and delay creditors, and the representative of the deceased debtor is not a party to the suit, it is error to render a judgment declaring a trust against the grantee and in favor of the debtor's estate.[15] Where a creditor sues the executor of his deceased debtor and the fraudulent mortgagee of the debtor to set aside the mortgage, judgment should be rendered against the executor for the amount of the debt, and a decree against the mortgagee cancelling the encumbrance as to so much of the property as, when levied on and sold, will satisfy the judgment.[16] Where a bill by a judgment creditor alleges that the judgment debtor has transferred the greater part of his property to various persons in fraud of creditors, and has also, for the same purpose, made a statutory assignment for the benefit of creditors and adds a special prayer for relief that all the transfers, as well as the assignment, may be set aside, the assignment may be retained if such a course is more beneficial to creditors.[17] Where a debtor makes no answer to a bill filed by a creditor, and his grantee after decree but during the term, files a disclaimer to the

12. Lyman v. Place, 26 N. J. Eq. 30.

13. Hall v. Greenly, 1 Del. Ch. 274.

14. Searing v. Berry, 58 Iowa, 20, 11 N. W. 708. See also Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308.

15. Bachman v. Sepulveda, 39 Cal. 688.

16. Kerr v. Huchins, 46 Tex. 384.

17. Davis v. White, 49 N. J. Eq. 567, 25 Atl. 936, *aff'g* 48 N. J. Eq. 22, 21 Atl. 187.

land sought to be subjected, a decree in accordance with the prayer of the plaintiff's bill is properly rendered.[18] Where a judgment creditor suing to set aside a deed of trust on certain property in whole or in part on the ground of fraud fails on such issue, he is nevertheless entitled to have the land sold and the proceeds applied first to the satisfaction of such deed, and the balance, if any, to the payment of the judgment.[19] Upon a bill filed by a creditor to set aside a conveyance as fraudulent, judgment may be entered for the debt, although the fraud charged is not proven.[20] Where after issue was joined in an action in the nature of a creditor's suit against a husband and wife, by a judgment creditor of the husband, to reach real estate claimed to have been fraudulently conveyed to the wife, the wife died, and no fraud was established by the plaintiff, he could not have judgment for the interest in the real estate acquired by the husband upon the death of the wife.[21] Where defendants, by a fraudulent combination, had made themselves individually answerable to the judgment debtor for certain property sold on execution, the court need not adjust their liabilities among themselves unless requested to do so.[22] Where a court finds that a conveyance was voluntary as to part of the alleged consideration, and requires the grantee to pay that sum into court for the benefit of creditors, it is not error to fix the value of the land at the amount of the alleged consideration, and to permit the grantee to retain the land at that price, it not being shown that it was so inadequate as to constitute fraud.[23] Where the evidence is not sufficient to induce the court to avoid a conveyance absolutely on the ground of fraud, but to excite a suspicion as to the adequacy of the consideration and the fairness of the transaction, the court will permit the conveyance to stand only as security for the con-

18. Roanoke Nat. Bank v. Farmers' Nat. Bank, 84 Va. 603, 5 S. E. 682.

19. Scott v. Thomas (Va. 1905), 51 S. E. 829.

20. Pigue v. McFerrin, 80 Tenn. 645.

21. Curtis v. Fox, 47 N. Y. 299.

22. Bruce v. Kelly, 39 N. Y. Super. Ct. 27.

23. Stonebraker v. Hicks, 94 Va. 618, 27 S. E. 497.

sideration actually paid, and a decree may be properly rendered that the conveyance should stand as a mortgage to secure the consideration actually paid, and should direct a sale of the premises, first for the payment of such amount, and then for the satisfaction of complainant's judgment.[24] Where an absolute conveyance is adjudged by the court to be a mortgage, the judgment creditor in an action to set it aside as fraudulent should be decreed to have a lien upon the premises subject to the lien of the mortgage.[25] Under the Louisiana civil code, the judgment in the revocatory action instituted by creditors to set aside a fraudulent conveyance, if the action be successful, is that the conveyance be avoided as to its effect on the complaining creditors, and that all the property or money taken from the original debtor's estate by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the complaining creditors.[26] Where all of defendant's real estate and interest in real estate in a certain county has been attached, and the record does not show what real estate has been covered by the attachment, plaintiff should make a written motion for the judgment desired, particularly describing the property which it is claimed is covered by the attachment, because conveyed in fraud of creditors, supported by the affidavit that it is believed that such property was fraudulently conveyed, and was covered by the attachment.[27] In a suit to set aside a mortgage as fraudulent, where the mortgagee paid taxes on the mortgaged property, he was entitled, on cancellation of the mortgage, to be repaid the taxes with interest.[28] Where a husband fraudulently conveyed his goods to his wife and another, and such other conveyed to defendant, who purchased in good faith and formed a partnership with the wife, and subsequently after notice of the fraud and of a pending action to set aside the conveyance, the goods of the part-

24. Withrow v. Warner, 56 N. J. Eq. 795, 40 Atl. 751, 67 Am. St. Rep. 501, *rev'g* 35 Atl. 1057.

25. Lazarus v. Rosenberg, 70 App. Div. (N. Y.) 105, 75 N. Y. Supp. 11. See also Fenton v. Morgan, 16 Wash. 30, 47 Pac. 214.

26. Claflin v. Lisso, 27 Fed. 420; Stone v. Kidder, 6 La. Ann. 552.

27. American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 Atl. 515.

28. Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320.

nership were transferred to a corporation organized for the purpose, and in which the members of the partnership were the principal stockholders, a receiver of the property so conveyed was entitled to judgment against the corporation for the amount of the wife's interest in the partnership at the time it was transferred to the corporation, and against the wife for the value of the property conveyed to her by her husband, but to no judgment against the wife's partner individually.[29]

§ 3. **Conformity of judgment to pleadings.**—In a suit to set aside conveyances by a debtor on the ground of fraud, the *bona fides* of a conveyance not alleged in the bill to be fraudulent cannot be adjudicated.[30] As a general rule, issues not raised by an averment or prayer in the bill cannot be adjudicated, and judgment cannot be given upon facts not stated in, or at least fairly inferable from those set out in the complaint.[31] For example, where a complaint, in an action by a judgment creditor to set aside a conveyance of real estate as fraudulent, avers that the conveyance was granted by the debtor in favor of his wife without consideration, with the sole purpose and intent to hinder, delay, and defraud

29. Varnum v. Behn, 63 App. Div. (N. Y.) 570, 71 N. Y. Supp. 903, *aff'd* 175 N. Y. 522, 67 N. E. 1090.

30. Wheeler, etc., Mfg. Co. v. Hasbrouck, 68 Iowa, 554, 27 N. W. 738; Hunter v. Hunter, 10 W. Va. 321; Erdall v. Atwood, 79 Wis. 1, 47 N. W. 1124.

31. *N. Y.*—Greenough v. Greenough, 32 App. Div. 631, 53 N. Y. Supp. 1104, *aff'g* 21 Misc. Rep. 727, 47 N. Y. Supp. 1096; Tuthill v. Myrus, 57 App. Div. 37, 68 N. Y. Supp. 37; Kennedy v. Barandon, 67 Barb. 209; Maders v. Whallon, 64 Hun, 636, 19 N. Y. Supp. 638, *aff'd* 65 Hun, 622, 20 N. Y. Supp. 145; Hotop v. Neidig, 17 Abb. Pr. 332; Nicholson v. Leavitt, 6 N. Y. Super. Ct. 252. See also Gray v. Schneck, 4 N. Y. 460.

Ala.—Pattison v. Bragg, 95 Ala. 55, 10 So. 257.

Iowa.—Cathcart v. Greive, 104 Iowa, 330, 73 N. W. 835.

Ky.—Eskridge v. Carter, 16 Ky. L. Rep. 760, 29 S. W. 748.

Md.—Chatterton v. Mason, 96 Md. 236, 37 Atl. 960.

Mo.—Schneider v. Patton, 175 Mo. 684, 75 S. W. 155; Needles v. Ford, 167 Mo. 495, 67 S. W. 240.

S. C.—National Bank v. Kinard, 28 S. C. 101, 5 S. E. 464.

Tenn.—Dunscomb v. Wallace, 105 Tenn. 385, 59 S. W. 1013.

Compare Doherty v. Holiday, 137 Ind. 282, 32 N. E. 315.

creditors, and asks that it be canceled of record, and the property declared to belong to the judgment debtor, but the evidence shows that the deed was upon an actual consideration as expressed therein, and was made with no intent to defraud any creditor, but in good faith, a judgment declaring that the deed should stand as a mortgage security in the sum of the actual consideration, and that, subject to it, the plaintiff's judgment should be a lien upon the property, is not within the relief prayed for by the complaint, and is erroneous.[32] A judgment in an action to set aside several conveyances to creditors in fraud of other creditors, which sets aside a conveyance not specified in the petition, cannot stand, although the petition alleges that other transfers, unknown to the plaintiffs, were made in contemplation of insolvency, and within six months of the filing of the petition.[33] The Minnesota statute provides that where no answer is interposed the court cannot grant more relief than is prayed for in the complaint. In many other cases it may grant any relief consistent with the case made by the complaint, and embraced within the issue.[34] Cases are cited in the note below wherein the judgments and decrees were held by the courts to be warranted by the pleadings and evidence.[35]

§ 4. **Judgment under prayer for general relief.**—Under a prayer for general relief in a creditors' bill which seeks to set aside a conveyance as fraudulent, the equitable interest of the debtor in property purchased on conditional sale, and such interest in other

32. Truesdell v. Sarles, 104 N. Y. 164, 10 N. E. 139.

33. Bowers v. Huntingdon Bank, 97 Ky. 294, 30 S. W. 647.

34. Thompson v. Brickford, 19 Minn. 17, in a suit to set aside a fraudulent conveyance of land, part of which is to secure a debt to the grantee and a part to be held in trust for the grantor, where the grantee claims to be a *bona fide* purchaser of the whole land, the court may avoid the conveyance as to the whole for the actual fraud.

35. *Cal.*—Woodbury v. Nevada Southern R. Co., 120 Cal. 463, 52 Pac. 730; Bull v. Ford, 66 Cal. 176, 4 Pac. 1175.

Ill.—Andrews v. Donnerstag, 70 Ill. App. 236.

Iowa.—Stubblefield v. Gadd, 112 Iowa, 681, 84 N. W. 917.

Mass.—Stratton v. Herndon, 154 Mass. 310, 28 N. E. 269.

property sold as was owned by the debtor, may be condemned.[36] Where facts are alleged to show that deeds were made without consideration, or in fraud of creditors, the creditors are, upon proof of these facts, entitled to have the deeds canceled, but not to have them treated as mortgages, or to be substituted to the vendor's lien of the debtor for the unpaid purchase money.[37] In an action by a judgment creditor to set aside as fraudulent a trust deed given by a debtor, plaintiff may, on a general prayer for relief, have a foreclosure of the trust assignment, so as to reach the surplus, if any, after the payment of the trust expenses and debts.[38] Where a trust deed sought to be set aside is held valid, the complainants are entitled to have the surplus proceeds of the trust property, if any, after the satisfaction of the debts secured in the deed, applied in discharge of their demand.[39] Where a creditor recovers judgment against his debtor, without including interest to accrue, and the debtor thereafter makes a fraudulent conveyance of his property to prevent its seizure on execution, a court of equity will set aside such conveyance on the petition of the creditor, and decree interest under the prayer for general relief.[40] In a creditors' bill which seeks to set aside a conveyance as fraudulent, the court may decree that, on default in payment of the amount found due, the land found to have been fraudulently conveyed may be sold by a master in chancery.[41]

§ 5. **Amount of recovery.**—Notwithstanding a judgment, the court will, where the judgment creditor asks relief against a fraudulent conveyance, look into the original consideration, and give the creditor only what on the whole appears due to him.[42] It is proper, in setting aside a transfer in favor of a plaintiff who has

36. Hunter v. Austin, 109 Ala. 311, 9 So. 511.

37. Muenks v. Bunch, 90 Mo. 500, 3 S. W. 63.

38. Craigmiles v. Hays, 75 Tenn. 720.

39. Marks v. Hill, 15 Gratt. (Va.) 400.

40. Beall v. Silver, 2 Rand. (Va.) 401.

41. Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367.

42. Bean v. Smith, 2 Fed. Cas. No. 1,174, 2 Mason, 252.

in his hands personal property of the debtor, to apply the value of such property on his debt.[43] A complainant who purchased under execution property fraudulently conveyed, at a reduced price, and brought his bill to set aside the conveyance, should be allowed to annul the sale, and subject the property to the payment of his demand, upon the terms only of surrendering to defendant the remainder not sold.[44]

§ 6. **Setting aside conveyance.**—In an action by a judgment creditor to set aside a conveyance of real property as fraudulent, plaintiff is only entitled to the setting aside of the conveyance so far as it obstructs his judgment.[45] Where the fraud is established, the creditor is not entitled to a judgment setting aside and annulling the conveyance, but only that the property be sold and his judgment paid out of the proceeds.[46] In a suit by creditors to subject land fraudulently conveyed as to them, but good between the parties, the conveyance should not be decreed void *in toto*.[47] In an action to charge lands in the hands of a fraudulent grantee with the payment of a debt due by the equitable owner, it is not necessary that the deeds should be set aside.[48] Equity may relieve in the case of a fraudulent conveyance by making the debt of the complainant a charge upon the land so conveyed, without avoiding the deed.[49] Where an execution is levied on only a part of real estate which was conveyed by a debtor, it is error on decreeing the conveyance to be fraudulent to render a decree canceling the deed as a whole, but it should be canceled only as to the part levied upon.[50] A voluntary transfer of personal property being valid as between the parties, will not be set aside, except so far as is necessary to pay the debt of the complaining creditor, and therefore the

43. Morris v. Morris, 71 Hun (N. Y.), 45, 24 N. Y. Supp. 579.

44. Payne v. Burke, 43 Ky. 492.

45. Coons v. Lennieu, 58 Minn. 99, 59 N. W. 977.

46. Orr v. Gilmore, 7 Lans. (N. Y.) 345.

47. Duncan v. Custard, 24 W. Va. 730; Murdock v. Welles, 9 W. Va. 552.

48. Cheely v. Wells, 33 Mo. 106.

49. Buckman v. Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

50. Walters v. Cantrell (Tex. Civ. App. 1902), 66 S. W. 790.

judgment should provide that, on satisfying such debt, the property be returned to the grantee.[51] A transfer of property in fraud of the rights of creditors can only be set aside at the instance of a creditor to the extent of his claim.[52] Where plaintiff is the only creditor seeking relief as against alleged fraudulent transfers of personal property by defendant, and plaintiff's claim can be satisfied by the vacation of a particular transfer of a sum of money, it is not essential that the judgment should vacate all the transfers shown to be fraudulent.[53]

§ 7. **Ordering sale of property.**—It is held in most jurisdictions that the decree in behalf of creditors, in an action brought by them to set aside a deed to land transferred by their debtor to avoid his debts, should, or may properly, order a sale of the land, and not remit the complainants to their execution at law.[54] But in New York it has been held that the plaintiff is not entitled to a decree directing the sale of the real estate, even though he asked for it in his bill,[55] that the court has power only to ap-

51. Comyus v. Riker, 83 Hun, 471, 31 N. Y. Supp. 1042.

52. Ford v. Rosenthal, 74 Tex. 28, 11 S. W. 904.

53. Fox v. Erbe, 100 App. Div. (N. Y.) 343, 91 N. Y. Supp. 832.

54. *Ark.*—Turner v. Vaughan, 33 Ark. 454; Apperson v. Burgett, 33 Ark. 328.

Ga.—Cruger v. Tucker, 69 Ga. 557.

Ind.—Simons v. Bushy, 119 Ind. 13, 21 N. E. 451; Hadley v. Hood, 94 Ind. 119. *Compare* Levy v. Crittenden, 120 Ind. 37, 22 N. E. 92.

Ky.—White v. Cates, 37 Ky. 357. *Compare* Mize v. Turner, 15 Ky. L. Rep. 67, 22 S. W. 83.

La.—Decuir v. Veazey, 8 La. Ann. 453, under a statute.

Miss.—Hunt v. Knox, 34 Miss. 655.

Ohio.—Sockman v. Sockman, 18 Ohio, 362. The decree should not order the sale of more property than would be sufficient to satisfy plaintiff's claim. Martin v. Elden, 32 Ohio St. 282.

S. C.—Wagener v. Mars, 27 S. C. 97, 2 S. E. 844.

Va.—Barger v. Buckland, 28 Gratt. 850; Greer v. Wright, 6 Gratt. 154, 52 Am. Dec. 111.

W. Va.—Chrislip v. Teter, 43 W. Va. 356, 27 S. E. 288.

Where a creditor attacks a conveyance of his deceased debtor as fraudulent, and there is no other creditor of the estate, the court may decree a sale of the property and an application of the proceeds to pay the plaintiff's debt. Hills v. Sherwood, 48 Cal. 386.

55. Hendrickson v. Winne, 3 How. Pr. (N. Y.) 127.

point a receiver to take a conveyance of land from the debtor, and to make another conveyance thereof by his deed, which would be valid,[56] and that courts of equity will not require a sale and conveyance of the land by a master without requiring the owner of the legal estate to unite in the conveyance to the purchaser or to the receiver.[57] Where a fraudulent conveyance of land was made before judgment was recovered to prevent its lien attaching, a decree that the debtor and his fraudulent assignee join with the receiver in the suit in executing the conveyance to the purchaser on a sale of the land directed by the decree, is appropriate and valid.[58] The precise amount of the debt should be first ascertained by the report and stated in the decree, and a reasonable time allowed the defendant to pay the amount into the office of the court before the sale is ordered.[59] Where a deed void as to creditors is valid as between the parties, in a suit by the grantor's creditors to subject the land to the payment of their claims, other property of the grantor in the hands of parties to the suit will be first applied to the payment of the claims.[60] If a judgment debtor has conveyed away land fraudulently, and retains other lands, a court of equity, on setting aside a conveyance at the suit of the judgment creditors, should direct a sale of a moiety of the whole, embracing in the

56. Walker v. White, 36 Barb. 592.

57. Dawley v. Brown, 65 Barb. 107.

58. McCalmont v. Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

59. Lewis v. Baker, 38 Tenn. 385.

In Virginia, under a statute which forbids a decree of sale unless it appears that the rents and profits of the land subject to the lien will not satisfy the judgment in five years, before setting aside a deed as fraudulent towards creditors, the court should direct an inquiry as to whether plaintiff's debts could not be paid out of the rents and profits of the property in five years. Cromie v. Hart, 18 Gratt. (Va.) 739.

In West Virginia, it is not required by statute, or by the general law on the subject, that all the creditors shall be convened, and their debts reported, or that it should be ascertained, whether the rents will pay off the debts in five years, or in a reasonable time, before there can be a decree of sale. State v. Bowen, 38 W. Va. 91, 18 S. W. 375; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Core v. Cunningham, 27 W. Va. 206.

60. Fones v. Rice, 9 Gratt. (Va.) 568.

moiety decreed to be sold the land not conveyed by the debtor, and taking only so much of the land conveyed as will, with the land retained by the debtor, constitute a moiety of the aggregate of the whole.[61] Where a bill to subject land fraudulently conveyed by a debtor does not show any interest in the land conveyed in the fraudulent grantee, he cannot object that the decree directs the whole of the land sold.[62] On a bill against fraudulent donees of a deceased person and his heir to subject the lands conveyed and those descended, the whole may be decreed to be sold to satisfy the plaintiff's debt.[63]

§ 8. **Personal judgment.**—Where a fraudulent purchaser holds the property, the creditor must subject it, and cannot take a personal money decree for his debt, or the value of the property, against such purchaser.[64] Where the party has taken a conveyance in fraud of creditors of the property transferred, and his title has been declared void, and set aside in a suit by a receiver appointed in proceedings supplemental to execution, by a decree reciting that the property is in existence, a money judgment cannot, in addition, be rendered against him in favor of such receiver.[65] A court of equity has power, however, to adapt its relief to the exigencies of the case, and may award a personal judgment against a party in lieu of setting aside a transfer where the facts establish such personal liability.[66] Where the specific property conveyed in fraud of creditors to one participating in the fraud cannot be recovered, a decree for

61. McNew v. Smith, 5 Gratt. (Va.) 84.

62. Ballentine v. Beall, 4 Ill. 203.

63. Blow v. Maynard, 2 Leigh (Va.) 29.

64. Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46.

65. Harrison v. Obermeyer, etc., Brewing Co., 64 App. Div. (N. Y.) 499, 72 N. Y. Supp. 270; Van Blarcom v. Isaac, 92 Wis. 541, 66 N. W. 617.

66. Fox v. Rebe, 100 App. Div. (N. Y.) 343, 91 N. Y. Supp. 832, *citing* Baily v. Hornthal, 154 N. Y. 648, 49 N. E. 56, 61 Am. St. Rep. 645; Murtha v. Curley, 90 N. Y. 372. See also Varnum v. Behn, 63 App. Div. (N. Y.) 570, 71 N. Y. Supp. 903; Greer v. Wright, 6 Gratt (Va.) 154, 52 Am. Dec. 111.

its value may be rendered.[67] The court has jurisdiction to grant full relief upon a bill by creditors by entering personal decrees against defendants for balances due after sale of the property subjected to their claims.[68] But where the only prayer is to have the transfer set aside a money judgment cannot be rendered.[69] While it is true that a court of equity will adapt its relief to the exigencies of the case, it is well settled that it will only give a personal judgment for money where that form of relief becomes necessary in order to prevent a failure of justice, and when it is for any reason impracticable to grant the species of relief demanded.[70] Where a husband causes real estate to be conveyed to his wife in fraud of creditors, a judgment *in personam* for its value cannot be taken, at the suit of his assignee in bankruptcy, against her, nor, in case of her death, against her executors, her estate not having received any actual benefit from the conveyance.[71] On a creditor's bill to set aside a fraudulent conveyance, it is improper to render a decree making the grantee responsible in damages to the creditor. Such damages should be sought by a proceeding at law.[72] Where a petition in no way intimated, nor contained any allegation from which it would be inferred, on what account, if at all, a personal judgment against defendant would be asked, such judgment was unauthorized.[73] Where a husband conveys his property to his wife in fraud of creditors, with her knowledge, and it is sold to

67. Thompson v. Johnson, 55 Minn. 515, 57 N. W. 223; Solinsky v. Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836, *overruling* Tubb v. Williams, 26 Tenn. 367.

68. Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305; Hinton v. Ellis, 27 W. Va. 422.

69. Carpenter v. Knapp, 1 Tex. App. Civ. Cas., § 1111.

70. Harrison v. Obermeyer, etc., Brewing Co., 64 App. Div. (N. Y.) 499, 72 N. Y. Supp. 270, *citing* Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 N. E. 75; Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436.

71. United States Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed. 954; Phipps v. Sedgwick, 95 U. S. 3, 24 L. Ed. 591.

72. Dunphy v. Kleinsmith, 78 U. S. 610, 20 L. Ed. 223.

73. Schneider v. Patton, 175 Mo. 684, 75 S. W. 155.

an innocent third party, personal judgment may be entered against the wife for the proceeds of such sale.[74]

§ 9. **Operation and effect.**—A decree avoiding a deed as to creditors of the grantor leaves the deed operative *inter partes.* The legal effect of a judgment declaring a conveyance void as against a judgment creditor is not to restore the title to the debtor, but to make the property subject in the hands of the grantee to the judgment lien and clear the way for the judgment creditor to sell in satisfaction thereof.[75] A decree adjudging a conveyance void as being in fraud of creditors is a decree *sub modo,* and binding only as to such creditors.[76] A judgment which sets aside a conveyance so far as is necessary to secure the plaintiff's debt does not affect the validity of the conveyance beyond its terms, so far as other creditors who have not asked relief are concerned.[77] Where the purchaser of real estate at sheriff's sale obtains a decree setting aside a deed which had been made to defraud the judgment creditor, such decree does not vest the absolute title in the complainant.[78] A decree to set aside a fraudulent sale cannot affect the interests of minor children not parties to the suit.[79] Where a deed conveying land embracing a homestead is set aside as fraudulent at the suit of a creditor, a provision in the decree that the master in selling the land shall proceed in accordance with the homestead law does not cause the homestead estate to revert to the grantor, but simply confirms the grantee's title thereto.[80] Where in an action to have a declaration of trust declared void, the court decreed that

74. Sheldon v. Parker (Neb. 1903), 95 N. W. 1015, 92 N. W. 923.

75. Knapp v. Crane, 14 App. Div. (N. Y.) 120, 43 N. Y. Supp. 513 (citing Waterbury v. Westervelt, 9 N. Y. 598; Bank v. Eames, 4 Abb. Dec. [N. Y.] 83); Dawley v. Brown, 11 St. Rep. (N. Y.) 260; McDowell v. McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Succession of Schultz, 39 La. Ann. 505, 2 So. 47.

76. Boggess v. Scott, 48 W. Va. 316, 37 S. E. 661.

77. Kerr v. Hutchins, 46 Tex. 384.

78. Frakes v. Brown, 2 Blackf. (Ind.) 295.

79. Burns v. Bangert, 16 Mo. App. 22.

80. Quinn v. People, 146 Ill. 275, 34 N. E. 148, *aff'g* 45 Ill. App. 547.

defendants "be and they hereby are devested of all title to" the land the effect of the decree was to declare the declaration of trust void.[81] Where a purchase is made of the grantee of an alleged fraudulent deed, during the pendency of proceedings properly instituted for the express purpose of testing the validity of such deed, and the deed is adjudged fraudulent, such purchase becomes a nullity against the title established by such proceedings.[82] Where, however, one of two grantees of a fraudulent grantor has purchased from the other a portion of the land so conveyed for a valuable consideration, and recorded his deed, a decree in a subsequent suit setting aside the conveyance first mentioned will not affect the validity of the last deed, though the grantee of the last deed was a party to the action in which the decree was entered.[83] When a conveyance by a debtor is declared to be fraudulent as to creditors, and is adjudged void, and the property decreed to be sold and the proceeds to be brought into court, such decree is conclusive, and cannot be opened and modified, in the subsequent proceedings, to ascertain the amount of the debts of the complainants and to distribute the proceeds of the sale.[84] Where judgment is rendered against the creditor denying his right to subject the property in controversy to the payment of his debt, such judgment, until appealed from or reversed, becomes the law of the case, and estops the creditor from further pursuing the property.[85]

§ 10. **Persons entitled to claim benefit.**—The judgment or decree, in an action to set aside a fraudulent conveyance, avails the plaintiff only, and not those who are neither parties nor privies to the proceedings,[86] since no one can take advantage of an adjudica-

81. Lindell Real Estate Co. v. Lindell, 133 Mo. Sup. 386, 33 S. W. 466.

82. Jackson v. Andrews, 7 Wend. (N. Y.) 152, 22 Am. Dec. 574.

83. Applegate v. Dowell, 15 Or. 513, 16 Pac. 651.

84. Strike's Case, 1 Bland (Md.), 57.

85. Shaffer v. Knox, 7 Kan. App. 182, 53 Pac. 785.

86. Labauve v. Boudreau, 9 Rob. (La.) 28; McManns v. Jewett, 6 La. 530. See also Enger v. Lofland, 100 Iowa, 303, 69 N. W. 526. *Contra*, Adams v. Coons, 37 La. Ann. 305.

tion who was not in a position to be prejudiced by an adverse determination.[87] The action of the court is only to the extent of supplying a remedy to the suitor creditor. As to all other persons, the conveyance remains as if no proceedings had been taken.[88] The fact that the conveyance is void as to one judgment creditor does not render it void as to judgment creditors who did not become parties plaintiff under the decree.[89] It has been held, however, that a conveyance, fraudulent as to one creditor, is void as to all others of the same class, and that a decree adjudicating its fraudulent character inures to the benefit of all other creditors of the same class taking advantage thereof in proper time by proper pleadings,[90] and that a conveyance set aside for fraud as to subsisting creditors is void as to subsequent judgment creditors.[91] On the contrary it is held that the fact that a conveyance is declared void as to prior creditors does not benefit subsequent creditors, and it should be held valid as to them.[92] When a fraudulent conveyance is set aside by certain creditors, another creditor may notwithstanding ratify it, and enforce rights given him thereunder.[93]

§ 11. **Enforcement of judgment or decree.**—Where judgment creditors have, by process in equity, had a deed of their debtor set aside as void, their course is either to have a receiver appointed by the court to take conveyance from the debtor and then pass a deed in his own name, or else to proceed to levy execution thereon by virtue of their original judgment, the lien whereof is still in force.[94] The vendee in a fraudulent sale may either pay the creditor who sets the sale aside, or surrender the property. If he does

87. Schultze's Appeal, 1 Pa. St. 258, 44 Am. Dec. 126.

88. McCalmont v. Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

89. Warden v. Browning, 12 Hun (N. Y.), 497.

90. Sibley v. Stacey, 53 W. Va. 292, 44 S. E. 420.

91. Trimble v. Turner, 21 Miss. 348, 53 Am. Dec. 90.

92. Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74.

93. German Nat. Bank v. Leonard, 40 Neb. 676, 59 N. W. 107.

94. Walker v. White, 36 Barb. (N. Y.) 592.

neither, execution may issue.[95] A conveyance by a debtor having been found to be in fraud of creditors and declared void, and the property ordered to be sold, an account of the rents and profits of the property sold should be taken.[96] Upon an application of the surplus money arising under the sale of real estate fraudulently conveyed, judgment creditors who have not become parties under the decree cannot enforce their judgments against the real estate until the debtor's personal estate has been first exhausted.[97] A debtor has no equitable interest in property which he has conveyed in fraud of creditors, entitling either him or his judgment creditor to redeem it from an execution sale made at the suit of other creditors who have had the conveyance set aside in a proceeding in equity.[98] A writ of assistance will be granted where defendant refuses to surrender property under a decree setting aside the conveyance to him as fraudulent.[99] In Kentucky, by statute, the execution plaintiff may file a petition in equity to set aside a fraudulent conveyance, and as the chancellor has jurisdiction of the parties he may grant complete relief while they are before him, by enforcing the execution.[1] In Indiana the statute which provides that property conveyed by a debtor with intent to hinder, delay, or defraud his creditors shall be sold without appraisement applies to property which the debtor fraudulently procured to be conveyed to another, and which ought to have been conveyed to himself, as well as to property held in his own name and by him fraudulently conveyed to another.[2]

§ 12. **Sales and conveyances under order of court.**—Where a debtor has fraudulently conveyed his property, it is not error for a court of equity, in which the conveyance is assailed by his creditors, to direct that the property be sold upon an order of sale

95. Atwill v. Belden, 1 La. 504.

96. In re Strike, 1 Bland (Md.), 57.

97. Warden v. Browning, 12 Hun (N. Y.), 497.

98. Howland v. Knox, 59 Iowa, 46, 12 N. W. 777.

99. Pratt v. Burr, 22 Fed. Cas. No. 11,372, 5 Biss. 36.

1. Gorman v. Glenn, 25 Ky. L. Rep. 1755, 78 S. W. 873.

2. Muggs v. Helgemeier, 81 Ind. 120. *Compare* Whitehall v. Crawford, 37 Ind. 147.

instead of an execution.[3] But a sale of land fraudulently conveyed, on application of one not entitled to assert its invalidity, at the instance of his creditors, conveys no title,[4] and a sale of lands by trustee under a decree in chancery will be adjudged invalid where such sale is not made pursuant to the decree.[5] A judgment setting aside a sale and conveyance of lands as fraudulent as to creditors, and decreeing a sale to pay plaintiff's debt, is void as to a pledgee of the notes executed for the purchase money, who was not a party to the action, and the sale made thereunder is void.[6] The judgment, in a creditors' suit, setting aside a sale as fraudulent, and ordering a sale of the property, should not be enforced until an execution has been issued on personal property shown on the trial to be owned by the judgment debtor and subject to execution, and the property sold and the proceeds applied on the judgment.[7] Where there are valid liens prior to that of the plaintiff, and the money secured by them is due and payable, the court should ascertain the amounts and priorities of such liens, and decree a sale to satisfy the same, as well as that of plaintiff.[8] A judgment obtained against a debtor after he has conveyed land in fraud of creditors only binds the title of the fraudulent grantee, and a sale thereunder does not discharge prior liens.[9] The title given pursuant to a decree ordering the debtor and his fraudulent grantee to join with the receiver in the suit in executing a conveyance on a sale of the land directed by the decree is full and

3. McNally v. White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214; Teabout v. Jaffray, 74 Iowa, 28, 36 N. W. 783, 7 Am. St. Rep. 466; Stillwell v. Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408, *rev'g* 18 Atl. 679, decree for sale set aside, at the instance of the debtor's wife, to whom he had conveyed, where by reason of the fraud of the husband she was not made a party to the proceedings; Benton v. Collins, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33.

4. George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203.

5. Quarles v. Lacy, 4 Munf. (Va.) 251.

6. Gunn v. Orndorff, 23 Ky. L. Rep. 2369, 67 S. W. 372, 68 S. W. 461.

7. Hyatt v. Dusenbury, 12 Civ. Proc. R. (N. Y.) 152.

8. Dent v. Pickens, 50 W. Va. 382, 40 S. E. 572; Root-Tea-Na-Herb Co. v. Rightmire, 48 W. Va. 222, 36 S. E. 359.

9. Appeal of Dungan, 88 Pa. St. 414.

perfect, and discharged of all right on the part of the debtor or other judgment creditors of his to redeem.[10] Where, in an action on behalf of all the judgment creditors of the grantor in an alleged fraudulent conveyance, a receiver is appointed to take and sell the real estate, and a claimant of other interest therein is made a party defendant, and the validity of his claim or lien is made a question which is disposed of adversely to him, such lien becomes subordinate to the title of the receiver's grantee.[11] The purchaser at a valid sale by a receiver to whom property has been transferred by order of court is vested with all the title of the owner of the property at the time of the transfer to the receiver, as against the lien of a judgment subsequently obtained against the debtor.[12] Where, when a wife has joined her husband in a conveyance of his real estate, and the conveyance is subsequently set aside in an action to which the wife is not a party, as fraudulent as against the husband's creditors, and the land is sold to the creditors at a sheriff's sale in satisfaction of their claims, her inchoate interest becomes vested in her by statute, she is entitled to recover her third interest in the property of her husband so sold, in a suit against the purchasers, and the purchasers are not entitled to set up that her interest is held by the grantee in the fraudulent deed, who is not a party to the action.[13]

§ 13. **Disposition of property and proceeds — Subjection to claims of creditors.**—Subsequent creditors may share in the proceeds where the conveyance of land by the debtor is set aside as fraudulent at the instance of existing creditors.[14] Where a voluntary conveyance has been set aside by pre-existing creditors of the grantor, his subsequent creditors may avail themselves of the property, but there must be proof of actual or intentional fraud.[15]

10. McCalmont v. Lawrence, 15 Fed. Cas. No. 8,676, 1 Blatchf. 232.

11. Shaud v. Hanley, 71 N. Y. 319.

12. Chautauqua County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442, *rev'g* 6 Barb. 589.

13. Rupe v. Hadley, 113 Ind. 416, 16 N. E. 391.

14. O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133.

15. *N. Y.*—Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

Where a conveyance of a deceased debtor is set aside at the suit of creditors, the court will order the property to be delivered to the executor or administrator, to be applied in the course of administration.[16] Where upon the complaint of one or more creditors of an estate, fraudulent conveyances made by the deceased are set aside, the creditors should all share therein.[17] But where a transfer of the debtor's property is set aside as fraudulent as to creditors, creditors who have ratified the transfer or claimed under it should not be allowed to participate in the fund arising therefrom.[18] Where an assignor gives a fraudulent trust deed, and a judgment creditor by process of garnishment reaches the funds or effects held by such trustee, the creditor is entitled to have all the funds or effects applied to his demand, there being no other creditors in a position to share the fund.[19] Although a trust deed is held to be valid in a suit by a judgment creditor to set it aside, the creditor is entitled to the surplus after paying the debt secured.[20] Where a judgment is obtained after a conveyance by a debtor, if such conveyance is in good faith for full consideration, the creditor has no remedy against the land; if fraudulent as to the creditor, he may sell the grantee's title, which sale will not discharge the prior liens, nor will the proceeds be applied to their payment.[21] Where

Contra.—Lore v. Dierkes, 16 Abb. N. Cas. 47.

Ala.—Kirksey v. Snedecor, 60 Ala. 192.

Pa.—Thomson v. Dougherty, 12 Serg. & R. 448.

S. C.—Brock v. Bowman, 1 Rich. Eq. Cas. 185; Iley v. Niswanger, 1 McCord Eq. 518.

16. Brockman v. Bowman, 1 Hill Eq. (S. C.) 338. *Contra.*—Bank of United States v. Burke, 4 Blackf. (Ind.) 141; McNaughtin v. Lamb, 2 Ind. 642.

17. *Ark.*—Jackson v. McNabb, 39 Ark. 111.

D. C.—Gilbert v. Washington Ben., etc., Assoc., 10 App. Cas. 316.

Ind.—Bottorff v. Covert, 90 Ind. 508.

Md.—Bierly v. Staley, 5 Gill & J. 432, 25 Am. Dec. 303.

Ohio.—Pendery v. Allen, 9 Ohio Cir. Ct. 245.

Pa.—Thomson v. Dougherty, 12 Serg. & R. 448.

Tenn.—Levering v. Norvell, 68 Tenn. 176; Rains v. Rainey, 30 Tenn. 261.

18. Lore v. Dierkes, 16 Abb. N. Cas. (N. Y.) 47; Hancock v. Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466.

19. Morris v. House, 32 Tex. 492.

20. Sipe v. Earman, 26 Gratt. (Va.) 563.

21. Appeal of Hack, 100 Pa. St. 59.

secured creditors prosecute a bill to subject to the satisfaction of their claims property fraudulently conveyed by the debtor, they will be required to account for the security held by them before they can appropriate the property sought to be reached.[22] Upon an application of the surplus money arising under a sale of real estate fraudulently conveyed, a receiver is entitled to priority over judgment creditors who did not become parties plaintiff under the decree.[23] A creditor whose judgment was entered after a fraudulent conveyance of the debtor's property, but is a lien prior to that of another creditor, under whose execution the property is sold, is entitled to participate in the proceeds only to the extent that the previous conveyance tended to defraud him.[24] Cases in which other questions relating to this subject have been passed upon by the courts are cited in the note below.[25]

§ 14. **Costs and attorney's fees.**—Although, where a creditor secures a decree setting aside his debtor's fraudulent conveyance, the recovery inures to the benefit of all the debtor's other creditors, yet the complaining creditor is first entitled to a reimbursement, out of the fund created, of all his costs and expenses necessarily incurred in prosecuting his suit.[26] Upon conveyances by a debtor being set aside as fraudulent at the suit of a creditor, and a sale

22. Barret v. Reed, Wright (Ohio), 700.

23. Warden v. Browning, 12 Hun (N. Y.), 497.

24. Appeal of Henderson, 133 Pa. St. 399, 19 Atl. 424.

25. Hines v. Dresher, 93 Ind. 551, disposition of property conveyed to a *bona fide* mortgagee, by a fraudulent grantee; Tilford v. Burnham, 37 Ky. 109, the assignee of notes given as the apparent consideration of a deed fraudulent as to creditors cannot have the notes satisfied out of the land in preference to a *bona fide* creditor who has filed his bill to set the conveyance aside; Bank of Kentucky v. Allen, 7 Ky. L. Rep. 595, division of property transferred between *bona fides* transferee attacking creditor; Bernard v. Barney, Myroleum Co., 147 Mass. 356, 17 N. E. 837, bill held not a creditor's bill under the statute and a decree applying the property to complainant's claim, without regard to other creditors, proper; Boyle v. Thomas, 1 Chest. Co. Rep. (Pa.) 117, court will not order a conveyance of lands to an assignee to whom defendant had made an assignment for the benefit of creditors.

26. Rains v. Rainey, 30 Tenn. 261; Hinton v. Ellis, 27 W. Va. 422.

of the property being ordered, the creditor's attorney may be allowed a fee out of the proceeds, [27] but the fee should be paid out of that part applicable to the demands of creditors, and not out of such balance as may come to the debtor after the liquidation of the debts proven and passed.[28]

§ 15. **Mortgages and other liens.**—Where the fraudulent grantee, at the request and to secure debts of the fraudulent grantor then existing, has given mortgages upon the property to creditors ignorant of his pecuniary condition and of his intent in making the conveyance, the rights of such mortgagees are superior to those of creditors.[29] A fraudulent grantee of land, who pays of a mortgage thereon which is prior to the lien of plaintiff's judgment, is entitled to the lien of the mortgage as a prior lien over plaintiff's claim, where it appears that there was no fraud in the transaction, and that plaintiff will not be prejudiced.[30] When preferential mortgages are set aside at the suit of creditors for reasons not involving a charge of fraudulent intent or moral turpitude, the mortgagees will be permitted to share *pari passu* in the fund made out of the mortgaged property.[31] Where a conveyance of a husband's land by husband and wife is set aside as in fraud of creditors, the wife's right to dower therein is subject to a ratable contribution towards the payment of a mortgage on the premises executed by the grantee.[32] Where a grantor executes successive deeds of the same property to secure different debts, none of them being given subject to

27. Davis v. H. Feltman Co., 112 Ky. 293, 65 S. W. 615, 23 Ky. L. Rep. 1510, 99 Am. St. Rep. 289; Armour Packing Co. v. London, 53 S. C. 539, 31 S. E. 500; Wagener v. Mars, 27 S. C. 97, 2 S. E. 844. *Compare* Darby v. Gilligan, 37 W. Va. 69, 16 S. E. 507.

28. Wagener v. Mars, *supra*.

29. Murphy v. Moore, 23 Hun (N. Y.), 95.

30. Garner v. Phillips, 35 Iowa, 597.

31. Lippincott v. Shaw Carriage Co., 25 Fed. 577.

32. McMahon v. Specht, 64 App. Div. (N. Y.) 128, 71 N. Y. Supp. 806, and it is immaterial, as affecting such right by the mortgagee, that the wife was not a party to the action to set aside the conveyance.

those previously executed, if any of the deeds are subsequently declared void as in fraud of creditors, the proceeds of the property must be applied to the payment of the remaining valid incumbrances in the order of their priorities before any claims of unsecured creditors of the grantor can be paid.[33] Where one holding mortgages based on loans made to take up prior mortgages on the property thereafter receives a conveyance of the property, which is held invalid, as in fraud of a creditor subsequently acquiring a judgment, the judgment is subject to the liens of the mortgages for the amount due thereon.[34] Creditors with liens on property fraudulently conveyed, which had attached prior to the conveyance, are entitled to priority in the distribution of the fund arising from a sale of the property under the execution of a later creditor who was defrauded by the conveyance.[35] Where the owner of land incumbered with liens makes a conveyance fraudulent as against creditors, and the land is sold by the sheriff under a judgment subsequently obtained, the liens existing before the conveyance remain incumbrances upon the property, and are therefore not payable out of the proceeds of the sale.[36] In an action by a judgment creditor to set aside as fraudulent conveyances of real estate by the debtor, the judgments against him to recover installments of money are a lien on such real estate, but the court cannot declare other installments which had not been reduced to judgment a lien on such land.[37] It is unnecessary to ascertain the liens existing upon the land before making a distribution of the proceeds of a sale of the land, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there are prior liens.[38] Where a deed is made directly

33. Lewis v. Caperton, 8 Gratt. (Va.) 148.

34. Burne v. Partridge, 61 N. J. Eq. 434, 48 Atl. 770, *citing* Malloney v. Horan, 49 N. Y. 111, 121; Roberts v. Jackson, 1 Wend. (N. Y.) 478, 484.

35. Appeal of Byrod, 31 Pa. St. 241.

36. Appeal of Hoffman, 44 Pa. St. 95.

37. Carpenter v. Osborne, 102 N. Y. 552, 7 N. E. 823.

38. State v. Bowen, 38 W. Va. 91, 18 S. E. 375.

from husband to wife, and as a part of the consideration she agrees to pay certain debts which the husband owes and to secure which amount the vendor's lien is reserved, although the deed may be set aside as to general creditors as fraudulent, the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the record of said deed, if said claims were valid in other respects.[39]

§ 16. **Liens and priorities of creditors.**—A creditor who during the lifetime of his debtor brings an action or files a suit to set aside as fraudulent a conveyance or transfer of property made by such debtor thereby acquires a lien on the property covered by such conveyance or transfer, and becomes entitled to a preference over all other creditors in the payment of his claim,[40] unless it is other-

39. Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. 220.

40. *N. Y.*—Metcalf v. Del Valle, 64 Hun, 245, 19 N. Y. Supp. 16; In re Prime, 1 Barb. 296; McDonald v. McDonald, 17 N. Y. Supp. 230.

U. S.—Neal v. Foster, 36 Fed. 29; Johnston v. Straus, 26 Fed. 57; Kimberling v. Hartly, 1 Fed. 571, 1 McCrary, 136.

Ala.—Mathews v. Mobile Ins. Co., 75 Ala. 85; Battle v. Reid, 68 Ala. 149; Evans v. Welch, 63 Ala. 250, a creditor at large may thus acquire a superior lien.

Ark.—Stix v. Chayton, 55 Ark. 116, 17 S. W. 707.

Del.—Newell v. Morgan, 2 Harr. 225.

Ill.—Cole v. Marple, 98 Ill. 58, 38 Am. Rep. 83.

Ind.—Bank of United States v. Burke, 4 Blackf. 141.

Iowa.—Clark v. Raymond, 97 Iowa, 156, 66 N. W. 86; Kisterson v. Tate, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419.

Ky.—Moffatt v. Ingham, 37 Ky. 495; Tilford v. Burnham, 37 Ky. 109; Scott v. Coleman, 21 Ky. 73.

La.—Townsend v. Miller, 7 La. Ann. 632.

Mo.—George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203. *Compare* City of St. Louis v. O'Neill Lumber Co., 114 Mo. 74, 21 S. W. 484, the principle does not apply where the debtor simply absconds leaving visible assets in the hands of a city.

Tex.—Cassaday v. Anderson, 53 Tex. 527.

Va.—Noyes v. Carter (1895), 23 S. E. 1; Wallace v. Treakle, 27 Gratt. 479. See also Davis v. Bonning, 89 Va. 755, 17 S. E. 229.

W. Va.—Richardson v. Ralphsnyder, 40 W. Va. 15, 20 S. E. 854; Witz v. Lockridge, 39 W. Va. 463, 19 S. E. 876; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874; Cohn v. Ward, 36 W. Va. 516, 15 S. E. 140; Clark v. Figgins, 31 W. Va. 156, 5 S. E. 643, 13 Am. St. Rep. 860; Sweeny v. Grape Sugar Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88.

wise provided by statute,[41] A creditor who brings an action to set aside a fraudulent transfer of property, made by the debtor before the appointment of a receiver of his property, thereby acquires a lien on the property and a preference over the receiver and all other creditors, and he cannot be deprived thereof by the bringing of a suit by the receiver for the same purpose.[42] A junior judgment creditor who succeeds in having a conveyance or transfer set aside obtains priority over senior judgment creditors.[43] Cases wherein the question of the priority of the lien of creditors who have filed a bill to set aside a conveyance as fraudulent as against the lien of attachment creditors has been determined,[44] and as to the enforcement of such a lien when provided by statute,[45] are cited in the notes below.

§ 17. **Rights of grantee or purchaser as creditor.**—Where a conveyance or transfer is made by a debtor without actual intent to defraud, or the grantee did not participate in the fraudulent intent, the grantee, being also a creditor, has a priority over other creditors on the distribution of the proceeds of the property;[46] but where the grantee participated in the fraudulent intent, his rights

41. Stanton v. Keyes, 14 Ohio St. 443; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554; Miner v. Lane, 87 Wis. 348, 57 N. W. 1105.

42. Metcalf v. Del Valle, 64 Hun, 245, 19 N. Y. Supp. 16.

43. Atwater v. American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017, *rev'g* 40 Ill. App. 501; Rappleya v. International Bank, 93 Ill. 396; Lyon v. Robbins, 46 Ill. 276; Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657; Rappleye v. International Bank, 1 Ky. L. Rep. 71. *Contra.*—Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; Curlee v. Rembert, 37 S. C. 214, 15 S. E. 954; Cohn v. Ward, 36 W. Va. 516, 15 S. E. 140.

44. *Ala.*—McDermott v. Eborn, 90 Ala. 258, 7 So. 751.

Ill.—McKinney v. Farmers' Nat. Bank, 104 Ill. 180.

La.—Lambert v. Saloy, 37 La. Ann. 3.

Miss.—Levy v. Marx (1895), 18 So. 575.

Tenn.—Brooks v. Gibson, 75 Tenn. 271.

45. Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 305.

46. Brown v. Chubb, 135 N. Y. 174, 31 N. E. 1030, *rev'g* 8 N. Y. Supp. 61; First Nat. Bank v. Rhea, 155 Ill. 434, 40 N. E. 551, *aff'g* 53 Ill. App. 511; Fifield v. Gaston, 12 Iowa, 218; Wilson v. Curtis, 13 La. Ann. 601; Nadel v. Britton, 112 N. C. 188; 16 S. E. 915.

will be postponed to those of other creditors.[47] Attaching creditors who attack a deed of trust executed by their debtor to secure certain creditors, and succeed in establishing the fictitious or fraudulent character of one of the claims so secured, are not thereby advanced to the place of the excluded claimant, so as to take priority over the *bona fide* creditors named in such deed.[48] Where a mortgage is made for the security of several creditors, the claims of some of whom are invalid, the remaining creditors are entitled not only to the *pro rata* share which would have gone to them, respectively, if all the claims had been valid, but to their shares of the whole of the mortgaged property, up to the full amount of their respective claims.[49] A surety who, in good faith, takes a mortgage for his indemnity, is regarded in equity as entitled to a *bona fide* purchaser's preference over a creditor whose judgment is subsequent to a fraudulent sale by the principal debtor.[50]

§ 18. **Rights of creditors of grantee.**—Where the proceeds of property fraudulently transferred have been brought into court at the instance of creditors of the assignor, the creditors of the assignee have no claim on the fund until after the creditors of the assignor have all been paid therefrom.[51] Where a manufacturing corporation was organized and its business carried on for the purpose of defrauding the creditors of its president, a *bona fide* creditor of the corporation has no priority of lien on, or right to, the property of the corporation over a creditor of the president, and a purchaser at an execution sale, under an execution against the president, gets a good title as against the corporation.[52] Where a merchant sold his stock to his son, who

47. Baldwin v. June, 68 Hun (N. Y.), 284, 22 N. Y. Supp. 852; Appeal of Nusbaum, 1 Pa. Cas. 109, 1 Atl. 392.

48. Woodson v. Carson, 135 Mo. 527, 35 S. W. 1005.

49. Tefft v. Stern, 73 Fed. 591, 43 U. S. App. 148, 21 C. C. A. 67.

50. Farmers' Nat. Bank v. Teeters, 31 Ohio St. 36.

51. Mullanphy Sav. Bank v. Lyle, 75 Tenn. 431.

52. Booth v. Bunce, 24 N. Y. 592, *rev'g* 35 Barb. 496.

continued the business, and brought fresh supplies on his own credit, and his father's creditors attacked the sale as fraudulent, and attached the stock, old and new, and the son's creditors levied executions on the blended stock, the articles purchased by the son after taking possession of his father's stock were the property of the son and subject to the executions against him.[53]

§ 19. **Application of payments to judgment or execution.**—Although, on a settlement in an action by a judgment creditor against the grantee of the judgment debtor to reach property alleged to have been fraudulently conveyed, the money paid by defendant is not specially applied to the debt or otherwise, it should be applied upon and deducted from the judgment, since the object of the action was to obtain payment of the judgment.[54]

§ 20. **Right to surplus.**—Where property is conveyed or transferred for the purpose of defrauding creditors and a sale of the granted premises is ordered in a suit brought to set aside the conveyance, any surplus of the proceeds thereof remaining after satisfying the demand and costs of the grantor's creditors, belongs to the grantee, since, as to all parties not assailing the conveyance, it is valid.[55] The rule applies to a deed of gift fraudulent as against creditors,[56] and to a sale by an administrator of land under order of the court to pay debts of his intestate, after recovering the real estate by a writ of entry from one to whom the intestate conveyed it in fraud of his creditors, but for a valuable consideration.[57]

53. Carter v. Carpenter, 70 Ky. 257.

54. Kittel v. Jones, 11 St. Rep. (N. Y.) 541.

55. *N. Y.*—Wood v. Hunt, 38 Barb. 302; Welch v. Tobias, 7 St. Rep. (N. Y.) 297.

U. S.—Lee v. Hollister, 5 Fed. 752.

Cal.—Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

Iowa.—Mallow v. Walker, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158.

56. Williams v. Avent, 40 N. C. 47.

57. Allen v. Trustees of Ashley School Fund, 102 Mass. 262.

§ 21. **Discovery.**—A court of chancery will compel a discovery to detect fraud and imposition in a suit to set aside a fraudulent conveyance.[58] Where the creditor has knowledge of an assignment of the debt which he attaches, and believes it fraudulent, he should summon the assignee, and compel a discovery.[59] A judgment creditor may demand from his debtor a disclosure of his assets, and of the names of his creditors in general terms.[60] A creditors' bill still lies to obtain discovery from debtors of certain book accounts concealed, withheld, and transferred in fraud of creditors, although the same relief may be obtained by supplementary proceedings.[61] On a creditor's bill the plaintiff is entitled to a full discovery as to every trust created for the defendant's benefit; he is also entitled to a full discovery of all the property owned by the defendant, at the time of filing the bill, although it be out of the jurisdiction of the court of law.[62] Where the bill points out the property conveyed and specifies the particulars in which the fraud consists, the complainant may, as ancillary to the main relief sought, have a discovery as to the property alleged to have been fraudulently concealed or conveyed by the debtor, and the consideration received therefor.[63] But a

58. Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691.

59. Gordon v. Webb, 13 Mass. 215; Dix v. Cobb, 4 Mass. 508. The provisions of St. 1846, chap. 168, § 1, authorizing proceedings "against any one suspected of having fraudulently received, concealed, embezzled or conveyed away any of the money, goods, effects or other estate" of an insolvent debtor, extend to fraudulent conveyances of real estate. Harlow v. Tufts, 58 Mass. 448.

60 Cadwallader v. Granville Alexandrian Soc., 11 Ohio, 292; Miers v. Zanesville, etc., Turnpike Co., 11 Ohio 273.

61. Hart v. Albright, 18 N. Y. Supp. 718, 28 Abb. N. Cas. 74.

62. Le Roy v. Rogers, 3 Paige (N. Y.), 234.

The creditor must have obtained judgment and actually issued execution. Detroit Copper, etc., Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; Rambaut v. Mayfield, 8 N. C. 85.

63. *U. S.*—Lanmon v. Clark, 14 Fed. Cas. No. 8,071, 4 McLean, 18; Verselius v. Verselius, 28 Fed. Cas. No. 16,925, 9 Blatchf. 189.

Ala.—Guyton v. Terrell, 132 Ala. 66, 31 So. 83; Sweetzer v. Buchanan, 94 Ala. 574, 10 So. 552; Lawson v. Warren, 89 Ala. 584, 8 So. 841.

Ill.—Scott v. Moore, 4 Ill. 306.

Md.—McNeal v. Glenn, 4 Md. 87.

bill for that purpose must state some specific fund, equity, or chose, in which the debtor has an interest; a general charge that he has been in receipt of a large salary, has acquired property by marriage, has drawn a large prize in a lottery, and is now in the possession or enjoyment of the use of property of considerable value, which cannot be reached at law, is insufficient.[64] Discovery will not be granted to the creditor of an insolvent trader on the ground that certain mortgages executed by the latter are fraudulent, where the bill for discovery fails to disclose that any assets would remain after payment of certain other mortgages which are not shown to be invalid.[65] Bills of discovery are not authorized under the Texas practice, in which law and equity are blended into one system, and in which statutory provisions have been made for the discovery of evidence by simple interrogatories in a pending suit, and for depositions of the adverse party.[66] A bill cannot be sustained solely for discovery where parties in interest are competent to testify, and can be compelled to answer under oath all relevant interrogatories either at the trial or in proceedings supplementary to execution, except possibly under peculiar and exceptional circumstances.[67] The remedy, however, still exists where it has not been abolished by statute.[68] The defendant cannot be required to make a discovery of facts which would subject him to a criminal prosecution or a forfeiture and he may claim his privilege in his answer.[69]

Va.—Saunders v. James, 85 Va. 936, 9 S. E. 147.

Wis.—Pierce v. Milwaukee Constr. Co., 38 Wis. 253.

64. Verdier v. Foster, 2 Rich. Eq. (S. C.) 227.

65. Cortland Wagon Co. v. Gordy, 98 Ga. 527, 25 S. E. 574.

66. Cargill v. Kountze, 86 Tex. 386, 25 S. W. 13, 22 S. W. 1015, 40 Am. St. Rep. 853, 24 L. R. A. 183, 194.

67. Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200; Field v. Hastings, etc., Co., 65 Fed. 279; Preston v. Smith, 26 Fed. 884.

68. Hart v. Albright, *supra;* Floyd v. Floyd, 77 Ala. 353; Dutton v. Cameron, 97 Mich. 93, 56 N. W. 229; Treadwell v. Brown, 44 N. H. 551.

69. Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219; Horstman v. Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802; Michael v. Gay, 1 F. & F. 409.

§ 22. **Injunction to restrain fraudulent conveyance by debtor.**—A general creditor who has not reduced his claim to judgment, or in any other manner acquired a lien upon his debtor's property, cannot, in the absence of a statute permitting it, maintain a bill or action for an injunction to restrain or prevent the debtor from disposing of his property in fraud of creditors.[70] Certain cases do not fall within the rule that a general creditor cannot ask the preventive aid of a court of equity before he gets a judgment at law, but they depend upon a state of facts giving the complainant an equitable interest in the property which creates a peculiar equity which gives jurisdiction to the court and authorizes the granting of an injunction.[71] Equity will interfere by injunction to prevent one summoned as trustee from fraudulently conveying his property so as to defeat the collection of the judgment which he anticipates may be rendered against him as such trustee.[72] A court of equity will grant an injunction restraining a married woman, buying and selling in her own name in a state by the laws of which she is a free dealer, from fraudulently disposing of her goods to defeat the demands

70. *N. Y.*—Reubens v. Joel, 13 N. Y. 488; Neustadt v. Joel, 9 N. Y. Super. Ct. 530; Brooks v. Stone, 19 How. Pr. 395, 11 Abb. Pr. 220; Wiggins v. Armstrong, 2 Johns. Ch. 144.

Fla.—Barrow v. Bailey, 5 Fla. 9.

Ga.—Mackenzie v. Thomas, 118 Ga. 728, 45 S. E. 610; Guilmartin v. Middle Georgia, etc., R. Co., 101 Ga. 565, 29 S. E. 189; Mayer v. Wood, 56 Ga. 427; Dortic v. Dugas, 52 Ga. 231.

Ill.—Bigelow v. Andress, 31 Ill. 322.

Md.—Balls v. Balls, 69 Md. 388, 16 Atl. 18; Rich v. Levy, 16 Md. 74; Hubbard v. Hubbard, 14 Md. 356; Ehl v. Dillon, 10 Md. 500, 69 Am. Dec. 172.

Neb.—Brumbaugh v. Jones (1904), 98 N. W. 54; Crowell v. Horacek, 12 Neb. 622, 12 N. W. 99; Adams v. Miller, 4 Neb. (Unoff.) 464, 94 N. W. 711.

N. J.—Meyers v. Wedel (Ch. 1904), 57 Atl. 1008; Mittnight v. Smith, 17 N. J. Eq. 259, 88 Am. Dec. 233; Robert v. Hodges, 16 N. J. Eq. 299.

Ohio.—Marion Deposit Bank v. McWilliams, 2 Ohio Dec. 142, 1 West. L. Month. 571.

Va.—Rorrer v. Guggenheimer, 87 Va. 533, 12 S. E. 1054; Kelso v. Blackburn, 3 Leigh, 299; Tate v. Liggat, 2 Leigh, 84; Rhodes v. Cousins, 6 Rand. 188, 18 Am. Dec. 715.

Wis.—Almy v. Platt, 16 Wis. 169.

71. Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519; Cohen v. Meyers, 42 Ga. 46.

72. Moore v. Kidder, 55 N. H. 488.

of a creditor who cannot sue her at law.[73] Partnership creditors are entitled to an injunction to restrain a transfer of partnership property between the partners, alleged to have been fraudulently made, the firm being at the time insolvent.[74] Where defendant mortgages his property during the pendency of an action, for the purpose of rendering worthless any judgment which may be rendered against him, a petition by plaintiff for a cautionary judgment against defendant will be granted.[75] After judgment and execution at law against a debtor, the court will, in a proper case, grant an injunction to restrain the debtor from disposing of his property,[76] and the court will entertain a bill by a judgment creditor to prevent, by injunction and receiver, the fraudulent disposition of assets by the debtor, although the property sought to be reached is not specifically described.[77] A creditor is not precluded in equity from suing to restrain a fraudulent disposition of certain property belonging to the debtor by the fact that his claim is secured by a mortgage on other property of the debtor.[78] In some states it is provided by statute that an injunction may issue to restrain the removal or disposition of property where, during the pendency of an action in which judgment is about to be recovered, the defendant therein threatens or manifests an intent to dispose of his property with intent to defraud his creditors, or to place it beyond the reach of an execution.[79] Under such a statute a general creditor before judgment may enjoin his debtor from disposing of his property.[80] Several creditors may join in filing a bill to enjoin a debtor from

73. Sands v. Marburg, 36 Ga. 534, 91 Am. Dec. 781.

74. Sanderson v. Stockdale, 11 Md. 563.

75. Witmer v. Port Treverton Church, 17 Pa. Co. Ct. 38.

76. Candler v. Pettit, 1 Paige (N. Y.), 168, 19 Am. Dec. 399; Conolly v. Riley, 25 Md. 402.

77. Shainwald v. Lewis, 6 Fed. 766, 1 Sawy. 148.

78. Robinson v. Springfield Co., 21 Fla. 203.

79. Reubens v. Joel, 13 N. Y. 488; Mitchell v. Bettman, 25 Barb. (N. Y.) 408; Brewster v. Hodges, 8 N. Y. Super. Ct. 609; Perkins v. Warren, 6 How. Pr. (N. Y.) 341; Pomeroy v. Hindmarsh, 5 How. Pr. (N. Y.) 437; Morey v. Ball, 90 Ind. 450.

80. Mitchell v. Bettman, 25 Barb. (N. Y.) 408; Morey v. Ball, 90 Ind. 450.

fraudulently conveying his property, when they have similar rights with respect to the property of such debtor,[81] although their claims are several, and not in judgment.[82] One who is not made a defendant in the cause cannot, however, be enjoined from paying over money due a debtor for property fraudulently transferred.[83] A court of equity will not issue an injunction to restrain a debtor from transferring property beyond its jurisdiction, if the creditor can have as perfect a remedy by judgment, execution, or attachment at law.[84] The right to such injunction depends on the fact of the pendency of the action, and the existence of the fraudulent intent,[85] and a mere suspicion of the intent to dispose of property for a fraudulent purpose is not sufficient.[86] Such remedy is applicable only where the act is threatened, or is about to be done, and not where it has been done.[87] An injunction *pendente lite* will not be granted unless plaintiff establishes an equitable ground for interference by showing that he is a creditor, or that he will be injured by the threatened fraudulent transfer.[88] If plaintiff's legal right to recover in the action is denied on oath and not supported by any evidence, an injunction *pendente lite* should be refused.[89]

§ 23. **Injunction to restrain disposition of property by fraudulent grantee.**—A court of equity will not intervene by way of injunction in behalf of a simple contract creditor or general creditor upon the ground that his debtor's transferee is about to

81. Orr v. Moore, 1 Tex. App. Civ. Cas., § 588.

82. Field v. Holzman, 93 Ind. 205.

83. Reed v. Baker, 42 Mich. 272, 2 N. W. 959; Meyers v. Wedel (N. J. Ch. 1904), 57 Atl. 1008.

84. Rogers v. Michigan, etc., R. Co., 28 Barb. (N. Y.) 539; Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598.

85. Comyns v. Riker, 65 Hun (N. Y.), 626, 20 N. Y. Supp. 578; Mitchell v. Bettman, 25 Barb. (N. Y.) 408; Brewster v. Hodges, 8 N. Y. Super. Ct. 609; Pomeroy v. Hindmarsh, *supra;* Baker v. Naglee, 82 Va. 876, 1 S. E. 191.

86. Pomeroy v. Hindmarsh, *supra.*

87. Reubens v. Joel, 13 N. Y. 488; Perkins v. Warren, 6 How. Pr. (N. Y.) 341.

88. Comyns v. Riker, *supra;* Perkins v. Warren, *supra.*

89. Perkins v. Warren, *supra;* Empire Paving, etc., Co. v. Robinson, 11 N. Y. Supp. 540.

make a further fraudulent transfer of the property.[90] To justify an injunction to restrain the further disposition of property conveyed by a debtor in fraud of his creditors, it must appear that the suing creditor has obtained a judgment or other lien upon such property;[91] that the fraudulent vendee is insolvent;[92] and is threatening or about to dispose of the property;[93] that the creditor has not a complete remedy at law;[94] and that an injunction is necessary to the preservation of the alleged rights of the plaintiff.[95] The fraudulent grantee of a decedent may be enjoined from further disposing of the property, although the complaining creditor has not reduced his claim to judgment,[96] or acquired any lien upon the property.[97] Where the further alienation of land held under a conveyance fraudulent and void as to complaining creditors is enjoined until their claims are paid, the quiescent creditors cannot take advantage of the pro-

90. Hart v. Hart, 52 Ga. 376; Oberholser v. Greenfield, 47 Ga. 530; Cubberge v. Adams, 42 Ga. 124; Bigelow v. Andress, 31 Ill. 322.

91. *N. Y.*—Falconer v. Freeman, 4 Sandf. Ch. 565, a lien acquired by attachment is sufficient to justify an injunction to aid its enforcement.

Ga.—Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Mayer v. Wood, 56 Ga. 427.

Mo.—Spitz v. Kerfoot, 42 Mo. App. 77.

Wis.—Almy v. Platt, 16 Wis. 169.

92. *Fla.*—Fuller v. Cason, 26 Fla. 476, 7 So. 870.

Ga.—Einstein v. Lee, 89 Ga. 130, 15 S. E. 27; Stillwell v. Savannah Grocery Co., *supra;* Dereny v. Hicks, 82 Ga. 240, 8 S. E. 179; Mayer v. Wood, *supra.*

Ill.—Bigelow v. Andress, 31 Ill. 322.

Md.—Connolly v. Riley, 25 Md. 402.

Wash.—Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213.

93. Rockford Watch Co. v. Rumpf, *supra.*

94. Phelps v. Foster, 18 Ill. 309; Spitz v. Kerfoot, 42 Mo. App. 77; Brough v. Greist, 1 Danph Co. Rep. (Pa.) 243; Almy v. Platt, 16 Wis. 169.

95. *N. Y.*—MacKaye v. Soule, 25 N. Y. Supp. 798.

Ga.—Williams v. Harris, 95 Ga. 453, 22 S. E. 682.

Iowa.—Joseph v. McGill, 52 Iowa, 127, 2 N. W. 1007.

N. J.—Williams v. Michenor, 11 N. J. Eq. 520.

N. C.—Ellett v. Newman, 92 N. C. 519.

Pa.—Appeal of Fowler, 87 Pa. St. 449.

Wis.—Hoxie v. Price, 31 Wis. 82.

96. Appeal of Fowler, 87 Pa. St. 449.

97. Loomis v. Tifft, 16 Barb. (N. Y.) 541.

ceedings; and when the complaining creditors are paid the land is released from the injunction.[98]

§ 24. **Injunction to restrain sale under fraudulent judgment or mortgage.**—An injunction to restrain the sale of a debtor's property under a judgment which was fraudulently obtained or confessed, or the foreclosure of a fraudulent mortgage, will lie in a proper case, at the instance of a creditor who has established his debt by judgment, or who has acquired a lien on the property,[99] where the insolvency of the mortgagee is shown,[1] and where there is sufficient evidence that the mortgagee is not a *bona fide* creditor, without notice of the fraud.[2] A sale under void chattel mortgages given other creditors cannot be enjoined by creditors without proof of the levy of execution as well as obtaining judgment.[3] One to whom chattels are mortgaged is entitled to equitable relief against a subsequent fraudulent mortgage on the chattels, and a judgment foreclosing the same, without regard to whether the mortgagor may be solvent or insolvent when his debt becomes due.[4] A court may enjoin the enforcement of its own decree of foreclosure shown in a creditors' suit to be fraudulent as to creditors.[5] Attaching creditors of one whose property has been taken under execution to satisfy a judgment may, where fraud is alleged in obtaining the judgment, have an injunction to restrain proceedings on the execution, or any disposition of the proceeds of sale until such time as will enable them to obtain judgments.[6]

98. Appeal of Fowler, 87 Pa. St. 449. See also Fuqua v. Farmers', etc., Nat. Bank, 18 Ky. L. Rep. 101, 35 S. W. 545.

99. *N. Y.*—Mills v. Block, 30 Barb. 549, judgment overruled; Hall v. Stryker, 27 N. Y. 596.

Ga.—Peyton v. Lamar, 42 Ga. 131.

Ill.—Shufeldt v. Bochm, 96 Ill. 560.

N. J.—Oakley v. Young, 6 N. J. Eq. 453.

Pa.—Kelly v. Herb, 157 Pa. St. 41, 27 Atl. 539; Artman v. Giles, 155 Pa. St. 409, 26 Atl. 668.

1. Atlanta Nat. Bank v. Fletcher, 80 Ga. 327, 9 S. E. 1072.

2. Putney v. Kohler, 84 Ga. 528, 11 S. E. 127.

3. Glorieux v. Schwartz, 53 N. J. Eq. 231, 28 Atl. 470.

4. McCormick v. Hartley, 107 Ind. 248, 6 N. E. 357.

5. Robinson v. Springfield Co., 21 Fla. 203.

6. People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446;

§ 25. **Violation of injunction and punishment.**—Where an injunction issues upon a creditors' bill, prohibiting the defendant from transferring, assigning, delivering, or in any way disposing of his property, any active interference with the property by the defendant or his agent, for the purpose of having the legal title to the same transferred to another, whereby the equitable lien which the complainant has acquired thereon by the filing of his bill is or may be defeated, is a breach of the injunction; and the fact that the defendant, in violating the injunction, acts under the erroneous advice of counsel, will not protect him from a fine sufficient to compensate the adverse party for the injury sustained.[7] Where attaching creditors obtain an injunction to restrain the sale of property under fraudulent judgments against their debtor, and the persons against whom such injunction is granted violate the same by disposing of and purchasing the property, the amount of the fine is properly fixed at the sum due on the claims of the attaching creditors.[8] A mortgagee of chattels, having been enjoined from enforcing his mortgage, is guilty of contempt by replevying the chattels, and should be condemned by fine equal to the expense he has occasioned the owner of the property in the premises.[9]

§ 26. **Appointment of receiver.**—Equity will not interfere, as a general rule, at the instance of a general creditor before judgment, to prevent, by the appointment of a receiver, the further disposition of property conveyed in fraud of such creditor.[10] There are, however, exceptions to the rule, and a receiver

Bowe v. Arnold, 31 Hun (N. Y.), 256; Bates v. Plonsky, 28 Hun (N. Y.), 112; Tannenbaum v. Rosswog, 6 N. Y. Supp. 579, 22 Abb. N. C. 346; Keller v. Payne, 48 Hun (N. Y.), 620, 1 N. Y. Supp. 148, 22 Abb. N. C. 352; Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519. *Compare* Artman v. Giles, 155 Pa. St. 409, 26 Atl. 668.

7. Smith v. Cook, 39 Ga. 191.

8. People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 33 N. E. 743, 20 L. R. A. 446, *aff'g* 63 Hun, 635, 18 N. Y. Supp. 734.

9. In re Feeny, 8 Fed. Cas. No. 4,715, 1 Hask. 304.

10. *U. S.*—Fechheimer v. Baum, 37 Fed. 167.

Ala.—Weis v. Goetter, 72 Ala. 259.

D. C.—Clark v. Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

may be appointed whenever the complainant has a lien on the property, or a special right to have the property or funds in controversy applied to the payment of his claim.[11] A court of equity, auxiliary to its jurisdiction to set aside a fraudulent transfer, may appoint a receiver to preserve the property involved during the pendency of the litigation, where it appears that there is such a reasonable probability of success on the part of the complainants in finally subjecting such property to the satisfaction of their claim as would justify the court in disturbing defendant in their possession of it;[12] that the property or its rents and profits, are in danger of being lost, wasted, injured, destroyed, disposed of, or gotten out of the reach of the court so that they will not be forthcoming to satisfy a decree in plaintiff's favor;[13] and that a receiver is necessary to afford the plaintiff adequate relief.[14] But where there is a sufficient equity in

Ga.—Oberholser v. Grienfield, 47 Ga. 530.

Va.—Rorrer v. Guggenheimer, 87 Va. 533, 12 S. E. 1054.

See also Nature of relief granted, chap. XIX, § 2, *supra*.

11. Cohen v. Meyers, 42 Ga. 46, and cases cited in preceding note. See also Nature of relief granted, chap. XIX, § 2, *supra*.

12. Waeber v. Rosenstein, 6 App. Div. (N. Y.) 447, 39 N. Y. Supp. 593; Heard v. Murray, 93 Ala. 127, 9 So. 514; Micon v. Moses, 72 Ala. 439.

13. *N. Y.*—Waeber v. Rosenstein, *supra*.

Ala.—Head v. Murray, *supra*.

D. C.—Clark v. Walter T. Bradley Coal, etc., Co., *supra*.

Ill.—Jeffery v. J. W. Butler Paper Co., 37 Ill. App. 96.

Ind.—Springfield Grocery Co. v. Thomas, 3 Ind. T. 330, 58 S. W. 557.

Iowa.—Hirsch v. Israel, 106 Iowa, 498, 76 N. W. 811; Clark v. Raymond, 86 Iowa, 661, 53 N. W. 354.

Minn.—Mower v. Hanford, 6 Minn. 535.

N. C.—Ellett v. Newman, 92 N. C. 519.

Va.—Shannon v. Hanks, 86 Va. 338, 13 S. E. 437; Smith v. Butcher, 28 Gratt. 144.

14. *N. Y.*—St. John Woodworking Co. v. Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025, *aff'd* 178 N. Y. 629, 71 N. E. 1139; National Union Bank v. Riger, 38 App. Div. (N. Y.) 123, 56 N. Y. Supp. 545.

U. S.—National Bank of Republic v. Hobbs, 118 Fed. 626.

Iowa.—Clark v. Raymond, 86 Iowa, 661, 53 N. W. 354.

Mich.—Tregaskie v. Judge Detroit Super. Ct., 47 Mich. 509, 11 N. W. 293.

Wis.—Ahlheuser v. Doud, 74 Wis. 400, 43 N. W. 169, appointment of receiver to take charge of condemnation money, the property having been taken in condemnation proceedings after the levy.

the property to satisfy plaintiff's judgment,[15] or enough money to pay plaintiff's claim has been deposited in court,[16] or proceedings at law would afford ample redress and protection,[17] the appointment of a receiver is not necessary and one will not be appointed. The safer and better practice, where a creditor brings action to set aside a transfer of real estate, is to set aside the conveyance so far as it obstructs the plaintiff's judgment, and permit him to pursue his remedy on his judgment in the usual way by the issue of execution, and the appointment of a receiver should not be resorted to, ordinarily, unless good reason is made to appear why the rights of the plaintiff cannot be properly protected in the ordinary way by the issue of execution.[18] The appointment of a receiver is a power to be exercised with a considerable degree of caution,[19] and where property has been sold by an insolvent debtor, which it is sought to make liable for his debts, a receiver will not usually be appointed to take the property out of the hands of the purchasers, where the latter are not charged to be insolvent.[20] Courts of equity will not ordinarily grant an application for the appointment of a receiver *ex parte,* but only after notice or rule to show

15. National Union Bank v. Riger, 38 App. Div. (N. Y.) 123, 56 N. Y. Supp. 545.

16. St. John Woodworking Co. v. Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025, *aff'd* 178 N. Y. 629, 71 N. E. 1139.

17. Pearce v. Jennings, 94 Ala. 524, 10 So. 511.

18. Harris v. Osnowitz, 35 App. Div. (N. Y.) 594, 55 N. Y. Supp. 172; Bryer v. Foerster, 14 App. Div. (N. Y.) 315, 43 N. Y. Supp. 801.

19. National Union Bank v. Riger, 38 App. Div. (N. Y.) 123, 56 N. Y. Supp. 545; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437.

20. *N. Y.*—Waeber v. Rosenstein, 6 App. Div. (N. Y.) 447, 39 N. Y. Supp. 593; Cassilear v. Simms, 8 Paige, 273.

Ala.—Freeman v. Stewart, 119 Ala. 158, 24 So. 31.

Ga.—Turnipseed v. Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84; Mills v. Webb, 89 Ga. 734, 15 S. E. 635; Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Kehler v. G. W. Jack Mfg. Co., 55 Ga. 639.

Minn.—Mower v. Hanford, 6 Minn. 535.

Where the evidence is conflicting as to whether the vendor is able to respond in damages, it is no abuse of discretion to refuse to appoint a receiver. Sheffield v. Parker, 96 Ga. 774, 22 S. E. 450.

cause.[21] That the applicant has an honest relief as to the apprehended danger of loss of property which will result from the delay incident to a notice of the application is not sufficient to authorize an appointment of a receiver pending an action without notice, but there must be a full statement of facts clearly and satisfactorily showing such belief to be well grounded.[22] But a receiver may be appointed without notice when the exigency of the case demands it, where, for example, some urgent emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste or injury of property,[23] or where to give notice would cause delay, which would defeat the receiver and prevent him from taking possession of the property.[24] The insolvency of the vendees or their inability to respond to any decree which may be rendered against them, if clearly established by the facts set forth in the application, may be a good reason for failure to give notice.[25] It has been held that the title to property, in an action to set aside a conveyance as fraudulent, and the rights of creditors in such case, are not affected by the appointment of a receiver.[26] But the doctrine of the New York courts is that when a creditor procures the appointment of a receiver, he abandons his judgment lien for the remedy of a sale by the receiver, and seeks a satisfaction of his debt out of the debtor's property generally. The personal estate becomes vested in the receiver from the time and by virtue of the appointment; the real estate only by virtue of a conveyance to him which the court has power to compel; and in this way the satisfaction is

21. Stillwell v. Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963, the grantee should be offered the alternative of giving bond and security in lieu of surrendering the property to a receiver; Ruffner v. Mairs, 33 W. Va. 655, 11 S. E. 5.

22. Gilreath v. Union Bank, etc., Co., 121 Ala. 204, 25 So. 581; Thompson v. Tower Mfg. Co., 87 Ala. 733, 6 So. 928.

23. Moritz v. Miller, 87 Ala. 331, 6 So. 269; Micon v. Moses, 72 Ala. 439; Weis v. Goetter, 72 Ala. 259; Ruffner v. Mairs, *supra*.

24. Moritz v. Miller, *supra*.

25. Thompson v. Tower Mfg. Co. 87 Ala. 333, 6 So. 928; Turnipseed v. Kentucky Wagon Co., 97 Ga. 258, 23 S. E. 84.

26. Davis v. Bonney, 89 Va. 755, 17 S. E. 229. See also Micon v. Moses, 72 Ala. 439.

worked out. The legal title passes to the receiver who thus becomes a trustee of the property for the benefit of the creditor and discharges his duty under the direction of the court.[27]

§ 27. **Appeal and review.**—The rules of almost universal application requiring presentation and reservation in the lower court of grounds of review, or that questions, of whatever nature, not raised in the trial court will not be noticed on appeal, and that objections must be raised in the trial court in order to reserve questions for review, apply in actions to set aside fraudulent conveyances.[28] The usual exceptions to these rules also apply, as to errors apparent on the face of the record, etc.[29] In an action to set aside a fraudulent conveyance, an objection that there is no return of *nulla bona* must be taken in the court below and cannot be made after a trial on the issue of fraud.[30] The general rules as to the parties entitled to allege error apply, and one not prejudiced thereby cannot take advantage of errors committed in the lower court.[31] Every reasonable presumption

27. Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; McDonald v. McDonald, 62 Hun (N. Y.), 621, 17 N. Y. Supp. 230; Passacant v. Bowdoin, 60 Hun (N. Y.), 433, 15 N. Y. Supp. 8; National Union Bank v. Riger, 38 App. Div. (N. Y.) 123, 56 N. Y. Supp. 545.

28. *Ky.*—Kinkle v. Gale, 11 Ky. L. Rep. 126, 11 S. W. 664, filing of judgment, execution, and sheriff's return.

Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am. Dec. 203.

Mass.—Boylen v. Leonard, 84 Mass. 407.

Mo.—Renney v. Williams, 89 Mo. 139, 1 S. W. 227; Ziekel v. Douglass, 88 Mo. 382.

Va.—Flynn v. Jackson, 93 Va. 341, 25 S. E. 1; McNew v. Smith, 5 Gratt. 84.

29. Gibbs v. Hodge, 65 Ala. 366; Taylor v. Johnson, 113 Ind. 164, 15 N. E. 238; Potter v. Stevens, 40 Mo. 229; Thornton v. Gaar, 87 Va. 315, 12 S. E. 753.

30. Barton v. Barton, 80 Ky. 212, 3 Ky. L. Rep. 743; Hill v. Cannon, 6 Ky. L. Rep. 591.

31. *Ill.*—Coale v. Moline Plow Co., 134 Ill. 350, 25 N. E. 1016, the grantee in a fraudulent conveyance cannot complain on appeal because the conveyance was set aside for the benefit of a single creditor, instead of all the creditors, of the grantee.

Mich.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657, 80 N. W. 707.

Mo.—Meyer Bros. Drug Co. v. White, 165 Mo. 136, 65 S. W. 295.

N. C.—Allen v. McLenden, 113 N. C. 321, 18 S. E. 206.

Va.—Price v. Thrash, 30 Gratt. 515,

will be resolved in favor of the judgment of the court below.[32] Unless it plainly appears that the discretion of the trial court has been abused, the appellate court, on review, will not reverse a decision made in the exercise of the trial court's discretion.[33] The general rules relating to the review of questions of fact on appeal are applicable in actions to set aside fraudulent conveyances.[34] Where the evidence is conflicting the finding of the

in a suit to set aside a fraudulent conveyance, the judgment debtor cannot question the fraud on appeal, where the alienees do not appeal.

W. Va.—Silverman v. Greaser, 27 W. Va. 550.

32. Stam v. Smith, 183 Mo. 464, 81 S. W. 1217, in an action by a judgment creditor to set aside an alleged fraudulent conveyance of the homestead of the debtor, a general finding for defendant raises a presumption that the trial court found as a matter of fact that the land conveyed did not exceed fifteen hundred dollars in value, in the absence of a special finding on that issue; Beeman v. Cooper, 64 Vt. 305, 23 Atl. 794, where the record is silent as to whether the mortgagor retained other property sufficient to pay his existing debts, the court will not presume the want of other property to enable it to raise a constructive fraud in a mortgage given in consideration of future support.

33. Irwin v. McKnight, 76 Ga. 669.

34. *N. Y.*—Smith v. Hahn, 130 N. Y. 694, 30 N. E. 68, *aff'g* 55 Hun, 611, 8 N. Y. Supp. 663; Donohue v. Joyce, 64 Hun, 634, 19 N. Y. Supp. 134; Manchester v. Tibbetts, 49 Hun, 612, 4 N. Y. Supp. 23.

Colo.—Gregory v. Filbeck, 12 Colo. 379, 21 Pac. 489.

Conn.—Greenthal v. Lincoln, 68 Conn. 384, 36 Atl. 813.

Ga.—Rouse v. Frank, 84 Ga. 623, 11 S. E. 147.

Ill.—Treadwell v. McEwen, 123 Ill. 253, 13 N. E. 850, *aff'g* 23 Ill. App. 111; Powers v. Green, 14 Ill. 386.

Kan.—Johnson v. Jones, 6 Kan. App. 755, 50 Pac. 983.

Ky.—Marcoffsky v. Franks, 19 Ky. L. Rep. 1377, 43 S. W. 440; Lutkenhoff v. Lutkenhoff, 13 Ky. L. Rep. 584, 17 S. W. 863; Meritt v. Meritt, 11 Ky. L. Rep. 493, 11 S. W. 593; Johnson v. Skaggs, 8 Ky. L. Rep. 601, 2 S. W. 493.

La.—Carrollton Bank v. Cleveland, 15 La. Ann. 616; Hayes v. Clarke, 12 La. Ann. 666.

Mich.—Heaton v. Nelson, 74 Mich. 199, 41 N. W. 895.

Mo.—Brown v. Fickle, 135 Mo. 405, 37 S. W. 107; Pinger v. Leach, 70 Mo. 42.

Mont.—Woods v. Berry, 7 Mont. 195, 14 Pac. 758.

Neb.—Parlin, etc., Co. v. Ulrich, 57 Neb. 780, 78 N. W. 275; South Omaha Nat. Bank v. Chase, 30 Neb. 444, 46 N. W. 513; Hart v. Dogge, 29 Neb. 237, 45 N. W. 626, *aff'g* 27 Neb. 256, 42 N. W. 1035.

N. J.—Stone v. Newell, 54 N. J. Eq. 690, 35 Atl. 285.

Pa.—Stewart v. Wilson, 42 Pa. St.

court or jury will not be disturbed on appeal in the absence of evidence of passion, prejudice, or partiality on their part.[35] A judgment will not be reversed for error which is harmless and not prejudicial to the appellant.[36] Whether the conveyance assailed was or was not made with intent to hinder, delay, or defraud the creditors of the grantor depends upon the circumstances surrounding the transaction, the credit to be given to the witnesses, and the inferences properly drawn therefrom; and wherever the referee has found in favor of the conveyance and the general term has affirmed the finding, the court of appeals will not set it aside where the finding is possible and reasonable upon some view of the evidence.[37] The question of fraudulent

450; Rose v. Keystone Shoe Co., 2 Pa. Cas. 243, 4 Atl. 1.

S. C.—Mitchell v. Mitchell, 42 S. C. 475, 20 S. E. 405; Jackson v. Plyler, 38 S. C. 496, 17 S. E. 255, 37 Am. St. Rep. 782; Wagener v. Mars, 27 S. C. 97, 2 S. E. 844.

Tenn.—Farmers, etc., Nat. Bank v. Herndon (Ch. App. 1898), 46 S. W. 550.

Tex.—Moss v. Sanger, 75 Tex. 321, 12 S. W. 619; Frieberg v. Sanger (1889), 12 S. W. 1136; Linz v. Atchinson, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542; Houston, etc., R. Co. v. Shirley (Civ. App. 1894), 24 S. W. 809.

Va.—Moore v. Butler, 90 Va. 683, 19 S. E. 850.

Wash.—Liebenthal v. Price, 8 Wash. 206, 35 Pac. 1078; Eicholtz v. Holmes, 8 Wash. 71, 35 Pac. 607; Burt v. Agassiz, 6 Wash. 242, 33 Pac. 508.

Wis.—Rosenheimer v. Krenn, 126 Wis. 617, 106 N. W. 20; Conkey v. Hawthorne, 69 Wis. 199, 33 N. W. 435.

Can.—Reaume v. Guichard, 6 U. C. C. P. 170.

35. *N. Y.*—Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032, *rev'g* 60 Hun, 580, 14 N. Y. Supp. 748.

Cal.—Claudine v. Aguirre, 89 Cal. 501, 26 Pac. 1077.

Ind.—Seavey v. Walker, 108 Ind. 78, 9 N. E. 347.

Iowa.—Sperry v. Kain, 84 Iowa, 203, 50 N. W. 945; Saar v. Finkin, 79 Iowa, 61, 44 N. W. 538.

Ky.—Deshazer v. Deshazer, 11 Ky. L. Rep. 159, 11 S. W. 772.

Neb.—Sonnenschein v. Bartels, 37 Neb. 592, 56 N. W. 210; Bierbower v. Singer, 27 Neb. 414, 43 N. W. 254.

36. *N. Y.*—Mullenneaux v. Terwilliger, 50 Hun, 526, 3 N. Y. Supp. 442.

Ala.—Robinson v. Pontius, 136 Ind. 641, 36 N. E. 421.

Iowa.—Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117; Hall v. Carter, 74 Iowa, 364, 37 N. W. 956.

Minn.—McDonald v. Peacock, 37 Minn. 512, 35 N. W. 370.

Tex.—Hudson v. Willis, 87 Tex. 387, 28 S. W. 929; Sanger v. Colbert, 84 Tex. 668, 19 S. W. 863; Blum v. Light, 81 Tex. 414, 16 S. W. 1090.

37. Third Nat. Bank v. Cornes, 102 N. Y. 737, 8 N. E. 42.

intent is a question of fact, and, where there is sufficient evidence to sustain the finding, it will not be disturbed.[38] Where, by statute, fraud or fraudulent intent is made a question of fact for the court or jury trying the cause, the appellate court will not weigh the evidence and determine the preponderance on appeal in an action involving the question whether a conveyance was made with intent to defraud creditors, and where there is competent evidence to support the verdict or finding of the lower court, it will not be reviewed on appeal.[39] The usual practice in determining and disposing of the cause prevails on appeals in actions to set aside conveyances as fraudulent as against creditors.[40] The unanimous affirmance by the Appellate Division of that part of the judgment which sets aside certain confessions of judgment and transfers as fraudulent, is conclusive in the Court of Appeals that a finding of the trial court that the creditors so preferred participated in the debtor's fraud is sustained by the evidence.[41]

38. Bennett v. McGuire, 58 Barb. (N. Y.) 625.

39. *N. Y.*—Hastings v. Claffin, 133 N. Y. 539, 30 N. E. 1148, *aff'g* 60 Hun, 580, 14 N. Y. Supp. 757; Muller v. Abramson, 25 Misc. Rep. 520, 54 N. Y. Supp. 1027.

Cal.—Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

Ind.—Eacker v. Thompson, 4 Ind. App. 393, 30 N. E. 1114.

Minn.—Vose v. Stockney, 19 Minn. 367.

Neb.—Schrider v. Tighe, 38 Neb. 394, 56 N. W. 994.

N. D.—Stevens v. Myers (1905), 104 N. W. 529.

Tenn.—McQuade v. Williams, 101 Tenn. 334, 47 S. W. 427.

40. *N. Y.*—Loos v. Wilkinson, 113 N. Y. 485, 21 N. E. 392, 10 Am. St. Rep. 495, 4 L. R. A. 353.

Conn.—Weeden v. Hawes, 10 Conn. 50.

D. C.—Turner v. Gottwals, 15 App. Cas. 43.

Ky.—Wahl v. Murphy, 10 Ky. L. Rep. 388.

Minn.—Heim v. Heim, 90 Minn. 497, 97 N. W. 379.

Mo.—Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685, error corrected on appeal by modification of the decree.

41. Metcalf v. Moses, 161 N. Y. 587, 56 N. E. 67.

CHAPTER XX.

PENAL ACTIONS AND CRIMINAL PROSECUTIONS.

Section 1. Penalties and actions therefor; nature and extent of liability in general.
2. What constitutes a fraudulent transfer.
3. Persons liable to penalty.
4. Fraudulent intent necessary.
5. Persons entitled to enforce penalty.
6. Conditions precedent to action to enforce.
7. Limitation; jurisdiction and venue; parties.
8. Pleading; defenses; evidence.
9. Criminal prosecutions.
10. Offenses; fraudulent transfers.
11. Preliminary affidavit on application.
12. Indictment.
13. Defenses.
14. Evidence.
15. Trial and review.

Section 1. **Penalties and actions therefor; nature and extent of liability in general.**—Statutes have been enacted in many of the states for the more complete discouragement of fraudulent transfers which impose certain penalties upon the guilty participants.[1] The object of such statutes is to afford a remedy to creditors against any one to whom the property of their debtor, no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving such transfer, of concealing the same, so as "to secure it from creditors and prevent its attachment or seizure on execution."[2] Such statutes are based generally upon the statute of 13 Elizabeth, which provided for a *qui tam* action.[3] They have been variously construed by the courts, as penal,[4] as remedial,[5] and as penal as

1. See the statutes of the various States.
2. Spaulding v. Fisher, 57 Me. 411.
3. Wilder v. Winne, 6 Cow. (N. Y.) 284; Wright v. Eldred, 2 Aik. (Vt.) 401.
4. Brooks v. Clayes, 10 Vt. 37.
5. Daniel v. Vaccaro, 41 Ark. 316;

well as remedial.[6] Such statutes are to receive a liberal construction for the purpose of setting aside a conveyance, but must be construed strictly when they inflict a penalty.[7]

§ 2. **What constitutes a fraudulent transfer.**—If a judgment be valid in its inception, though execution be taken out with a view to delay and hinder creditors, and it have that effect, yet it is not fraudulent within the statute for the prevention of frauds, and the plaintiff is not liable to the penalty imposed by the statute.[8] The taking of a negotiable promissory note by the debtor in concealment of a debt due him on account, even if taken to prevent its attachment on trustee process, is not a transfer within a statute providing for a penalty for aiding a debtor in the fraudulent transfer of his property.[9] One is not liable under such a statute, unless the transfer is so far consummated as to be valid between the parties, and as against all persons, except on the ground of fraud.[10] Assisting a debtor to defeat creditors, by taking the title to realty purchased by the debtor's money and choses in action, subjects the person so taking title to an action under the statute, though the realty, not being in the debtor's name, was not subject to attachment or execution issued against him, since the money and choses in action which were the transaction fraudulently removed out of the reach of creditors were liable to be taken on those writs.[11] The fact that the land fraudulently transferred could not be attached or seized on execution is no defense, since it might have been attached or seized when

Pulsifer v. Waterman, 73 Me. 233; Platt v. Jones, 59 Me. 232; Quimby v. Carter, 20 Me. 218.

6. Wing v. Weeks, 88 Me. 115, 33 Atl. 779; Fogg v. Lawry, 71 Me. 215; Herrick v. Osborne, 39 Me. 231.

7. Brooks v. Clayes, 10 Vt. 37.

8. Wilder v. Winne, 6 Cow. (N. Y.) 284.

9. Skowhegan Bank v. Cutler, 49 Me. 315.

10. Skowhegan Bank v. Cutler, 49 Me. 315, in order to hold the transferee of shares of capital stock of a bank liable under the statute, it must appear that the transfer was recorded on the books of the bank.

11. Spaulding v. Fisher, 57 Me. 411.

the relation of debtor or creditor was created.[12] Under a statute imposing a penalty for being a party to a fraudulent note or judgment, the whole amount of such judgment is forfeited, although but part of the consideration was fraudulent.[13]

§ 3. **Persons liable to penalty.**—Under a statute which provides that whoever knowingly aids or assists a debtor in the fraudulent transfer or concealment of his property to secure it from creditors, and prevents its attachment or seizure on execution, shall be liable for the penalty prescribed by the statute, a wife, who knowingly receives a conveyance of property purchased by her husband, for the purpose of hindering and delaying creditors, is within the statute.[14] It need not be made to appear that a person who knowingly aids a debtor in the fraudulent transfer or concealment of his property derives a benefit therefrom to make him liable to the action of the creditor.[15] A conveyance may be invalid, so as to be avoided by the creditors of the grantor, and the parties thereto not liable for the penalty of the statute.[16] Where a person takes a conveyance to defraud creditors of the grantor, and pretends publicly to pay for it with money of his own, which in fact the grantor was privately furnishing him for that purpose, an action for the penalty has accrued, without proving that he afterwards justified the same.[17] Where the name of a party is inserted in a transfer as vendee without his knowledge, if he afterwards ratifies it by accepting it, the transfer is perfected, and, if fraudulent, such vendee becomes liable for the penalty under the statute.[18]

§ 4. **Fraudulent intent necessary.**—In a *qui tam* action,

12. Pulsifer v. Waterman, 73 Me. 233.

13. Webb v. Long, 17 Vt. 587; Wright v. Eldred, 2 Aik. (Vt.) 401.

14. Warner v. Moran, 60 Me. 227; Hart v. Leete, 104 Mo. 315, 15 S. W. 976. *Compare* Burns v. Brown, 15 Vt. 174.

15. Aiken v. Kilburne, 27 Me. 252.

16. Brooks v. Clayes, 10 Vt. 37.

17. Forbes v. Davison, 11 Vt. 660.

18. Skowhegan Bank v. Cutler, 49 Me. 315; Wright v. Eldred, 2 Aik. (Vt.) 401.

brought by a creditor against the debtor and his grantee,[19] or against the creditor in a fraudulent judgment,[20] or the grantee in a fraudulent conveyance,[21] to recover the statutory penalty for fraudulent conveyances, the plaintiff cannot recover without showing that the conveyance or transfer was made and received with a fraudulent intent, which existed in the minds of both parties;[22] but, where either party is composed of two or more persons, the fact that all such persons did not participate in the corrupt intent will not relieve the rest.[23] If the defendant received the deed in good faith, for the purpose of securing a debt due to him, he would not thereby subject himself to the penalty.[24] If the conveyance of the property was made with fraudulent intent on the part of the grantor, to which the grantee was privy and in which he participated, the grantee is liable for the penalty, notwithstanding he paid a full consideration for the property.[25]

§ 5. **Persons entitled to enforce penalty.**—The statutory remedy against one who aids in a fraudulent transfer or concealment of a debtor's property is allowed to creditors only.[26] It must appear that the plaintiff was a creditor at the time of the fraudulent transfer or concealment and continued to be such until the commencement of the action.[27] A subsequent creditor cannot maintain an action for the penalty,[28] but the right to sue for the penalty accrues immediately upon the making of the fraudulent conveyance, and a subsequent collection or assignment of the debt does not divest the right.[29] A surety for a grantor is so far a creditor from the date of his suretyship that

19. Brooks v. Clayes, 10 Vt. 37, the intent is a question of fact.

20. Barnum v. Hackett, 35 Vt. 77.

21. Smith v. Kinne, 19 Vt. 564.

22. Meux v. Howell, 4 East, 1; In re Moroney, 21 L. R. Ir. 27.

23. Barnum v. Hackett, 35 Vt. 77.

24. Smith v. Kinne, 19 Vt. 564.

25. Colgate v. Hill, 20 Vt. 56.

26. Fowler v. Frishie, 3 Conn. 320; Platt v. Jones, 59 Me. 232; Craig v. Webber, 36 Me. 504.

27. Percival v. Hichborn, 56 Me. 575; Craig v. Webber, 36 Me. 504; Thacher v. Jones, 31 Me. 528.

28. Pullen v. Hutchinson, 25 Me. 249.

29. Forbes v. Davison, 11 Vt. 660.

he is a "party aggrieved" by a subsequent fraudulent conveyance of his principal, and his right to recover the penalty given by the statute is perfected by his subsequent payment of the debt.[30] A creditor who has commenced an action to recover the penalty provided may by his subsequent conduct waive his right to further prosecute his suit.[31] One entitled to recover against another in tort is not a creditor within the meaning of the statute.[32]

§ 6. **Conditions precedent to action.**—In order to maintain an action for the statutory penalty against a person for aiding a debtor in the fraudulent transfer or concealment of his property, it is not necessary that the creditor should first have obtained a judgment against his debtor.[33] It is not necessary, in order to maintain an action for the statutory penalty, that the party be first convicted under a provision of the statute making it a misdemeanor for any person to make a conveyance with intent to defraud creditors.[34] The general rule that a party who elects to rescind a sale must tender back to the other party the consideration received, applies to the case of a creditor who has assigned his account against his debtor to a third person in consideration of a sum less than the whole amount due thereon, and who brings an action against such third person under a statute giving a remedy for assisting a debtor "in a fraudulent transfer and concealment of his property.[35]

§ 7. **Limitation; jurisdiction and venue; parties.**—An action of debt for the penalty for a fraudulent conveyance or concealment of his property by a debtor is not within the general statute of limitations,[36] or within a statute limiting actions for penalties generally.[37] An action to recover the penalty for being

30. Beach v. Boynton, 26 Vt. 725.
31. Fogg v. Lawry, 71 Me. 215.
32. Craig v. Webber, 36 Me. 504.
33. Aiken v. Kilburne, 27 Me. 252.
34. Daniel v. Vaccaro, 41 Ark. 316.
35. Percival v. Hichborn, 56 Me. 575.
36. Wilcox v. Fitch, 20 Johns. (N. Y.) 472.
37. Thacher v. Jones, 31 Me. 528;

a party to a fraudulent conveyance may be brought in the county where either of the parties reside, for the benefit of the plaintiff and the treasurer of that county, but not in a state other than that in which the conveyance was made.[38] Several creditors, having distinct and separate debts due to them severally from the same debtor, cannot join as plaintiffs in an action *qui tam* against such debtor to recover the penalty given by statute for being party to a fraudulent conveyance or judgment.[39] A joint action against a fraudulent grantor and grantee, to recover the penalty for being a party to a fraudulent conveyance, cannot be maintained, and if both are joined as defendants, and a verdict is obtained against them, judgment will be reversed.[40]

§ 8. **Pleading; defenses; evidence.**—In an action to recover the penalty for knowingly aiding a debtor in a fraudulent transfer of his property, all the elements material to the plaintiff's case must be affirmatively and distinctly stated, and a declaration is insufficient unless it allege that the defendant did knowingly aid and assist in the fraudulent concealment or transfer of the property of the debtor, which was liable to seizure by attachment or levy on execution by the plaintiff,[41] and that plaintiff was at the time of such fraudulent concealment or transfer, and at the time the action was commenced, a creditor of such debtor.[42] It is also necessary to aver the time when the fraudulent transfer was made.[43] An amendment will not be allowed of an additional count, alleging a fraudulent transfer of other property, under which the damages claimed were not in any way embraced in the first count.[44] A count alleging several distinct transfers of property, all pertaining to the same demand, is not bad for duplicity.[45] It is no defence to an action for a penalty for making

Forbes v. Davison, 11 Vt. 660; Denton v. Crook, Brayt. (Vt.) 188.

38. Slack v. Gibbs. 14 Vt. 357.

39. Carroll v. Aldrich, 17 Vt. 569.

40. Slack v. Gibbs, 14 Vt. 357.

41. Wing v. Weeks, 88 Me. 115, 33 Atl. 779; Herrick v. Osborne, 39 Me. 231.

42. Platt v. Jones, 59 Me. 232.

43. Platt v. Jones, 59 Me. 232.

44. Skowhegan Bank v. Cutler, 49 Me. 315.

45. Platt v. Jones, 59 Me. 232.

a fraudulent conveyance that the plaintiff did not direct the commencement of the suit, as, if he does not discontinue it, he will be taken to ratify it.[46] A defendant, who has received a transfer from the debtor and certificate for five shares of bank stock, cannot deny his title thereto because the endorsement upon the certificate recites the transfer of the "within share," instead of the "within shares."[47] The debtor is a competent witness for the plaintiff in an action to recover the penalty for aiding a debtor in making a fraudulent transfer.[48] Admissions of the debtor, who is not party to the suit, made previous to the alleged fraudulent sale, may be given in evidence by the plaintiff for the purpose of establishing the fact of the debtor's indebtedness to him;[49] but it is not competent for the plaintiff to prove, for the purpose of establishing such indebtedness, any declarations made by the debtor subsequent to the time of the sale.[50] In an action to recover the penalty full proof must be made, as in criminal cases, and the case must be established beyond a reasonable doubt.[51] To entitle a creditor to recover he must show that he has a just debt; that his debtor has fraudulently transferred his property to defendant; that such property was liable to be taken on execution or attachment; that defendant has knowingly aided the debtor to defeat the rights of his creditors; and the amount of plaintiff's damages.[52] Where the testimony as to intent is conflicting the plaintiff is entitled to have the case submitted to the jury.[53] Where the evidence is insufficient to go to the jury, a nonsuit is properly ordered.[54] Parol testimony is not admissible to prove the transfer of stock on the books of a bank.[55]

46. Forbes v. Davison, 11 Vt. 660.

47. Skowhegan Bank v. Cutler, 49 Me. 315.

48. Aiken v. Kilburne, 27 Me. 252; Philbrook v. Handley, 27 Me. 53.

49. Aiken v. Peck, 22 Vt. 255.

50. Barnum v. Hackett, 55 Vt. 77; Aiken v. Peck, 22 Vt. 255.

51. Brooks v. Clayes, 10 Vt. 37.

52. Daniel v. Vaccaro, 41 Ark. 316; Pulsifer v. Waterman, 73 Me. 233; Quimby v. Carter, 20 Me. 218.

53. Barnum v. Hackett, 35 Vt. 77.

54. Gardiner Nat. Bank v. Hagar, 65 Me. 359.

55. Skowhegan Bank v. Cutler, 49 Me. 315.

§ 9. **Criminal prosecutions.**—In many of the states, statutes have been enacted making it a misdemeanor for any person to convey his property with intent to defraud his creditors.[56] The foundation of these statutes is the statute of 13 Elizabeth, c. 5, by which it was made a criminal offense to be a party to a conveyance made to hinder, delay, or defraud creditors, and 27 Elizabeth, c. 26, by which it was also made an offense in all parties concerned to make a conveyance in trust or for uses with a view to defraud creditors. Both of the statutes are in force in Pennsylvania.[57] In Alabama, under a statute against the fraudulent concealment of a debtor's property, one who buys, receives, and leases property without knowledge of any claim, and then refuses to inform claimant of its location, is not guilty of a concealment.[58]

§ 10. **Offenses; fraudulent transfers.**—A fraudulent transfer of property, in some of these statutes, includes secreting, assigning, transferring, concealing, encumbering, selling, or in any way fraudulently disposing of property, and in a prosecution the criminal act cannot be limited to that by which the owner delivers it to any person, with the intent of passing the right he had in it to such person.[59] In some jurisdictions these statutes are held to apply to personal property only,[60] while in other jurisdictions they are held to apply to a fraudulent transfer of real estate as well as of personal property.[61] The offense of disposing of property with intent to defraud creditors is complete when the disposition is made, though the creditors intended to be defrauded are not judgment creditors and in a condition to question the validity of the transfer in the form of a civil remedy.

56. See the statutes of the various States.

57. Ex parte Doran, 2 Pars. Eq. Cas. (Pa.) 467.

58. Thomas v. State, 92 Ala. 49, 9 So. 540.

59. Herold v. State, 21 Neb. 50, 31 N. W. 258.

60. People v. District Police Justice, 41 Mich. 224, 2 N. W. 25.

61. Costello v. Palmer, 20 App. Cas. (D. C.) 210; Durham Fertilizer Co. v. Little, 118 N. C. 308, 24 S. E. 664.

All creditors are within the meaning of the statute.[62] To constitute the statutory offense there must be an actual fraudulent intent to injure and defraud creditors.[63] The fact that the conveyance is constructively fraudulent is not sufficient.[64] An essential element of a fraudulent transfer is that the possible operation of the conveyance shall be prejudicial to creditors.[65] A statute imposing a penalty of fine and imprisonment for willfully and knowingly purchasing, in block, goods and merchandise unpaid for by the seller, and without exacting from such seller a sworn written statement that the goods and merchandise have been paid for, does not apply to the case of a wife who receives such goods by *dation en paiement* from her husband in restitution of her paraphernal property received and alienated by him.[66] In some jurisdictions there are statutes making it a misdemeanor for any person to execute a conveyance of encumbered property without reciting or describing the encumbrance.[67] Under such a statute it has been held that, if the fraudulent intent exists, the fact that no one was actually defrauded by the second conveyance is immaterial.[68]

§ 11. **Preliminary affidavit on application.**—An application to a circuit court commissioner, under the fraudulent debtor's act, for the imprisonment of a debtor who has assigned his property with intent to defraud creditors, must make out facts

62. People v. Underwood, 16 Wend. (N. Y.) 546; Reg. v. Smith, 6 Cox C. C. 31; Reg. v. Henry, 21 Ont. 113.

63. State v. Marsh, 36 N. H. 196; Commonwealth v. Hickey, 2 Pars. Eq. Cas. (Pa.) 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86.

A fraudulent intent may properly be inferred where a debtor, on demand of payment of his debt, sells out to his brother to avoid an attachment, and refuses to give any information about the transaction. Smit v. People, 15 Mich. 497.

64. Watson v. Hinchman, 42 Mich. 27, 3 N. W. 236; Commonwealth v. Hickey, *supra*.

65. State v. Chapman, 68 Me. 477; State v. Bragg, 63 Mo. App. 22.

66. Compton v. Dietlein & Jacobs, 118 La. 360, 42 So. 964.

67. Commonwealth v. Brown, 81 Mass. 189; State v. Wilson, 66 Mo. App. 540.

68. State v. Wilson, 66 Mo. App. 540.

amounting to a *prima facie* case of fraud.[69] The complaint must set forth such facts and circumstances, which are within affiant's own knowledge, as will authorize the officer issuing a warrant to find such a state of facts as required by statute; and hence an affidavit that affiant "has good reason to believe," or that he "is credibly informed," that such facts exist, is insufficient. A warrant may not issue without satisfactory evidence by plaintiff or some other person of the facts required by the statute. It cannot be issued upon hearsay, nor upon any statement, however positive founded upon hearsay.[70]

§ 12. **Indictment.**—An indictment for fraudulently conveying or otherwise disposing of property with intent to defraud creditors should be sufficiently certain in its allegations to inform defendant of the offense with which he is charged. The offense as defined by the statute must be substantially set forth in the indictment.[71] An allegation that defendant removed his property to places unknown is not equivalent to a charge of secreting or removing it from the county.[72] It is sufficient to charge the offense in the language of the statute,[73] or in language of equivalent meaning,[74] especially where in doing so the fact is expressly alleged in the doing or not doing of which the offense consists.[75] The value of the property must be stated.[76] The time of the concealment or other disposition must be alleged.[77] A fraudulent intent should be averred. It is sufficient to state facts showing that the conveyance was corruptly executed to defraud creditors.[78] The indictment need not set forth the character of the debts or

69. In re Teachout, 15 Mich. 346.

70. Proctor v. Prout, 17 Mich. 473. *Contra*, Costello v. Palmer, 20 App. Cas. (D. C.) 210.

71. State v. Leslie, 16 N. H. 93; Commonwealth v. Brown, 81 Mass. 189; Commonwealth v. Gallagher, 2 Clark (Pa.), 297, 4 Pa. L. J. 58.

72. Thomas v. People, 19 Wend. (N. Y.) 480.

73. State v. Miller, 98 Ind. 70; Respublica v. Tryer, 3 Yeates (Pa.), 451.

74. State v. Miller, 98 Ind. 70.

75. Hartman v. Commonwealth, 5 Pa. St. 60.

76. Thomas v. People, 19 Wend. (N. Y.) 480.

77. Respublica v. Tryer, 3 Yeates (Pa.), 451.

78. State v. Miller, 98 Ind. 70.

the manner in which they arose in support of the averment that the conveyance was made with intent to defraud creditors.[79] An indictment for fraudulently conveying real estate without giving notice of an incumbrance should describe the property in terms sufficiently certain to identify it.[80] The indictment must not be duplicitous, but where the substantive offense is the fraudulent removal of a debtor's property, an indictment including several methods or phases of removal in one count is not bad.[81] The allegations of the indictment must be supported by the proofs at the trial in order to be sustained.[82]

§ 13. **Defenses.**—In an indictment for concealing the goods of a debtor, to prevent their being taken for his debts, it is no defense to show that the defendant, at the time of the concealment, held the goods under a fraudulent mortgage from the debtor, duly executed and recorded; nor that the defendant, previous to the concealment, was summoned as trustee of the debtor in a process of foreign attachment, which was pending at the time of the concealment.[83]

§ 14. **Evidence.**—On the trial of an indictment for conveying property with intent to defraud creditors, declarations of a grantor before the conveyance respecting the estate conveyed and tending to prove a fraudulent intent on his part are admissible,[84]

79. Loomis v. People, 19 Hun (N. Y.), 601.

80. Commonwealth v. Brown, 81 Mass. 189, a description merely as "a certain parcel of real estate situated in Salem, in the county of Essex," is insufficient; State v. Wilson, 66 Mo. App. 540, the entire description of the land conveyed by the second deed need not be set forth. It is sufficient to identify the land by its lot number.

81. Commonwealth v. Lewis, 6 Pa. Super. Ct. 610.

82. Commonwealth v. Williams, 127 Mass. 285; Commonwealth v. Brown, 81 Mass. 189.

83. State v. Johnson, 33 N. H. 441, to show that the goods concealed were the property of the debtor, within the meaning of the statute, it is competent to prove that a mortgage, previously made of the same goods to the defendant, by the debtor, was fraudulent, though the taking of such mortgage by the defendant was a distinct statutory offense.

84. Loomis v. People, 19 Hun (N.

but answers given by the debtor in supplementary proceedings against him cannot be used against him in any criminal proceeding.[85] The general rules of evidence relating to the admissibility of evidence in criminal actions apply to criminal prosecutions for fraudulent conveyances, and any relevant testimony or evidence tending to prove material facts in issue is admissible. For example, evidence of other sales and dispositions of his property by the debtor, to defraud his creditor, so connected in time and circumstances as to constitute parts of a general scheme of fraud, is competent to prove that the transaction immediately in question was fraudulent,[86] but on the trial of an indictment charging defendant with conveying his property at a particular time, therein specified, with intent to defraud his creditors, debts contracted by him after said time cannot be proved.[87] Under an indictment for conveying incumbered property without informing the grantee of the incumbrance, where there was evidence that from loss of memory the grantee might not have been aware of the incumbrance, evidence that just before the conveyance defendant had met with a large loss of property was admissible.[88] Evidence is also admissible to show that, as to the second conveyance, there was no incumbrance, in law or in fact, by reason of the first conveyance.[89] A debtor proceeded against on the ground of having removed his property may show that the removal consisted in taking it with him on changing his residence, and that the intended change was known in the neighborhood.[90]

§ 15. **Trial and review.**—A refusal to give an instruction to the effect that, to find the defendant guilty, the jury must be satisfied, not only that defendant transferred his property, but

Y.), 601; Reg. v. Chapple, 17 Cox C. C. 455, 56 J. P. 360, 66 L. T. Rep. N. S. 124.

85. Loomis v. People, 19 Hun (N. Y.), 601.

86. State v. Johnson, 33 N. H. 441.

87. Loomis v. People, 19 Hun (N. Y.), 601.

88. Commonwealth v. Brayman, 136 Mass. 48.

89. Commonwealth v. Harriman, 127 Mass. 287.

90. Thomas v. People, 19 Wend. (N. Y.) 480.

that such transfer was made with fraudulent intent to hinder or delay his creditors, or some of them, is not error, where the court has already submitted to the jury, by instruction on its own motion, the question of the fraudulent intent of the defendant.[91] Since the power of the appellate court to hear and dispose of the case finally involves the power to order such action as will make its judgment effective, where the Supreme court has affirmed the action of a circuit court commissioner ordering the imprisonment under the fraudulent debtor's act of a debtor who has assigned his property in fraud of creditors, it may order the issuance of an order or warrant of commitment to carry out a judgment of affirmance.[92]

91. Herold v. Smith, 21 Neb. 50, 31 N. W. 258.

92. Smit v. People, 15 Mich. 516.

CHAPTER XXI.

FRAUDULENT CONVEYANCES UNDER THE BANKRUPTCY LAW — ACTS OF BANKRUPTCY.

Section 1. General nature and effect of the bankruptcy law.
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30. Solvency and the second and third acts of bankruptcy.
31. Fraudulent transfer as objection to discharge. Sec. 14b(4).

Section 1. **General nature and effect of the Bankruptcy law.** —"Bankruptcy" is an ancient English word coextensive in mean-

ing with "insolvency,"[1] but it is not synonymous with "insolvency," as insolvency does not make one a bankrupt without some act done to the injury of creditors.[2] Bankruptcy is the state or condition of a bankrupt or the status of one who has been made the subject of a bankrupt law.[3] A "bankrupt law" means a statutory system under which an insolvent debtor may, either on his own petition or that of his creditors, be adjudicated bankrupt by a court of competent jurisdiction, which thereupon takes possession of his property, distributes it equally among his creditors, and discharges the bankrupt and his after-acquired property from debts existing at the commencement of the bankruptcy proceedings.[4] A "bankrupt" includes a person against whom an involuntary petition, or an application to set a composition aside, or to revoke a discharge, has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.[5] In England, in the United States,[6] and in nearly all civilized countries bankruptcy laws similar in their essential characteristics have from time to time been enacted. The power vested in Congress

1. Kunzler v. Kohaus, 5 Hill (N. Y.), 317, 320.

2. Sackett v. Andross, 5 Hill (N. Y.), 327, 343, 3 N. Y. Leg. Obs. 11.

3. Bouvier L. Dict.; Sackett v. Andross, *supra*.

4. Grunsfeld v. Brownell (N. M.), 76 Pac. 310; 5 Cyc. 237.

5. Bankr. Act, 1898, section 1(4). See also Barr v. Bartram, etc., Mfg. Co., 41 Conn. 502; In re Scott, 21 Fed. Cas. No. 12,518, a "bankrupt" is one unable or wilfully refusing to pay debts in full.

6. In the United States there have been four bankruptcy laws, including the one now in force.

The first act was passed April 4, 1800, and repealed December 19, 1803. 2 U. S. Stat. at L., pp. 19, 248. It made no provision for voluntary bankruptcy and was only applicable to merchants, traders, bankers, etc.

The second of these laws was enacted August 19, 1841, and repealed March 3, 1843. 5 U. S. Stat. at L., pp. 440, 614. This act provided for both voluntary and involuntary bankruptcy, and was broader in its provisions than the act of 1800.

The third act was passed March 2, 1867, was subsequently amended June 22, 1874, and finally repealed to take effect September 1, 1878. 14 U. S. Stat. at L., p. 517; 20 U. S. Stat. at L., p. 99; U. S. Rev. Stat. (1878), §§ 4972-5132.

The law now in force in the United States was enacted July 1, 1898. 30 U. S. Stat. at L., p. 544. This act is in many respects similar to the act of 1867, so that decisions under the earlier act have been constantly

to enact national bankruptcy legislation is derived from the provision of the Constitution to the effect that "Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States." [7] This grant of power to the federal government is a plenary grant, subject only to the provision that the bankruptcy legislation shall be uniform as to all the States.[8] Except so far as Congress shall exercise the power vested by the Constitution, and subject to the restriction that no State may pass a law impairing the obligation of contracts, each State may pass laws in the nature of bankruptcy acts, operative within its own territorial limits.[9] The State laws have been generally called insolvency laws, while the federal acts have been known as bankruptcy laws. The main object and purpose of the Bankruptcy Act is to secure an equal distribution among the creditors of an insolvent, of all the property which he owned at any time within four months prior to the filing of the petition upon which he might be adjudicated bankrupt, and, for that purpose to avoid all transfers thereof made by him in due course for value,

used and applied in construing the act of 1898. The act is supplemented by rules established by the United States Supreme Court, as to matters of practice, called General Orders, and also by official forms for use in such practice. See Collier on Bankruptcy, 6th ed., p. 633, *et seq.*

7. U. S. Const., art. i, § 8, cl. 4.

8. Hanover Bank v. Moyses, 186 U. S. 181, 22 S. Ct. 857, 46 L. Ed. 1113; Mitchell v. Great Works Milling, etc., Co., 2 Story (U. S.), 648, 17 Fed. Cas. No. 9,662; Silverman's Case, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12,855.

The uniformity required is geographical and not personal; and no limitation is imposed on Congress as to the classification of persons who are to be affected by such laws, provided only the laws shall have uniform operation throughout the United States. Leidigh Carriage Co. v. Stengel, 2 Am. B. R. 383, 95 Fed. 637, 37 C. C. A. 210.

9. Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606, the power of the separate States to pass bankruptcy laws is undoubted, but they cannot, in the exercise of that power, act upon the rights of citizens of other States or countries; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Adams v. Storey, 1 Paine (U. S.), 79, Fed. Cas. No. 66; Pettit v. Seaman, 2 Root (Conn.), 178; Pannebaker v. Bitting, 11 Pa. Dist. 537; Zacharins v. Paint, etc., Co., 11 Pa. Dist. 171; In re Hull, 10 Pa. Dist. 661, 25 Pa. Co. Ct. 353; Pugh v. Bussell, 2 Blackf. (Ind.) 394; Fisk v. Montgomery, 21 La. Ann. 446.

although but for the intervening of the bankruptcy proceeding, they would not otherwise be morally or legally wrong; and while such transfers have been said by the courts to be in fraud of the Bankruptcy Act, such phrase does not denominate them frauds in fact. As to other conveyances which were fraudulent by the common law, or under the statutes of the States, a right of action is expressly conferred upon a trustee in bankruptcy under the Act of 1898, which also expressly vests him with the ownership of the property so conveyed.[10] And by the amendments of 1903 to the Bankrupt Act of 1898, jurisdiction is given to the bankruptcy courts, by plenary action or summary proceedings, as the nature of the case may call for, to adjudge recovery by the trustee of property transferred as a voidable preference, or made to hinder and delay creditors, as defined by the Act, or which may have been transferred by fraudulent conveyances strictly so called.[11] The application of these principles is discussed under the appropriate subjects in subsequent sections. Another object of the Bankruptcy Act has been said to be to enable those who were unfortunate in business "to emerge from a questionable and undignified seclusion and face the vicissitudes of the business world openly and honestly.[11a]

§ 2. **Effect of bankruptcy law upon insolvency laws.**—When Congress has exercised its constitutional powers to enact a uniform bankruptcy law, all existing State insolvency laws applying to the same persons are suspended,[12] but, this power not being exclusive, State laws are valid and continue operative so far as they do not con-

10. Bankr. Act, 1898, section 70.

11. Bankr. Act, 1898, sections 23, 60a, 60b, 67e, 70e; In re John J. Coffey, 19 Am. B. R. 148; In re Blount, 16 Am. B. R. 97, 142 Fed. 263; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814.

11a. In re Fitchard, 4 Am. B. R. 609, 103 Fed. 742. An assignment of stock by a bankrupt to his wife and acting as agent for his wife under an unrecorded power of attorney, held not to be a fraudulent transfer. In re Hedley, 19 Am. B. R. 409.

12. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529.

flict with the paramount federal law.[13] The State law is merely suspended during the life of the bankruptcy law, not repealed.[14] The Act of 1898 expressly provides that "proceedings commenced under State insolvent laws before the passage of this Act shall not be affected by it."[15] Laws regulating general assignments for the benefit of creditors[16] not being insolvency laws, are not suspended. Likewise as to laws concerning the punishment of fraudulent debtors,[17] or for the settlement of the estates of deceased insolvents.[18] A general assignment for the benefit of creditors by the debtor's voluntary common-law deed of assignment, conveying all his property subject to the payment of his debts for the equal benefit of all his creditors, but not providing for the release of the debtor, is valid except as against proceedings seasonably taken under the Bankruptcy Act to set it aside as an act of bankruptcy, even though such an assignment may be regulated and supplemented by legislative safeguards of the State where it is made or operates.[19] But where such an assignment has been made and proceedings are not instituted in bankruptcy within the statutory four months thereafter, the State

13. Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Singer v. National Bedstead Mfg. Co., 11 Am. B. R. 276, 65 N. J. Eq. 290, 55 Atl. 868.

14. In re Storck Lumber Co., 8 Am. B. R. 86, 114 Fed. 360; Ketchum v. McNamara, 6 Am. B. R. 160; In re Macon Sash & Door Co., 7 Am. B. R. 66; Carling v. Seymour Lumber Co., 8 Am. B. R. 29, 113 Fed. 483; Scheuer v. Book, etc., Co., 7 Am. B. R. 384, 112 Fed. 407; In re Smith, 2 Am. B. R. 9, 92 Fed. 135; In re Sievers, 1 Am. B. R. 117, 91 Fed. 366. That State laws are not suspended: In re Scholtz, 5 Am. B. R. 782, 106 Fed. 834.

15. Bankr. Act, 1898, last clause. *Compare* In re Mussey, 3 Am. B. R. 592, 99 Fed. 71.

16. In re Sievers, 1 Am. B. R. 117, 91 Fed. 366; Duryea v. Guthrie (Wis.), 11 Am. B. R. 234. *Contra*, In re Smith, 2 Am. B. R. 9, 92 Fed. 135. But see Mayer v. Hellman, 91 U. S. 496. And *compare* Thrasher v. Bentley, 1 Abb. N. C. (N. Y.) 39; Beck v. Parker, 65 Pa. St. 262.

17. Berthelon v. Betts, 4 Hill (N. Y.), 577; Scully v. Kirkpatrick, 79 Pa. St. 324.

18. Hawkins v. Larned, 54 N. H. 333.

19. Patty-Joiner, etc., Co. v. Cummins, 4 Am. B. R. 269, 93 Tex. 598, 57 S. W. 566; Boese v. King, 108 U. S. 379, 2 S. Ct. 765, 27 L. Ed. 760; In re Scholtz, 5 Am. R. Rep. 782, 106 Fed. 834; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377.

Court may proceed to administer the estate under local statutes and a trustee appointed in bankruptcy subsequent to the four months cannot attack such proceedings.[20]

§ 3. **Interpretation or construction of statute.**—The National Bankruptcy Act of 1898 establishes a uniform system, and regulates, in all their details, the relations, rights, and duties of debtor and creditor. It is a remedial statute and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and promote justice.[21] But while the purpose of the act as a whole is remedial and the act in its entirety is liberally construed, section 3, which prescribes what constitutes an act of bankruptcy, while not penal, is in derogation of common law rights, and should therefore be considered penal in its operation and effect and should not be construed to include within its provisions any act not therein specified as an act of bankruptcy.[22]

20. West Co. v. Lea, 2 Am. B. R. 463, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Matter of Gray, 3 Am. B. R. 647, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp. 618.

21. Paper Co. v. Morse, 127 Fed. 643, 62 C. C. A. 369; Norcross v. Nathan, 3 Am. B. R. 613, 99 Fed. 414; In re New York, etc., Water Co., 3 Am. B. R. 508, 98 Fed. 711; Southern L. & T. Co. v. Benbow, 3 Am. B. R. 9, 96 Fed. 514, *citing* Houston v. New Orleans City Bank, 6 How. (U. S.) 486, 12 L. Ed. 526; In re Kirtland, 10 Blatchf. (U. S.) 515, 14 Fed. Cas. No. 7,851; Blake v. Francis-Valentine Co., 1 Am. B. R. 372, 89 Fed. 691. See also Ripon Knitting Works v. Schreiber, 4 Am. B. R. 299, 101 Fed. 810; In re Terrill, 4 Am. B. R. 145, 100 Fed. 778; Costello v. Harbaugh, 83 Ill. App. 29, *aff'd* 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; Silverman's Case, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 22 Fed. Cas. No. 12, 855, 13 Int. Rev. Rec. 52, 4 Nat. B. R. 522; In re Muller, Deady (U. S.), 513, 17 Fed. Cas. No. 9,912, 2 Am. L. T. B. R. 33, 3 Nat. B. R. 329; In re Locke, 1 Lowell (U. S.), 293, 15 Fed. Cas. No. 8,439, 2 Nat. B. R. 382.

22. In re Empire Metallic Bedstead Co., 3 Am. B. R. 575, 98 Fed. 581; Wilson v. St. Paul City Bank, 17 Wall. (U. S.) 473, 21 L. Ed. 723; Jones v. Sleeper, 13 Fed. Cas. No. 7,496.

When acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class. In re Metallic Bedstead Co., *supra.*

Under act Feb. 5, 1903, the appointment of a receiver because of insolvency, is an act of bankruptcy. In re Burrell, 123 Fed. 414, 59 C. C.

While a strict construction of this section is generally held to be the rule, there are some authorities which tend to support the view that, being limitations on the operation of a statute that is highly remedial, a broader construction would be more equitable.[23]

§ 4. **Important statutory definitions: insolvency.**—The Bankruptcy Act provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[24] In all foreign bankruptcy laws, cessation of payments is the essential of insolvency,[25] and this was the test in the United States until the passage of the present law. Thus, it was held that "the amount of the trader's property was of no consequence, if he was unable to pay his debts in lawful money as they matured."[26] Under the law of 1898 the value of that property is the essential element. Insolvency turns on what is a "fair valuation" of the property.[27] Property may include any asset of value. Fair valuation has been held to be the present market value, and not the amount which the bankrupt might realize from the forced sale of his property,[28] nor what the property brought

A. 508, 119 Fed. 991; Lowenstein v. Mfg. Co., 130 Fed. 1007; Iron, etc., Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295; In re Coal, etc., Co., 131 Fed. 769; In re Atkin, 133 Fed. 813; In re Spaulding, 134 Fed. 507. But the appointment of a receiver, in a State court, is held not to be such an act. In re Spalding, 139 Fed. 244, 71 C. C. A. 370.

23. Southern Loan & Trust Co. v. Benbow, 3 Am. B. R. 9, 96 Fed. 514; In re Adams, 1 Am. B. R. 94; In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475; In re Mueller, Fed. Cas. 9,912; Silverman's Case, Fed. Cas. 12,855; Collier, Bankr., 6th ed., p. 39.

24. Bankr. Act, 1898, section 1 (15).

25. Collier, Bankr., 6th ed., p. 4.

26. In re Wells, Fed. Cas. No. 17,388; Morgan v. Mastick, Fed. Cas. No. 9,803; Ex parte Hull, Fed. Cas. No. 6,856; In re Dibblee, Fed. Cas. No. 3,884.

27. In re Gilbert, 8 Am. B. R. 101, 112 Fed. 951.

28. In re Hines, 16 Am. B. R. 295, 144 Fed. 142; Duncan v. Landis, 5 Am. B. R. 649, 106 Fed. 839.

in a lump at an auction sale by the trustee.[29] This value should be determined as of the time the proceedings were commenced,[30] or at the time of the alleged preferential payments.[31] When the act of bankruptcy itself depreciates the debtor's property until, under this definition, he is insolvent, the petition against the alleged bankrupt must be dismissed.[32] Manifestly, a person may not be able to meet current obligations, and yet his property at a fair valuation may be sufficient to pay his debts.[33] Evidence must be adduced sufficient to show that the alleged bankrupt's debts were more than the value of his assets at the time the petition is filed.[34] The Bankruptcy Act has given an artificial meaning to the word "insolvent," complicating the construction of statutes as applied to alleged preferences and rendering inapplicable to a large extent judicial decisions upon statutes where the word "Insolvency" is to be read in its ordinary business sense, and consequently the usual *indicia,* by virtue of which a creditor may be said to have reason to believe his debtor is "insolvent" or the reverse, become to a large extent of no importance.[35] It is undoubtedly humane, but is thought to put creditors at their debtor's mercy. On the other hand, it protects the debtor whose property is not quickly convertible. In this aspect, it results in conditions not unlike those of a debtor who has taken advantage of the suspended payment periods sanctioned by some of the continental bankruptcy systems. In actual practice, it has

29. Rutland County Nat. Bank v. Graves, 19 Am. B. R. 446.

30. In re Hines, *supra.*

31. Rutland County Nat. Bank v. Graves, *supra.*

32. Chicago Title & Trust Co. v. Roebling's Sons, 5 Am. B. R. 368, 107 Fed. 71. See also Lansing Boiler Works v. Ryerson & Son, 11 Am. B. R. 558, 128 Fed. 701; In re Rogers Milling Co., 4 Am. B. R. 540, 102 Fed. 687; Vaccaro v. Bank, 4 Am. B. R. 474, 103 Fed. 436; In re Rome Planing Mills, 3 Am. B. R. 766, 99 Fed. 937.

33. Hackney v. Raymond Bros., etc., Co. (Neb.), 10 Am. B. R. 213. See also In re Doscher, 9 Am. B. R. 547, 556, 120 Fed. 408; In re Coddington, 9 Am. B. R. 243, 126 Fed. 891.

34. Knittel v. McGowan, 14 Am. B. R. 209, 134 Fed. 498.

35. In re Andrews, 16 Am. B. R. 387, 144 Fed. 922, *aff'g* 14 Am. B. R. 247; In re Pettingill & Co., 14 Am. B. R. 758, 135 Fed. 218. See Indebtedness or Insolvency, chapter VII, *supra.*

done little harm.[36] In determining the issue as to the solvency or insolvency of an alleged bankrupt, all of his property, exempt and non-exempt, is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors.[37] Where property is transferred in fraud of creditors, the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent. Where property is transferred by a debtor in payment of, or as security for, a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.[38] Where a bankrupt received money which should have been applied to the payment of his debts, refuses to disclose where or how it was kept, but insists that it has been invested by him beyond the jurisdiction of the court, it must be held that the money was "concealed" within the meaning of the Bankruptcy Act, and may not be considered in marshaling the assets to ascertain whether he was solvent.[39]

§ 5. **Definition of conceal.**—The Bankruptcy Act provides that "conceal" shall include secrete, falsify, and mutilate.[40] This, under the present law, means more than "hide;" it connotes more than "secrete." Thus, with peculiar reference to the second objection to a discharge,[41] it includes the falsifying or mutilating of books or business records. Under the former law, concealment of property included a concealment of title to property.[42] The

36. Collier, Bankr., 6th ed., p. 5; Matter of Rung Furniture Co., 10 Am. B. R. 44.

37. In re Crenshaw, 19 Am. B. R. 502; In re Hines, 16 Am. B. R. 295, 144 Fed. 142; In re Baumann, 3 Am. B. R. 196, 96 Fed. 946.

38. In re Doscher, 9 Am. B. R. 547, 554, 120 Fed. 408, subdivision (15), as regards property to be excluded, has evident reference to the act of bankruptcy stated in section 3a(1), and not to the acts of bankruptcy relating to preferences.

39. In re Shoesmith (C. C. A.), 13 Am. B. R. 645, 135 Fed. 684.

40. Section 1(22).

41. Section 14b(2), "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained."

42. In re Williams, Fed. Cas. No. 17,703.

new definition strengthens rather than impairs this doctrine. It may be doubted, however, whether the definition adds anything to the ordinary meaning of the word "concealed" in section 29b; the difficulty of reading in either "falsified" or "mutilated" will be apparent at a glance.[43] Almost as difficult would be the interpolation of these new meanings into the first act of bankruptcy.[44] This definition has not yet been interpreted by the courts.[45]

§ 6. **Definition of transfer.**—The Bankruptcy Act provides that "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."[46] All technicality and narrowness of meaning is precluded by this definition. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished—a preference enabling a creditor "to obtain a greater percentage of his debt than any other creditors of the same class." Thus, a payment of money by an insolvent debtor to a creditor, even in due course of business, the debtor not intending to give a preference and the creditor not having reasonable cause to believe a preference was intended, nevertheless is a transfer and constitutes a preference within the meaning of the Bankruptcy Act, and must be surrendered as a condition precedent to proving the balance of the debt or other claims of the creditor.[47] The performance of labor by a debtor for his creditor is, however, not a "transfer of property" within

43. Section 29b, "concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy."

44. Section 3a(1), "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them."

45. Collier, Bankr., 6th ed., p. 6.

46. Bankr. Act, 1898, sec. 1(25).

47. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814.

the meaning of the bankrupt law.[48] In section 67e, "transfer" seems to be used as something different from "conveyance," "assignment," and "incumbrance," but the better opinion is that this was an inadvertence in the drafting of the law, and that even here the generic word includes those that are specific. The words "as a payment, pledge, mortgage, gift, or security," as used in this subdivision, are interpreted as illustrative only and not as qualifying the rest of the paragraph.[49] The giving of a chattel mortgage is a transfer of property within the meaning of the act.[50] The term is not, however, sufficiently broad to include a preferential payment to a creditor so as to bar a discharge under section 14b(4), in the absence of a fraudulent intent.[51] The definition becomes important in sections 3a(1)(2) and b(1), 60a, 67e, three of the principal sections of the law. It occurs in some of the sections as amended by the Act of 1903.[52] Its significance to a proper understanding of the statute cannot be too much emphasized.[53]

§ 7. **Definition of preference.**—Although this word is not expressly defined in section one of the bankruptcy law, the Supreme Court has held that section 60a is a definition.[54] A preference under this law has, therefore, but three elements: (a) insolvency, (b) the procuring or suffering of a judgment or the making of a transfer by the bankrupt, (c) a consequent inequality between creditors of the same class. Since the amendatory act of 1903,

48. In re Doscher, 9 Am. B. R. 547, 120 Fed. 408; In re Steers Lumber Co., 6 Am. B. R. 315, 110 Fed. 738, *aff'd* 7 Am. B. R. 332, 112 Fed. 406.

49. In re Steege, 8 Am. B. R. 515, 116 Fed. 342, 54 C. C. A. 116.

50. Matter of Riggs Restaurant Co., 11 Am. B. R. 508, 130 Fed. 691.

51. Matter of Maher, 15 Am. B. R. 786, *aff'd* 16 Am. B. R. 340.

52. Sections 57g, 60a.

53. Collier, Bankr., 6th ed., p. 7.

54. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814, "subdivisions *a* and *b* are concerned with a preference given by a debtor to his creditor. Subdivision *a* defines what shall constitute it, and subdivision *b* states a consequence of it." See also Swartz v. Bank, 8 Am. B. R. 673, 117 Fed. 1; In re Rosenberg, 7 Am. B. R. 316. *Compare* Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501.

such a preference ceases to be so if four months shall elapse before the bankruptcy proceeding begins.[55] A voidable preference is something very different.[56] It follows, also, that only transfers and judgments can be preferences. The English law continues to distinguish between mere preferences and those that are either "fraudulent" or "undue." The result of our new meaning to an old-time word has been far-reaching.[57]

§ 8. **Definition of property.**—The bankruptcy law contains no definition of "property." Section 70a indicates what property passes to the trustee. The English act of 1883 defines property in comprehensive terms.[58]

§ 9. **Acts of bankruptcy; statutory provisions.**—The Bankruptcy Act of 1898 provides as follows:

§ 3. *Acts of Bankruptcy.*—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, *being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;** or (5) admitted in writing his in-

55. Section 60a.

56. Section 60b.

57. Collier, Bankr., 6th ed., p. 8. *Compare* Pirie v. Chicago Title & Trust Co., *supra*, with In re Hall, 4 Am. B. R. 671, 679; and note changes due to amendments of 1903, under section 60.

58. Collier, Bankr., 6th ed., p. 9.

* Amendment of 1903 in italics.

ability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or asignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant

shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

§ 10. **Acts of bankruptcy in general.**—The Bankruptcy Act of 1898 specifies five acts of bankruptcy. These will be considered under the appropriate headings, although some of them have little, if any, relation to the subject of fraudulent conveyances. The provisions of the Bankruptcy Act which relate directly to fraudulent conveyances or transfers of his property by a debtor or bankrupt are contained in four sections of the act. Section 3a(1) of the act makes a fraudulent transfer of his property by a debtor an act of bankruptcy. If the fraudulent transfer is within four months of the filing of the petition in bankruptcy, it is not only an act of bankruptcy but void under section 67e. It is also an objection to the bankrupt's discharge under section 14b(4). If the fraudulent transfer is also voidable under the State laws, it may be set aside under section 70e, and the property or its value recovered by proper proceedings begun within the limitations as to time fixed by the State statutes. These doctrines are further considered in the appropriate sections.

§ 11. **Who may commit acts of bankruptcy.**—Any person who can be adjudged an involuntary bankrupt may commit an act of bankruptcy. The term "person" includes corporations, part-

nerships, and women.[59] An agent, acting without the scope of his agency and without the consent of his principal, cannot render his principal liable for an act of bankruptcy.[60] But if one member of a partnership commits an act of bankruptcy, within the scope of his authority and in respect to the partnership property, an involuntary bankruptcy proceeding may be instituted against the partnership itself.[61]

§ 12. **First act of bankruptcy; a fraudulent transfer; subs. a(1).**—Under the statutory provision, "having conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them,"[62] constitutes an act of bankruptcy on the part of the person so doing.[63] The conveyances and transfers[64] made with intent to hinder, delay, or defraud creditors which are declared by the act to be acts of bankruptcy are those which by the common law and by the Statute of Elizabeth,[65] now a part of the law of nearly every State, are

59. Bankr. Act (1898), § 1(19).

When partnership regarded as insolvent.—In re Perley, 15 Am. B. R. 54, 138 Fed. 927.

Liabilities of stockholders of a corporation considered in determining question of solvency. First Nat. Bank v. Wyoming Valley Ice Co., 14 Am. B. R. 448, 136 Fed. 466.

60. Ex parte Blain, 12 Ch. D. 522, 41 L. T. Rep. N. S. 46, 28 Wkly. Rep. 334. As to persons against whom petition may be filed under section 3b, see Collier on Bankruptcy, 6th ed., pp. 54-56.

61. Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; In re Dibblee, 3 Ben. (U. S.) 283, 7 Fed. Cas. No. 3,884; In re Black, 2 Ben. (U. S.) 196, 3 Fed. Cas. No. 1,457.

62. The term "creditors or any of them" means one who owns a demand or claim provable in bankruptcy. Beers v. Hanlin, 3 Am. B. R. 745, 99 Fed. 695; Bankr. Act, § 1(9), § 63-a-b.

An accommodation indorser, even before payment, is a creditor. In re O'Donnell, 12 Am. B. R. 621, 131 Fed. 150.

63. Bankr. Act, § 3a(1).

64. The term "transfer" is defined in Bankr. Act, § 1(25).

65. 13 Eliz., chap. 5. In re Belknap, 12 Am. B. R. 326, 129 Fed. 646; Brake v. Callison, 11 Am. B. R. 797, 129 Fed. 201, 63 C. C. A. 359.

Creditors may be estopped to assert fraud. In re Marks, 15 Am. B. R. 457, 135 Fed. 448. See Lowenstein v. McShane Mfg. Co., 12 Am. B. R. 602.

deemed to be fraudulent.[66] Although insolvency may be an important circumstance to show fraudulent intent under this clause, it is not essential, as it is under clause 2, to constitute the second act of bankruptcy.[67] The various transactions which will furnish a legal presumption of this fraudulent intent depend largely on the State decisions cited and discussed in preceding chapters.[68] A conveyance of property by a debtor to a trustee of his own selection or a conveyance of any kind by an insolvent debtor, for the equal benefit of all his creditors, although not a voluntary general assignment, because containing certain conditions of defeasance, is nevertheless an act of bankruptcy, because of its tendency to defeat or delay the operation of the Bankruptcy Act by providing a different method of administration than that contemplated thereby and because it clearly deprives the creditors of the valuable rights accorded to them by that act.[69] A chattel

Failure of bankrupt's creditors to ascertain fact of transfer may be chargeable to their own negligence. In re Bogen, 13 Am. B. R. 529, 134 Fed. 1019.

66. Githens, etc., Co. v. Shiffler & Bros., 7 Am. B. R. 453, 112 Fed. 505; In re Shapiro, 5 Am. B. R. 839, 106 Fed. 495; In re Baker-Ricketson Co., 4 Am. B. R. 605, 97 Fed. 489. See Fraudulent Conveyances generally, chap. I, *supra;* Nature and form of transfer, chap. II, *supra.*

All such conveyances and transfers are null and void as to creditors, if made within four months prior to the filing of the petition in bankruptcy. Bankr. Act, § 67e. They may be set aside in an action brought by the trustee, even if made earlier than four months prior to the filing of such petition. Bankr. Act., § 70e.

67. In re Mingo Valley Creamery Assn., 4 Am. B. R. 67, 100 Fed. 282.

68. See chaps. I to XV, *supra.* See also Githens, etc., Co. v. Shiffler Bros., *supra;* Tiffany v. Lucas, 15 Wall. (U. S.) 410; In re Hussman, Fed. Cas. 6,951, and citations to the next section.

69. Rumsey, etc., Co. v. Novelty Mfg. Co., 3 Am. B. R. 704, 99 Fed. 699, "Among the rights conferred upon creditors by the Bankruptcy Act are: (1) to choose their own trustees; (2) to examine the bankrupt; (3) to have notice of all the important steps in the administration of the estate; and (4) to have the assets converted into money and distributed under the supervision and control of a court of bankruptcy;" Davis v. Bohle, 1 Am. B. R. 412, 92 Fed. 325, 34 C. C. A. 372; Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. No. 5,486, 4 Am. L. Rec. 652, 8 Chic. Leg. N. 258, 14 Nat. B. R. 311; In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337, 34 C. C. A. 377. See In re Salmon, 16 Am. B. R. 122, 143 Fed. 395.

mortgage to secure a present loan to pay certain creditors is
act of bankruptcy.[70] But where an insolvent debtor, prior
legal bankruptcy, borrows money and gives security therefor
the same time, and the advancements are made in good fai
upon such security to enable the insolvent debtor to carry
business, there is no violation of either the terms or policy of t
Bankruptcy Act.[71]

§ 13. **Intent.**—In order to constitute an act of bankrupt
under section 3a(1) the bankrupt must have transferred[72] h
property with intent to hinder, delay, or defraud his creditors.

70. In re Pease, 12 Am. B. R. 66, 129 Fed. 446.

71. In re Wolf, 3 Am. B. R. 555; In re Davidson, 5 Am. B. R. 528, 109 Fed. 882, a mortgage executed to secure a money loan made at the same time is valid, but if such mortgage is given to secure an antecedent debt, it will be deemed a preferential transfer, and therefore an act of bankruptcy.

Under the former act it was held that "an insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time security therefor, provided always that the transaction be free from fraud in fact and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act." Darby v. Boatman's Sav. Inst., 1 Dill. (U. S.) 141, 6 Fed. Cas. No. 3,571, 4 N. B. R. 600. See also Gatman v. Honea, 10 Fed. Cas. No. 5,271, 12 N. B. R. 493; In re Sanford, 21 Fed. Cas. No. 12,310, 7 N. B. 351; In re Rosenfeld, 20 Fed. C No. 12,057, 2 N. B. R. 116; In Cowles, 6 Fed. Cas. No. 3,297, 1 B. R. 280.

72. In re Nusbaum, 18 Am. B. 598, 152 Fed. 835, where an alleg bankrupt, while insolvent, volunta ily confesses judgment in favor certain of his creditors and perm them to levy executions on and s his property thereunder, witho having vacated or discharged t judgment, execution and levy, the is a "transfer" which constitutes act of bankruptcy under clauses and 2 of section 3a, irrespective clause 3 of said section.

73. In re Flint Hill Stone Constr. Co., 18 Am. B. R. 81, a pe tion, charging an act of bankrupt in giving a chattel mortgage with the four months period must alle facts showing that the mortgage w given either with intent to hind delay and defraud creditors and th the debt secured in the mortgage w pre-existing, or, if then incurred made, that the mortgage was for inadequate consideration.

It is competent to show th deeds, although absolute upon th

An intent to defraud is essential under this clause.[74] An actual intent to defraud, whether directly shown or established by presumption, must exist; the commission or permission of any of the acts therein specified with intent not to become a bankrupt is not in all cases equivalent to an intent to hinder, delay or defraud creditors.[75] The intent need exist only on the part of the person making the transfer; if that exists the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person receiving it may be.[76] If the natural consequence of a fraudulent transfer is to defraud creditors the intent will be presumed.[77] It rarely can be established by direct proof.[78] It may be inferred from the act itself as a necessary consequence of it, or it may be established by admissions and

face, were intended as mere securities, to prove that there was no intent to defraud. Acme Food Co. v. Meier, 18 Am. B. R. 550, 153 Fed. 74.

Intent to hinder, delay and defraud creditors is not shown where a mother, who had, years previously, executed continuing guaranty of her son's notes, renewals, etc., conveyed real estate of considerable value to a creditor, in satisfaction of a large indebtedness due him, in the absence of satisfactory evidence that the grantor knew at the time of the conveyance that she was insolvent or that she had any creditor other than the grantee. Merchants' Nat. Bank v. Cole, 18 Am. B. R. 44, 149 Fed. 708.

74. In re Belknap, 12 Am. B. R. 326, 129 Fed. 646; Bean, etc., Mfg. Co. v. Spoke, etc., Co., 12 Am. B. R. 610, 131 Fed. 215, 65 C. C. A. 201, intent presumed from result of transfer; Clark v. Henne, 11 Am. B. R. 583, 127 Fed. 288, 62 C. C. A. 172; Lansing Boiler Works v. Ryerson & Son, 11 Am. B. R. 558, 128 Fed. 701; In re Wilmington Hosiery Co., 9 Am. B. R. 581, 120 Fed. 180; In re Goldschmidt, 3 Ben. (U. S.) 379, 10 Fed. Cas. No. 5,520, 3 N. B. R. 164; Langley v. Perry, 14 Fed. Cas. No. 8,067, 2 N. B. R. 596; In re Cowles, 6 Fed. Cas. No. 3,297, 1 N. B. R. 280; In re McKibbin, Fed. Cas. No. 8,859; Fox v. Eckstein, Fed. Cas. No. 5,009.

75. In re Wilmington Hosiery Co., *supra*.

76. In re Drummond, 7 Fed. Cas. No. 4,093, 1 N. B. R. 231.

77. In re Bloch, 6 Am. B. R. 300, 109 Fed. 790, 48 C. C. A. 650; Johnson v. Wald, 2 Am. B. R. 84, 93 Fed. 640, 35 C. C. A. 522; Wager v. Hall, 16 Wall. (U. S.) 584, 21 L. Ed. 504; Toof v. Martin, 13 Wall. (U. S.) 40, 20 L. Ed. 481, 6 N. B. R. 49; In re Smith, 4 Ben. (U. S.) 1, 22 Fed. Cas. No. 12,974, 3 N. B. R. 377; Sawyer v. Turpin, 1 Holmes (U. S.), 251, 21 Fed. Cas. No. 12,409, 5 N. B. R. 339, *aff'd* 91 U. S. 114, 23 L. Ed. 235; Miller v. Keys, 17 Fed. Cas. No. 9,578, 3 N. B. R. 224.

78. Van Wyck v. Seward, 18 Wend. (N. Y.) 375, 395.

declarations. The burden is, of course on him who asserts it Thus, in the absence of proof as to when or how assets were lost the presumption is against fraud.[79] It is still an open question whether a voluntary receivership by an insolvent corporation under a State law may not be "with intent to hinder or delay creditors" and thus an act of bankruptcy, irrespective of the amendment of 1903.[80] The weight of authority seems to be that it is.[81] In a proceeding instituted prior to the amendment of 1903, it was held that the appointment of a receiver of an insolvent partnership was not an act of bankruptcy under this clause.[82] A transfer intended to delay creditors was under the former statute held to be an act of bankruptcy.[83] Allegations that the defendant transferred his property with intent to hinder, delay, or defraud his creditors should be specific if possible, but the purpose of the law does not require greater detail than it is probable that creditors can furnish.[84] An allegation, in the language of the statute, of a disposition of property to hinder, delay, and defraud creditors, is not sufficient; facts and circumstances should be stated from which the inferences may be drawn that the disposition of the property was done with evil intent.[85]

§ 14. **Insolvency.**—The insolvency of an alleged bankrupt at the time of the filing of the petition in an involuntary bankruptcy proceeding is only important as a defence to a conveyance made with intent to hinder, delay, or defraud creditors, charged as

79. Davis v. Stevens, 4 Am. B. R. 763. *Compare* In re Shapiro & Novick, 5 Am. B. R. 839, 106 Fed. 495.

80. Scheuer v. Smith, 7 Am. B. R. 384, 112 Fed. 407; In re Harper & Bros., 3 Am. B. R. 804, 100 Fed. 266; West v. Lea, 2 Am. B. R. 463, 174 U. S. 590; In re Gutwillig, 1 Am. B. R. 388, 390, 92 Fed. 337; In re Empire Metallic Bedstead Co., 1 Am. B. R. 136, 141, this point not having been passed on when this case was subsequently reversed.

81. In re Wilmington Hosiery Co., *supra*. *Compare* Bean, etc., Mfg. Co. v. Spoke Co., *supra*.

82. Matter of Burrell & Carr, 9 Am. B. R. 625, 123 Fed. 414, 59 C. C. A. 508.

83. In re Goldschmidt, *supra*.

84. In re Mero, 12 Am. B. R. 171, 128 Fed. 630.

85. In re Hark Bros., 14 Am. B. R. 400, 135 Fed. 603; In re White, 14 Am. B. R. 241, 135 Fed. 199.

an act of bankruptcy under section 3a(1),[86] and the burden of showing this is on the defendant.[87] Insolvency of a person as defined in the act, exists "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[88] The Bankruptcy Act declares that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."[89] This subdivision has reference only to the first act of bankruptcy and to solvency at the time of filing the petition. It is conceivable that a debtor may have been insolvent at the time of the act of bankruptcy, but not when the petition is filed. Insolvency, other than as evidence of intent, being unimportant where the act of bankruptcy consists of hindering, delaying, or defrauding creditors, it was both proper and scientific to insert this subsection.[90] It seems, therefore, that, where this act of bankruptcy is relied on, it is not necessary that the petitioning creditors either allege or prove insolvency at either period.[91] On the other hand, it is clear that proof of solvency by the debtor at the time the petition is filed is a complete defense. Solvency may be pleaded by a responding creditor as well as by the alleged bankrupt.[92]

86. Acme Food Co. v. Meier, 18 Am. B. R. 550, 153 Fed. 74.

87. Acme Food Co. v. Meier, *supra;* Bankr. Act, 1898, § 3c.

88. Section 1(15), Bankr. Act, 1898.

89. Section 3-a-c, Bankr. Act, 1898.

90. In re Pease, 12 Am. B. R. 66, 120 Fed. 446.

91. West Co. v. Lea, 2 Am. B. R. 463, 174 U. S. 590; In re West, 1 Am. B. R. 261.

92. In re West, *supra.* See Collier, Bankruptcy, 6th ed., p. 56.

§ 15. **Meaning of words and phrases.**—"Convey" has its common meaning and is the equivalent of "grant." The act provides that "'transfer' shall include the sale and every other different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."[93] The payment of a partner's individual debts out of the assets of the partnership is, as to creditors of the partnership, a transfer.[94]

§ 16. **Concealment and removal.**—The Act provides that "conceal" shall include secrete, falsify, and mutilate.[95] It may, perhaps, with correctness, be said that the separation of some tangible thing, money, or chose in action, from the body of the insolvent debtor's estate, and its secretion from those who have a right to seize upon it for the payment of their debts, is, within the law, a concealment, and continues such as long as the secretion remains.[96] An attachment secured upon a fictitious debt for the purpose of preventing an attachment by a *bona fide* creditor has

93. Bankr. Act, 1898, § 1(25).

94. In re Gillette, 5 Am. B. R. 119, 104 Fed. 769; Mattocks v. Rogers, Fed. Cas. No. 9,300.

95. Bankr. Act, 1898, § 1(22).

As to what concealment of the property of a bankrupt will prevent his discharge, see Bankr. Act, 1898, section 14b.

The concealment of property by a bankrupt, while a bankrupt or after his discharge, is an offense against the Bankruptcy Act and is punishable by imprisonment. Bankr. Act, 1898, § 29b(1).

96. Citizens' Bank v. De Pauw, 5 Am. B. R. 345, 105 Fed. 926, 45 C. C. A. 130, where an officer of an insolvent corporation buys up at a discount, under the guise of another person, outstanding judgments against such corporation, under which its property, under the same guise, is subsequently purchased at a judicial sale, and where the *quantum* of the property is not kept under cover or concealed, but remains visible, and the only concealment is that of the actual consideration paid, such transaction is not a continuing concealment within the meaning of the Bankruptcy Act, 1898, § 3a(1), although it may be fraudulent. See also Fox v. Eckstein, 9 Fed. Cas. No. 5,009, 4 N. B. R. 373; O'Neil v. Glover, 5 Gray (Mass.), 144, 159. *Compare* In re Quackenbush, 4 Am. B. R. 274.

Presumption of concealment.—If money belonging to an insolvent debtor has been lost or not accounted for, there is no presumption that it has been secreted or concealed. Davis v. Stevens, 4 Am. B. R. 763, 104 Fed. 235.

been considered a concealment, because the words imply not only a physical removal or concealment of the property, but also a concealment of title and the position of the property.[97] The word "removed," as used in this clause, signifies an actual or physical change in the position or locality of the property constituting the subject of removal.[98] The removal of property within the meaning of the act is a removal from the jurisdiction of the court with intent to deprive creditors of their legal rights in respect thereto.[99] An insolvent debtor who absconds and takes with him property which, had he remained, must have been transferred to his trustee in bankruptcy, both "conceals" and "removes" his property with intent to defraud his creditors and commits an act of bankruptcy.[1] Where property is removed by a creditor in the debtor's absence, and against his protest, the failure to take legal proceedings to recover such property is not an act of bankruptcy.[2]

§ 17. **Second act of bankruptcy; a preferential transfer; subs. a(2).**—As we have heretofore shown the rule is well settled that, in the absence of statutory restrictions, an insolvent debtor may pay one creditor in full to the exclusion of all others, and has the right to sell and transfer the whole or any portion of his property to one or more of his creditors to pay or secure his debts, when that is his honest purpose, although the effect of the sale or transfer is to hinder, delay, or defeat other creditors.[3] But, under the Bankruptcy Act, "having transferred, while insolvent,[4] any portion of his property to one or more of his creditors with intent to

97. In re Williams, 1 Lowell (U. S.), 406, 29 Fed. Cas. No. 17, 703, 3 N. B. R. 286; In re Hussman, 12 Fed. Cas. No. 6,951, 2 N. B. R. 437.

98. In re Wilmington Hosiery Co., 9 Am. B. R. 581, 120 Fed. 180, the word "removed" has no application to the taking of property by a receiver of a corporation acting under competent authority.

99. In re Hammond, 1 Lowell (U. S.), 381, 11 Fed. Cas. No. 5,999, 3 N. B. R. 273.

1. In re Filer, 5 Am. B. R. 332, 108 Fed. 209. Note the additional word "destroyed" in § 14b(4).

2. In re Belknap, 12 Am. B. R. 326, 129 Fed. 646.

3. Preferences to creditors, chap. XI, *supra*.

4. As to what constitutes insolvency, see Insolvency, § 4, *supra*; for burden of proof under this subsection, see under § 30, *infra*.

prefer such creditors over his other creditors," constitutes an act of bankruptcy on the part of the person so doing.[5] A transfer of the debtor's property to his creditor is essential.[6] Where at the time of the transfer there were no creditors, a subsequent creditor cannot complain.[7] The payment by an insolvent debtor, within the four months period, of substantial sums of money to certain of his creditors in full satisfaction of their claims, while denying payment to others whose claims are due and equally entitled to payment, constitutes an act of bankruptcy.[8] His payments under such circumstances inevitably result in giving the creditors so favored a preference over the others. The debtor is presumed to intend the necessary results of his own intelligent act.[9] The elements of preference under this subsection are: (1) insolvency, (2) intent to prefer, and (3) a transfer of property.[10] The judicial definition of preference[11] is not controlling in this connection, for a preference which will be an act of bankruptcy is something other and more than one voidable under section 60b. The intent to prefer on the part of the debtor may not be accompanied by reasonable cause to believe that it was intended as a preference on the part of the creditor, as required by the latter section.[12]

5. Bankr. Act, 1898. § 3a(2). See also Rumsey, etc., Co. v. Novelty, etc., Mfg. Co., 3 Am. B. R. 704, 99 Fed. 699; Beers v. Hanlin, 3 Am. B. R. 745, 99 Fed. 695; In re Pearson, 2 Am. B. R. 482, 95 Fed. 425.

The transfer of notes secured by a chattel mortgage, more than four months prior to the petition in bankruptcy, the assignment being endorsed on the mortgage, which was duly filed, does not constitute an act of bankruptcy. In re Bogen, 13 Am. B. R. 529, 134 Fed. 1019.

6. In re Rome Planing Mill, 3 Am. B. R. 123, 96 Fed. 812.

7. Brake v. Callison (C. C. A.), 11 Am. B. R. 797, 129 Fed. 201.

8. Rex Buggy Co. v. Hearick, 12 Am. B. R. 726.

9. In re Gilbert, 8 Am. B. R. 101, 112 Fed. 951; In re Bloch, 6 Am. B. R. 300, 109 Fed. 790; In re Grant, 5 Am. B. R. 837, 106 Fed. 496; In re Rome Planing Mill, *supra;* Johnson v. Wald, 2 Am. B. R. 84, 93 Fed. 640.

10. See In re Rome Planing Mill, 3 Am. B. R. 123, 96 Fed. 812, for analysis of this subsection; Goldman v. Smith, 1 Am. B. R. 266, as to what evidence will establish this act of bankruptcy.

11. See sections 1 and 60, Bankr. Act, 1898; In re Wright Lumber Co., 8 Am. B. R. 345, 114 Fed. 1011. See also Definitions, § 7, *supra.*

12. In re Wright Lumber Co., *supra;* Crooks v. The People's Nat. Bank, 3 Am. B. R. 238, 46 App. Div. (N. Y.) 335. See also Hussey v.

Insolvency at the time of the giving of the preference is essential.[13] It is also essential that the property transferred be that of the bankrupt.[14] A petition, charging as an act of bankruptcy the giving of a chattel mortgage by an insolvent corporation within the four months period must allege facts sufficient to show that the mortgage was given either with intent to hinder, delay, and defraud creditors, or with intent to prefer the mortgagee over other creditors; it should also allege that there were other creditors and that the debt secured by the mortgage was pre-existing, or if then incurred or made, that the mortgage was for an inadequate consideration, as the case may be.[15]

§ 18. **Intent to prefer.**—Where the transaction consists of a transfer of personal property by way of payment, the intent to prefer will be presumed.[16] The question of intent is one for the jury.[17] The doctrines held under the former law are summarized in the note below, the cases cited probably being still controlling.[18]

Richardson-Roberts Dry Goods Co., 18 Am. B. R. 511, 148 Fed. 598.

13. Acme Food Co. v. Meier (C. C. A.), 18 Am. B. R. 550, 153 Fed. 74.

14. Hartman v. Peters & Co., 17 Am. B. R. 61, 146 Fed. 82, a transfer by a partner of individual property, with intent to prefer a firm creditor, although an act of bankruptcy as against such partner, does not constitute an act of bankruptcy by the firm.

15. In re Flint Hill Stone & Construction Co., 18 Am. B. R. 81, 149 Fed. 1007, to give a mortgage, while insolvent, to secure an honest debt incurred in his business, or to secure an indorsement made at the time of giving a note which is for a present full consideration in carrying on his business, the mortgage being given at the same time, even if these acts are done within four months of the filing of the petition, is not necessarily an act of bankruptcy, as in such case there may not exist either an intent to hinder, delay, or defraud, or to prefer one creditor over another.

The execution of a chattel mortgage for part of the purchase price of certain goods, the mortgage ultimately covering said goods and goods on hand, does not constitute an act of bankruptcy, there being no intent to prefer. Martin v. Hulen & Co. (C. C. A.), 17 Am. B. R. 510, 149 Fed. 982.

16. See cases cited in note 9 to preceding section. Also Githens, etc., Co. v. Schiffler Bros., 7 Am. B. R. 453, 112 Fed. 505.

17. In re Bloch, 6 Am. B. R. 300, 109 Fed. 790.

18. Traders' Bank v. Campbell, 14 Wall. (U. S.) 87, as one is presumed to know the law, he is presumed to know the legal results of his acts,

Every one is presumed to intend the legal consequences of his acts.[19] Where, within the four months period, an insolvent debtor makes a payment to a particular creditor, the presumption is that he intends the necessary, natural and legal consequences of his act, that is, to enable the creditor to obtain a greater percentage of his debt than will enure to other creditors, and such payment constitutes an act of bankruptcy under section 3a(2).[20] It is possible that, under the new definition of insolvency, one may not always know the fair valuation of his property, and, therefore, may not be able to show that he knew whether he was solvent or not. But the presumption is not so much one of actual knowledge as that a person is chargeable with knowledge of his financial condition.[21] Payments made within the four months period by a debtor who did not regard himself as insolvent, but was so in fact, in the sense in which the word is used in the Bankruptcy Act, to *bona fide* creditors in the ordinary course of business, which the evidence shows he expected to continue and meet his obligations as they fell due, will not be held to have been made with "intent to prefer" within section 3(2), and are not acts of bankruptcy.[22]

and there is a consequent presumption that he intends the legal results of those acts; In re Dibblee, Fed. Cas. No. 3,884, one intends the legal consequences which would naturally follow; Driggs v. Moore, Fed. Cas. No. 4,083, and Rison v. Knapp, Fed. Cas. No. 11,861, payments by one knowing himself to be insolvent raise a conclusive presumption of intent to prefer; In re Silverman, Fed. Cas. No. 12,855, a debtor is presumed to know his financial condition and, if in fact insolvent, the burden is on him to establish his want of knowledge; Toof v. Martin, 13 Wall. (U. S.) 40, but if a debtor honestly believes himself solvent, the burden shifts from him to the creditors.

19. In re McGee, 5 Am. B. R. 262, 105 Fed. 895.

20. Macon Grocery Co. v. Beach, 19 Am. B. R. 558, such presumption, however, presupposes that said payment is injurious to other creditors, and so where such payment amounts only to 60 cents for soda water, coca-cola, and a bar of soap, and $2.15 for a "dressed doll," which the alleged bankrupt, an old bachelor, testifies was a present, which perhaps made happy the heart of some tiny maiden whose lovely face and graceful form brought back to his veteran and hapless heart the memory of features which "love used to wear," "sweet and sad to the soul, like the memory of joys that are gone," a presumption of intent to prefer does not arise.

21. Collier, Bankr., 6th ed., p. 44.

22. Goodlander-Robertson Lumber

There must be a design to give an advantage. Where the transfer is in pursuance of an effort to extricate the transferrer from his embarrassments, it will not be held a preference.[23] Where, within four months prior to a petition, in pursuance of a contract, valid and equitable, theretofore executed, a creditor exercised his rights in possessing himself of the bankrupt's property and making sale of it under such subsisting contract, he is not guilty of securing a preference.[24] But a transfer is not the less a preference because given in answer to a request or in fulfillment of a prior promise made at the time of contracting the debt.[25] Evidence of a failure to record a mortgage until several months after its execution may justify a finding that it was given with an intent to prefer.[26] But a renewal in good faith within the four months period of a chattel mortgage, given as security for a pre-existing debt, is not an illegal preferential transfer.[27] An agreement to insure goods and assign the policies to secure a creditor is not necessarily prejudicial to the other creditors, and an assignment of such policies made in pursuance thereof after the debtor became insolvent, is not an act of bankruptcy.[28] The specific fact as to the preference relied on must be alleged, with time, place, person and circumstances. Issuable facts, not conclusions, should be alleged.[29] The petition alleging a preferential payment should set out specifically the amounts paid and to whom.[30] An involuntary petition is good where it specifies the time of the making of an alleged preferential payment and its amount, and sufficiently accounts for failure to state the names of the preferred

Co. v. Atwood (C. C. A.), 18 Am. B. R. 510.

23. In re Wolf, 3 Am. B. R. 555, 98 Fed. 84.

24. Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974. See Winter v. Railway Co., Fed. Cas. No. 17,890, and In re Hapgood, Fed. Cas. No. 6,044, analogous cases under the law of 1867.

25. Arnold v. Maynard, Fed. Cas. No. 561. See also Collier, Bankr., 6th ed., p. 44.

26. In re Edelman (C. C. A.), 12 Am. B. R. 238, 130 Fed. 700.

27. In re Cutting, 16 Am. B. R. 751, 145 Fed. 388.

28. Wilder v. Watts, 15 Am. B. R. 57, 138 Fed. 426.

29. In re Nelson, 1 Am. B. R. 63, 98 Fed. 76.

30. In re Blumberg, 13 Am. B. R. 343, 133 Fed. 845.

creditors.[31] An omission of the specific date of the transfer does not render the petition demurrable.[32] When a debtor with knowledge of his insolvent condition transfers property to his creditors, an intent to prefer will be conclusively presumed.[33] The precedents as to alleging and proving intent to prefer under the former laws are summarized in the note below.[34]

§ 19. **Transfer of property.**—The word "transfer" as used in this subsection has the enlarged meaning given it by section 1(25). It is immaterial how the transfer is made. A duly recorded assignment of money coming due to an alleged bankrupt, made within the four months period, while he was insolvent, to an accommodation indorser of his note, is a preferential payment and constitutes an act of bankruptcy under subsection b.[35] The giving of a chattel mortgage, within the four months period, with intent to prefer a creditor,[36] the transfer of his property by an insolvent to another who executes a mortgage thereon in favor of a creditor,[37] the transfer of firm property by one partner to the other to give individual creditors a preference,[38] the transfer of

31. In re Lackow, 14 Am. B. R. 514, 140 Fed. 573.

32. In re Vastbinder, 11 Am. B. R. 118, 126 Fed. 417.

33. In re Billing, 17 Am. B. R. 80; In re Gilbert, 8 Am. B. R. 101, 112 Fed. 951.

34. Any fact which tends to establish the existence or non-existence of intent is admissible evidence. Linkman v. Wilcox, Fed. Cas. No. 8,374; Giddings v. Dodds, Fed. Cas. No. 5,405. The testimony of the party himself is entitled to little weight. Oxford Iron Co. v. Slafter, Fed. Cas. No. 10,637. Transfers of one's property afford a violent, almost conclusive, presumption of intent to prefer, if there are creditors unprovided for. In re Waite, Fed. Cas. No. 17,044. Proof of an antecedent indebtedness is, in general, necessary to establish that a payment or security is a preferential transfer. Clark v. Iselin, 21 Wall. (U. S.) 360; Burnhisel v. Firman, 22 Wall. (U. S.) 170; Sawyer v. Turpin, 91 U. S. 114. But where the proof is that the property was transferred to a mortgagee, who was a creditor in an amount larger than the value of the property transferred, the presumption of intent to prefer will be negatived. Livingston v. Bruce, Fed. Cas. 8,410; Catlin v. Hoffman, Fed. Cas. 2,521.

35. In re O'Donnell, 12 Am. B. R. 621.

36. Matter of Riggs Restaurant Co. (C. C. A.), 11 Am. B. R. 508, 130 Fed. 691.

37. Gilson v. Dobie, Fed. Cas. No. 5,394.

38. Collins v. Hood, Fed. Cas. No. 3,015.

property to a person partly in consideration of the payment of checks which amounted to an overdraft, but were guaranteed to the bank by the transferee,[39] is an act of bankruptcy. A transfer is not the less preferential and an act of bankruptcy because made indirectly through a third person. Thus, where a debtor transferred property to the administratrix of the estate, which was the creditor of said debtor, in her individual capacity, who thereupon borrowed money which was given to the husband of the debtor for the discharge of the indebtedness for which the estate as well as the debtor was liable, it was an act of bankruptcy.[40] Where a manufacturing corporation, as security for the payment of its note delivered to a bank, pledges all the material it has on hand at its mills, upon the agreement that it should have the privilege to sell or use such as might be needed in the operation of the mill, and that in case of such sale or use it would pay cash or transfer and deliver its equivalent in good accounts, and thereafter the corporation disposes of the material and within the four months period transfers to the bank, accounts, a large amount of which accrued prior to the date of the loan and pledge, the transaction must be held not to be a mere exchange of securities but a preference to the bank, and an act of bankruptcy.[41] A cash sale of all the property of an insolvent firm and the application of the proceeds of the sale to the full payment of several of their creditors, leaving others unpaid, constitutes a preferential transfer in violation of section 3a(2).[42]

§ 20. **Third act of bankruptcy; preference through legal proceedings; subs. a(3).**—Having suffered or permitted while insolvent,[43] any creditor to obtain a preference[44] through legal pro-

39. Goldman v. Smith, 1 Am. B. R. 266, 93 Fed. 182.

40. In re McGee, 5 Am. B. R. 262, 105 Fed. 895.

41. Anniston Iron, etc., Co. v. Anniston Rolling Mills, 11 Am. B. R. 200, 125 Fed. 974.

42. Boyd v. Lemon-Gale Co., 8 Am. B. R. 81, 114 Fed. 647.

For an alleged concealment held to be a transfer, see Citizens' Bank v. De Pauw Co., 5 Am. B. R. 345, 105 Fed. 926.

43. That the debtor was insolvent at the time the preference was obtained must be shown. Acme Food Co. v. Meier, 18 Am. B. R. 550, 153 Fed. 74; In re Rome Planing Mill,

ceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference, constitutes an act of bankruptcy on the part of the person so doing.[45] This has been termed the passive act of bankruptcy. It differs from the corresponding act in the law of 1867 in that intent is not material. It is in harmony with section 67b, under which liens through legal proceedings are void, irrespective of intent on the part of the debtor, or pressure, due to knowledge, on the part of the creditor.[46] Intent was necessary under the act of 1867 in order that a preference by permitting or suffering legal proceedings might constitute an act of bankruptcy, and such intent could not be inferred from the mere neglect of the alleged bankrupt, properly sued on a just claim, to interpose an answer where there was no valid defense—it could not be predicated on mere passive nonresistance.[47] The earlier and most of the later cases arising under the present law held that intent was not essential, but that result—the inequity flowing from the transaction rather than the animus of it—had been substituted therefor.[48] Two decisions held to the former doctrine that mere passivity was not enough.[49] The Supreme Court finally upheld the majority of the previous cases.[50] The rule is now settled that intent is not an element of pleading or proof where the third act of bankruptcy is relied on.[51] An insolvent may be thrown into bankruptcy by the requisite number of his

3 Am. B. R. 123, 96 Fed. 812. Solvency or insolvency at the time of the petition can only have a reflex importance. Acme Food Co. v. Meier, *supra*.

44. In re Rome Planing Mill, *supra*, that preference was actually secured through such proceedings must be shown.

45. Bankr. Act, 1898, § 3a(3).

46. Collier, Bankr., 6th ed., p. 45.

47. Wilson v. City Bank, 17 Wall. (U. S.) 473.

48. In re Meyers, 1 Am. B. R. 1; In re Reichman, 1 Am. B. R. 17, 91 Fed. 624; In re Moyer, 1 Am. B. R. 577, 97 Fed. 324; In re Rome Planing Mill, *supra;* In re Thomas, 4 Am. B. R. 571, 103 Fed. 272; In re Miller, 5 Am. B. R. 140, 104 Fed. 764; In re Harper, 5 Am. B. R. 567, 105 Fed. 900.

49. In re Nelson, 1 Am. B. R. 63, 98 Fed. 76; Duncan v. Landis, 5 Am. B. R. 649.

50. Wilson Bros. v. Nelson, 183 U. S. 191, 7 Am. B. R. 142.

51. Bradley Timber Co. v. White, 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55, *aff'g* 9 Am. B. R. 441.

creditors, if a judgment has been entered against him, execution issued and levy made, and the sale is five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him.[52] Failure to vacate a preference resulting from such a judgment, levy and sale is an act of bankruptcy within the meaning of this clause.[53] The act of bankruptcy is consummated five days before the sale, if at that time the levy has not been lifted; the sale having been noticed, and nothing having been done by the judgment debtor to set aside the preference, the creditors may file a petition against him; they are not required to wait for the sale.[54] But while the failure to discharge a levy five days before sale is an act of bankruptcy, a distinct and independent act of bankruptcy is also committed by a failure to discharge the levy on each succeeding day, including the day of the sale, and limitations against the creditor's right to file the petition runs from the day of the sale and not from the fifth day previous thereto.[55] Where, within the four months period, a corporation suffers its property, placed on premises leased by it and already subject to a mortgage, to secure its bonds, to be sold under a warrant of distraint for rent due, issued under a statute which gives the landlord a superior lien upon the property, the sale does not constitute a preference through legal proceedings, nor the commission of an act of bankruptcy on the part of the corporation.[56]

§ 21. **Meaning of words.**—"Insolvent" means what it is defined to mean in section 1(15). "Five days before a sale" means the same as "five days before the day set for the sale."[57]

52. Matter of Rung Furniture Co., 10 Am. B. R. 44, where the cases interpreting section 3a(3) are collated.

53. Matter of Rung Furniture Co., 14 Am. B. R. 12, 139 Fed. 526.

54. In re National Hotel & Cafe Co., 15 Am. B. R. 69, 138 Fed. 947.

55. In re Nusbaum, 18 Am. B. R. 598, 132 Fed. 835.

56. Richmond Standard Steel, etc., Co. v. Allen, 17 Am. B. R. 583, 141 Fed. 657. See In re Belknap, 12 Am. B. R. 326, 129 Fed. 646.

57. In re Elmira Steele Co., 5 Am. B. R. 484; In re Meyers, 1 Am. B. R. 1. And *compare* Re North (1895), 2 Q. B. 624.

"Preference" refers merely to a resultant inequality between creditors of the same class.[58] "Legal proceedings" means proceedings in a court to assert a legal remedy or obtain an equitable relief,[59] any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his creditors.[60] A distraint of goods under a landlord's warrant is not "a legal proceeding" under this clause.[61] "Suffered or permitted" includes passive nonresistance as well as nonability to resist.[62] A debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him, and levies upon his property, "suffers and permits" such judgment to be taken, and such levy to be made, and commits an act of bankruptcy under this clause.[63] "Creditor" is defined in section 1(9). Where it is shown that the petitioning creditors induced a judgment creditor to levy execution on his judgment, they are estopped from setting up such levy as an act of bankruptcy.[64]

§ 22. **Provision liberally construed.**—The courts have interpreted this subdivision broadly. A payment of money to a sheriff by a debtor of the judgment debtor against whom an execution has been issued is a technical levy and available as an act of bankruptcy.[65] So also is garnishee process after execution unsatisfied.[66] Failure to pay matured judgment notes followed by entry of judgment and execution issued is an act of bankruptcy.[67] Although the judgment is more than four months old, the levy,

58. Section 60a.

59. *Compare* In re Emslie, 4 Am. B. R. 126, 102 Fed. 291, *rev'g* 3 Am. B. R. 282, 97 Fed. 929.

60. In re Rome Planing Mill, 3 Am. B. R. 123, 96 Fed. 812.

61. In re Belknap, 12 Am. B. R. 326, 129 Fed. 646.

62. In re Gallagher, 6 Am. B. R. 255.

63. Bogen & Trummel v. Potter (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533.

64. Matter of Marks Bros., 15 Am. B. R. 457, 142 Fed. 279.

65. In re Miller, 5 Am. B. R. 140, 104 Fed. 764.

66. In re Harper, 5 Am. B. R. 567, 105 Fed. 900.

67. In re Thomas, 4 Am. B. R. 571, 103 Fed. 272.

if within that period, followed by a sale, is an act of bankruptcy.[68] But the mere entry of judgment without the issue of execution is not an act of bankruptcy.[69] The suing out of an attachment and levying the same does not suffice to constitute an act of bankruptcy.[70] The enforcement of the lien of a judgment obtained prior to the enactment of the Bankruptcy Act by the issue of an execution is not a preference and the provisions of section 3a(3) do not apply.[71] A failure to vacate a livery-stable keeper's lien is not an act of bankruptcy under such subdivision,[72] and it is held that a mechanic's lien is not a lien obtained through legal proceedings.[73]

§ 23. **Fourth act of bankruptcy; a general assignment or receivership; subs. a(4).**—The making of a general assignment for the benefit of creditors, with or without preferences, has been an act of bankruptcy for more than a century.[74] It was quite generally held under the law of 1867 that, being a palpable fraud on the law, it was an act of bankruptcy, although that act did not expressly so provide.[75] While, under the decisions, there would seem to be little doubt that a general assignment is an act of bankruptcy, because intended to hinder or delay creditors,[76] this new clause in the Act of 1898, section 3a(4), removes all question. Such an assignment, whether made by a person or copartnership, or by a corporation entitled to the benefits of the act under

68. In re Ferguson, 2 Am. B. R. 586, 95 Fed. 429.

69. In re Anderson, 2 N. B. N. Rep. 1000. *Compare* also, on the general subject, In re Chapman, 3 Am. B. R. 607, 99 Fed. 395, and Parminter Mfg. Co. v. Stoever, 3 Am. B. R. 220, 97 Fed. 330.

70. In re Vetterman, 14 Am. B. R. 245, 135 Fed. 443; In re Standard Steel Casting Co., 10 Am. B. R. 594, 124 Fed. 75.

71. Owen v. Brown, 9 Am. B. R. 717, 120 Fed. 812, 57 C. C. A. 180.

72. In re Mero, 12 Am. B. R. 171, 128 Fed. 630.

73. In re Emslie, 4 Am. B. R. 426, 102 Fed. 292.

74. *Compare* Jones v. Sleeper, Fed. Cas. No. 7,496.

75. *Compare* Globe Ins. Co. v. Cleveland Ins. Co., Fed. Cas. No. 5,486; Platt v. Preston, Fed. Cas. No. 11,219; In re Kasson, Fed. Cas. No. 7,617; In re Mendelsohn, Fed. Cas. No. 9,420; MacDonald v. Moore, Fed. Cas. No. 8,763.

76. Section 3a(1).

section 4b, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the act,[77] and, in itself, without either insolvency or intent, an available act of bankruptcy.[78] A general common-law assignment for the benefit of creditors, directing an equal distribution among them, without any attempt to defraud or embarrass persons to whom the assignor is under liability, is, however, not contrary to the policy of the bankruptcy law.[79]

§ 24. **What is a general assignment.**—The general assignment contemplated by section 3a(4) is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike.[80] Such a conveyance inevitably thwarts operation of the Bankruptcy Act.[81] The following assignments have been held to be acts of bankruptcy: A general assignment for the benefit of creditors, under a statute regulating this common-law right;[82] a general assignment by a corporation made by direction of a majority of the directors and stockholders;[83] a confession of judgment to a trustee for the benefit of all creditors.[84] An assignment for the benefit of creditors which purports to transfer all the property of the partnership is an act of bankruptcy, even though the assignment itself may be void or voidable as against the firm because made by only

77. In re Gray, 3 Am. B. R. 647, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp. 618; In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337.

78. Day v. Beck, etc., Co., 8 Am. B. R. 175, 114 Fed. 834; West Co. v. Lea Bros., 2 Am. B. R. 463, 174 U. S. 594.

79. In re Chase, 10 Am. B. R. 677, 124 Fed. 753, 59 C. C. A. 629.

80. In re Tomlinson Co. (C. C. A.), 18 Am. B. R. 691; Davis v. Bohle, 1 Am. B. R. 412, 92 Fed. 325; Appolos v. Brady, 1 C. C. A. 299, 49 Fed. 401; Bartlet v. Teah (C. C.), 1 Fed. 768.

81. In re Tomlinson Co., *supra.*

82. In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 425, 1 Am. B. R. 388, 92 Fed. 337; In re Sievers, 1 Am. B. R. 117, 91 Fed. 366.

83. Clark v. Am. Mfg. & Enameling Co., 4 Am. B. R. 351, 101 Fed. 962.

84. In re Green & Rogers, 5 Am. B. R. 848.

one partner. There is no distinction in this respect between valid and invalid instruments.[85] While a bill of sale or a deed of trust in the nature of a mortgage containing a power of sale, but reserving an equity to the mortgagor or pledgor, is not, technically speaking, an assignment, because the entire title to the property does not pass to the trustee,[86] where there is an absolute conveyance of the title to the trustee for the benefit of all the creditors, the instrument is none the less an assignment because it provides that a possible surplus shall revert to the grantor, inasmuch as that is implied in law.[87] It has been held, however, that a deed of trust which contained a condition of defeasance and an equity reserved to the grantor after satisfaction of claims of creditors was not a voluntary general assignment.[88]

§ 25. **What is not a general assignment.**—It was long thought to be settled that the voluntary application of an insolvent corporation for a receivership under State laws is not a general assignment within the meaning of the act, and, therefore, not an act of bankruptcy under section 3a(4),[89] although there is now authority that such an act is in effect the equivalent of a general assignment and an act of bankruptcy under section 3a(1).[90] It followed that a suit by one partner against the other for an accounting of their insolvent partnership, resulting in the appointment of a receiver, was not an act of bankruptcy under section

85. In re Meyer, 3 Am. B. R. 559, 98 Fed. 976, *aff'g* Chemical Nat. Bank v. Meyer, 1 Am. B. R. 565, 98 Fed. 976.

86. Dunham v. Whitehead, 21 N. Y. 131; Bishop, Insol. Deb., 3d ed., p. 110, *et seq.*

87. Rumsey v. Novelty, etc., Co., 3 Am. B. R. 704, note.

88. Rumsey v. Novelty, etc., Co., 3 Am. B. R. 704, 99 Fed. 699.

89. In re Gilbert, 8 Am. B. R. 101, 112 Fed. 951; In re Baker-Ricketson Co., 4 Am. B. R. 605, 97 Fed. 489; Vaccaro v. The Security Bank, 4 Am. B. R. 474, 103 Fed. 436; Davis v. Stevens, 104 Fed. 235; In re Empire Metallic Bedstead Co., 3 Am. B. R. 575, 98 Fed. 981.

90. Scheuer v. Smith, 7 Am. B. R. 384, 112 Fed. 407; In re Macon Sash, etc., Co., 7 Am. B. R. 66, 112 Fed. 323, *reversed* as Carling v. Seymour Lumber Co., 8 Am. B. R. 29, 113 Fed. 483; In re Harper, 3 Am. B. R. 804, 100 Fed. 266; In re Metallic Bedstead Co., *supra*. See also Intent, sec. 13, *supra*, and cases cited in note 80, to that section.

3a(4).[91] A direct transfer to creditors, after the intervention of a trustee duly appointed, is not an assignment for the benefit of creditors.[92]

§ 26. **Amendment of 1903; receiver or trustee in charge of property.**—By the amendment of 1903 a person, being insolvent, having applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee having been put in charge of his property under the laws of a State, of a Territory, or of the United States, constitutes an act of bankruptcy.[93] Now, a co-partnership or a corporation,[94] which is insolvent and applies for, or because of insolvency,[95] has been put in charge of a receiver or trustee, under the laws of a State, or of a Territory, or of the United States, thereby commits an act of bankruptcy. An agreement to wind up the affairs of a corporation and make an assignment of all its property to its directors as trustees to close up its business is an act of bankruptcy.[96] The amendment was intended to place all co-partnerships and such corporations as may be adjudged involuntary bankrupts[97] on the same footing as individual insolvents who attempt an equivalent fraud on the act.[98] The receiver must have been appointed because of the

91. But see Mather v. Coe, 1 Am. B. R. 504, 92 Fed. 333. *Compare* also In re Storck Lumber Co., 8 Am. B. R. 86, 114 Fed. 860; In re Storm, 4 Am. B. R. 601, 103 Fed. 618.

92. Anniston Iron, etc., Co. v. Anniston Rolling Mill Co., 11 Am. B. R. 200, 125 Fed. 974.

93. Section 3a(4).

94. Section 1(19).

95. As to necessity of insolvency, see Zugalla v. International Merc. Agency, 16 Am. B. R. 67, 142 Fed. 927, *rev'g* 13 Am. B. R. 725; In re Douglas Coal, etc., Co., 12 Am. B. R. 539, 131 Fed. 769.

96. In re Bennett Shoe Co., 15 Am. B. R. 497, 140 Fed. 687; In re Herculan Atkin Co., Limited, 13 Am. B. R. 369, 133 Fed. 813. So also as to a private bank conducted by a partnership placed in the hands of a special agent under a State law, the partnership being insolvent. In re Salmon, 16 Am. B. R. 122, 143 Fed. 395.

97. Section 4b. See Lowenstein v. McShane Mfg. Co., 12 Am. B. R. 601.

98. Some of the reasons for the change have been stated thus:

(1) It is one of the general purposes of the bankruptcy law to provide a uniform national law by which insolvent traders can make a pro

debtor's insolvency,[99] but insolvency being in fact the basis for the receivership, it is immaterial that the appointment was made under a statute which contained no provision for alleging insolvency *eo nomine* as the cause,[1] or that insolvency was not the sole reason. Insolvency, either as a distinct ground or as coupled with others is sufficient.[2] The amendment of 1903 is not retroactive, and a petition filed after such amendment took effect alleging the appointment of a receiver for an insolvent corporation within the four months period, but prior to the passage of the

rata distribution of their assets among creditors, and there is no reason apparent why trading corporations as well as trading copartnerships should not be permitted to avail themselves of this statute.

(2) In the more important commercial States, small corporations, with their limited liability, have practically superseded partnerships. As the law now stands, short of the commission of an act of bankruptcy, these corporations must wind up their affairs under the procedure of the State which created them, a procedure which is everywhere less favorable to creditors.

(3) Owing to the lack of comity between the States, a receiver of an insolvent corporation in one State is rarely recognized in another, with the result that the creditors in that other State, by garnishee process or otherwise, may, unless the corporation commits an act of bankruptcy, secure preference.

(4) If a corporation seeks to wind up its affairs and distribute its assets by means of a receivership, such a proceeding does not constitute an act of bankruptcy, and, consequently, creditors are entirely deprived of the valuable rights and safeguards provided by the bankruptcy law.

(5) As the law now stands, a corporation which wishes to be administered in bankruptcy is compelled to go through the motions of committing an act of bankruptcy that involuntary bankruptcy may be alleged against it, and it be brought into court apparently against its will. This circumlocution is bad in principle and worse in practice.

(Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, of March, 1900.)

99. Hooks v. Aldridge (C. C. A.), 16 Am. B. R. 658. The appointment of a temporary receiver in a stockholder's suit to restrain the corporation from the further exercise of its corporate franchises is not an act of bankruptcy. Zugalla v. International Merc. Agency, *supra*. A receiver appointed under Rev. St. Ohio, 1906, sections 3167, 3169, on petition of surviving partner and administrator of a dead partner, is not appointed because of insolvency, and is not an act of bankruptcy. Moss Nat. Bank v. Arend (C. C. A.), 16 Am. B. R. 867, 146 Fed. 351.

1. In re Belfast Mesh Underwear Co., 18 Am. B. R. 620, 153 Fed. 224.

2. Beatty v. Anderson Coal Min. Co. (C. C. A.), 17 Am. B. R. 738, 150 Fed. 293.

amendment, must be dismissed; the fact that the receivership continues after the taking effect of the amendment, is not of itself sufficient to constitute an act of bankruptcy.[3] Since the passage of the amendment a State court cannot by appointing a receiver of an insolvent debtor obtain priority of jurisdiction to administer the assets of such debtor.[4] It is immaterial that a proceeding for the dissolution of a corporation was instituted prior to the taking effect of the amendment, if the application for an order appointing a permanent receiver in such proceedings was made subsequent to such amendment.[5]

§ 27. **Meaning of words; precedents.**—"Insolvent" has the same meaning here as elsewhere in the statute.[6] The amendment thus makes insolvency an essential element of proof in receivership cases. "Applied for" manifestly means the voluntary application of the co-partnership or of a corporation under a resolution of its board of directors or other governing body, as regulated and prescribed by the State law of which the corporation is the creature. "Been put in charge of" clearly indicates every other means of securing the appointment of a receiver, as when the State or a creditor proceeds against a corporation for its dissolution.[7] "Trustee," of course, means the same as "receiver," the nomenclature being different in different States. The intention of this amendment appears to be that any act, procedure, or process for the winding up of insolvent corporations, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given by the bankruptcy law, will, provided the alleged bankrupt is insolvent at the time of the commission of the act complained of and that act be within the four months period, amount to an act of

3. Seaboard Steel Casting Co. v. Trigg Co., 10 Am. B. R. 594, 124 Fed. 75.

4. In re Knight, 11 Am. B. R. 1, 125 Fed. 35.

5. Matter of Milbury Co., 11 Am. B. R. 523.

6. See section 1(15).

7. In re Spalding (C. C. A.), 14 Am. B. R. 129, 132, 139 Fed. 243.

bankruptcy.[8] The corresponding acts of bankruptcy under the former law were not sufficiently analogous to furnish reliable precedents.[9]

§ 28. **Fifth act of bankruptcy; a confession of bankruptcy; subs. a(5).**—The value of this act of bankruptcy did not appear until the doctrine that corporations might through it in effect become voluntary bankrupts was generally recognized.[10] Three things seem to be necessary to this act: (1) a writing signed by the debtor or some officer or agent duly authorized; (2) a distinct admission therein of his inability to pay his debts; and (3) an unqualified expression of willingness to be adjudged a bankrupt on that ground. Thus, where the officer of a corporation was deputized to execute such a writing, provided a petition should be filed against it, this is not an act of bankruptcy.[11] If the writing is sufficient, the fact that the debtor requested certain creditors to file a petition against him does not affect the character of the act.[12] It is sufficient in legal effect if the board of directors of a corporation who were charged with the conduct of its business, declare the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt, in accordance with the legal requirements specified.[13] While a writing in

8. Collier, Bankr., 6th ed., p. 52.

9. See In re Merchants' Ins. Co., Fed. Cas. No. 9,441; Thornhill v. Bank of Louisiana, Fed. Cas. No. 13,992, *aff'g* Fed Cas. No. 13,990.

10. In re Kelly Dry Goods Co., 4 Am. B. R. 528, 102 Fed. 747; In re Marine Machine Co., 1 Am. B. R. 421, 100 Fed. 439. *Contra*, In re Bates Machine Co., 1 Am. B. R. 129, 91 Fed. 625.

11. In re Baker-Ricketson Co., 4 Am. B. R. 605, 97 Fed. 489.

12. Matter of Duplex Radiator Co., 15 Am. B. R. 324, 142 Fed. 906.

13. In re Moench & Sons Co., 10 Am. B. R. 656, 123 Fed. 965, *aff'd* 12 Am. B. R. 240, 130 Fed. 685, in which case it was held that petitioning creditors are not estopped from alleging a resolution adopted by a board of directors an act of bankruptcy, on the ground of collusion, charged by an answering creditor, who would obtain a preference by attachment if the petition were dismissed. Directors holding over may admit inability to pay debts. Matter of Talbot, 16 Am. B. R. 159. Directors may admit insolvency and willingness, although proceedings have been instituted to sell franchise and property of the corporation and distribute the proceeds thereof. Cresson Coal & Coke Co. v. Stauffer (C. C. A.), 17 Am. B. R. 573, 148 Fed. 981.

the exact words of the statute, if authoritatively signed,[14] is surely sufficient, yet it would seem that any writing which substantially covers the three essentials just stated will be enough.[15] Suggestive cases are cited in the note below.[16]

§ 29. **Solvency and the first act of bankruptcy.**—The bankruptcy law provides that it shall be a complete defense to any proceedings in bankruptcy under the first subdivision of section three to allege and prove that the party proceeded against was not insolvent as defined in the act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.[17] Insolvency of the debtor is not an element of subdivision one, where the act of bankruptcy consists of hindering, delaying or defrauding creditors, other than as evidence of intent.[18] It seems, therefore, that where this act of bankruptcy is relied on, it is not necessary that the petitioning creditors either allege or prove insolvency either at the time of the act of bankruptcy or at the time of filing the petition.[19] On the other hand, it is clear that proof of solvency by the debtor at the time the petition is filed is a complete defense. Solvency may

14. In re Mutual Mercantile Agency, 6 Am. B. R. 607, 111 Fed. 152.

15. In the case of Brinkly v. Smithwick, 11 Am. B. R. 500, 126 Fed. 686, it was held that an insolvent debtor's willingness to be adjudged bankrupt on the ground of insolvency may be inferred from the admission in his answer to an involuntary petition. But in the case of In re Wilmington Hosiery Co., 9 Am. B. R. 579, 120 Fed. 179, it was held that an admission of insolvency by a corporation in its answers to a bill filed against it praying for the appointment of a receiver is not an admission in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, within the meaning of clause 5 of section 3a. See Collier, Bankr., 6th ed., p. 54.

16. In re Kersten, 6 Am. B. R. 516, 110 Fed. 929; In re Rollins Gold & Silver Min. Co., 4 Am. B. R. 327, 102 Fed. 982.

17. Subs. c, section 3.

18. In re Pease, 12 Am. B. R. 66, 129 Fed. 446.

19. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; In re West, 1 Am. B. R. 261.

be pleaded by a responding creditor as well as by the alleged bankrupt.[20]

§ 30. **Solvency and the second and third acts of bankruptcy.**—The bankruptcy law provides that whenever a person against whom a petition has been filed as therein provided, under the second and third subdivisions of section three, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.[21] The second and third acts of bankruptcy are constructive or legal frauds. As to neither, therefore, is the burden properly on the party having the affirmative. Where the alleged bankrupt fails to appear, with his books, papers, and accounts and submit to an examination, or on appearing for examination fails to produce such books, papers, and accounts as are material in determining his financial condition, the burden is upon him to prove his solvency.[22] The books of the alleged bankrupt are competent, but not conclusive, evidence on the question of insolvency.[23] If the alleged bankrupt does put solvency at issue and produces his books and submits to examination, and his insolvency does not appear, the burden is upon the petitioning creditors to make the proof.[24] Cases where the meaning of this subsection has been in question are cited in the note below.[25]

20. In re West, *supra*.

21. Subs. d, section 3.

22. Matter of Rosenblatt, 16 Am. B. R. 306, 143 Fed. 663; Bogen & Trummell v. Protter (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533; In re Coddington, 9 Am. B. R. 243, 126 Fed. 891; In re Taylor, 4 Am. B. R. 515, 102 Fed. 728.

23. In re Docker-Foster Co., 10 Am. B. R. 584, 123 Fed. 190.

24. McGowan v. Knittel (C. C. A.), 15 Am. B. R. 1, 137 Fed. 1015, *rev'g* 14 Am. B. R. 209, 137 Fed. 453; Bogen & Trummell v. Protter, *supra*.

25. In re Rome Planing Mills, 3 Am. B. R. 766, 99 Fed. 137; Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. 102; Lea Bros. v. West Co., 1 Am. B. R. 261, 91 Fed. 237.

§ 31. **Fraudulent transfer as objection to discharge; sec. 14b(4).**—Under the bankruptcy law of 1867 the making of both a fraudulent preference and a fraudulent transfer were objections to discharge. Under the definition of transfer,[26] it is difficult to conceive of a preference that does not amount to a transfer, and, if fraudulent, either transaction will come within the clause of the present law. The words of subdivision (4) are doubtless a definition or explanation of the words "fraudulent transfer" there used. The words "with intent to hinder, delay, or defraud his creditors" mean for the purpose of defrauding the entire body of the bankrupt's creditors, and not a conversion of property belonging to a single creditor.[27] The creditor alleging this objection must show, in substance, the commission of the first act of bankruptcy. Any transfer, destruction of, or concealment of property within the inhibition of the statute of Frauds, even if in the four months period, will, if seasonably pleaded and duly proven, bar a discharge. If the transfer be made within the limited period it will be a bar although not knowingly and fraudulently made.[28] If made prior to the four months period it is no bar, even if made for the purpose of defeating a just claim.[29] A preferential transfer consisting of a payment of money on account of an existing indebtedness, in the absence of evidence that such payment was made in fraud of creditors is not within the meaning of this clause.[30] If the trustee failed in his action to set aside a fraudulent transfer, such transfer cannot be

26. See Bankr. Act, 1898, sec. 1(25).

27. Matter of Berry & Co., 15 Am. B. R. 360, a transfer by employees having general authority to make such transfers if made within the four months period and with intent to defraud will bar a discharge.

The pledging by a firm of brokers of their customer's stock to secure a loan to themselves is not a transfer with intent to delay or defraud creditors, although the brokers may have had a lien upon some of the stock pledged. Matter of Berry & Co., *supra*.

28. In re Gift, 12 Am. B. R. 244, 130 Fed. 230.

29. In re Brumbaugh, 12 Am. B. R. 204, 128 Fed. 971. See In re Dauchy, 11 Am. B. R. 511 (C. C. A.), 130 Fed. 532.

30. Matter of Maher, 16 A. B. R. 340, 144 Fed. 503, *aff'g* 15 Am. B. R. 786.

set up as a bar to a discharge.[31] Cases cited in the sections referring to fraudulent transfers as acts of bankruptcy will be found valuable.[32] Other cases are collected in the note below.[33] Whether a previous general assignment is a bar to a discharge has not been authoritatively determined. That such an assignment is a transfer is elementary; that it amounts to an intent to hinder or delay creditors is now thought well settled.[34] It would seem to follow, that if within the interdicted period, a general assignment is a sufficient objection to a discharge.[35]

31. In re Tiffany, 17 Am. B. R. 296.

32. See sections 12, 13, 14, 15 and 16, this chapter, *supra*.

33. In re Miller, 14 Am. B. R. 329, 135 Fed. 591; In re Wolfskill, Fed. Cas. No. 17,930; In re Hannahs, Fed. Cas. No. 6,032; In re Freeman, Fed. Cas. No. 5,082; In re Jones, Fed. Cas. No. 7,446; In re Diehl, 15 Fed. 234.

34. In re Milgraum v. Ost, 12 Am. B. R. 306, 129 Fed. 827; In re Macon Sash, etc., Co., 7 Am. B. R. 66, 112 Fed. 323; Carling v. Seymour Lumber Co., 8 Am. B. R. 29, 113 Fed. 483; Scheuer v. Smith, 7 Am. B. R. 384, 112 Fed. 407; In re Harper, 3 Am. B. R. 804, 100 Fed. 266; In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475, 1 Am. B. Rep. 388, 92 Fed. 337. *Compare* also under the former law, Mayer v. Hellman, 91 U. S. 496; Haas v. O'Brien, 66 N. Y. 597; In re Pierce, Fed. Cas. No. 11,141; In re Chadwick, Fed. Cas. No. 2,569.

35. Collier, Bankr., 6th ed., p. 201.

CHAPTER XXII.

FRAUDULENT LIENS AND TRANSFERS.

Section 1. Statutory provision.
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3. Claims void for want of record. Subs. a.
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5. Subrogation of trustee to rights of creditor. Subs. b.
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16. Transfers and incumbrances under State laws.
17. Suits to recover property.
18. Miscellaneous invalid transfers or incumbrances.
19. Mortgages to secure antecedent debts.
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24. Liens through legal proceedings. Subs. c and f.
25. Invalid liens by judgment and execution.
26. Invalid liens by attachment.
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28. Suits to annul liens.
29. Preserving liens.
30. Saving clause.

Section 1. **Statutory provision.**—The Bankruptcy Act of 1898 provides as follows:

§ 67. *Liens.*—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b When a creditor is prevented from enforcing his rights as

against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration;

and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of his creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purpose of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair

* Amendment of 1903 in italics.

the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

§ 2. **Scope and meaning of section 67.**—The Bankruptcy Act, in section 67, recognizes the well settled doctrine that a trustee in bankruptcy takes the bankrupt's property subject to all valid liens,[1] and declares what liens are not to be considered as valid, as, in substance, (1) those which are invalid under the laws of a State,[2] and, provided they are less than four months old, (2) those which were not recorded or are invalid "for other reasons,"[3] (3) those which were given with intent to hinder, delay, or defraud creditors,[4] and (4) those which were obtained through legal proceedings;[5] with the further proviso that even liens so declared invalid shall not be so as to *bona fide* purchasers without notice. Fraudulent transfers are also made null and void, if made by an insolvent with intent to hinder, delay, or defraud his creditors and within four months of the filing of the petition in bankruptcy. The section also provides for the subrogation of the trustee of the bankrupt's estate to the rights of the holders of liens; which, because declared void, a mere creditor cannot enforce. As a general rule, liens more than four months before the bankruptcy are, unless fraudulent, not affected;[6] nor are liens acquired after the bankruptcy.[7] On the other hand, while subdivision e is in itself a statute of limitations on fraudulent transfers, if the transfer is also interdicted by the law of the State, it may, under section 70c be attacked within the much longer period

1. See Valid liens, sections 6-9, *infra*. See also In re Moore, 6 Am. B. R. 175, 107 Fed. 234; Continental Bank v. Katz, 1 Am. B. R. 19; Stewart v. Platt, 101 U. S. 731; Yeatman v. Savings Inst., 95 U. S. 764; Ex parte Christy, 3 How. (U. S.) 292; In re Stuyvesant Bank, 49 How. Pr. (N. Y.) 133.

2. In re Davis, Fed. Cas. No. 3,618; Peck v. Jenness, 7 How. (U. S.) 612; Donner v. Brackett, 21 Vt. 599.

3. Subd. a.

4. Subd. e.

5. Subds. e and f.

6. In re Dunavant, 3 Am. B. R. 41, 96 Fed. 542; Doe v. Childress, 21 Wall. (U. S.) 642.

7. In re Engle, 5 Am. B. R. 372, 105 Fed. 893; Kinmouth v. Braentigam, 4 Am. B. R. 344.

fixed by the State statute.[8] And while liens through legal proceedings within the four months period are dissolved by bankruptcy, other liens are not, unless the lienor was insolvent at the time and there was "intent to hinder, delay, or defraud" creditors.[9] It follows also that a trustee, not being a purchaser for value,[10] not only stands in the shoes of the bankrupt as to his property, but, as the representative of the creditors, may sue to avoid the effect of the bankrupt's acts.[11] But the trustee does not represent creditors who are secured by valid liens, and, therefore, he has no interest in the respective rights of priority of such creditors.[12] It has also been held that, where a valid lien is incident to a debt and the debt is discharged, the lien nevertheless remains.[13] Section 67 is closely connected with both section 60a-b, on voidable preferences, and section 70e, on fraudulent transfers voidable under the State law; somewhat less closely with section 3a(1), section 3a(2), and section 3a(3), where similar transactions are declared acts of bankruptcy; while by section 14b(4) a fraudulent transfer is defined in words almost identical with those of subdivision e, and is made an objection to discharge.[14]

§ 3. **Claims void for want of record; subs. a.**—Subdivision a of section 67 of the bankruptcy law provides as follows: "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." This subdivision should

8. In re Dunavant, 3 Am. B. R. 41, 96 Fed. 542; In re Adams, 1 Am. B. R. 94.

9. See Fraudulent transfers and liens, sections 10-16, *infra*.

10. Chattanooga Bank v. Rome Iron Co., 4 Am. B. R. 441, 102 Fed. 755. *Contra*, In re Booth, 3 Am. B. R. 574, 98 Fed. 975.

11. In re Leigh, 2 Am. B. R. 606, *aff'd* 96 Fed. 806; In re Legg, 96 Fed. 806. *Contra*, In re Ohio Co-operative Shear Co., 2 Am. B. R. 775.

12. Goldman v. Smith, 2 Am. B. R. 104; Jerome v. McCarter, 94 U. S. 734.

13. Bank of Commerce v. Elliott, 6 Am. B. R. 409. *Compare* Bracken v. Johnston, Fed. Cas. 1,761.

14. Collier, Bankr., 6th ed., p. 553. See discussion of the sections referred to in the appropriate sections of this work.

be read in connection with the provision of subdivision e that "all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." The reference in subdivision a is clearly to the State law. Claims which are not yet liens, properly so called, under the State law, as, for want of record or "for other reasons," cannot be recognized in bankruptcy. It is the statute or judicially established rule of the State which must control in every case.[15] The State law of the State where the property is located governs.[16] Subdivision a is the corollary of the proposition that the property of the bankrupt comes to the trustee charged with all valid liens. It is merely declaratory of the law.[17]

§ 4. **Unfiled chattel mortgages and contracts of conditional sale.**—Whether a contract is one of conditional sale or is a chattel mortgage, and, as between the parties thereto, whether it is valid, and what the effect of the failure to file or record it may be, are questions to be determined exclusively by the local law.[18]

15. Humphrey v. Tatman, 198 U. S. 91, 14 Am. B. R. 74; In re First Nat. Bank of Canton (C. C. A.), 14 Am. B. R. 180, 135 Fed. 62; Thompson v. Fairbanks, 196 U. S. 516, 13 Am. B. R. 437; Dodge v. Norlin, 13 Am. B. R. 177.

16. In re Green, 13 Am. B. R. 504, 134 Fed. 137, a mortgage made and executed in New York, where both parties resided, upon property, then and at the time of the mortgagor's adjudication as a bankrupt, contained in a hotel in Connecticut, if recorded in compliance with the statutes of the latter State is valid as against the bankrupt's trustee, though not recorded or filed in New York. See also 64 L. R. A. 353, 361, note.

17. Collier, Bankr., 6th ed., p. 553.

18. In re Newton & Co. (C. C. A.), 18 Am. B. R. 567, 153 Fed. 841; York Mfg. Co. v. Cassell, 201 U. S. 344, 15 Am. B. R. 633; Humphrey v. Tatman, *supra;* Thompson v. Fairbanks, *supra.*

A chattel mortgage is void, as

The trustee is not a "party" to a mortgage given by the bankrupt within the meaning of the recording acts.[19] Where chattel mortgages are withheld from record contrary to the provisions of a statute for the purpose of enabling the mortgagor to preserve his credit, such mortgages are not entitled to priority of payment in bankruptcy over claims arising subsequent to the execution of the mortgages and before they were recorded.[20] In some jurisdictions and under some statutes it must affirmatively appear in order to invalidate the mortgage that it was withheld from record by agreement, or that some prejudice resulted to creditors on account of its not having been filed for record.[21] The object of the recording acts is to prevent the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien by giving notice to those intending to purchase such property and to creditors who give credit on the faith thereof.[22] The law of New York is that an unfiled chattel mortgage is absolutely void as to all creditors of the mortgagor then existing, or who may exist while such mortgage remains unfiled, but those creditors only who obtain a lien on the property by re-

against the mortgagor's trustee in bankruptcy, where it was not recorded and the property was not retained by the mortgagee in conforming to the express provisions of Rev. Laws, c. 198, sec. 1. Goodrich v. Dore (Mass.), 80 N. E. 480.

An unfiled chattel mortgage is void as to creditors, even if the mortgagee is in possession of the property, when proceedings in bankruptcy have been commenced prior to a sale of the property to satisfy such mortgage. Cornelius v. Bolling, 18 Okla. 469, 90 Pac. 874.

19. In re Shaw, 17 Am. B. R. 196, 146 Fed. 273, unrecorded chattel mortgage held void as against the trustee.

20. Clayton v. Exchange Bank of Macon, 10 Am. B. R. 173, 121 Fed. 630; Guras v. Porter, 9 Am. B. R. 271, 118 Fed. 668; In re Andrae Co., 9 Am. B. R. 135, 117 Fed. 561.

21. Deland v. Miller & Cheney Bank, 11 Am. B. R. 744, 119 Iowa, 368; In re Williams, 9 Am. B. R. 731, 120 Fed. 542.

22. In re Cannon, 10 Am. B. R. 64, 121 Fed. 582; Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 5 L. Ed. 393, "there is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of a vendor against a creditor who is a mortgagee would be to counteract the spirit of these laws."

ducing their debts to judgment and issuing execution are in a position to assert and enforce such invalidity, but a general creditor upon obtaining judgment and issuing execution may impeach the validity of the mortgage for non-filing, although in the meantime it may have been filed.[23] The Court of Appeals of New York has recently held that an unfiled chattel mortgage is void as against creditors whose claims accrued prior to such filing and, although creditors cannot, under the general rule, attack it until after the recovery of a judgment and issue of an execution, this rule is simply one of procedure and does not affect the right; and, therefore, where the recovery of a judgment is impracticable it is not an indispensable requisite to enforcing the rights of the creditor; hence, a trustee in bankruptcy may, for the benefit of creditors, attack such mortgage, though if a creditor seek that relief in his own name it would be necessary that his claim be first put in judgment.[24] And, since the Supreme Court of the United States has held that, in determining the validity of a chattel mortgage, it will accept as decisive the settled law of the State in which the mortgage was given, as established by the decisions of its highest courts,[25] this ruling of the Court of Appeals of New York would seem conclusive upon this question, notwithstanding the decisions of the lower federal courts at variance therewith.[26]

23. In re Beede, 14 Am. B. R. 697, 138 Fed. 441; In re Beede, 11 Am. B. R. 387, 120 Fed. 853, in which cases Judge RAY considered at length and in full all the New York authorities applicable to the validity of unfiled chattel mortgages.

24. Skilton v. Coddington, 185 N. Y. 80, 15 Am. B. R. 810, *disapproving* In re Economical Printing Co., 6 Am. B. R. 615, 110 Fed. 514. See also Matter of Metropolitan Stove, etc., Co., 15 Am. B. R. 119; Gove v. Morton Trust Co., 12 Am. B. R. 297, 96 App. Div. (N. Y.) 177; In re Ducker (C. C. A.), 13 Am. B. R. 760, 133 Fed. 771; Matter of Thompson, 10 Am. B. R. 242, 122 Fed. 174.

25. Humphrey v. Tatman, 198 U. S. 91, 14 Am. B. R. 74; Thompson v. Fairbanks, 196 U. S. 516, 13 Am. B. R. 437. See also In re Antigo Screen Door Co., 10 Am. B. R. 359.

26. In re Economical Printing Co. (C. C. A.), 6 Am. B. R. 615, 110 Fed. 514, 49 C. C. A. 133; In re Burnham, 15 Am. B. R. 548, 140 Fed. 926, in New York a trustee in bankruptcy cannot take advantage of the omission to strictly conform to provisions of the statute in regard to filing renewals of a chattel mortgage within thirty days preceding the expiration of each year after the original filing.

In Massachusetts a chattel mortgage made prior to the four months period and recorded within that period is good as against the mortgagor's trustee in bankruptcy,[27] and the rule seems to be the same in Ohio.[28] Where under a State law, a conditional sale of chattels with reservation of title, until paid for, is good between the parties, although not filed, such contract is not void as to creditors who have not acquired a specific lien, and under such a statute the trustee of the bankrupt vendee has not acquired such a lieu by the adjudication of the vendee, and he may not avoid the contract.[29] A failure to record a real property mortgage until after the adjudication of the bankrupt mortgagor and the appointment of his trustee has been held, under the Pennsylvania rule, to deprive the mortgagor of his lien as against the trustee.[30] In Tennessee, an unrecorded mortgage given in good faith to secure a valid debt is good between the parties, and where it is given by the bankrupt anterior to the four months period, payment thereof does not constitute a preference.[31] The cases are numerous which involve the question of the validity of unfiled or unrecorded chattel mortgages or conditional sales as against general or judgment creditors of the bankrupt. The determination of the question must necessarily depend upon the statutes and decisions of the several States.[32] A number of these cases are cited in the note below.[33]

27. Humphrey v. Tatman, *supra.*

28. In re First Nat. Bank of Canton (C. C. A.), 14 Am. B. R. 180, 135 Fed. 62.

29. York Mfg. Co. v. Cassell, 15 Am. B. R. 632, 201 U. S. 342. *Compare* In re Press Post Printing Co., 13 Am. B. R. 797; In re Dunn Hardware & Furniture Co., 13 Am. B. R. 147, 132 Fed. 719, in which cases the statute under consideration was similar to that under consideration in the above case and a different rule was applied.

30. In re Lukens, 14 Am. B. R. 683 133 Fed. 188.

31. Rogers v. Page, 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164.

32. In re Beede, 11 Am. B. R. 387, 126 Fed. 853; In re Antigo Screen Door Co., 10 Am. B. R. 359, 123 Fed. 249; In re Andrae Co., 9 Am. B. R. 135, 117 Fed. 561.

33. Epstein & Co. v. Wilson (Tex.), 17 Am. B. R. 583; In re Armstrong (Iowa), 16 Am. B. R. 583; In re Hill (Cal.), 15 Am. B. R. 499; Farmers Bank v. Carr (S. C.), 11 Am. B. R. 733; In re Gosch (Ga.), 12 Am. B. R. 149, 126 Fed. 627, *rev'g* 9 Am. B. R. 610; In re Rabenau (Mo.), 9 Am. B. R. 180;

§ 5. **Subrogation of trustee to rights of creditors; subs. b.**— Subdivision b of section 60 of the bankruptcy law is doubtless declaratory of the law.[34] The doctrine that the trustee only can sue has been considered elsewhere.[35] Cases involving the subrogation of the trustee to the rights of creditors are cited in the notes below.[36] The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the State courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned unsatisfied are necessary elements; *i. e.*, that he was in effect, if not in name, a judgment creditor.[37] This has been thought still the rule,[38] especially in view of the words, "may enforce such rights of such creditor for the benefit of the estate." The phrasing of section 70e, limiting actions to avoid transfers to such suits as a creditor could have brought, has, however, again opened the question. Thus, it has been held that only a judgment cred-

In re Josephson (Ga.), 8 Am. B. R. 423, 116 Fed. 404; Duplan Silk Co. v. Spencer (Pa.), 8 Am. B. R. 367; In re Hill (Vt.), 8 Am. B. R. 302, 115 Fed. 858; In re Pekin Plow Co. (Neb.), 7 Am. B. R. 369, 112 Fed. 308; In re Wilkes (Ark.), 7 Am. B. R. 574, 112 Fed. 975; In re Sewell (Ky.), 7 Am. B. R. 133, 111 Fed. 791; In re N. Y. Economical Printing Co., 6 Am. B. R. 615, 110 Fed. 514; In re Tatem (N. C.), 6 Am. B. R. 426, 110 Fed. 519; In re Booth (Or.), 3 Am. B. R. 574, 98 Fed. 975; In re Harrison (N. Y.), 2 N. B. N. Rep. 541; In re Wright (Ga.), 2 Am. B. R. 364, 96 Fed. 187; In re Yukon Woolen Co. (Conn.), 2 Am. B. R. 805, 96 Fed. 326.

34. *Compare* In re Yukon Woolen Co., 2 Am. B. R. 805, 96 Fed. 326.

35. See Suits by trustees, chap. XXIV. sec. 32, *infra*.

36. In re Beede, 14 Am. B. R. 697, 138 Fed. 441; Receivers of Virginia Iron, etc., Co. v. Staake (C. C. A.), 13 Am. B. R. 281, 133 Fed. 717; Patten v. Carley, 8 Am. B. R. 482; Barnes Mfg. Co. v. Norden, 7 Am. B. R. 553; In re Howland, 6 Am. B. R. 495, 109 Fed. 869; In re Boston, 3 Am. B. R. 388; In re Kenney, 3 Am. B. R. 353, 97 Fed. 554. As to the subrogation of the trustee to rights of attaching creditors, see In re Morrow, 12 Am. B. R. 615; In re Sententne & Green Co., 9 Am. B. R. 648.

37. In re Metzger, Fed. Cas. No. 9,510; In re Duncan, Fed. Cas. No. 4,131; Beecher v. Clark, Fed. Cas. No. 1,223; Barker v. Barker's Assigns, Fed. Cas. No. 986. *Compare* Platt v. Stewart, Fed. Cas. No. 11,220, as *rev'd* as Stewart v. Platt, 101 U. S. 731.

38. *Compare* In re McNamara, 2 N. B. N. Rep. 341; In re Harrison, 2 N. B. N. Rep. 541.

itor can share in the property of a bankrupt, affected by a chattel mortgage not duly refiled as provided in the New York statute, *i. e.*, that the trustee is a judgment creditor only so far as he represents judgment creditors, the New York law denying to creditors whose debts are not reduced to judgment the remedy of a suit to set it aside.[39] This case has, however, been disapproved by the Court of Appeals of New York, which has held that the general rule that creditors cannot attack such a chattel mortgage until after the recovery of a judgment and the issue of an execution is simply one of procedure and does not affect the right, and, therefore, where the recovery of a judgment is impracticable it is not an indispensable requisite to enforcing the rights of creditors, and, hence, the mortgagor's trustee in bankruptcy may attack such mortgage, though if a creditor seeks that relief in his own name it would be necessary that his claim be first put in judgment.[40] There can be no doubt about the trustee's power to sue to set aside a transaction which amounts to a fraud in fact, whether on the law or on the creditors; and that, too, irrespective of whether any of the creditors had obtained judgments. Where, however, the wrong on creditors is purely constructive, and the remedy is denied until certain statutory preliminaries are observed, the case may be different. Such a distinction would harmonize with the doctrine that the trustee takes the assets in the "plight and condition" they were the day of the bankruptcy.[41]

§ 6. **Valid liens, in general; subs. d.**—This subsection is also declaratory of the law. It is the converse of subsections c, e, and f, and is emphasized by subsection b, the saving clause in the body of subsection e and the proviso clause at the end of sub-

39. In re Economical Printing Co., 6 Am. B. R. 615, 110 Fed. 514 (C. C. A.). *Compare* In re Schmitt, 6 Am. B. R. 150, *aff'd* In re Shirley, 7 Am. B. R. 299.

40. Skilton v. Coddington, 185 N. Y. 80, 15 Am. B. R. 810. But see In re Burnham, 15 Am. B. R. 548.

41. This rule has been held not to apply to liens which, although valid as to the bankrupt, are invalid as to creditors. First Nat. Bank v. Staake, 202 U. S. 141, 15 Am. B. R. 639.

section f. It is much broader than the corresponding clauses of the act of 1867, which protected liens by mortgage only.[42] The supreme test of validity is, of course, "good faith."[43] Want of present consideration or failure to record where record is necessary to impart notice are also important.[44] These are often elements of proof on the question of *bona fides*. Where the lien is through legal proceedings, however, *bona fides* is not material. The rule, in general, seems to be that where the lien does not contravene the bankruptcy law, and is recognized by the State law, it will be preserved.[45] The Bankruptcy Act protects all statutory liens which have been properly perfected, before or after the adjudication in bankruptcy, in accordance with the statute or provision of law which gives it birth.[46] A statutory lien filed within the time prescribed by the statute is protected if otherwise valid, although not filed until after the debtor's adjudication as a bankrupt.[47]

§ 7. **Mechanics' liens.**—Here there was some question under the former law.[48] There is now none under the present.[49] Such

42. Section 14, R. S., section 5052.

43. In re Soudans Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804.

44. *Compare* subs. a; In re Durham, 8 Am. B. R. 115, 114 Fed. 750; In re Soudans Mfg. Co., *supra*.

45. *Compare* In re Grevy, 7 Am. B. R. 459, 461, 112 Fed. 957, 959; In re Alverson, 5 Am. B. R. 855; In re Lowensohn, 4 Am. B. R. 79, 100 Fed. 776; In re Byrne, 3 Am. B. R. 268. In re West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. 759; McNair v. McIntyre, 7 Am. B. R. 638, 113 Fed. 113; Evans v. Rounsaville, 8 Am. B. R. 236. *Compare* also Harvey v. Smith, 7 Am. B. R. 497; In re Standard Laundry Co., 8 Am. B. R. 538, 116 Fed. 476; In re Klapholz, 7 Am. B. R. 703; Clark v. Iselin, 21 Wall. (U. S.) 360; In re Hutto, Fed. Cas. No. 6,960; In re N. Y. Mail, etc., Co., Fed. Cas. No. 10,209; In re Dunkerson, Fed. Cas. No. 4,156; Gardner v. Cook, Fed. Cas. No. 5,226.

46. In re Franklin, 18 Am. B. R. 218.

47. In re Lillington Lumber Co., 13 Am. B. R. 153, 132 Fed. 886; Fehling v. Goings, 13 Am. B. R. 154, 67 N. J. Eq. 375, 58 Atl. 642; Crane v. Smythe, 11 Am. B. R. 747, 86 N. Y. Supp. 711, 87 N. Y. Supp. 917; Matter of Roeber, 9 Am. B. R. 778, 121 Fed. 444; In re Mero, 12 Am. B. R. 171, 128 Fed. 630.

48. Sabin v. Connor, Fed. Cas. No. 12,197; In re Cook, Fed. Cas. No. 3,151; In re Dey, Fed. Cas. No. 3,871; In re Coulter, Fed. Cas. No. 3,276.

49. In re Emslie, 4 Am. B. R. 126, 102 Fed. 291, *rev'g* 3 Am. B. R. 282,

a lien is not one through legal proceedings[50] and, unless so, cannot be attacked, save for intention to hinder, delay, or defraud, an element not likely to appear in liens of this class. It seems even that such a lien may be perfected after bankruptcy.[51] A laborer's or materialman's lien for labor performed for, or materials furnished to, a subcontractor is not affected by the bankruptcy of the subcontractor.[52] In determining the validity of such liens the law of the State will control.[53] Akin to this subject are all liens which or whose priority rests on special statutes.[54]

§ 8. **Landlords' liens.**—In some of the States, the lessor is given a lien, either after or before distraint for rent. The requirements of the State statute must be strictly observed or the lien will not be recognized.[55] If distraint is necessary and has not been resorted to, there is no lien.[56] Where a landlord's lien

97 Fed. 929; In re Kirby-Dennis, 2 Am. B. R. 402, 95 Fed. 166, *aff'g* 2 Am. B. R. 218, 94 Fed. 818. See also In re Coe-Powers Co., 6 Am. B. R. 1; In re Beck Prov. Co., 2 N. B. N. Rep. 532.

50. Howard v. Cunliff (Mo. App.), 10 Am. B. R. 71; In re Emslie, *supra*.

51. In re Huston, 7 Am. B. R. 92.

52. Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619, 9 Am. B. R. 78, note; Crane Co. v. Smythe, 11 Am. B. R. 747, 94 App. Div. (N. Y.) 53; In re Cramond, 17 Am. B. R. 22; Matter of Grissler, 13 Am. B. R. 508, 136 Fed. 754, where a mechanic's lien has been perfected as provided by a State statute, an action to enforce it will not be stayed by the bankruptcy court; Fehling v. Goings, 13 Am. B. R. 154, 67 N. J. E. 375. *Contra*, Matter of Roeber, 9 Am. B. R. 303 (C. C. A.), 121 Fed. 449, *rev'g* 9 Am. B. R. 778, a trustee in bankruptcy takes title to the money due to a bankrupt under a building contract, free from the liens of subcontractors for labor and materials furnished for the building, although the notices of liens were filed pursuant to statute, but after the contractor had filed his petition in bankruptcy.

53. Morgan v. First Nat. Bank, 16 Am. B. R. 639, 145 Fed. 466.

54. For example, in cases like In re Matthews, 6 Am. B. R. 96, 109 Fed. 603; In re Gosch, 9 Am. B. R. 613, 121 Fed. 604. But see In re Falls City Shirt Co., 3 Am. B. R. 437, 98 Fed. 592.

55. In re McIntire, 16 Am. B. R. 80, 142 Fed. 593; Marshall v. Knox, 16 Wall. (U. S.) 551. *Compare* In re Consumers' Coffee Co., 18 Am. B. R. 500.

56. In re Ruppel, 3 Am. B. R. 233, 97 Fed. 778.

is not recognized by statute, a lien under a distress warrant is avoided by subsection f.[57] Where a lease provides that the landlord shall have at all times the right to distrain for rent due, and shall have a valid and first lien upon all the property of the tenant, the lien thus created, though it did not attach by the levy of a distress warrant until two days before the filing of the petition in bankruptcy against the tenant, is preserved by section 67d.[58] A landlord may not enforce by distraint a claim for rent after his tenant has been adjudicated a bankrupt.[59] Where a landlord's lien is given by statute, it is waived by the landlord taking a chattel mortgage for the rent.[60] And where a landlord consents to the sale of the property to which his lien has attached in bulk with other property not affected thereby he loses his lien, since under such circumstances it would be impossible to determine how much of the proceeds of sale was the product of the property covered by his lien.[61] Cases under the law of 1867 are cited in the note below.[62]

§ 9. **Other valid liens.**—Mortgages given in good faith by way of continuing collateral are valid to the amount advanced before the petition in bankruptcy is filed.[63] So also, it is thought, of mortgages purporting to cover property to be acquired.[64] A chattel mortgage covering after acquired property in the possession of the mortgagor valid under the laws of the State where

57. In re Dougherty, 6 Am. B. R. 457, 109 Fed. 480.

58. In re Robinson v. Smith (C. C. A.), 18 Am. B. R. 563.

59. In re Bishop, 18 Am. B. R. 635.

60. In re Wolf, 3 Am. B. R. 558, 98 Fed. 84.

61. Keyser v. Wessel, 12 Am. B. R. 126, 128 Fed. 281, *aff'g* 10 Am. B. R. 586, and distinguishing Carroll v. Young, 9 Am. B. R. 643, 119 Fed. 577.

62. Trim v. Wagner, Fed. Cas. No. 14,174; In re Bowne, Fed. Cas. No. 1,741; Bailey v. Loeb, Fed. Cas. No. 739.

63. Marvin v. Chambers, Fed. Cas. No. 9,179. See Matter of United States Food Co., 15 Am. B. R. 329; Stedman v. Bank of Monroe, 9 Am. B. R. 4, 117 Fed. 237; In re Williams, 9 Am. B. R. 731, 120 Fed. 542; Davis v. Turner (C. C. A.), 9 Am. B. R. 704, 120 Fed. 605.

64. Barnard v. Norwich, etc., Co., Fed. Cas. No. 1,007; In re Sentenne & Green Co., 9 Am. B. R. 648, 120 Fed. 436. *Compare* Brett v. Carter, Fed. Cas. No. 1,844.

given, is effectual as against the mortgagor's trustee in bankruptcy, and the taking possession of the property by the mortgagee after conditions broken within the period of four months prior to filing the petition against the mortgagor is not a preference.[65] The validity of a chattel mortgage on after acquired property as against a trustee in bankruptcy depends upon the laws of the State wherein the property is situated; such a mortgage is held invalid in New York.[66] In Rhode Island such a mortgage is valid.[67] A chattel mortgage is not void for indefiniteness of description which purports to be upon all property "now being and remaining in the possession" of the mortgagor.[68] Nor does an agreement therein permitting the mortgagor to sell the mortgaged goods and use the proceeds thereof invalidate the mortgage, where no fraudulent intention is found; the only effect of such agreement is to withdraw the goods sold from the operation of the mortgage.[69] In New York, while permission given the mortgagor to sell mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage or to the acquisition of new property, does not render a chattel mortgage

65. Thompson v. Fairbanks, 196 U. S. 516, 13 Am. B. R. 437; In re Rogers, 13 Am. B. R. 75.

66. In re Marine, etc., Co., 16 Am. B. R. 325; In re Adamant Plaster Co., 14 Am. B. R. 815, 137 Fed. 251; Zartman v. National Bank, 16 Am. B. R. 152, 109 App. Div. (N. Y.) 406. *Compare* In re Burnham, 15 Am. B. R. 548.

67. In re Chantler Cloak & Suit Co., 18 Am. B. R. 498.

68. In re Beede, 11 Am. B. R. 387, 126 Fed. 853; Davis v. Turner, 9 Am. B. R. 704 (C. C. A.), 120 Fed. 605. Under the settled rule in Iowa, that all descriptions of mortgaged chattels should be considered in determining whether or not a third person, aided by inquiries which the mortgage itself suggests, would be able to identify the property, a description, "125 head of three and four-year-old dehorned steers, all branded on the right side with the reverse four, and kept on full feed on section 16, township 82, range 40," is insufficient, and the mortgage is not a valid lien upon the property, and where, after the bankruptcy of the mortgagor, the "125 head of three and four-year-old dehorned steers" were placed upon another section in the same range, the mortgagee, by virtue of previous mortgage covering after-acquired or after-located property, acquires no equitable title to the steers. Des Moines Nat. Bank v. Council B. Sav. Bank, 18 Am. B. R. 108.

69. In re Ball, 10 Am. B. R. 564, 123 Fed. 164.

void, yet a chattel mortgage which expressly provides that the mortgagor may sell and dispose of the mortgaged property at his pleasure, is fraudulent as a matter of law and void as to creditors.[70] An attorney's lien on the papers of his client;[71] and a bank's lien on the dividends to its stockholders who are debtors;[72] and the special lien given by a State statute to the manufacturer of machinery supplied to a factory,[73] or to laborers for wages,[74] are valid, if perfected as required by statute.[75] A livery stable keeper's statutory lien does not depend for its existence upon the institution of judicial or other proceedings, but is a perfect lien under the statute, and as such is cognizable and enforceable in bankruptcy.[76] Deeds of trust and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause d of section 67 and valid liens.[77] If valid, the lienor becomes a secured creditor,

70. Skilton v. Codington, 15 Am. B. R. 810, 185 N. Y. 80. As to effect of mortgagor remaining in possession under the Ohio law, see In re First Nat. Bank of Canton, 14 Am. B. R. 180, 135 Fed. 62; In re National Valve Co., 15 Am. B. R. 524, 140 Fed. 679.

71. Rogers v. Winsor, Fed. Cas. No. 12,023; In re N. Y. Mail, etc., Co., Fed. Cas. No. 10,209.

72. Matter of Gesas (C. C. A.), 16 Am. B. R. 872, 146 Fed. 734; In re Dunkerson, Fed. Cas. No. 4,156. See also Hutchinson v. Otis, 8 Am. B. R. 382, 115 Fed. 937.

73. Mott v. Wissler Mining Co., 14 Am. B. R. 321, 68 C. C. A. 335; In re Matthews, 6 Am. B. R. 96, 109 Fed. 603; In re Georgia Handle Co., 6 Am. B. R. 472, 109 Fed. 632; In re Oconee Milling Co., 6 Am. B. R. 475, 109 Fed. 866.

74. Brower & Co. v. Hill (C. C. A.), 14 Am. B. R. 619, 136 Fed. 821, orders by a bankrupt corporation upon a merchant to supply goods to laborers as part payment of wages are not assignments of wages so as to subrogate the merchant to the rights of the laborers under a statute creating a lien in favor of such laborers.

75. In re Lillington Lumber Co., 13 Am. B. R. 153, 132 Fed. 886.

76. In re Mero, 12 Am. B. R. 171, 128 Fed. 630; In re Pratesi, 11 Am. B. R. 319, 126 Fed. 588.

77. Matter of Alden, 16 Am. B. R. 362; Crim v. Woodford (C. C. A.), 14 Am. B. R. 302, 136 Fed. 34; In re Noel, 14 Am. B. R. 715, 137 Fed. 694; Wilder v. Watts, 15 Am. B. R. 57, 138 Fed. 426; In re Clifford, 14 Am. B. R. 281, 136 Fed. 475. As to validity of pledge of warehouse receipts to secure loans made to owner by trust company, see Union Trust Co. v. Wilson, 198 U. S. 530, 14 Am. B. R. 109; Love v. Export Storage Co. (C. C. A.), 16 Am. B. R. 171, 143 Fed. 1; Security Warehousing Co. v. Hand (C. C. A.), 16 Am. B. R. 49. Foreign commission mer-

and must be treated as such. A lien upon timber not yet cut under a contract for the sale of standing timber may be valid and entitle the seller to prevent its removal by the trustee in bankruptcy until paid for.[78]

§ 10. **Fraudulent transfers; subs. e.**—All conveyances, transfers, assignments, or encumbrances of the property of a bankrupt, or any part thereof, made or given by such person adjudged a bankrupt under the provisions of the act subsequent to the passage thereof and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, are null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, are, and must remain, a part of the assets and estate of the bankrupt estate, and pass to his trustee, whose duty it is to recover and reclaim the same by legal proceedings or otherwise for the benefit of creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, territory, or district in which such property is situate, are to be deemed null and void against such creditors of the debtor if he be adjudged a bankrupt, and such property will pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.[79] For the purpose of such

chants have no equitable lien upon goods sold by them for the purpose of manufacture. In re Liberty Silk Co., 18 Am. B. R. 582.

78. In re Muncie Pulp Co., 18 Am. B. R. 56.

79. Bankr. Act, 1898, § 67e.

History of provision.—"As bearing on what section 67e means, it may be interesting to examine its history. Neither the Torrey bill nor the Henderson bill, commonly known as the House bill in the Fifty-fifth Congress, contained any clause like section 67e of the present act. Each of these bills, however, contained a

recovery any court of bankruptcy as defined in the act, and any State court which would have had jurisdiction if bankruptcy had

clause which is now found in section 70e of the law. It seems, therefore, to have been the opinion of the framers of those bills that the latter clause was sufficient, especially as in every State in the Union there is a statute making transfers and conveyances which are made in fraud of creditors absolutely void. The Senate bill, commonly known as the Nelson bill in the Fifty-fifth Congress, section 7, contains a clause which is similar to the present section 67e. It is well known that the two bills were fused in the conference committee, and it would seem, from an examination of section 7, *supra*, and section 67e of the present law, that, in the fusing process, the former was inserted as a harmless addition. It probably gives no rights not already given by State statutes." In re Phelps, 3 Am. B. R. 396, 401, opinion of Hotchkiss, referee.

N. Y.—Saxton v. Sebring, 96 App. Div. (N. Y.) 570, 89 N. Y. Supp. 372, where, in an action by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of the bankrupt's property, the complaint alleged that the bankrupt, while insolvent, with intent to hinder, delay and defraud his creditors, conspired with the other defendants to secure, convert and dispose of all of his property, and alleged that in pursuance thereof the property was so disposed of, complainant established a cause of action thereunder by proof that any two of the defendants acted in concert in the fraudulent scheme, though he was unable to prove that all of the defendants were parties to the conspiracy; Gans v. Weinstein, 37 Misc. Rep. (N. Y.) 209, 75 N. Y. Supp. 155, where a vendor was in financial difficulties, and sold his stock for $6,700 to purchasers who had valued it at $12,000, and who knew of his financial troubles, the sale will be set aside at the suit of his trustee in involuntary bankruptcy, and the purchasers will be made to account for its value; Skillen v. Endelman, 39 Misc. Rep. (N. Y.) 261, 79 N. Y. Supp. 413, where a mortgagor is selling the mortgaged chattels for his own use with the consent of the mortgagee, the latter is not a *bona fide* holder of the mortgage, within Bankr. Law, 1898, section 70e, and the trustee in bankruptcy may have the mortgage set aside as fraudulent under such section.

U. S.—In re Hill, 15 Am. B. R 499, 140 Fed. 984; Allen v. Hollander, 11 Am. B. R. 753, 128 Fed. 159; In re Knight, 11 Am. B. R. 1, 125 Fed. 35; Pollock v. Jones, 10 Am. B. R. 616, 124 Fed. 163, 61 C. C. A. 555; In re Frazier, 9 Am. B. R. 21, 117 Fed. 746; In re Jones, 116 Fed. 431; In re Platts, 6 Am. B. R. 568, 110 Fed. 126. *Compare* Montgomery v. McNicholas, 138 Fed. 956.

Cal.—Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

Conn.—Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12. *Compare* Bunnell v. Bronson, 63 Atl. 396.

Ill.—Hoffman v. Title, etc., Co., 198 Ill. 452, 64 N. E. 1027.

Iowa.—Lavender v. Bowen, 101 N. W. 760; Clark v. Sherman, 128 Iowa, 353, 103 N. W. 982.

Kan.—Sherman v. Luckhardt, 11

not intervened, have concurrent jurisdiction.[80] The transfers prohibited by section 67e are only those fraudulent and therefore voidable at "common law," or, what is the same thing, such as constitute acts of bankruptcy under section 3.[81] By "common law" must be understood the rules of property growing out of 13 Eliz., chap. 5, as affected by similar statutory enactments in force in the State wherein the transaction complained of took place.[82] The provision refers to fraudulent transfers made with the intent on the part of the bankrupt to hinder, delay, or defraud his creditors. Under it the trustee can only set aside such fraudulent transfers as were made within the four months period.[83] As to whether the transfer was fraudulent depends upon the facts and circumstances of each case,[84] and the facts and circumstances must be

Am. B. R. 26, 67 Kan. 682, 74 Pac. 277.

Mass.—Clark v. Mulcahy, 190 Mass. 64, 76 N. E. 236.

Mo.—Landis v. McDonald, 88 Mo. App. 335.

Mont.—Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

Neb.—Raley v. Raymond Bros. Clarke Co., 103 N. W. 57.

N. J.—Congleton v. Schreihofer (Ch.), 54 Atl. 144.

N. C.—Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877. *Compare* Bank v. Levy, 50 S. E. 657.

Tex.—Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800.

80. Amendment of 1903.

81. Wright v. Sampter, 18 Am. B. R. 355, 152 Fed. 196; In re Bloch, 15 Am. B. R. 751, 142 Fed. 674.

82. Wright v. Sampter, *supra.*

83. In re Steininger Mercantile Co., 6 Am. B. R. 68, 107 Fed. 669, 46 C. C. A. 548; In re Gray, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp 618; In re Teague, 2 Am. B. R. 168; In re Adams, 1 Am. B. R. 94.

84. In re Eddleman, 19 Am. B. R. 45, 154 Fed. 160, where it appears that, upon a sale of property by a debtor within a month of his adjudication as an involuntary bankrupt, he turned over all the proceeds to his wife, she will be regarded as holding the money as his agent; Thomas v. Fletcher, 18 Am. B. R. 623, 153 Fed. 226, the transfer of all his attachable property by an insolvent debtor to his wife, anterior to the four months period and for a nominal consideration, is fraudulent, and the transfer of a bankrupt's interest in certain timber to his wife in consideration of her assuming his debt to a bank for a part of the purchase price of the timber is fraudulent; Roberts v. Johnson (C. C. A.), 18 Am. B. R. 132, 151 Fed. 567, where a bankrupt borrowed money from a creditor's brother and used the money to pay such creditor's claim, a mortgage given to secure such loan was given with intent to hinder, delay and defraud other creditors, rendering it void under section 67e; In re Friedman, 18 Am. B. R. 712, 153 Fed. 939, the sale of his en-

such as to show an intent on the part of the insolvent debtor to hinder, delay, or defraud his creditors.[85] The Bankruptcy Act containing no provision that a sale made out of the usual and ordinary course of business of a debtor is *prima facie* fraudulent, such a sale by a retail merchant of his entire stock of goods does not, taken alone, render it *prima facie* fraudulent, but it may be a badge of fraud, of little or considerable influence, depending upon the surrounding facts.[86] Evidence, however, that goods were sold

tire stock by a bankrupt, the money being received by his wife and used in the payment of so-called unidentified loans, held to be a scheme to defraud creditors; In re Builders' Lumber Co., 17 Am. B. R. 449, 148 Fed. 244, where a corporation gives its notes without consideration to one of its officers, who, as intended by the parties, pledges them as collateral security for his personal indebtedness to the knowledge of the pledgees, a mortgage securing the notes, given by the corporation while insolvent and within the four months of its bankruptcy, is not a valid lien against its property in the hands of the trustee; Ott v. Doroshow, 17 Am. B. R. 417, 147 Fed. 762, the sale of his stock of goods by a bankrupt for about one-half its value shortly before bankruptcy and during the adjournment of an action against him by one of his creditors is fraudulent; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957, a deed of real estate executed by a bankrupt to his wife to secure alleged pre-existing indebtedness held valid only as an equitable mortgage to secure the bankrupt's actual indebtedness to the grantee at the time the deed was made.

Conveyances held not fraudulent.—Clark v. Else (S. D.), 110 N. W. 83, the purchase of land by a husband for his wife, she subsequently repaying the amount loaned her by her husband for the purchase money, was not fraudulent; In re Foss, 17 Am. B. R. 439, 147 Fed. 790, the independent and unconnected facts that a bankrupt, when free from debt, paid the consideration for property which was conveyed to his wife, and that he soon thereafter engaged in the hazardous, illegal pursuit of keeping a liquor store, do not establish an intent to defraud creditors.

Question for the jury.—Where an insolvent debtor, in contemplation of bankruptcy, and immediately before filing her petition, disposed of substantially her whole estate, and out of the proceeds paid certain of her creditors, to the exclusion of others, her trustee in bankruptcy in an action to set aside the payments, was entitled to go to the jury on the question whether she made the payments with intent to hinder, delay or defraud creditors. Webb's Trustee v. Lynchberg Shoe Co. (Va.), 56 S. E. 581.

85. In re McLam, 3 Am. B. R. 245, 97 Fed. 922; In re Jacobs, 1 Am. B. R. 518.

86. Houck v. Christy (C. C. A.), 18 Am. B. R. 330, 152 Fed. 612, limiting and explaining Dokken v. Page (C. C. A.), 17 Am. B. R. 228, 147 Fed. 438.

without invoice or examination, in connection with other circumstances, may show that a sale was fraudulent.[87] It has been held that the words "conveyance, transfer, assignment or incumbrance" apply to a transfer of property, real or personal, rather than to a payment of money upon a pre-existing debt.[88]

§ 11. **Scope of subsection.**—This subsection is in effect less favorable to the debtor than the provisions in the law of 1867. That act avoided a conveyance made within four months "with a view to give a preference" to a person "having reasonable cause to believe" the bankrupt to be insolvent, and that the conveyance was being made in fraud of the act. The present act avoids such conveyances by the bankrupt made "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them." The purpose and intent of the bankrupt only is looked at, and if contrary to the act is sufficient to avoid the conveyance.[89] The former law interdicted transfers only, while transfers under the present act has been given an enlarged meaning.[90] The present subsection includes encumbrances, too, that is, mortgages, pledges, and the like, as distinguished from judgments, attachments, and other liens through legal proceedings, at least so far as such liens result from the voluntary act of the debtor.

§ 12. **Insolvency not essential.**—Unlike fraudulent preferences, fraudulent transfers may, it seems, be made at a time when the transferrer is solvent.[91] But, intent to hinder, delay, or defraud being necessary, insolvency will usually be an element of proof.

§ 13. **"Within four months prior to filing the petition."**—The meaning of these words is discussed elsewhere.[92] If the period

87. Dokken v. Page, *supra*.

88. Blakey v. Boonville Nat. Bank, 2 Am. B. R. 459, 95 Fed. 267.

89. In re McLam, 3 Am. B. R. 245, 97 Fed. 922.

90. Bankr. Act, 1898, sec. 1(25).

91. Pollock v. Jones, 10 Am. B. R. 616, 124 Fed. 163. *Compare* In re Soudans Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804; In re McLam, 3 Am. B. R. 245, 97 Fed. 922.

92. Chap XXIII, sec. 5, *infra*.

has elapsed, there may still be a remedy under the State law, as pointed out by section 70e.[93] The words quoted do not apply where the fraudulent transaction amounted to a voluntary gift;[94] nor where the transfer was made more than four months before the petition in bankruptcy was filed.[95]

§ 14. **"With intent to hinder, delay, or defraud."**—These words have their immemorial meaning.[96] They have already been considered in previous sections.[97] The cases under the former law are thought to be still applicable, although in that statute they were used in defining an act of bankruptcy.[98] Knowledge of, or participation in, the fraud by the creditor to whom the transfer was made is held by some authorities to be necessary,[99] while others hold that it is not material.[1] An agreement to withhold a mortgage from record is not of itself conclusive upon the question of fraud, but is a circumstance constituting more or less cogent evidence of a want of good faith.[2] An intent to defraud is the test; if the transaction was in good faith, there is no fraud.[3] Illustrative cases under the present law are cited in the note below[4] and

93. *Compare* In re Grahs, 1 Am. B. R. 465; In re Adams, 1 Am. B. R. 94; In re Taylor, 95 Fed. 956.

94. In re Schenck, 8 Am. B. R. 727, 116 Fed. 554.

95. Little v. Holly Brooks Hardware Co., 13 Am. B. R. 422, 133 Fed. 874.

96. Githens v. Schiffer Bros., 7 Am. B. R. 453, 112 Fed. 505.

97. Chapter XXI, section 13.

98. Sedgwick v. Place, Fed. Cas. No. 12,620; In re Cowles, Fed. Cas. No. 3,297; In re McKibben, Fed. Cas. No. 8,859; In re Williams, Fed. Cas. No. 17,703; Curran v. Munger, Fed. Cas. 3,487.

99. Wright v. Sampter, 18 Am. B. R. 355, 152 Fed. 196; Stich v. Berman, 15 Am. B. R. 466, 40 Misc. Rep. (N. Y.) 104, — N. Y. Supp. —; In re Bloch, 15 Am. B. R. 751, 142 Fed. 674.

1. Sherman v. Luckhardt, 11 Am. B. R. 26, 67 Kan. 682, 74 Pac. 277; In re McLam, 3 Am. B. R. 245.

2. Rogers v. Page, 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164. See In re Shaw, 17 Am. B. R. 196.

3. In re Bloch, 15 Am. B. R. 748, 142 Fed. 674, where a member of a firm pledges his life insurance policies to secure certain creditors with the understanding that they were not firm assets, fraudulent intent is not shown; In re Benjamin, 15 Am. B. R. 351, 140 Fed. 320; In re Longbottom, 15 Am. B. R. 437, 142 Fed. 291; In re Hill, 15 Am. B. R. 490, 140 Fed. 984.

4. In re Kellogg, 6 Am. B. R. 389, *aff'd* 7 Am. B. R. 270, 112 Fed. 52;

under subsequent sections. It is questionable whether the Bankruptcy Act has laid down a new rule in respect of the voidability of fraudulent conveyances, by wholly sweeping away the requirement that the transferee or grantee, to merit condemnation, shall have either actual notice of the fraudulent intent, have participated in the fraud, or had notice of some fact calculated to put him on inquiry and leading to a discovery of such fraudulent intent.[5]

§ 15. **"Except purchasers in good faith and for a present fair consideration."**—Valid transfers are protected by this clause,[6] but property conveyed by the debtor within four months prior to the filing of the petition cannot be retained by the purchaser unless he is a purchaser not only in good faith, but for a present fair consideration.[7] A transfer of all the bankrupt's property to a person with knowledge of the bankrupt's financial condition is not in good faith.[8] A purchaser is not in good faith who makes no effort to determine whether an insolvent may make a transfer which will not be in violation of the act.[9] Evidence of good faith on the part of the transferee should be admitted.[10] A sale on credit is not necessarily void.[11] A conveyance in fulfilment of a contract previously made is valid;[12] but past services, rendered without expectation of compensation, are an insufficient consideration.[13]

In re Shepherd, 6 Am. B. R. 725; In re Steininger, 6 Am. B. R. 68, 107 Fed. 669; In re Hugill Mercantile Co., 3 Am. B. R. 686, 100 Fed. 616; Johnson v. Wald, 2 Am. B. R. 84, 93 Fed. 640; Carter v. Goodykoontz, 2 Am. B. R. 224, 94 Fed. 108.

5. Wright v. Sampter, *supra*.

6. *Compare* Tiffany v. Lucas, 15 Wall. (U. S.) 410; Sedgwick v. Wormser, Fed. Cas. No. 12,626; Curran v. Munger, Fed. Cas. No. 3,487.

7. Friedman v. Verchofsky, 105 Ill. App. 414; O'Sullivan's Trustee v. Douglass, 30 Ky. L. Rep. 366, 98 S. W. 990, assignment of salary held fraudulent, no consideration passing.

8. In re Moody, 14 Am. B. R. 272, 134 Fed. 628.

9. In re Knopf, 16 Am. B. R. 272, 134 Fed. 628. See also Dokken v. Page, 17 Am. B. R. 228.

10. Joseph v. Raff, 82 App. Div. (N. Y.) 47, 81 N. Y. Supp. 546, *aff'd* 176 N. Y. 611, 68 N. E. 1118.

11. Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12.

12. Mercer v. Mercer, 24 Ky. L. Rep. 2469, 74 S. W. 285.

13. Brescheimer v. Houston (Iowa), 96 N. W. 756.

The consideration must be so inadequate as to shock the moral sense to render a sale fraudulent.[14] Inadequacy of consideration is immaterial when the purchaser knew of the debtor's insolvency.[15] One acquiring payment of his debt is a "purchaser" because he acquires the payment otherwise than by descent.[16] One is not a purchaser in good faith if he purchases with knowledge of the fraudulent intent of the seller, or under such circumstances as should put him on inquiry as to the object for which the vendor sells.[17]

§ 16. **Transfers and encumbrances under State laws.**—The last sentence of the subsection adopts all State laws which interdict fraudulent conveyances or transfers and liens, provided the acts complained of are within four months of the bankruptcy.[18] Since section 70e is broader and applies the period of limitation fixed by the State law, this sentence is of little importance.[19]

§ 17. **Suits to recover property.**—Although all fraudulent transfers or encumbrances are declared null and void by section 67e and, by section 70a(4) the title to property affected thereby vests in the trustee, yet a suit to recover will often be necessary. This is invariably so, where possession is not in the bankrupt. If

14. Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

15. Bonnie v. Perry, 117 Ky. 459, 25 Ky. L. Rep. 1560, 78 S. W. 208.

16. Wright v. Sampter, 18 Am. B. R. 355, 152 Fed. 196.

17. Houck v. Christy, 18 Am. B. R. 330 (C. C. A.), 152 Fed. 612, where, within the four months period, the bankrupt, a country merchant, sells out his entire property, consisting of a store building and lot, a stock of general merchandize, book accounts and a homestead, for 75 per cent. of its fair value, the purchaser having knowledge that the bankrupt had been recently incumbering his property for a small amount, and that the transaction was unusual, was chargeable with all the knowledge that reasonable inquiry might have disclosed.

18. Matter of Farrell Co., 9 Am. B. R. 341, where the provisions of the New York statute, L. 1902, chap. 528, entitled "An act to regulate the sale of merchandise in bulk," are wilfully and deliberately ignored by an alleged bankrupt, upon such a sale made by him within the four months' period, the transfer is void under subsection e of section 69; Matter of Robertshaw Mfg. Co., 13 Am. B. R. 409, 133 Fed. 556.

19. Collier, Bankr. (6th ed.), 563.

in his possession, it may be reached summarily.[20] Not so where a third party is interested, save with his consent.[21] The trustee must then proceed by suit in the proper tribunal,[22] and show facts bringing the case within the provisions of this subsection.[23] The words added to this subsection by the amendment of 1903 are the same as those added to section 60b and section 70e. They refer to any suit which may be brought under the subsection, and not merely to a suit based on a State law. The meaning and purpose of the amendment are elsewhere discussed.[24] The amendatory act has conferred jurisdiction upon District Courts concurrent with State courts to set aside transfers made by a bankrupt within the four months period, which are alleged to be null and void as to creditors by a State law.[25]

20. In re Denell, 4 Am. B. R. 60, 100 Fed. 633. *Compare*, on power to commit for contempt, In re McCormick, 3 Am. B. R. 340; In re Schlesinger, 3 Am. B. R. 342; In re Mayer, 3 Am. B. R. 533.

21. Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163, and note.

22. See, generally, under sections 2 and 23, Bankr. Act, chapter XXIV, sections 22-32.

Proceedings to recover.—See Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176, 60 Atl. 575. Creditors may sue to set aside conveyance. Shoe Mfg. Co. v. Billings (Or.), 80 Pac. 422. But trustee to sue rather than creditors without lien. Davis v. Vandiver (Ala.), 38 So. 850. And trustee may sue though creditors have not secured judgment. Crary v. Kurtz (Iowa), 105 N. W. 590. Demand not necessary before recovery. Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707. Pleading. Shelley v. Nolen (Tex. Civ. App.), 88 S. W. 524. Burden of proof on trustee. Halbert v. Franke, 91 Minn. 204, 97 N. W. 976; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800. But see Lawrence v. Lowrie, 133 Fed. 995. Solvency presumed on appeal where no allegation or proof of insolvency. Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

23. Collier, Bankr., 6th ed., 563. See also Collier, Bankr., 6th ed., 488, as to suits to set aside voidable preferences, which is largely applicable here.

24. See chapters XXIII, XXIV.

25. Johnston v. Forsyth Mercantile Co., 11 Am. B. R. 669, 127 Fed. 845. See McNulty v. Feingold, 12 Am. B. R. 338, a trustee in bankruptcy may maintain a suit in equity in a district court for an accounting of money collected by defendants on accounts fraudulently assigned to them by bankrupts, although the face value of such accounts is known to the trustee. As to actions by trustees to set aside fraudulent conveyances, see Schmitt v. Dahl, 11 Am. B. R. 226 (Minn. Sup.); Kohout v. Chaloupka, 11 Am. B. R. 265 (Neb. Sup.).

§ 18. **Miscellaneous invalid transfers or encumbrances.**—Where prior to adjudication, the bankrupt in good faith purchased property subject to a chattel mortgage, which he assumed and agreed to pay, his trustee in bankruptcy is estopped from disputing the validity of the mortgage.[26] The bankruptcy of the mortgagor does not affect the mortgagor's right to foreclose the chattel mortgage.[27] But the dissolution of an insolvent partnership and the withdrawal of its assets by the respective partners to be held as individual property will be set aside as in violation of section 67e of the Bankrupt Act, and the assets of the firm in the hands of the partners treated as partnership property.[28] Pledges to secure money loaned at the time and not an antecedent indebtedness are valid.[29] The invalidity or validity of transfers or encumbrances as a rule turn on the facts of each particular case. The more important cases are classified in the succeeding sections.

§ 19. **Mortgages to secure antecedent debts.**—Mortgages given by a bankrupt within the four months period to secure antecedent debts are invalid and void under section 67e of the Bankruptcy Act.[30] If the consideration is in part a present consideration and the mortgage is made in good faith, it will be good to that extent.[31]

As to the effect of the omission from section 23b, as amended, of any reference to section 70e, as originally phrased in the Ray bill, see section 23, *supra*.

For the time when the amendments become operative, see "Supplementary Section to Amendatory Act," Collier, Bankr., 6th ed., 624.

26. In re Standard Laundry Co., 8 Am. B. R. 538, 116 Fed. 476.

27. Harvey v. Smith, 7 Am. B. R. 497.

28. In re Head, 7 Am. B. R. 556, 114 Fed. 489.

29. In re Little River Lumber Co., 1 Am. B. R. 483, 92 Fed. 585.

30. Morgan v. First Nat. Bank, 16 Am. B. R. 639; In re Hill, 15 Am. B. R. 499, 140 Fed. 984; Matter of Hutchinson, 14 Am. B. R. 518; Farmers' Bank v. Carr & Co., 11 Am. B. R. 733, 127 Fed. 690; Pollock v. Jones, 10 Am. B. R. 616, 124 Fed. 163, *aff'g* 9 Am. B. R. 262; In re Ronk, 7 Am. B. R. 31, 111 Fed. 154. *Compare* Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974; In re Wolf, 3 Am. B. R. 558, 98 Fed. 84.

31. In re Dismal Swamp Contracting Co., 14 Am. B. R. 175, 135 Fed. 415, a chattel mortgage given to secure both an antecedent debt and a present loan is valid only as to the latter; In re Sawyer, 12 Am. B. R. 269, 130 Fed. 384, a chattel mortgage given in security for the payment of notes to a certain amount will be

But where there is an entire absence of good faith, the first consideration does not save the mortgage; it is void even as to that.[32] Where the mortgagor remains in possession with power to sell in the usual course of business, under a mortgage which contains no provision that the proceeds of sales shall be applied upon the debt secured, the legal effect of the mortgage is to hinder and delay creditors; and if given within the four months period, the mortgage is null and void.[33] Although the mortgage is given to secure a present loan, if the money borrowed is to be used in part payment of antecedent debts, the mortgage is void.[34] But a transfer or mortgage made by a person adjudged a bankrupt to secure a pre-existing debt within four months of the filing of the petition is not void, unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory, or district in which the property is situated.[35]

§ 20. **Chattel mortgages.**—The validity of a chattel mortgage

sustained as to the amount actually loaned at the time the mortgage was executed; Stedman v. Bank of Monroe, 9 Am. B. R. 4, 117 Fed. 237; City Nat. Bank v. Bruce, 6 Am. B. R. 311, 109 Fed. 69, *aff'g* In re Alverson, 5 Am. B. R. 855; In re Wolf, *supra*. *Compare* In re Durham, 8 Am. B. R. 115, 114 Fed. 750; In re Davidson, 5 Am. B. R. 528, 109 Fed. 882.

32. In re Hugill Mercantile Co., 3 Am. B. R. 686, 100 Fed. 616. See also In re Barrett, 6 Am. B. R. 48. *Compare* In re Soudans Mfg. Co., *supra*.

33. Zartman v. National Bank, 16 Am. B. R. 152, 109 App. Div. (N. Y.) 406, 96 N. Y. Supp. 633; Skilton v. Coddington, 15 Am. B. R. 810, 185 N. Y. 80; In re Mains Construction & Dry Dock Co., 14 Am. B. R. 466, 135 Fed. 921; Dodge v. Norlin, 13 Am. B. R. 177, 133 Fed. 363; Egan State Bank v. Rice, 9 Am. B. R. 437, 119 Fed. 107.

34. In re Pease, 12 Am. B. R. 66, 129 Fed. 446; In re Butler, 9 Am. B. R. 539, 120 Fed. 100; In re Soudan Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804.

35. Coder v. Arts (C. C. A.), 18 Am. B. R. 513, 152 Fed. 943, *modfg.* In re Armstrong, 16 Am. B. R. 583, 145 Fed. 202, such a transfer for the purpose of securing or paying a pre-existing debt, without any intent or purpose to affect other creditors injuriously beyond the necessary effect of the security, is lawful, if not violative of other provisions of the law, and it does not evidence any intent to hinder, delay or defraud creditors within the meaning of Bankruptcy Act, 1898, § 67e.

given to secure a present loan of money within four months of bankruptcy does not depend upon the solvency of the borrower, or upon notice, actual or constructive, of his financial condition, but the sole test is whether the security was accepted in good faith and in contemplation of or in fraud upon the Bankrupt Act, and in the absence of notice which impeaches the good faith of the transaction as so defined, the mortgagee is entitled to the benefit of his lien, notwithstanding the fraud, if any there was, on the part of the mortgagor.[36] The validity of the mortgage in each instance turns upon the requirements of the State law.[37] In New York a failure to file a chattel mortgage where there is no change of possession of the mortgaged property, renders it void as to then existing creditors of the mortgagor, and the mortgagee cannot thereafter acquire title to property by taking possession and selling the same under the mortgage and bidding it off on the sale, and this, although the mortgage was given in good faith to secure an actual indebtedness.[38] Under the Bankruptcy Act the failure to record a chattel mortgage or to take possession there-

36. In re Soudans Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804.

37. Dodge v. Norlin, 13 Am. B. R. 177, 133 Fed. 363, a chattel mortgage is voidable by creditors, according to the decisions of the court of Colorado, if it covers merchandise and other property, and the mortgagee consents to the sale of the merchandise in the usual course of business, without requiring the application of the proceeds to the payment of the debt; and where such a mortgage is voidable as to part of the mortgaged property it is voidable as to all of it; In re Soudans Mfg. Co., *supra*, in Indiana a verbal agreement that a mortgagor may sell part of the property covered by a chattel mortgage, in the usual course of trade, for his own benefit, invalidates the mortgage only to the extent of the property to which such agreement applies; In re Pekin Plow Co., 7 Am. B. R. 369, 112 Fed. 308, chattel mortgage not filed invalid as against the trustee in bankruptcy of the mortgagor under the Nebraska statute; In re Platts, 6 Am. B. R. 568, 110 Fed. 126, under South Dakota statute; In re Ronk, 7 Am. B. R. 31, 111 Fed. 154, chattel mortgage for antecedent loan given pursuant to a verbal promise to give at the time the loan was agreed upon is invalid under the Indiana statute; In re Shirley, 7 Am. B. R. 299, unfiled chattel mortgage invalid under Ohio statute; Stroud v. McDaniel, 5 Am. B. R. 695, 106 Fed. 493, insufficient description and failure to register renders mortgage invalid under South Carolina statute; In re Adams, 2 Am. B. R. 415, under Michigan statute.

38. Stephens v. Perrine, 143 N. Y. 476.

under renders the same invalid as to the trustee in bankruptcy representing the general creditors, if by the law of the State where the mortgage is made it is invalid as to creditors.[39] It has been held that the decision of the United States Supreme Court that a chattel mortgage under which the mortgagor has the right to sell and replace goods, to be included in the mortgage, is fraudulent as matter of law and void as to other creditors, must be followed by the bankruptcy court, although the highest State court has determined that such a mortgage is good and valid.[40] But the better rule seems to be that the decision of the highest court of a State, as, for example, that recording is not essential to the validity of a chattel mortgage executed therein, when the State law does not so require, must be followed by the bankrupt court,[41] since it has been held by the United States Supreme Court that each State has a right to determine for itself the validity of chattel mortgages executed therein and that the Supreme Court will accept the settled law of each State as decisive on that subject.[42] Any chattel mortgage which was ineffectual as against creditors under the law of the State of the transaction is ineffectual as against the bankrupt's trustee.[43] Cases where the validity of conditional sales has been attacked,[44] and where

39. In re Leigh Bros., 2 Am. B. R. 606, under Colorado statute. *Compare* In re Yukon Woolen Co., 2 Am. B. R. 805; In re Geo. W. McKay, 1 Am. B. R. 292.

40. In re Hull, 8 Am. B. R. 302, 115 Fed. 858.

41. In re Josephson, 8 Am. B. R. 423, 111 Fed. 404.

42. Etherbridge v. Sperry, 139 U. S. 266. See also Parker v. Moore, 115 Fed. 799.

43. In re Shaw, 17 Am. B. R. 196; In re Birck & Co. (C. C. A.), 15 Am. B. R. 694, 142 Fed. 438, under the Illinois statute a chattel mortgage is void as against the mortgagor's trustee, where such mortgage was given to secure notes containing no mention upon their face that they were secured by an instrument in the form of a chattel mortgage; In re Chadwick, 15 Am. B. R. 528, 140 Fed. 674; In re First Nat. Bank of Canton (C. C. A.), 14 Am. B. R. 180, 135 Fed. 62.

44. In re Garcewich, 8 Am. B. R. 119, 115 Fed. 87; In re Sewell, 7 Am. B. R. 133, 111 Fed. 791; In re Tatem, 6 Am. B. R. 426, 110 Fed. 519; In re Howland, 6 Am. B. R. 495, 109 Fed. 869; In re Klingaman, 4 Am. B. R. 254, 101 Fed. 691.

a pledge of collateral has been called in question,[45] are cited in the notes below.

§ 21. **Voluntary transfers.**—A voluntary transfer of property founded upon the consideration of blood or marriage is presumptively valid;[46] but, where the only consideration for a voluntary transfer is goodwill or friendship, it is *prima facie* fraudulent,[47] If the grantor is indebted at the time the transfer is made, the burden is upon the grantee to show that the grantor had abundant means, exclusive of the property transferred, to pay all his debts.[48] If at the time the transfer is made the grantor is indebted to such an extent that the transfer will embarrass him in the payment of his debts, the transfer will be fraudulent, although the debts due may be subsequently paid in the course of business.[49] If the transfer is made by an insolvent husband to his wife it will be held to be void.[50] Where an insolvent husband transfers property to his wife without consideration, intent to defraud creditors will be presumed and the transfer set aside.[51] Transfers to other relatives are suspicious and require strict proof. A conveyance by a father to his sons, in consideration of his sup-

45. Chattanooga Nat. Bank v. Rome Iron Co., 4 Am. B. R. 441, 102 Fed. 755; In re Cobb, 3 Am. B. R. 129, 96 Fed. 821; Casey v. Cavaroc, 96 U. S. 467; Clark v. Iselin, 21 Wall. (U. S.) 360; Adams v. Nat. Bank, 2 Fed. 174; Davis v. R. R. Co., Fed. Cas. No. 3,648; In re Grinnell, Fed. Cas. No. 5,829.

46. Sedgwick v. Place, 5 Ben. (U. S.) 184, 21 Fed. Cas. No. 12,620.

47. Babcock v. Eckler, 24 N. Y. 623; Van Wyck v. Seward, 18 Wend. (N. Y.) 375.

48. Pratt v. Curtis, 2 Lowell (U. S.), 87, 19 Fed. Cas. No. 11,375.

49. Antrim v. Kelly, 1 Fed. Cas. No. 494. See also Smith v. Kehr, 2 Dill. (U. S.) 50, 22 Fed. Cas. No. 13,071; Fisher v. Henderson, 9 Fed. Cas. No. 4,820; In re Antisdel, 1 Fed. Cas. No. 490.

Where one engaged in business made a settlement upon his wife to protect his family in case he became insolvent, and at the time, though not actually insolvent, he was weak and unsteady in his pecuniary matters, the conveyance was fraudulent. Sedgwick v. Place, 12 Blatchf. (U. S.) 163, 21 Fed. Cas. No. 12,621.

50. In re Skinner, 3 Am. B. R. 163, 97 Fed. 190; In re Grahs, 1 Am. B. R. 465; Kehr v. Smith, 20 Wall. (U. S.) 31.

51. In re Smith, 3 Am. B. R. 95, 100 Fed. 795; In re Eldred, Fed. Cas. No. 4,328.

port, is fraudulent as to his creditors, and would be an act of bankruptcy at the instance of his creditors.[52] If a transfer be made in good faith to a wife, in consideration of her release of her inchoate dower right, it is valid.[53] A voluntary transfer made while the grantor was free from debt cannot be impeached by subsequent creditors, unless it be shown to have been fraudulent, or made with a view to defraud future creditors.[54] Where a grantor is engaged, or is about to engage in a business involving great risks, or which is in a failing condition, such transfers are then looked upon with suspicion.[55] The settlement of property of moderate value upon his wife, by a bankrupt when in prosperous circumstances, all his debts existing at the time being afterwards paid, is valid as against his creditors.[56] A voluntary transfer made to a child at a time when the grantor is in prosperous circumstances, although in debt to a small amount, is not fraudulent, if it be shown that the gift is reasonable and sufficient property remains to pay debts.[57]

§ 22. **General assignment for the benefit of creditors.**—Where a debtor has made a general assignment for the benefit of creditors under a State law, whether with or without preferences, and subsequently and within four months after such assignment a petition in bankruptcy is filed against him, the deed of assignment becomes voidable, and the trustee in bankrupty may recover the property or its proceeds from the assignee.[58] The legal effect of a general assignment is considered elsewhere.[59]

52. In re Johann, 2 Biss. (U. S.) 139, Fed. Cas. No. 7,331. *Compare* Adams v. Collier, 122 U. S. 382.

53. In re Porterfield, 15 Am. B. R. 11, 138 Fed. 192; In re Grundy, 17 Am. B. R. 206.

54. In re Jones, 6 Biss. (U. S.) 68, 13 Fed. Cas. No. 7,444; Barker v. Barker, 2 Woods (U. S.), 87, 2 Fed. Cas. No. 986.

55. Case v. Phelps, 39 N. Y. 164; Beecher v. Clark, 12 Blatchf. (U. S.) 256, 3 Fed. Cas. No. 1,223.

56. Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

57. Sedgwick v. Place, 5 Ben. (U. S.) 184, 21 Fed. Cas. No. 12,620.

58. In re Gray, 3 Am. B. R. 647; West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; Lea v. West Co., 1 Am. B. R. 261; In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475, *aff'd* 1 Am. B. R. 388, 92 Fed. 327; Davis v. Bohle, 1 Am. B. R. 412, 92 Fed. 325, *aff'g* In re Sievers, 1 Am. B. R. 117, 91 Fed. 366; Globe Ins. Co. v. Cleve-

§ 23. **Practice.**—If the property may be recovered summarily a petition, duly verified, will usually be enough to secure the order to show cause. The petition should show facts bringing the transfer or incumbrance within the terms of one or more of the subdivisions of this section.[60] If the bankrupt or his agent who is in possession refuses to deliver the property, contempt proceedings may be brought. In cases where a suit is necessary, it must be for either the property or its value, and in accordance with the rules and practice of the court where brought. The trustees should not, however, bring such a suit without obtaining a direction to that effect from the referee in charge.[61] Where it appears that the sale in bulk of the stock in trade of alleged bankrupts and assignments of their open accounts a few days before the filing of the petition is clearly fraudulent and null and void as to creditors under section 67e, the bankruptcy court has power to order the receiver in bankruptcy to take possession of the property pending adjudication and suit by the trustee, when appointed, to set aside the transfers.[62]

§ 24. **Liens through legal proceedings generally; subs. c and f.**—Under the former bankruptcy law only attachment liens

land Ins. Co., Fed. Cas. No. 5,486; Boese v. King, 108 U. S. 379; In re Romanow, 1 Am. B. R. 461, 92 Fed. 510; In re Curtis, 1 Am. B. R. 440, 91 Fed. 737.

59. See under section 3, chapter XXI, and section 23, chapter XXIV.

60. See McNulty v. Wiesen, 12 Am. B. R. 341, in an action by a trustee to compel an accounting by the transferees of book accounts assigned to them by the bankrupt within the four months period, an answer alleging that the purchase was made without any intent on the part of the defendants to hinder, delay and defraud the bankrupt's creditors, or any of them, is not impertinent, for the reason that under section 67e the defendants are required to show that they were purchasers in good faith and for a present fair consideration; and an allegation of the bill that the assignment of the book accounts was without a present fair consideration is sufficiently met by an allegation in the answer of the cash payment of such a consideration, without setting forth the circumstances in detail. See also Johnston v. Forsyth Mercantile Co., 11 Am. B. R. 669, 127 Fed. 845.

61. See under sections 2 and 23, chapter XXIV, and section 60, chapter XXIII.

62. In re Haupt Bros., 18 Am. B. R. 585.

were dissolved. Now all liens through legal proceedings are dissolved by the adjudication. Thus, the subsections under discussion are in harmony with the so-called "passive" act of bankruptcy under section 3a(3), and establish a new and important class of constructive frauds, which invalidate liens which were formerly enforced and regarded as matters of course, if not, indeed, of right.[63] There was a conflict of opinion in the early administration of the law as to whether subsection f applied to voluntary bankruptcies. Some cases held that it did not.[64] The weight of authority, however, is that both subsections may refer to either voluntary or involuntary cases.[65] Some confusion also arose from the fact that two subsections with apparently the same purpose were in many respects inconsistent, but now subsection f is usually relied on as being the latest expression on the subject since it occurs later in the law.[66] Subsection f covers in general terms almost every lien specifically declared voidable in subsection c, as well as many more. Subsection c is, therefore, important only in instances where subsection f does not apply. The element of insolvency at the time of the lien not always being essential under subsection c, as under subsection f, cases where this fact is in doubt will, if possible, be brought within the former. Liens may be obtained through legal proceedings which amount to a fraud on the act irrespective of insolvency. In that event subsection c applies. The distinction between "void" and "voidable," in the respective subsections is regarded as unimportant.

63. In re Rhoads, 3 Am. B. R. 380, 98 Fed. 399.

64. In re Collins, 2 Am. B. R. 1; In re De Luc, 1 Am. B. R. 387, 91 Fed. 510; In re Easley, 1 Am. B. R. 715, 93 Fed. 419; In re O'Connor, 95 Fed. 943.

65. Mohr v. Mattox, 12 Am. B. R. 330; McKenney v. Cheney, 11 Am. B. R. 54 (Ga. Sup.); Mencke v. Rosenberg, 9 Am. B. R. 323, 202 Pa. St. 131; In re Benedict, 8 Am. B. R. 463; Brown v. Case, 6 Am. B. R. 744, 61 N. E. 279; In re Kemp, 4 Am. B. R. 242, 101 Fed. 689; In re Lesser, 3 Am. B. R. 815, 100 Fed. 433; In re Dobson, 3 Am. B. R. 420, 98 Fed. 86; In re Rhoads, 3 Am. B. R. 380, 98 Fed. 399; In re Fellerath, 2 Am. B. R. 40, 95 Fed. 121; In re Richards, 2 Am. B. R. 518, 95 Fed. 258; Peck, etc., Co. v. Mitchell, 95 Fed. 258; In re Friedman, 1 Am. B. R. 510.

66. In re Tune, 8 Am. B. R. 285, 115 Fed. 906.

Several of the classes making up subsection c have been considered elsewhere.[67] The phrase "in fraud of the provisions of the act" has been held, under the former law from which it is derived, to mean, in brief, any act intended to disturb or resulting in a disturbance of that equilibrium between creditors of the same class which is the basic principle of all bankruptcy laws.[68] The concluding clause of subsection c is doubtless expressive of the law. It extends to liens through legal proceedings[69] the rule of subrogation stated in subsection b. In order that a judgment or other lien obtained within four months of bankruptcy should be dissolved thereby, it must appear that the person whose property is subject to the lien was at the time insolvent.[70] Liens through legal proceedings acquired more than four months before the bankruptcy are not affected.[71] When the question is one of hours, only whole days are counted.[72] But it is the accrual of the lien, not the entry of a judgment not amounting to a lien, from which the time runs.[73]

§ 25. **Invalid liens by judgment and execution.**—A mere judgment is not always a lien. Until it becomes such, as by issue of execution or docketing in a register's office, it is not affected by this subsection;[74] and this notwithstanding the use of the word "judgment" in the first clause.[75] The law of each

67. For instance, "Within four months prior to filing the petition;" "Reasonable cause to believe that the defendant was insolvent;" "In contemplation of bankruptcy;" "Obtained or permitted;" and "Insolvency."

68. Wagner v. Hall, 16 Wall. (U. S.) 584; Buchanan v. Smith, 16 Wall. (U. S.) 277; Toof v. Martin, 13 Wall. (U. S.) 40.

69. In re Moore, 6 Am. B. R. 175, 107 Fed. 234; In re Higgins, 3 Am. B. R. 364, 97 Fed. 775.

70. Simpson v. Van Etten, 6 Am. B. R. 204, 108 Fed. 199.

71. In re Blumberg, 1 Am. B. R. 633, 94 Fed. 476.

72. Jones v. Stevens, 5 Am. B. R. 571, 48 Atl. 170.

73. *Compare* Parmenter Mfg. Co. v. Stoever, 3 Am. B. R. 220, 97 Fed. 330. See also Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36.

74. In re Kenney, 5 Am. B. R. 355, 105 Fed. 897; Levor v. Seiter, 5 Am. B. R. 576. *Compare* In re Darwin, 8 Am. B. R. 703; Doyle v. Heath, 4 Am. B. R. 705; 3 Am. B. R. 832, 99 Fed. 928.

75. In re Lesser, 187 U. S. 165, 9 Am. B. R. 36, 5 Am. B. R. 320; In re

State determines when a judgment becomes a lien.[76] Under the former law, judgments, even when followed by execution and levy, were not affected by bankruptcy.[77] Now, if in fact liens and the element of insolvency appears, such judgment-liens are annulled by bankruptcy if the petition is filed within four months.[78] But this is not so where the money collected has already been paid to the judgment creditor.[79] The term "all levies" is comprehensive enough to include a seizure of the property of an insolvent under replevin process.[80] A judgment or decree enforcing a pre-existing lien is not necessarily within the prohibition of subsection f, since such subsection is confined to judgments which themselves create liens.[81] But if a judgment is rendered upon an unsecured claim within the four months period, it becomes null and void under such subsection upon the

Beaver Coal Co., 6 Am. B. R. 404, 110 Fed. 630, *aff'd* 7 Am. B. R. 542, 113 Fed. 889; In re Pease, 4 Am. B. R. 547; In re Engle, 5 Am. B. R. 372, 105 Fed. 893. *Contra*, St. Cyr v. Daignault, 4 Am. B. R. 638, 103 Fed. 854. *Compare* Mauran v. Crown Carpet Lining Co., 6 Am. B. R. 734.

76. In re Darwin, 8 Am. B. R. 703; In re Blair, 6 Am. B. R. 206, 108 Fed. 509.

77. In re Winn, Fed. Cas. No. 17,876; In re Gold, etc., Co., Fed. Cas. 5,515.

78. *Compare* In re Richards, 2 Am. B. R. 518, 95 Fed. 258. See also In re Benedict, 8 Am. B. R. 463; In re Stout, 6 Am. B. R. 505, 109 Fed. 794; In re Storm, 4 Am. B. R. 601, 103 Fed. 618.

79. In re Bailey, 16 Am. B. R. 289, 144 Fed. 214; Matter of Pollman, 16 Am. B. R. 144; Levor v. Seiter, 8 Am. B. R. 459, *modifying* 5 Am. B. R. 576.

80. In re Hymes, etc., Co., 12 Am. B. R. 477, 130 Fed. 977; Matter of Weinger, 11 Am. B. R. 424, 126 Fed. 875; In re Haynes, 10 Am. B. R. 715, 123 Fed. 1001.

81. Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Hiller v. Leroy, 179 N. Y. 369, 12 Am. B. R. 733, in which case the judgment had been received and docketed more than four months prior to the filing of a petition in bankruptcy by the judgment debtors, and it was held that the lien thus impressed upon the real estate of the debtors could be enforced within such period either by a sale of the land under execution or by an action in equity to obtain a decree adjudging transfers made by the judgment debtors to have been void. *Compare* Mencke v. Rosenberg, 9 Am. B. R. 323, 202 Pa. St. 131, in which case it was held that under the Pennsylvania statute, if a *testatum fi. fa.* is issued within the period of four months prior to the filing of the petition, a lien is created which is invalidated by section b.

debtor being adjudicated a bankrupt, in which case the invalidity of the judgment relates back to the time the judgment was rendered, and nullifies such judgment and all subsequent proceedings thereon.[82]

§ 26. **Invalid liens by attachment.**—An attachment lien is within the terms of subsection c as well as subsection f.[83] The provisions of a State insolvency law, preferring a claim for costs incurred in an attachment, are suspended by this section.[84] Exempt property constitutes no part of the estate passing to the trustee, and where such property is subject to an attachment lien, such lien is unaffected by the bankruptcy of the debtor.[85] Even if the judgment antedates the law, and the attachment is within the four months period, it is dissolved.[86] Where the lien is by attachment on *mesne* process made before such four months period and followed by a judgment and levy within it, the attachment is not dissolved by subsection f.[87] The construction to be drawn from the language of section 67f is that it is the lien created by a levy or a judgment, or an attachment or otherwise that is invalidated, and that where the lien is obtained, more than four months prior to the filing of the petition in bankruptcy, it is not only not to be deemed null and void on adjudication, but its validity is recognized; when the lien is obtained within the four months period, the property of the bankrupt is discharged there-

82. Clark v. Larremore, 188 U. S. 486, 9 Am. B. R. 476; Mohr v. Mattox (Ga. Sup.), 12 Am. B. R. 330; McKenney v. Cheney (Ga. Sup.), 11 Am. B. R. 54; Kinmouth v. Braeutigan (N. J. Eq.), 10 Am. B. R. 83, 52 Atl. 226; In re Breslauer, 10 Am. B. R. 33, 121 Fed. 910.

83. Wood v. Carr (Ky. Ct. App.), 10 Am. B. R. 577; In re Kemp, 4 Am. B. R. 242, 101 Fed. 689; In re Higgins, 3 Am. B. R. 364, 97 Fed. 775.

84. In re Copper King, 16 Am. B. R. 148, 143 Fed. 649.

85. Jewett Bros. v. Huffman (N. D. Sup. Ct.), 13 Am. B. R. 738. *Compare* Matter of Downing, 15 Am. B. R. 423, 139 Fed. 590.

86. Peck Lumber Co. v. Mitchell, 95 Fed. 258. *Contra*, In re De Lue, 1 Am. B. R. 387, 91 Fed. 510.

87. Pepperdine v. Bank of Seymour, 10 Am. B. R. 570 (Mo. App.); In re Blair, 6 Am. B. R. 206, 108 Fed. 529.

from, but not otherwise.[88] Where the plaintiff in an action obtains a valid attachment upon property of the bankrupt, more than four months prior to the commencement of the bankruptcy proceedings, he should be permitted to prosecute the action to judgment and satisfy the same by an execution sale.[89]

§ 27. **Invalid liens by creditor's bill.**—Prior to 1903, while it was well settled that the beginning of a creditor's suit to reach equitable assets of the debtor gave such creditor at least an inchoate lien, the authorities were quite equally divided as to whether, when the suit ante-dated the four months period, such a lien was dissolved.[90] It was then settled by the Supreme Court that if the creditor's suit was commenced more than four months prior to the filing of the petition in bankruptcy, he acquired a lien upon the equitable assets of the bankrupt which was superior to the title of the trustee in bankruptcy thereto, and although the judgment was entered within the four months, the lien was not affected by section 67f, and the bankruptcy court had no power to enjoin further proceedings in the suit.[91] A judgment creditor of an alleged bankrupt should not be permitted, however, to obtain a preference by obtaining, upon the same day the petition in bank-

88. Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36. Prior to this decision the weight of authority was to the effect that attachments made before such four months' period were in the same category as those actually within four months of bankruptcy. In re Johnson, 6 Am. B. R. 202, 108 Fed. 373; In re Lesser, 5 Am. B. R. 326. *Compare* also In re Lesser, 3 Am. B. R. 815, 100 Fed. 433, *aff'd* 5 Am. B. R. 320, and both *rev'd* in Metcalf v. Barker, *supra*. Other cases, more or less affected by this decision, are: Matter of Downing, 15 Am. B. R. 423, 139 Fed. 590; Powers Dry Goods Co. v. Nelson, 7 Am. B. R. 506; Watschke v. Thompson, 7 Am. B. R. 504; In re Sheukein, 7 Am. B. R. 162, 113 Fed. 421; In re Burlington Malting Co., 6 Am. B. R. 369, 109 Fed. 777; Botts v. Hammond, 3 Am. B. R. 775, 99 Fed. 916; Schmilovitz v. Bernstein, 47 Atl. 884.

89. In re Snell, 11 Am. B. R. 35, 125 Fed. 154.

90. Thus, *compare* In re Lesser, 3 Am. B. R. 815, 100 Fed. 433, *aff'd* 5 Am. B. R. 320, and *rev'd* in Metcalf v. Barker, *infra*, and In re Adams, 1 Am. B. R. 94, with Taylor v. Taylor, 3 Am. B. R. 211, and Doyle v. Heath, 4 Am. B. R. 705.

91. Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36. *Compare* In re Porterfield, 15 Am. B. R. 11, 138 Fed. 192.

ruptcy was filed, a lien, in proceedings instituted under New York Code of Civil Procedure, section 1391, upon a trust fund of which the alleged bankrupt was beneficiary, although the State law provides that in the case of certain trusts the surplus of the income beyond the sum necessary for the education and support of the beneficiary shall be liable in equity to the claims of creditors in the same manner as other personal property not reachable by an execution at law.[92]

§ 28. **Suits to annul liens.**—The distinction here between subsection f and subsection c is not important. Although the former makes the liens it condemns void, and declares that "the lien shall be deemed wholly discharged," when the lien has resulted in possession adverse to the trustee, a suit is usually necessary; but application addressed to the State court will sometimes be enough.[93] The forum for such suits is elsewhere considered.[94] The amendments of 1903 make it optional with the trustee to sue in the Federal court or in the State court. The practice is governed by the law and rules applicable to the court in which the suit is brought. The trustee usually applies to the referee for permission to bring such a suit.

§ 29. **Preserving liens.**—Here the statute is sufficiently explicit. If the creditor has a void or voidable lien, the court may order it preserved for the benefit of the estate. Thus, in those States where the filing of a creditor's bill does not create a lien that survives the bankruptcy, the court may order the trustee to intervene and ask to be substituted as plaintiff. Likewise, "the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." Subsection f makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and

92. In re Tiffany, 13 Am. B. R. 310, 133 Fed. 799.

93. Hardt v. Schuylkill, etc., Co., 8 Am. B. R. 479.

94. Under discussion of section 23, chapter XXIV, *infra*.

the property affected shall be deemed released and shall pass to the trustee of the estate of the bankrupt; or, second, the court may order that the right acquired by attachment shall be preserved for the benefit of the estate. In the latter case so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, " for the benefit of the estate,"—in other words the statute recognizes the lien of the attachment, but distributes it among all the creditors.[95]

§ 30. **Saving clause.**—The proviso at the end of subsection f corresponds to subsection d, which has reference to liens other than through legal proceedings, as well as to a clause in the body of subsection e, saving *bona fide* transactions from the penalties attending fraudulent transfers. It is also expressive of the law, and was seemingly inserted for reasons of caution only. That neither the plaintiff in nor the sheriff holding under a void attachment is a *bona fide* purchaser for value has already been held.[96]

95. First Nat. Bank v. Staake, 15 Am. B. R. 639, 202 U. S. 141, *aff'g* 13 Am. B. R. 281.

96. In re Kaupisch Creamery Co., 5 Am. B. R. 790, 107 Fed. 93; Jones v. Stevens, 5 Am. B. R. 571, 48 Atl. 170. *Compare* also note 10, section 2, this chapter.

CHAPTER XXIII.

PREFERRED CREDITORS.

Section 1. Statutory provision.
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10. Creditors only may be preferred.
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15. Property or its value—Damages—Costs.
16. Set-off of a subsequent credit. Subs. c.
17. Preference to bankrupt's attorney. Subs. d.

Section 1. **Statutory provision.**—The Bankruptcy Act of 1898 provides as follows:

§ 60. *Preferred creditors.*—(a) A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication,** procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.**

* Amendments of 1903 in italics.

(b) If a bankrupt shall have given a preference[1] and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. *And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**

(c) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

§ 2. **What is a preference; history and comparative legislation.** —A preference is a "conventional fraud;" the debtor merely prefers to pay one creditor more than, or to the exclusion of, others. At common law, such a payment or transfer was not even constructively fraudulent,[2] though as early as 1635, preferential transfers were regulated by statute and, for more than a century, were punishable as crimes. The modern doctrine that preferences

* Amendments of 1903 in italics.

1. Here the words "within four months before the filing of the petition, or after the filing of the petition and before the adjudication," were stricken out of the amendatory act of 1903, and inserted in subs. a.

2. See Preferences to creditors, chapter XI, section 1, *supra*.

are wrongs on other creditors was first declared by Lord Mansfield.[3] It was not reduced to a bankruptcy law definition until in the English act of 1869, although the Insolvent Debtor Acts, beginning with that of 1824, contained clauses declaring what were preferences in cases where debtors other than traders sought the refuge of the courts.[4] The statutory definition in England is the result of more than a century of decisions of the courts construing the word "preference" and the elements of proof. The elements of a preference under the English statute are: (1) a payment or transfer or conveyance (2) by a person unable to pay his debts as they become due, (3) with a view of giving the person to whom it is made an advantage over other creditors, provided (4) such payment is made within three months of the bankruptcy.[5] The English law specifically protects payments in due course of trade, and has since the middle of the eighteenth century;[6] hence, what are known as "protected transactions." The first definition of preferences in a bankruptcy law in the United States appeared in that of 1841.[7] The definition in the law of 1867 was identical with the present English definition, except that the time limit was four months instead of three, and that on the part of the creditor are required the additional elements of (1) reasonable cause to believe that the debtor was insolvent, and (2) knowledge that the payment was in fraud of the act.[8]

§ 3. **The present definition; the elements of a preference; subs. a.**—Since the amendatory act of 1903, a preference consists in a person, (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater

3. Worsely v. de Mattos, 1 Burr. 467; Anderson v. Temple, 4 Burr. 2235.

4. See In re Hall, 4 Am. B. R. 671, for a historical review.

5. Act of 1883, section 48.

6. Act of 1883, section 49.

7. Act of 1841, section 2.

8. Act of 1867, section 35, R. S. section 5128. The amendatory act of 1874 changed "belief" of a fraud on the act to "knowledge."

percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person recovering it or to be benefited thereby has (6) reasonable cause to believe that it was thereby intended to give a preference.[9] These elements of proof are discussed in detail in the sections immediately following. Briefly, the present definition differs from the English definition in (1) the elimination of "intent" and the substitution of "the result of the act," and (2) in making the preference period four months instead of three; while, when considered as an act that is voidable, it differs from that of our law of 1867, not only in substituting the result for the intent save in so far as the latter is an element of "reasonable cause to believe," but also in requiring the attacking trustee to show only that the creditor had reasonable cause to believe that a preference was intended instead of the more difficult elements of proof indicated in the preceding section. The present law, too, distinguishes between a mere preference in fact and one that is voidable.[10] It makes many of the cases under the former law inapplicable. Subdivision a has been held to be a definition of "preference,"[11] but it has been questioned whether this is altogether accurate.[12] A preference which amounts to an act of bankruptcy must still show intent,[13] and the so-called definition is not exactly consistent with another subsection.[14] It is a definition, however, when applied to a transaction voidable under subdivision b. The view that sub-

9. In re Belding, 8 Am. B. R. 718, 116 Fed. 1016, a preference is none the less a preference because the bankrupt first gave the creditor not the property itself, but a lien thereon, and the creditor subsequently sold the property and realized on the lien in order to pay the debt. See Stern v. Mayer, 16 Am. B. R. 763, 113 App. Div. (N. Y.) 181, 98 N. Y. Supp. 1028; In re Beerman, 7 Am. B. R. 431, 112 Fed. 662; Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501. For a case where nearly all the elements were lacking, see Brown v. Guichard, 7 Am. B. R. 515.

10. See In re Chaplin, 8 Am. B. R. 121, 115 Fed. 162, an unusual case.

11. See Preference, chapter XXI, section 7, *supra*.

12. In re Piper, 2 N. B. N. Rep. 7, it is merely a "rule of evidence." See also Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501.

13. See section 3a(2), chapter XXI, secs. 17-19, and the cases cited.

14. Section 67e(1), chapter XXII. *Compare* In re McLam, 3 Am. B. R. 245.

section a defined a preference led to the doctrine that payments on account or partial payments in due course of trade after insolvency were preferences without either knowledge of insolvency on the part of the debtor, or reasonable cause to believe that a preference was intended on the part of the creditor; a doctrine that reversed the rule that good faith was the test and rendered cash transactions in business not only the safest course, but, in effect, essential. As a consequence, the meaning of both subsection b and subsection c was greatly enlarged by judicial construction. The amendatory act of 1903 has rendered most of these cases inapplicable and valueless.[15]

§ 4. **Being insolvent.**—The word "insolvent" has the same meaning here as elsewhere in the act.[16] The burden of showing it is on him who alleges it.[17] The debtor must have been insolvent at the time the preference was committed.[18] If the levy following the judgment causes the insolvency, it is not enough.[19] But insolvency must be alleged and found as a fact; mere belief is not enough,[20] nor is danger of insolvency as a coming result.[21] The schedule of liabilities filed by the bankrupt is admissible on the issue of insolvency.[22] As to sufficiency of evidence as to insolvency consult cases cited in the note below.[23]

15. Collier, Bankr., 6th ed., p. 474, and cases there cited.

16. Bankr., Act, 1898, section 1(15). See Insolvency, chapter XXI, section 4, *supra*. See also Benjamin v. Chandler, 15 Am. B. R. 439, 142 Fed. 217. *Compare* In re Alexander, 4 Am. B. R. 376, 102 Fed. 464; Marvin v. Anderson, 6 Am. B. R. 520.

17. In re Chappell, 7 Am. B. R. 608, 113 Fed. 545.

18. In re Arkonia Fabric Mfg. Co., 18 Am. B. R. 470, 151 Fed. 914, evidence held to show that corporation was insolvent at date of transfer of its machinery, etc.; Butler Paper Co. v. Goembel (C. C. A.), 16 Am. B. R. 26, 143 Fed. 295; In re Wittenberg, etc., Co., 6 Am. B. R. 271, 108 Fed. 593. *Compare* Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974.

19. Chicago Title & Trust Co. v. Roebling's Sons, 5 Am. B. R. 368, 107 Fed. 71. See also Clarion Bank v. Jones, 21 Wall. (U. S.) 325; Otis v. Hadley, 112 Mass. 100.

20. Wagner v. Hall, 16 Wall. (U. S.) 584. *Compare* also In re Linton, 7 Am. B. R. 676.

21. Beals v. Quinn, 101 Mass. 262.

22. In re Docker-Foster Co., 10 Am. B. R. 584, 123 Fed. 190; Hackney v. Hargreaves, 13 Am. B. R. 676, 3 Neb. (Unoff.) 676.

23. Ridge Ave. Bank v. Sunheim, 16 Am. B. R. 863, 145 Fed. 798; Ben-

§ 5. **Within four months.**—This means within four months of the inception of the proceeding, in the words of the statute "before the filing of the petition." The method of computing time is fixed by another section of the statute, which is self-explanatory when enumerated by days,[24] and the same rule is applied when the time is enumerated by months and years.[25] Fractions of a day are disregarded.[26] If a preference was given before the passage of the bankruptcy law, it cannot be disturbed.[27] Nor can it if done in pursuance of a valid contract more than four months old.[28] But a transfer, which otherwise constitutes a voidable preference, is not validated by the fact that it was executed in the performance of a contract to do so made more than four months prior to the filing of the petition.[29] The period ordinarily begins to run from the moment the judgment or transfer takes effect.[30] Where possession is taken by the creditors of an insolvent debtor's property within four months before the filing of the petition, under an agreement, whereby a lien was created in favor of the creditors upon such property in case of a failure of the debtor to comply with the terms of such agreement, such assumption of possession will constitute an unlawful preference notwithstanding the fact that the agreement

jamin v. Chandler, 15 Am. B. R. 439, 142 Fed. 217.

24. Bankr. Act, 1898, section 31 provides that "whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." See also Whitley, etc., Co. v. Roach, 8 Am. B. R. 505; In re Wolf, 2 Am. B. R. 322, 94 Fed. 382.

25. *Compare* In re Stevenson, 2 Am. B. R. 66, 94 Fed. 110.

26. In re Warner, 16 Am. B. R. 519, 144 Fed. 987.

27. In re Terrill, 4 Am. B. R. 145, 100 Fed. 778.

28. Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974. But *compare* In re Sheridan, 3 Am. B. R. 554, 95 Fed. 406.

29. In re Great Western Mfg. Co., 18 Am. B. R. 259, 152 Fed. 123.

30. See Lawyer v. Turpin, 91 U. S. 114; In re Foster, Fed. Cas. No. 4,964. An order on a creditor for the payment of money due the bankrupt is a transfer of the fund from the day of its presentation. Johnston v. Huff (C. C. A.), 13 Am. B. R. 287, 133 Fed. 704; In re Hines, 16 Am. B. R. 495, 144 Fed. 142, 147, 543.

was made prior to the four months period.[31] Where there had been no effective transfer of certain insurance money to a creditor until the money was in fact paid, which was within the four months period, the amount so paid constituted a voidable preference.[32] A transfer of property for a past consideration and within ten days of the filing of the petition is voidable as a preference.[33] Where a verbal agreement is entered into between the parties more than four months prior to the filing of the petition, and a chattel mortgage or other incumbrance is executed in accordance with such agreement within such period, such mortgage or incumbrance is a voidable preference.[34] Prior to the amendments of 1903 this clause was in subdivision b in the original law. It led to the anomalous doctrine that mere preferences, as, for instance, *bona fide* payments, must be surrendered if since insolvency, no matter how many months or years back, but fraudulent preferences were good unless within the four months period.[35] The clause has been changed to subsection a and no transaction can now be held a preference unless complete within four months of the petition, or, if after the petition, if before the adjudication.

§ 6. **Running of time where the evidence of transfer must or may be recorded.**—The concluding sentence of subdivision a is new and was inserted by the amendatory Act of 1903. Its purpose is to meet the decisions that held the date of the delivery of a preferential instrument, rather than the date of its record, the beginning of the four months period.[36] Where a preference

31. Matter of Mandel, 10 Am. B. R. 774; Matthews v. Hardt, 9 Am. B. R. 373. *Compare* Christ v. Zehner, 16 Am. B. R. 788, 212 Pa. St.; In re Chadwick, 15 Am. B. R. 528, 140 Fed. 674.

32. Long v. Farmers' State Bank, 17 Am. B. R. 103, 147 Fed. 360.

33. In re Gesas (C. C. A.), 16 Am. B. R. 872, 146 Fed. 734.

34. In re Dismal Swamp Contracting Co., 14 Am. B. R. 175, 135 Fed. 415; In re Rounk, 7 Am. B.R. 31, 111 Fed. 154.

35. See the now inapplicable cases of In re Rosenberg, 7 Am. B. R. 316; In re Abraham Steers Lumber Co., 6 Am. B. R. 315, 110 Fed. 738, 7 Am. B. R. 332, 112 Fed. 406; In re Jones, 4 Am. B. R. 563. *Contra*, In re Biswick, 7 Am. B. R. 395; In re Dickinson, 7 Am. B. R. 679.

36. In re Mersman, 7 Am. B. R. 46; In re Kindt, 4 Am. B. R. 148,

consists in a transfer, the period of four months does not expire until four months after the date of recording, if by law such recording is required.[37] A similar clause is contained in section 3b of the Bankruptcy Act, but after the word "required" that section contains the words: "or permitted, or if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property," which for some reason have been omitted from this section. The evils aimed at by this amendment are thus but partially eradicated, since the concealment of preferences through the four months, and thus the accomplishment of gross frauds on creditors, will be possible, unless the preference is accomplished by an instrument which must be recorded.[38] The omission from this subsection of words equivalent to "unless the petitioning creditors have received actual notice of such transfer or assignment," found in the concluding sentence of section 3b should also be noted.[39] This clause as amended only refers to transfers originally intended as preferences, or which, at their inception, constituted such as a matter of law.[40] It will sometimes be found difficult to determine whether the law actually requires the recording or registering of a transfer within the meaning of this section. For instance, it has been held that "required," as here used, has reference to the character of the instrument rather than to the particular individuals who may or may not be affected by an unrecorded instrument.[41] It has also been held that, under a statute requiring the recording of a chattel mortgage, a failure to register rendered the mortgage

101 Fed. 107; In re Wright, 2 Am. B. R. 364, 96 Fed. 187.

37. In re Reynolds, 18 Am. B. R. 666, 153 Fed. 295.

38. See In re Mersman, *supra;* In re Tonawanda Street Planing Mill, 6 Am. B. R. 38.

39. See subs. 3b, chap. XXI, *supra.* Note distinction made between the language here used and that used in section 3b, as discussed in Little v. Holly Brooks Hardware Co. (C. C. A.), 13 Am. B. R. 422, 133 Fed. 874. See also English v. Ross, 15 Am. B. R. 370, 140 Fed. 630, where it is suggested that the amendment to section 60a was for the purpose of bringing it into substantial accord with section 3a.

40. Bradley Clark Co. v. Benson, 13 Am. B. R. 170, 100 N. W. 670.

41. In re Reynolds, 18 Am. B. R. 666, 153 Fed. 295.

void only as against lien creditors, subsequent purchasers or incumbrancers in good faith, and that such recording was therefore not required to make the instrument valid as against the mortgagor's general creditors; it is this character of a requirement which is needed to bring the transaction within this subdivision.[42] On the other hand, it has been held that a State statute which requires a conveyance or transfer to be recorded in order to be effectual as against any class or classes of persons is a law by which such recording is "required" within the meaning of the Bankruptcy Act.[43] If a chattel mortgage first comes into existence as against general creditors, under a State statute, when it is recorded, it is "required" to be recorded under this subdivision, even though it is not absolutely void in all circumstances because not so recorded.[44] Where, under a State law, an unrecorded instrument is valid between the parties and against general creditors of the grantor, the failure to record a deed until after the grantor's adjudication as a bankrupt is not sufficient to make it an unlawful preference within the meaning of sections 60a and 60b, as amended.[45] An assignment of a mortgage of real estate is an instrument "required to be recorded" in the State of New York, under section 60a of the Bankrupt Act.[46]

§ 7. **Procured or suffered a judgment.**—The words here are not the same as those in section 3a(3), which reads "suffered or permitted." They are similar to those of the law of 1867.[47]

42. In re Chadwick, 15 Am. B. R. 528, 140 Fed. 674; Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A.), 14 Am. B. R. 477, 136 Fed. 396; Matter of Hunt, 14 Am. B. R. 416, 139 Fed. 283.

43. Loeser v. Savings Deposit Bk. & Trust Co. (C. C. A.), 17 Am. B. R. 628, 148 Fed. 975, construing the Ohio law.

44. In re Montague, 16 Am. B. R. 18; First Nat. Bank v. Connett (C. C. A.), 15 Am. B. R. 662, 142 Fed. 33; In re Noel, 14 Am. B. R. 715, 137 Fed. 694.

45. In re McIntosh, 18 B. R. 169 (C. C. A.), 150 Fed. 546, construing California law. Correction of defect which affects only right to record allowed after bankruptcy. In re International Mahagony Co., 16 Am. B. R. 797 (C. C. A., N. Y.), 147 Fed. 147.

46. In re John J. Coffey, 19 Am. B. R. 148.

47. Act of 1867, section 39.

"Procuring" a judgment implies active agency on the part of the debtor. It is very different from "permitting" the same thing. But the disjunctive "or" being used, as is the word "suffered," cases in point under section 3a(3) are thought to be properly equally in point as to preferences which are voidable. The cases under the former law are not controlling here.[48] The crucial element of intent is now unnecessary. The decisions under the present law directly in point are to like effect.[49]

§ 8. **Made a transfer of his property.**—The word "transfer" here includes every mode of disposing of or parting with property.[50] It includes the payment of money.[51] It includes a mortgage or a lien voluntarily created by the debtor.[52] A mortgage given to secure repayment of misappropriated trust funds is a preference.[53] The method of transfer is immaterial.[54] A resultant inequality being now the essence of a preference, it makes no difference that the transferee was coerced by his creditor.[55] The fact that the transfer was made in good faith is immaterial, if it is made within the prescribed period to secure an antecedent debt, and is intended and accepted as a preference, and so results.[56] A fictitious transaction not affecting the estate of the

48. See Wilson v. The City Bank, 17 Wall. (U. S.) 473.

49. In re Collins, 2 Am. B. R. 1; In re Richards, 2 Am. B. R. 518, 95 Fed. 258.

50. Bankr. Act, 1898, section 1(25).

51. West v. Bank of Lahoma, 16 Am. B. R. 733; New York County Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42; Jaquith v. Alden, 189 U. S. 78, 82, 9 Am. B. R. 773; Pirie v. Chicago, etc., Trust Co., 182 U. S. 438, 5 Am. B. R. 814; In re Fixen, 4 Am. B. R. 10, 102 Fed. 296; In re Arndt, 4 Am. B. R. 773, 104 Fed. 234; In re Sloan, 4 Am. B. R. 356, 102 Fed. 116; In re Warner, Fed. Cas. No. 17,177; In re Clark, Fed. Cas. 2,812.

52. Coder v. Arts (C. C. A.), 18 Am. B. R. 513, 152 Fed. 943, modifying In re Armstrong, 16 Am. B. R. 583, 145 Fed. 202.

53. Smith v. An Gres Township, 17 Am. B. R. 745 (C. C. A.), 150 Fed. 257.

54. Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501. This was so under the former law. Gibson v. Dobie, Fed. Cas. No. 5,394; In re Waite, Fed. Cas. No. 17,044.

55. Clarion Bank v. Jones, 21 Wall. (U. S.) 325; Giddings v. Dodd, Fed. Cas. No. 5,405; In re Batchelder, Fed. Cas. No. 1,098.

56. Morgan v. First Nat. Bank (C. C. A.), 16 Am. B. R. 639, 145 Fed.

debtor or the rights of creditors cannot be deemed a transfer, although assuming the form of one.[57] A preference must have actually resulted from the transfer.[58] Where the transfer does not diminish the general fund, as where it consists of the giving of a fair security for a present loan,[59] the substitution of securities pledged to an old loan,[60] or a pledge or payment for a consideration given in the present or to be given in the future, whether in money, goods, or services,[61] no preference results. For a going concern, when unable to pay all its debts, to use a part of its assets to pay current expenses does not constitute a preference.[62] But any transfer within the statutory time by way of payment on or security of an antecedent debt is a preference.[63] It is only

466, so held in respect to a trust deed executed in good faith to secure an antecedent debt. Intent by bankrupt to prefer is essential. Goodlander-Robertson Lumber Co. v. Atwood (C. C. A.), 18 Am. B. R. 510, 152 Fed. 978.

57. In re Steam Vehicle Co., 10 Am. B. R. 385, 121 Fed. 939.

58. See Gomila v. Wilcombe (C. C. A.), 18 Am. B. R. 143, 151 Fed. 470; Richmond Standard Steel, Spike & Iron Co. v. Allen (C. C. A.), 17 Am. B. R. 583, 148 Fed. 657; Belknap & Co. v. Lyell (Miss.), 42 So. 799.

59. In re Noel, 14 Am. B. R. 715, 137 Fed. 694; First Nat. Bank v. Penn Trust Co., 10 Am. B. R. 782, 124 Fed. 968; In re Wolf, 3 Am. B. R. 555, 98 Fed. 74; Tiffany v. Boatman's Sav. Bank, 18 Wall. (U. S.) 375.

60. See Stewart v. Platt, 101 U. S. 731; Sawyer v. Turpin, 91 U. S. 114; Birnhisel v. Firman, 22 Wall. (U. S.) 70; Clark v. Iselin, 21 Wall. (U. S.) 369; Cook v. Tullis, 18 Wall. (U. S.) 332.

61. Furth v. Stahl, 10 Am. B. R. 442, 205 Pa. St. 439. See also Dressel v. North State Lumber Co., 9 Am. B. R. 541, 119 Fed. 531, the return of money to a bank advanced to the bankrupt upon a check under an agreement that it was to be used to obtain a loan, which was not made, is not a preferential payment to the bank.

62. Richmond Standard Steel Spike & Iron Co. v. Allen, 17 Am. B. R. 583, 148 Fed. 657, paid president's salary.

63. In re Jones, 9 Am. B. R. 262, 118 Fed. 673; In re Wolf, 3 Am. B. R. 555, 98 Fed. 74; In re Belding, 8 Am. B. R. 718, 116 Fed. 1016; In re Cobb, 3 Am. B. R. 129, 96 Fed. 821; In re Montgomery, Fed. Cas. No. 9,732; Coggeshall v. Potter, Fed. Cas. No. 2,955. But *compare* Brooks v. Davis, Fed. Cas. No. 1,950; Adams v. Merchants' Bank, 2 Fed. 174. See also In re Sanderlin, 6 Am. B. R. 384, 109 Fed. 857, and McNair v. McIntyre, 7 Am. B. R. 638, 113 Fed. 113, reversing the former. In re Nechamkus, 19 Am. B. R. 189, a horse delivered by a bankrupt to a creditor in payment of, or as security for, a debt, is a voidable preference.

where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferences.[64] Where the transferee pays a present, fair consideration for the property, there is no preference.[65] The repayment by the president of a bankrupt corporation from its assets, to himself as agent of another corporation, of money which he had stolen from the funds of the latter and applied to the uses and purposes of the former, does not constitute a preference.[66] A transfer of firm property in payment of an individual partner's debt is a preference,[67] but the firm must be adjudged bankrupt before a suit can be brought to avoid it.[68] A deposit of money in a bank, upon an open account, subject to check, is not a transfer constituting a preference, although the bank as a creditor has the right to set off its claim against the depositor.[69] A post-dated check constitutes a transfer at the time of its payment, and the question of preference under the statute is to be determined by the conditions existing at such time.[70] An absolute transfer of an account against an insolvent debtor made in good faith to a person who afterwards purchases goods from the debtor and gives in payment therefor the account thus transferred to him, is not a

64. Joseph Wild & Co. v. Provident L. & T. Co., 18 Am. B. R. 500, 153 Fed. 562, *aff'g* In re Watkinson, 17 Am. B. R. 56.

65. Weeks v. Spooner, 142 N. C. 479, 55 S. E. 432.

66. McNaboe v. Columbian Mfg. Co., 18 Am. B. R. 684, 153 Fed. 967.

67. In re Gillette et al., 5 Am. B. R. 119, 104 Fed. 769; In re Beerman, 7 Am. B. R. 431, 112 Fed. 662.

68. Withrow v. Fowler, Fed. Cas. 17,919. *Compare* In re Hines, 16 Am. B. R. 495, 144 Fed. 142; Amsinck v. Bean, 22 Wall. (U. S.) 395.

69. New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42; West v. Bank of Lahoma, 16 Am. B. R. 733; In re Hill Co. (C. C. A.), 12 Am. B. R. 221, 130 Fed. 315. As to whether a payment of a clearing house check by a clearing house association is a preference, see Rector v. City Deposit Bank Co., 15 Am. B. R. 336, 200 U. S. 405.

70. In re Lyon, 10 Am. B. R. 25 (C. C. A.), 121 Fed. 723, *aff'g* 7 Am. B. R. 412. If a bank received a bankrupt's check for an amount to be applied on account of a matured note held by the bank, it constitutes a voidable preference. Ridge Ave. Bank v. Sundheim, 16 Am. B. R. 863, 145 Fed. 798.

transaction especially prohibited by the Bankruptcy Act.[71] But if such a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable.[72] The rule is the same as to preferences generally obtained indirectly.[73] The question of the validity of the transaction will probably be deemed in every instance one of good faith,[74] although as has already been indicated good faith alone would not be sufficient to preserve the transfer, if it in fact constituted a preference.[75] It is always to be borne in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subdivision b must at least be available. In other words, the transfers must be voidable. Under the present law, only those cases which include the element of reasonable cause to believe[76] are, therefore, still in point. The others, since the changes made in section 57g, are of value only by way of possible suggestion.[77]

§ 9. **Effect, a greater percentage.**—As already indicated, intent, save as evidence of a reasonable cause to believe, is immaterial; it has given place to the new element, resultant inequality. It is the result or effect of the act done which is declared against and which is the supreme test.[78] If the effect of the transfer is

71. North v. Taylor, 6 Am. B. R. 233, 61 App. Div. (N. Y.) 253, 70 N. Y. Supp. 338; Hackney v. Raymond Bros., Clarke Co., 10 Am. B. R. 213 (Neb.); Lyon v. Clarke (Mich.), 88 N. W. 1046.

72. Hackney v. Raymond Bros., Clarke Co., *supra.*

73. Frank v. Musliner, 9 Am. B. R. 229, 76 App. Div. (N. Y.) 617; In re Beerman, 7 Am. B. R. 431, 112 Fed. 663.

74. See cases cited in last two preceding notes.

75. Morgan v. First Nat. Bank (C. C. A.), 16 Am. B. R. 639, 145 Fed. 466; Matter of Gesas (C. C. A.), 16 Am. B. R. 872, 146 Fed. 734.

76. See What preferences are voidable, section 11, *infra.*

77. Collier, Bankr., 6th ed., p. 482. Section 57g of the Bankruptcy Act now provides as follows: "The claims of creditors, who have received preferences, *voidable under section* 60, *subdivision b, or to whom conveyances, transfers, assignments,* or *incumbrances, void* or *voidable under section* 67, *subdivision e, have been made* or *given,* shall not be allowed unless such creditors shall surrender such preferences, *conveyances, transfers, assignments, or incumbrances.*

78. Crooks v. The People's Bank,

to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference.[79] But the "greater percentage" refers only to creditors of the same class. For this reason the payment of wages is not a preference.[80] A transfer having the effect of a preference under section 60a is "one intended to give a preference" under section 60b, which avoids such a transfer when received with reasonable cause to believe it was so intended.[81]

§ 10. **Creditors only may be preferred.**—Though the words "person" and "creditor" are used interchangeably in subsection a of section 60, it is clear that only a creditor can receive a preference.[82] A payment or transfer to any one other than a creditor, unless for the latter's benefit, falls within the remedies indicated by section 67, subdivision e, and section 70, subdivision e. The elements of voidable preferences and fraudulent transfers are somewhat different. It is, therefore, important, at the outset of a suit to recover, to decide whether the proposed defendant is a creditor or not. Pleading, proof, and possibly judgment will depend upon such decision.[83] It appearing that when a mortgage was executed and filed the mortgagee was not

3 Am. B. R. 238, 29 Misc. Rep. (N. Y.) 30, 60 N. Y. Supp. 305.

79. In re Douglass Coal & Coke Co., 12 Am. B. R. 539, 131 Fed. 769; Brittain Dry Goods Co. v. Bertenshaw, 11 Am. B. R. 629 (Kan. Sup. Ct.); Matter of Cotton Export, etc., Co., 10 Am. B. R. 14 (C. C. A.), 121 Fed. 663; In re Belknap, 12 Am. B. R. 326, 129 Fed. 643, a distress for rent by a landlord does not enable the landlord to obtain a greater percentage of his debt than other creditors of the same class, where there is but one landlord.

80. In re Keller, 6 Am. B. R. 334. *Compare* Swarts v. Bank, 8 Am. B. R. 673, 117 Fed. 1.

81. In re John J. Coffey, 19 Am. B. R. 148.

82. In re Hines, 16 Am. B. R. 495, 144 Fed. 147; Wood v. United States, 16 Am. B. R. 21, 143 Fed. 424; Swarts v. Siegel, 8 Am. B. R. 220, 114 Fed. 1001.

Teller of bank cashing his own check.—Where, three days before the closing of a bank, its receiving and paying teller, with full knowledge of the bank's insolvency, and claiming to be a creditor, pays himself, by cashing his own check drawn against the funds of the bank, the transaction constitutes a preference recoverable by the trustee in bankruptcy of the bank. In re Plant, 17 Am. B. R. 272, 148 Fed. 37.

83. Collier, Bankr., 6th ed., p. 482.

a creditor, such mortgage may not be attacked.[84] A customer of a stock broker, who bought stock on a margin and held the same as pledgee to secure him for the amount due thereon by his customer, is not a creditor, and is not preferred when the broker transfers to him the stock upon the payment of the amount due thereon.[85] Many of the more valuable illustrative cases under the present law are collated in the note below.[86]

84. In re Clifford, 14 Am. B. R. 281, 136 Fed. 475.

85. Richardson v. Shaw (C. C. A., N. Y.), 16 Am. B. R. 842, 147 Fed. 659. See In re Swift, 7 Am. B. R. 374, where the Massachusetts rule is discussed.

86. The following have been held not to be preferences, even within the four months' period: The payment of wages (In re Read, 7 Am. B. R. 111; In re Abraham Steers Lumber Co., *supra;* In re Feuerlicht, 8 Am. B. R. 550. *Contra*, In re Proctor, 6 Am. B. R. 660; In re Kohn, 2 N. B. N. Rep. 367); the payment of checks given by a corporation to its president for present advances with which to pay wages (In re Union, etc., Co., 7 Am. B. R. 472, 112 Fed. 774); the renewal of notes more than four months old (Chattanooga Bank v. Rome Iron Co., 4 Am. B. R. 441, 102 Fed. 755); the payment of interest on notes (In re Keller, 6 Am. B. R. 621, 110 Fed. 348); the payment of installments of rent (In re Barrett, 6 Am. B. R. 199. *Compare* In re Lange, 3 Am. B. R. 231); the avails of book accounts assigned as collateral to a present loan (Young v. Upson, 8 Am. B. R. 377, 115 Fed. 192); the collection and application of the avails of collateral security given before the period (In re Little, 6 Am. B. R. 681, 110 Fed. 621); the proceeds of a pledged fire insurance policy (In re West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. 759. See also McDonald v. Dascam, 8 Am. B. R. 543, 116 Fed. 276); a payment to an official successor under order of court (Fry v. Penn Trust Co., 5 Am. B. R. 51); a payment in pursuance of a valid executory contract more than four months old (Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974. Apparently *contra.* In re Sheridan, 3 Am. B. R. 554, 98 Fed. 406); payments to a surety who afterward pays the bankrupt's debt (In re New, 8 Am. B. R. 566, 116 Fed. 116); where a sheriff still has in his hands money collected on an execution (In re Kenney, 3 Am. B. R. 353, 97 Fed. 554. *Compare*, however, In re Blair, 4 Am. B. R. 220 102 Fed. 987); where a banker applies a deposit due the bankrupt on the notes of the latter (In re Elsasser, 7 Am. B. R. 215; In re Hill Co., 12 Am. B. R. 221 [C. C. A.], 130 Fed. 315; New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42); and where a mortgage is taken as security by a lender who knows that the borrower is hard pressed, the latter using the money to pay his debts (In re Pearson, 2 Am. B. R. 482. See also In re Harpke, 8 Am. B. R. 335, 116 Fed. 295); payment of interest on dower (In re Riddle's Sons, 10 Am. B. R. 204, 122 Fed. 559).

§ 11. **What preferences are voidable; subs. b.**—Under the amendatory act of 1903, a preference is a name only, unless it may be avoided. Unlike section 35 of the former law, which makes preferences void *per se*,[87] section 60b of the present act makes preferences voidable merely. A valid title thus passes to the transferee at the time of the preference and recovery must be had.[88] This is in line with the policy of the law, as evidenced by section 70a, to pro-

The following have been held preferences: Attachments (In re Burlington Malting Co., 6 Am. B. R. 369, 109 Fed. 777; In re Schenkein, 7 Am. B. R. 162, 113 Fed. 421; though, whether this will continue to be held under the changed conditions resulting from the amendments of 1903, may be doubted); a payment to a third person to relieve an indorser, the third person not having reasonable cause to believe, etc. (Landry v. Andrews, 6 Am. B. R. 281. *Compare* In re Dundas, 7 Am. B. R. 129, 111 Fed. 500); a payment on indorsed notes, the indorser being good (Swartz v. Bank, 8 Am. B. R. 673, 117 Fed. 1); a transfer of all the bankrupt's assets to a liquidator (In re Wertheimer, 6 Am. B. R. 187); a cash sale of property to an outsider and payment in full of several creditors (Boyd v. Lemon Gale Co., 8 Am. B. R. 81, 114 Fed. 647); the taking back of goods, whether hypothecated or sold, and the application of their value on account or in full (In re Klingman, *supra;* Silberstein v. Stahl, 4 Am. B. R. 626); payment after insolvency by means of a post-dated check (In re Lyon, 7 Am. B. R. 412, 114 Fed. 326; *affirmed*, 10 Am. B. R. 25, 121 Fed. 793); a loan by a banker to the bankrupt of the amount of the latter's deposit (In re Cobb, 3 Am. B. R. 129, 96 Fed. 821); deposits made in cancellation of over drafts (In re Keller, *supra*); a payment on the bankrupt's note after its sale to and discount by a bank (In re Waterbury Furniture Co., 8 Am. B. R. 79, 114 Fed. 225); the making of a lease (Carter v. Goodykoontz, 2 Am. B. R. 224, 94 Fed. 108); repayment of a loan out of a certain fund under an agreement entered into when the loan was made (Torrance v. Winfield Nat. Bank, 11 Am. B. R. 185); agreement that chattel mortgage executed prior to four months shall be lien on certain specified articles made within said period (First Nat. Bank v. Johnson, 10 Am. B. R. 208). See also In re Colton, etc., Co., 8 Am. B. R. 257, 115 Fed. 158; In re Metzger, etc., Co., 8 Am. B. R. 307, 114 Fed. 957; Swarts v. Siegel, 8 Am. B. R. 690, 117 Fed. 13.

The practitioner should, however, note that the provocation for many of these decisions—the necessity of surrender of "innocent" partial payments—is now gone. None of them are now valuable unless they show the all-essential element of voidable preferences. "reasonable cause to believe that a preference was intended."

87. Zahm v. Fry, Fed. Cas. No. 18,198; Rison v. Knapp, Fed. Cas. No. 11,861; Atkins v. Spear, 49 Mass. 490.

88. In re Phelps, 3 Am. B. R. 396.

tect intervening innocent purchasers. Under the former law the preference being void, there was no title in the preferential transferee, and the words "may recover the property," etc., in section 39 of that law, were surplusage, The corresponding clauses in the law of 1867, however, being similar in language and purpose to this subdivision, cases under that law are still deemed applicable both as to what is "reasonable cause to believe" and the practice on and measure of damages in suits to recover.[89] A transfer may be made to a third person and still be a preference; for a creditor may be benefited thereby.[90] Hence, the phrase "the person receiving it, or to be benefited thereby;" words found in the same connection in the law of 1867.[91] It would seem, therefore, from the last words in the subsection, that the suit can be brought not only against the creditor or his agent, but also against a transferee not a creditor.[92]

§ 12. **Reasonable cause to believe a preference intended.**— While the former law and the present law are not exactly equivalent, the phrase "reasonable cause to believe" occurs in both. Its meaning is not easily explained. Each case will turn on its own facts and must be decided upon the facts peculiar to it.[93]

89. See cases cited under following sections.

90. Benjamin v. Chandler, 15 Am. B. R. 439, 142 Fed. 217; Hackney v. Hargreaves, 13 Am. B. R. 164, 3 Neb. (Unoff.) 676, a transaction the legal effect of which is to appropriate out of the assets of the bankrupt an amount required to settle with a creditor, and which was subsequently turned over to such creditor, is a preference; Western Tie & Timber Co. v. Brown (C. C. A.), 12 Am. B. R. 111, 129 Fed. 728, *rev'd* on other grounds, 13 Am. B. R. 447.

91. Act of 1867, section 35. *Compare* Bartholow v. Bean, 18 Wall. (U. S.) 635; Graham v. Stark, Fed. Cas. No. 5,676; Ahl v. Thorner, Fed. Cas. No. 103; Cookingham v. Morgan, Fed. Cas. No. 3,183.

92. Coder v. Arts, 18 Am. B. R. 513, 152 Fed. 943.

93. In re Coffey, 19 Am. B. R. 148; Coder v. Arts, 18 Am. B. R. 513, 152 Fed. 943; Ridge Ave. Bank v. Sundheim, 16 Am. B. R. 863, 145 Fed. 798; Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470; Hussey v. Richardson-Roberts Dry Goods Co., 17 Am. B. R. 511, 148 Fed. 598; Pratt v. Christie, 12 Am. B. R. 1, 95 App. Div. (N. Y.) 282; Ryttenberg v. Schefer, 11 Am. B. R. 652; Baden v. Bertenshaw (Kan. Sup. Ct.), 11 Am. B. R. 308; Matter of Bartheleme, 11 Am. B. R. 67; Lever v. Seiter, 8 Am.

The cases under both laws seem to justify the rule that "reasonable cause to believe" does not require proof either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended.[94] Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances, is notice of all the facts which a reasonable inquiry would develop. And such notice is reasonable cause for belief.[95] Under the former law, any transfer out of due course of trade was *prima facie* evidence of fraud;[96] even in the absence of this provision, the same rule probably applies to preferences under the law of 1898.[97] It also follows that reasonable cause to believe must exist at the time of the alleged preference.[98] But there must be something more than a mere guess or suspicion

B. R. 459; Beck v. Connell, 8 Am. B. R. 500, *aff'g* 6 Am. B. R. 93; Crooks v. People's Bank, 3 Am. B. R. 238; North v. Taylor, 6 Am. B. R. 233. *Compare* also Long v. Farmers' State Bank (C. C. A.), 17 Am. B. R. 103; In re Wyly, 8 Am. B. R. 604, 116 Fed. 38; In re Bullock, 8 Am. B. R. 646, 116 Fed. 667.

94. Coder v. Arts, *supra*, modifying In re Armstrong, 16 Am. B. R. 583, 145 Fed. 202; Suffel v. McCartney Nat. Bank, 16 Am. B. R. 259, 106 N. W. 837; In re Hines, 16 Am. B. R. 495, 144 Fed. 543; Sundheim v. Ridge Ave. Bank, 15 Am. B. R. 132, 138 Fed. 951; In re Virginia Hardwood Mfg. Co., 15 Am. B. R. 135, 139 Fed. 209; Stevenson v. Milliken-Tomlinson, 13 Am. B. R. 201, 99 Me. 320; Hackney v. Raymond Bros., Clarke Co., 10 Am. B. R. 213; Sebring v. Wellington, 6 Am. B. R. 671; Crittenden v. Barton, 5 Am. B. R. 775; In re Eggert, 3 Am. B. R. 541, 98 Fed. 843, 4 Am. B. R. 449, 102 Fed. 735; In re Richards, 2 Am. B. R. 518, 95 Fed. 258; In re Jacobs, 1 Am. B. R. 518; Grant v. Bank, 97 U. S. 80; Buchanan v. Smith, 16 Wall. (U. S.) 77; In re McDonough, Fed. Cas. No. 8,775; Webb v. Sachs, Fed. Cas. 17,325.

95. In re John J. Coffey, 19 Am. B. R. 148; Coder v. McPherson, 18 Am. B. R. 523, 152 Fed. 951; In re Pease, 12 Am. B. R. 66. See also In re Knopf, 16 Am. B. R. 432; Parker v. Conner, 118 N. Y. 24.

96. Act of 1867, section 35, R. S., section 5130.

97. Walbrun v. Babbitt, 16 Wall. (U. S.) 577. *Compare* In re Andrews, 16 Am. B. R. 387, 144 Fed. 922; In re Eggert, 3 Am. B. R. 541, 98 Fed. 843.

98. In re Onimette, Fed. Cas. No. 10,622; In re Hunt, Fed. Cas. No. 6,881; Crump v. Chapman, Fed. Cas. No. 3,455; Galveston Dry Goods Co. v. Frienkel (Tex. Civ. App.), 103 S. W. 224.

or some cause to suspect.[99] A reasonable cause to believe that a preference was intended involves reasonable cause to believe that insolvency as a matter of fact exists,[1] although knowledge of a debtor's insolvency cannot transform into a preference an act which otherwise is no preference.[2] Reasonable cause to believe a preference intended is a very different thing from intent to prefer, *per se*. Where it has been proven that an insolvent debtor has made a payment, the effect of which was to give one creditor a preference over others of the same class, and this is supplemented by evidence from which a jury may find that the creditor receiving the payment had reasonable ground to believe that it was intended thereby to give a preference, it is not necessary to prove the intent of the debtor in making the payment.[3] Unrequested repayment of a loan, with letter stating that money can no longer be used, is not sufficient alone to establish reasonable cause to believe that a preference was intended.[4] Whether or not the creditor has reasonable cause to believe the debtor insolvent is a question of fact,[5] and where the evidence justified a submission

99. Off v. Hakes (C. C. A.), 15 Am. B. R. 696, 142 Fed. 364; Arkansas Nat. Bank v. Sparks (Ark.), 103 N. W. 626; Forbes v. Howe, 102 Mass. 427.

1. Des Moines Sav. Bank v. Morgan Co., 12 Am. B. R. 781, 123 Iowa, 432.

2. In re H. C. King Co., 7 Am. B. R. 619, 113 Fed. 110.

3. Benedict v. Deshel, 11 Am. B. R. 20, 177 N. Y. 1; Parker v. Black, 16 Am. B. R. 202, 143 Fed. 560, *aff'd* 18 Am. B. R. 15, 151 Fed. 18. *Compare* In re Andrews, 16 Am. B. R. 387, 144 Fed. 922, it is necessary to show that the debtor actually intended to give a preference, unless there exists what the law regards as the equivalent thereof; otherwise the reasonable cause to believe that there was such intention cannot exist.

4. Wright v. Sampter, 18 Am. B. R. 355, 152 Fed. 196. Such payment, under other circumstances, held to be a voidable preference. Pratt v. Columbia Bank, 18 Am. B. R. 406; Landry v. Andrews, 6 Am. B. R. 281.

5. In re Andrews, 14 Am. B. R. 247, 135 Fed. 599; Upson v. Mount Morris Bank, 14 Am. B. R. 6; Wetstein v. Francisco, 13 Am. B. R. 326, 133 Fed. 900; Turner v. Fisher, 13 Am. B. R. 243, 133 Fed. 594; Thomas v. Adelman, 14 Am. B. R. 510, 136 Fed. 973; Deland v. Miller & Cheney Bank, 11 Am. B. R. 744, 119 Iowa, 368; Landry v. First Nat. Bank, 11 Am. B. R. 223 (Kan. Sup. Ct.); Hackney v. Raymond Bros., Clarke Co., 10 Am. B. R. 213 (Neb. Sup. Ct.); and is not reviewable by the Supreme Court, Kaufman v. Tredway, 12 Am. B. R. 682 (U. S. Sup.).

of the question to the jury, the finding of the jury is not reviewable.[6] Where the creditor knew that the debtor's business was bad, and it was necessary to continually press the debtor for payment, the creditor may be said to have had reasonable cause to believe that a preference was intended.[7] The fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account within the four months period is not sufficient to charge the creditor with notice of the bankrupt's insolvency, and that a preference was intended.[8] Where there is no evidence tending to show that a creditor had reasonable cause to believe that payments made by the bankrupt were intended as a preference a recovery cannot be had;[9] the law presumes that such payments are legal, and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption.[10] The plaintiff must prove, in order to establish his cause of action, that when the creditor received the payment he had reasonable ground to believe that it was intended as a preference.[11] Where in an action to recover a preference the complaint alleges that the defendant had reasonable cause to believe that his debtor was insolvent, an averment in defense that the defendant had no knowledge of the debtor's insolvency is insufficient.[12] Where a creditor received a chattel mortgage cover-

6. Ridge Ave. Bank v. Sundheim, 16 Am. B. R. 863, 145 Fed. 798.

7. Thomas v. Adelman, 14 Am. B. R. 510, 136 Fed. 973. The mere fact of taking security is not of itself sufficient to show knowledge. Matter of Alden, 16 Am. B. R. 362.

8. In re Goodhile, 12 Am. B. R. 374, the condition of the debtor's affairs must be such that prudent business men would conclude that the aggregate of the debtor's property, at a fair valuation, was not sufficient to pay his debts, before there is reasonable cause to believe that the debtor is insolvent, and that a preference would, therefore, be the result of a payment while in such condition. See Butler Paper Co. v. Goembel (C. C. A.), 16 Am. B. R. 26, 143 Fed. 295; Bardes v. First Nat. Bank, 12 Am. B. R. 771, 122 Iowa, 443.

9. Keith v. Gettysburg Nat. Bank, 10 Am. B. R. 762, 23 Pa. Super. Ct. 14.

10. Deland v. Miller & Cheney Bank, 11 Am. B. R. 744, 119 Iowa, 368.

11. Benedict v. Deshel, 177 N. Y. 1, 11 Am. B. R. 20; In re Pfaffinger, 18 Am. B. R. 807.

12. Plummer v. Myers, 14 Am. B. R. 805, 137 Fed. 660; American Lumber, etc., Co. v. Taylor, 14 Am. B. R. 231, 137 Fed. 321.

ing all the bankrupt's personal property and given nine days before the adjudication and while he was insolvent, the creditor having ceased selling him goods some time before, pressed payment, had checks dishonored, etc., he had reasonable cause to believe that a preference was intended.[13] To make a payment of money by an insolvent within the four months a voidable preference under section 60b, as amended, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors, and the debtor himself must have intended the preference, but where the debtor, though in fact insolvent, and while continuing his business in the usual way, made such payment without a thought of disparagement of other creditors, and with confidence in his ability to pay them all, the creditor receiving such payment in the belief that the debtor, while paying him his debt in the common course of business, is acting without any purpose of giving special favor, cannot be held to have reasonable cause to believe that a preference was intended.[14]

§ 13. **Belief or knowledge of agent or attorney.**—Here the statute states the rule of law, *i. e.*, that any knowledge possessed by the agent of the creditor may be imputed to the latter;[15] but

13. Pittsburgh Plate Glass Co. v. Edwards (C. C. A.), 17 Am. B. R. 447, 148 Fed. 377. Mortgage on practically all of debtor's unincumbered property held, under the circumstances, to give the creditor reasonable cause to believe a preference was intended. Coder v. McPherson, 18 Am. B. R. 523, 152 Fed. 951. As to reasonable cause to believe that a preference was intended where the mortgagor of chattels retains possession until within the four months' period. See Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470; Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578.

14. In re First Nat. Bank of Louisville, 18 Am. B. R. 766 (C. C. A.); J. W. Butler Paper Co. v. Goembel, 16 Am. B. R. 26, 143 Fed. 295; Hardy v. Gray, 16 Am. B. R. 387, 144 Fed. 922; Stucky v. Mason Sav. Bank, 15 Am. B. R. 966, 108 U. S. 74; Grant v. National Bank, 97 U. S. 80.

15. In re Nassau, 15 Am. B. R. 793, 140 Fed. 912; Off v. Hakes (C. C. A.), 15 Am. B. R. 696, 142 Fed. 364; Babbitt v. Kelly, 9 Am. B. R. 335 (Mo. App.), 70 S. W. 384; Rogers v. Palmer, 102 U. S. 263; Sage v. Wynkoop, Fed. Cas. No. 12,215; Hooker v. Blount (Tex. Civ. App.), 97 S. W. 1083, knowledge of bank collecting note held imputable to owner of note.

not if, when acquired, the agent was acting in his own interest.[16] In order to make the words "or his agent acting therein" applicable, the person whose knowledge is to be imputed to another must be (a) an agent, and (b) he must be an agent authorized or empowered to act in respect of the preference, and (c) he must actually perform the duties of his agency in respect of the preference.[17] This general rule extends to such agents, as attorneys at law,[18] but not where the attorney acquired it while acting as attorney for the debtor.[19] It also extends to sub-agents,[30] but not, it seems, to attorneys of such sub-agents.[21]

§ 14. **Recovery.**—Where all the elements of a voidable preference as outlined in preceding sections exist, the property affected or its value may be recovered by the trustee,[22] although there are no creditors having claims in judgment and entitled to bring creditor's suit.[23] Only the trustee should sue, but, if the trustee refuses to sue, it has been held that a creditor may be permitted to do so for the benefit of all.[24] It seems to be a defect in the bankruptcy law that when one creditor or a combination of creditors at their own expense proceed and recover, they must share with others the fruits of their zeal.[25] The amendatory act of 1903, however, saves them their reasonable expenses,

16. Crooks v. People's Nat. Bank, 3 Am. B. R. 238, 46 App. Div. (N. Y.) 335, 61 N. Y. Supp. 604. See also Crooks v. People's Nat. Bank, 5 Am. B. R. 754, 72 App. Div. (N. Y.) 331, 76 N. Y. Supp. 92, 495, *aff'd* 177 N. Y. 68, 69 N. E. 228; Henry v. Allen, 151 N. Y. 1.

17. McNaboe v. Columbian Mfg. Co., 18 Am. B. R. 684 (C. C. A.), 153 Fed. 967.

18. In re Dunavant, 3 Am. B. R. 41, 96 Fed. 542; In re Ebert, 1 Am. B. R. 340; Rogers v. Palmer, 102 U. S. 263; Vogle v. Lathrop, Fed. Cas. No. 16,985; Brown v. Jefferson County Bank, 9 Fed. 258.

19. In re Ebert, *supra;* The Distilled Spirits, 11 Wall. (U. S.) 356; Mayer v. Hermann, Fed. Cas. No. 9,344.

20. Storrs v. City of Utica, 17 N. Y. 104.

21. Hoover v. Wise, 91 U. S. 308.

22. In re Ansley Bros., 18 Am. B. R. 457, 153 Fed. 983.

23. Mitchell v. Mitchell, 17 Am. B. R. 382, 147 Fed. 280.

24. In re Rothchild, 5 Am. B. R. 587; Glenny v. Langdon, 98 U. S. 20.

25. For an unsuccessful attempt to cure this defect, see In re McNamara, 2 N. B. N. Rep. 341.

a matter of little importance when there are assets.[26] The recovery must be against the person receiving the preference or to be benefited thereby. Where the proceeds of an execution sale have been paid to a judgment creditor, before the filing of an involuntary petition, the remedy is by action by the trustee against the creditor for having received a preference.[27] Since the amendatory act of 1903 all suits to avoid preferences may be brought either in the District Court or in the State court which would have had jurisdiction had not bankruptcy intervened. Such suits are analogous to judgment creditors' suits to set aside fraudulent conveyances, and are, therefore, properly within the equity jurisdiction of the court.[28] While not strictly necessary, good practice seems to require the trustee to ask permission to bring a suit to avoid a preference.[29] The practice in such suits is regulated by the rules applicable to the court in which they are brought. Actions to recover back property are clearly "matters in controversy" which are not "proceedings in bankruptcy,"[30] but matters outside bankruptcy proceedings proper,[31] and it is doubtful whether a jury trial can be had as a matter of right. The District Court does not try equity causes by jury; nor does the Circuit Court, in which, even in actions at law, a jury may be dispensed with by consent.[32] Careful pleading is essential. Valuable discussions on practice will be found in the cases cited in the note below.[33] The power of the bankruptcy court in a

26. Bankr. Act, 1898, section 64b(2), as amended.

27. In re Bailey, 16 Am. B. R. 289, 144 Fed. 214; Benjamin v. Chandler, 15 Am. B. R. 439, 142 Fed. 217.

28. Parker v. Black, 16 Am. B. R. 202, 143 Fed. 560, *aff'd* 18 Am. B. R. 15; Off v. Hakes (C. C. A.), 16 Am. B. R. 696, 142 Fed. 364; Pond v. New York Exchange Bank, 10 Am. B. R. 343, 124 Fed. 992; Lawrence v. Lowrie, 13 Am. B. R. 267; Wall v. Cox, 5 Am. B. R. 727, 101 Fed. 403. See chap. XXIV, *infra*.

29. In re Mersman, 7 Am. B. R. 46. But see Chism v. Bank, 5 Am. B. R. 56.

30. See Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163.

31. *Compare* In re Baudouine, 3 Am. B. R. 651, 101 Fed. 574, *rev'g* 3 Am. B. R. 55, 96 Fed. 536. And see In re Russell, 3 Am. B. R. 658, 101 Fed. 248.

32. Collier, Bankr., 6th ed., p. 260. See also Bankr. Act, 1898, section 19.

33. Crooks v. People's Nat. Bank, 3 Am. B. R. 238, 46 App. Div. (N. Y.) 335, 61 N. Y. Supp. 604; Martin

suit by a trustee under section 60b as amended, to set aside preferences, is not limited to the mere avoidance of the preferences and decreeing that the trustee recover the property or its value, but as a court of equity it may enforce the equitable rights of the defendant as against other creditors of the bankrupt, but such creditors not being parties to the suit, though in some sense represented by the trustee, are only conditionally bound by the decree therein.[33a]

§ 15. **Property or its value; damages; costs.**—The option of suing for the property or for its value rests with the trustee. These words are doubtless merely expressive of the rule of law. The judgment should include interest from the date of the preference.[34] In most cases, the value, i. e., damages, is demanded. This in effect satisfies the title which passed through the preference.[35] Suits to recover the property in specie should only be brought where it can be identified and is found in the hands of the person preferred. If a transfer be made within the four months period in part for a present consideration and in part payment of an antecedent indebtedness, a recovery may be had for the balance of the value of the property transferred after deducting the value of the present consideration.[36] Where the preference consists of suffering or permitting a judgment which has become a lien, the trustee has, it is thought, the option of suing under section 60b or under section 67e,[37] and perhaps, under section 70e.[38] Though the words " recover the property or its value "[39] do not exactly describe the purpose of such a suit where the transaction amounts to a preference, or the words " recover and reclaim the same by legal

v. Bigelow, 7 Am. B. R. 218; Brown v. Guichard, 7 Am. B. R. 515; Richter v. Nimmo, 6 Am. B. R. 680; Hicks v. Langhorst, 6 Am. B. R. 178; In re Nelson, 1 Am. B. R. 63, 98 Fed. 76; Chism v. Bank, *supra*.

33a. Allen v. McMannes, 19 Am. B. R. 276.

34. Traders' Nat. Bank v. Campbell, 14 Wall. (U. S.) 87.

35. *Compare* Winslow v. Clark, 47 N. Y. 261.

36. In re Manning, 10 Am. B. R. 500, 123 Fed. 181.

37. In re Mersman, 7 Am. B. R. 46; In re Adams, 1 Am. B. R. 94.

38. In re Gray, 3 Am. B. R. 647.

39. Section 60b.

proceedings,"[40] the purpose, where the transaction is a fraudulent transfer, the prayer of the bill or complaint may be easily adapted to the circumstances and may be to annul the lien or to recover possession of the property if seized on execution, or otherwise as the facts require. In any event, the pleading should show a demand and refusal to restore.[41] If the suit is for value, the judgment, if granted, should be for the worth of the property, not the amount realized under the execution sale by the preferential transferee.[42] He is also entitled to the gross proceeds.[43] Nor can the court allow by way of reduction of damages such amounts as the preferred creditor has paid to other creditors out of the avails of the property transferred.[44] If the latter includes exempt articles, their value cannot be included in the judgment.[45] Costs are regulated by the law and rules of practice applicable to the court where the suit is brought.[46]

§ 16. **Set-off of a subsequent credit.**—Prior to the amendments of 1903 there was a conflict of authority as to the meaning and application of the word " recoverable " in subdivision c of section 60. The question was whether this had reference to a voidable preference only or also to a mere preference in fact. If the former, then subsequent credits after a payment in due course of trade could not be set off, and the creditor not only found the door of the court shut to him if he refused to surrender, but the estate to be distributed increased by his goods sold, perhaps, on the strength of the confidence inspired by such payment. On the other hand, some courts gave a wide meaning to the subsection and declared it applicable even to the technical preference defined in subsection a. The authorities each way are cited in the note below.[47] The cases

40. Section 67a.

41. In re Phelps, 3 Am. B. R. 396; Schuman v. Flickenstein, Fed. Cas. No. 12,826.

42. Clarion Bank v. Jones, 21 Wall. (U. S.) 325.

43. Traders' Nat. Bank v. Campbell, 14 Wall. (U. S.) 87.

44. North v. House, Fed. Cas. No. 10,310.

45. Grow v. Ballard, Fed. Cas. No. 5,848; Brock v. Terrell, Fed. Cas. No. 1,914.

46. *Compare* Collins v. Gray, Fed. Cas. No. 3,013.

47. *Compare* Kimball v. Rosenham

which attempt to enlarge its meaning all turn on the manifest inequity of doing otherwise. Such inequity no longer exists. Only voidable preferences need now be surrendered. The word "recoverable" in subsection c is clearly to be connected with "recover" in subsection b. Standing alone, subsection a is nothing but an explanation or definition of a preference. The latter is not recoverable, unless the element of reasonable cause to believe appears. Only against a preference so recoverable then may subsequent credits granted the debtor be set off. The cases holding this doctrine are thought still to be in point.[48] It should, however, be noticed that to entitle to the set off, the credit must be "in good faith," "without security,"[49] and result in "property which becomes a part of the debtor's estate;" also, that any payments on the new credit must be deducted before the set-off is allowed. If the creditor acted in good faith, extended credit without security, and the money or property actually passed into the debtor's possession, he is entitled to the set-off, and he need not show that the money or property remained in the debtor's possession until his bankruptcy.[50] The rule stated in this subsection is an extension of that phrased in section 68a, where mutuality of debt is required.[51]

Co., 7 Am. B. R. 718; Morey Mfg. Co. v. Scheffer, 7 Am. B. R. 670, 114 Fed. 447; Gans v. Ellison, 8 Am. B. R. 153, 114 Fed. 734; Kahn v. Export, etc., Co., 8 Am. B. R. 157, 115 Fed. 290; McKey v. Lee, 5 Am. B. R. 267, 105 Fed. 923; In re Ryan, 5 Am. B. R. 396, 105 Fed. 760; In re Sechler, 5 Am. B. R. 579; In re Southern, etc., Co., 6 Am. B. R. 633, 111 Fed. 518; In re Thompson's Sons, 6 Am. B. R. 663, *aff'd* 7 Am. B. R. 214, 112 Fed. 651; In re Soldosky, 7 Am. B. R. 123, 111 Fed. 511; with *contra*, In re Christensen, 4 Am. B. R. 202, 101 Fed. 812; In re Arndt, 4 Am. B. R. 773, 104 Fed. 234; In re Keller, 6 Am. B. R. 334; In re Oliver, 6 Am. B. R. 626, 109 Fed. 784; In re Steers Lumber Co., 6 Am. B. R. 315, 110 Fed. 738, *aff'd* 7 Am. B. R. 332, 112 Fed. 406; In re Bailey, 7 Am. B. R. 26; In re Jones, 10 Am. B. R. 513, 123 Fed. 128. See also In re Topliff, 8 Am. B. R. 241, 114 Fed. 323, containing a summary of cases *pro* and *con*.

48. Collier, Bankr., 6th ed., p. 491.

49. *Compare* In re Tanner, 6 Am. B. R. 196.

50. Kaufman v. Tredway (U. S. Sup. Ct.), 12 Am. B. R. 682; In re Morrow, 13 Am. B. R. 392.

51. See an effort to connect the two in In re Ryan, 5 Am. B. R. 396, 105 Fed. 760.

§ 17. **Preferences to bankrupt's attorney; subs. d.**—The services referred to in subdivision d of section 60 are those "to be rendered," which are paid for in advance "in contemplation of the filing of a petition by or against" the bankrupt. The compensation for these services depends both as to payment and amount on the acts of the parties, and what the statute does is to recognize the validity of the payment, but subjects the reasonableness of the amount to the supervision of the court.[52] The attorney for the bankrupt is entitled to compensation for his services out of the estate.[53] The law gives him the option, either of collecting his compensation in advance or of asking its allowance, as entitled to priority, under section 64b(3); with, however, this exception, that, if he elects to pursue the former method, the court has the power to inquire into the payment, and the trustee to recover any excess for the benefit of the estate. This re-examination has been held merely a part of the proceeding and therefore not affected by the now abrogated doctrine that suits to recover preferences must be brought in the State courts.[54] A suit to recover a preference under this subdivision will rarely be necessary, although an order to restore made in a summary proceeding, if not obeyed, is perhaps not now a foundation for a proceeding in contempt.[55] Cases arising under this subsection are cited in the note below.[56]

52. Pratt v. Bothe, 12 Am. B. R. 529, 130 Fed. 670; Furth v. Stahl, 10 Am. B. R. 442, 205 Pa. St. 439.

53. Bankr. Act, 1898, section 62.

54. In re Habegger, 15 Am. B. R. 198, 71 C. C. A. 607, 139 Fed. 123; In re Lewin, 4 Am. B. R. 632.

55. Comingor v. Louisville Trust Co., 184 U. S. 18, 7 Am. B. R. 421. *Compare* In re Sims, Fed. Cas. No. 12,888.

56. In re Corbett, 5 Am. B. R. 224, 104 Fed. 872; In re Lewin, 4 Am. B. R. 632; In re Kross, 3 Am. B. R. 187, 96 Fed. 816; In re Tollett, 2 N. B. N. Rep. 1096; In re Goodwin, 2 N. B. N. Rep. 445.

CHAPTER XXIV.

POWERS AND DUTIES OF TRUSTEES AS TO PROPERTY TRANSFERRED IN FRAUD OF CREDITORS.

Section 1. Title to property—Statutory provision.
2. Scope of section.
3. When title vests. Subs. a.
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6. Effect of a general assignment.
7. Property which might have been transferred or levied upon.
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16. Burdensome property.
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18. Exemptions in property fraudulently transferred or concealed.
19. Transfers fraudulent under State laws may be avoided by trustee. Subs. e.
20. The saving clause.
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22. Jurisdiction of courts—Statutory provision.
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24. Jurisdiction of suits to recover property.
25. Jurisdiction of the Circuit Courts. Subs. a.
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28. Summary jurisdiction.
29. Effect of auxiliary remedies.
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31. Suits by and against bankrupt—Statutory provision.
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33. Stays of suits begun after filing of petition.
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35. Of suits or proceedings *in rem*.
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Section 39. Practice.
40. Papers and procedure.
41. Duration of stays.
42. Continuance of suits—Where bankrupt is defendant.
43. Where bankrupt is plaintiff.
44. Practice.
45. Limitation on suits by trustee and when it begins to run.

Section 1. **Title to property; statutory provision.**—The Bankruptcy Act of 1898 provides as follows:

§ 70. *Title to property.*—(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided,* That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

(b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal prop-

erty shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

(c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

(d) Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**

(f) Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

§ 2. **Scope of section.**—This section of the Bankruptcy Law is chiefly important (a) for its provisions fixing what property of a bankrupt vests in his trustee and the time when it vests, and (b) as adopting as a part of the bankruptcy system the respective State statutes providing a remedy against fraudulent transfers. It also includes nearly all that is in the law relative to the method of selling a bankrupt's property, provides for the appointment and reports of appraisers and certain minor matters of practice, which have no relation to the subject of this work. The matters first named only will, therefore, be considered.

* This sentence was added by the amendatory act of 1903.

§ 3. **When title vests; subs. a.**—Under the previous law, the trustee's title vested by relation as of the date of the commencement of the proceeding.[1] This cast doubt on the validity of even *bona fide* transactions between petition filed and adjudication. The words "as of the date he was adjudicated a bankrupt" seem to have been inserted to meet this difficulty. They are not antagonistic to the words found later in subdivision (5). The former refer to the time of vesting; the latter to what vests.[2] The filing of an involuntary petition does not, *ipso facto,* take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the adjudication. The remedy of the petitioning creditors, in case this freedom to trade is abused, is by the appointment of a receiver under section 2(3)(15), or an appropriate proceeding under section 3e or section 69.[3] It follows that, under the present law, the title remains in the bankrupt at least to the date of the adjudication; perhaps even to the date of the appointment of the trustee.[4] Prior to adjudication, in the absence of fraud, it may be transferred; but, being liable to be divested, no permanent lien can attach to it.[5] When, however, the trustee is appointed, his title goes back by relation to the date of the commencement of the proceeding.[6] The trustee takes no title to exempt property; the right

1. In re Rosenberg, Fed. Cas. No. 12,055; in re Wynne, Fed. Cas. No. 18,117; Markson v. Heaney, Fed. Cas. No. 9,098. See also cases cited under note 15, *infra.*

2. In re Elmira Steel Co., 5 Am. B. R. 484, 109 Fed. 456; In re Burka, 5 Am. B. R. 12, 104 Fed. 326; In re Pease, 4 Am. B. R. 578.

3. In re Laplum Condensed Milk Co., 16 Am. B. R. 729, 145 Fed. 1,013; American Trust Co. v. Wallis (C. C. A.), 11 Am. B. R. 360.

4. Though, perhaps, the better view is that, after adjudication, it is in *custodia legis.* Keegan v. King, 3 Am. B. R. 79, 96 Fed. 758; March v. Heaton, Fed. Cas. 9,061; In re Rosenberg, *supra.* See In re Duncan, 17 Am. B. R. 283, the property is in *custodia legis,* after the filing of the petition and before adjudication.

5. State Bank of Chicago v. Cox (C. C. A.), 16 Am. B. R. 32, 143 Fed. 91; In re Engle, 5 Am. B. R. 372, 105 Fed. 893. *Compare* In re Corbett, 5 Am. B. R. 224, 104 Fed. 872.

6. In re Appel, 4 Am. B. R. 722, 103 Fed. 931. See also In re Cramond, 17 Am. B. R. 22, the amount due to a bankrupt upon a paving contract with a city, when he files his

to exemptions is to be determined as of the date of the adjudication.[7] Illustrative cases under the former law, which may be of some value are cited in the note below.[8]

§ 4. **Nature of trustee's title in general.**—Stated broadly, the rule is that the trustee takes all the property of the bankrupt, whether in possession or in action, at the time the petition was filed,[9] subject to the rule that he is vested by operation of law with the title as of the date of the adjudication.[10] But he acquires title only to that which the bankrupt had at the time the petition was filed. Property not then owned but acquired before the adjudication,[11] and property acquired after it and before the discharge,[12] does not vest in the trustee, but becomes the bankrupt's, clear of all the claims of creditors, save those after the commencement of the proceeding or those who, for statutory reasons, are not

petition, is properly paid to his trustee; Matter of Hooks Smelting Co., 15 Am. B. R. 83, 138 Fed. 954, the trustee is entitled to the combination of a safe belonging to the bankrupt t the time of filing the petition.

7. Matter of Fletcher, 16 Am. B. R. 491.

8. Chapman v. Brewer, 114 U. S. 158; Connor v. Long, 104 U. S. 228; Howard v. Compton, Fed. Cas. No. 6,758; Babbett v. Burgess, Fed. Cas. No. 693; Miller v. O'Brien, Fed. Cas. No. 9,586; In re Lake, Fed. Cas. No. 7,992; Stevens v. Bank, 101 Mass. 109.

9. In re Great Western Mfg. Co. (C. C. A.), 18 Am. B. R. 259, 152 Fed. 123; In re Pease, 4 Am. B. R. 578; In re Burka, 5 Am. B. R. 12. See also Matter of Sherman Mfg. Co., 15 Am. B. R. 740; McFarland Carriage Co. v. Solanas, 6 Am. B. R. 221, 108 Fed. 532; In re Meyer, 5 Am. B. R. 593, 106 Fed. 828.

10. In re Fulton, 18 Am. B. R. 591, 153 Fed. 664; In re Youngstrom (C. C. A.), 18 Am. B. R. 572, 153 Fed. 98; Hiscock v. Varick Bank, 206 U. S. 28, 51 Fed. 945, a pledgee's power of sale may be exercised after filing of the petition and before adjudication.

Wages earned after adjudication do not pass to trustee. In re Karns, 16 Am. B. R. 841, 148 Fed 143. See also In re Home Discount Co., 17 Am. B. R. 168, 147 Fed. 538.

11. In re Harris, 2 Am. B. R. 359; Sibley v. Mason (Mass.), 81 N. E. 87. Where testator died in the morning of the day on which a legatee filed a petition and was adjudicated a bankrupt, the legacy vests in his trustee, In re McKenna, 15 Am. B. R. 4, 137 Fed. 611; otherwise, where legacy takes effect after adjudication. In re Woods, 13 Am. B. R. 240, 133 Fed. 82.

12. In re Stoner, 5 Am. B. R. 402, 105 Fed. 752; In re Rennie, 2 Am. B. R. 182.

affected by the discharge.[13] After the adjudication and before the appointment of a trustee or receiver, the bankrupt still retains title to his property so that he may maintain an action on a chose in action, and in such a case, a recovery being awarded against the defendant, the latter may protect himself against liability to another suit by the trustee by application to the bankruptcy court.[14] It is well settled that the trustee takes not as an innocent purchaser, but as the debtor had it at the time of the petition subject to all valid claims, liens, and equities.[15] In all cases unaffected by fraud, and wherein no attachments or executions have been levied upon the bankrupt's property, the trustee is vested, by operation of law,[16] with the same but no higher or better title than the bankrupt had.[17] A trustee in bankruptcy takes title to the bankrupt property subject to all the equities imposed upon it which are not invalid as to creditors.[18] The trustee takes subject to the rights

13. In re West, 11 Am. B. R. 782, 128 Fed. 205.

14. Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 16 Am. B. R. 692, 78 N. E. 574.

15. Chattanooga Nat. Bank v. Rome Iron Co., 4 Am. B. R. 441, 102 Fed. 755. The valid liens referred to are those valid as to creditors, In re Cramond, 17 Am. B. R. 22; Receivers, etc., v. Staake, 13 Am. B. R. 281, *aff'd* 202 U. S. 141, 15 Am. B. R. 639. *Compare* In re Standard Laundry Co., 7 Am. B. R. 254, 112 Fed. 126; Crosby v. Miller, 16 Am. B. R. 805; In re Kolin, 13 Am. B. R. 531, 134 Fed. 557; In re Plattsville F. & M. Co., 17 Am. B. R. 291; Thompson v. Fairbanks, 13 Am. B. R. 437, 445, 196 U. S. 516, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act.

16. In involuntary proceedings the passage of title from the bankrupt to the trustee is by operation of law and is neither a voluntary assignment nor a transfer under execution or other legal process. Held not to work forfeiture of a lease. Gazlay v. Williams (C. C. A.), 17 Am. B. R. 249, 147 Fed. 678.

17. In re Great Western Mfg. Co. (C. C. A.), 18 Am. B. R. 259, 152 Fed. 123; In re Newton & Co. (C. C. A.), 18 Am. B. R. 567, 153 Fed. 841; Atchison, etc., R. Co. v. Hurley (C. C. A.), 18 Am. B. R. 396, 153 Fed. 503; In re Franklin, 18 Am. B. R. 218, 151 Fed. 642; In re Blake (C. C. A.), 17 Am. B. R. 668, 150 Fed. 279; Doucette v. Baldwin (Mass.), 80 N. E. 444.

18. In re Chantler Cloak & Suit Co., 18 Am. B. R. 498, 151 Fed. 952. Property held by bankrupt as bailee does not pass to the trustee. In re

of the pledgor property held by the bankrupt as pledgee.[19] On a bankrupt's adjudication the debtor's entire non-exempt estate is in legal contemplation brought into *custodia legis* and appropriated to the payment of his debts as effectually as if taken in execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt.[20] Under certain circumstances, however, the trustee is a representative of the creditors, rather than the bankrupt, in relation to the property of the estate, and he may exercise rights and enforce a title that the bankrupt himself could neither enforce nor exercise.[21] Money paid to the bankrupt before adjudication under a mistake of fact is impressed with a constructive trust, which follows it into the hands of the trustee.[22] Other cases under the present law, in which the general rule above stated has been applied, are cited in the note below.[23] Documents relating to the bankrupt's property include deeds, contracts, securities, bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to the bankrupt's business.[24] Patents,

Smith & Nixon Piano Co. (C. C. A.), 17 Am. B. R. 636, 149 Fed. 111.

19. In re Bolling, 17 Am. B. R. 399, 147 Fed. 786. In the absence of evidence as to the creditors represented by the trustee, he took subject to agreement between the bankrupt and one who sold him goods that an absolute sale should be deemed a shipment or consignment. Buckwalter Stove Co. v. Stratton, 118 App. Div. (N. Y.) 915, 103 N. Y. Supp. 118.

20. In re Youngstrom (C. C. A.), 18 Am. B. R. 572, 153 Fed. 98.

21. In re Shaw, 17 Am. B. R. 196, 146 Fed. 273, the estoppel of a bankrupt to deny the validity of a lien on his property does not affect his trustee, where such lien was voidable by his creditors; Hosmer v. Tiffany, 17 Am. B. R. 318, 115 App. Div. (N. Y.) 303, 100 N. Y. Supp. 797, in an action by the trustee to set aside a transfer by the bankrupt to his wife in contemplation of their marriage, the trustee is entitled to prove that the "wife" had a husband living, and was incapable of entering into the marriage contract, thereby showing that there was no consideration for the transfer.

22. Matter of Berry & Co., 16 Am. B. R. 564, 146 Fed. 623.

23. Spencer v. Duplan Co., 7 Am. B. R. 563, 112 Fed. 638; Morton v. Lumber Co., 5 Am. B. R. 850; In re Goldman, 4 Am. B. R. 100, 102 Fed. 122; Marden v. Phillips, 4 Am. B. R. 56.

24. In re Hess, 14 Am. B. R. 539, 136 Fed. 988.

copyrights, and trade-marks vest in the trustee, irrespective of the statute.[25] But where, though application has been made, the letters patent have not yet been granted, the trustee takes no interest.[26] Subdivision 3 is expressive of a general rule of law. A power which is beneficial to a bankrupt donee vests in his trustee; not so a power in trust.[27] The plain purpose of the Bankruptcy Act is that the title and right to all things which do not fall within the vesting words of section seventy shall remain in the bankrupt. The studied enumeration of the particular rights and things which the bankrupt is required to surrender takes all other rights and things, not named, without the definition thus fixed, of the "property" which the statute intends to take from the bankrupt or to pass to his creditors.[28]

§ 5. **Property transferred in fraud of creditors.**—All the property of a bankrupt debtor transferred by him in fraud of his creditors passes to his trustee in bankruptcy. The Bankruptcy Law, section 70a(4), provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt.[29] This is the converse of the doctrine that trustees take title subject to equities; they also take title to all property which at any time has been fraudulently conveyed by the bankrupt,[30] and in which, therefore, the creditors have

25. An assignee of a copyright vests title in the assignee, which passes to his trustee in bankruptcy. In re Hawley-Dreser Co., 13 Am. B. R. 94, 132 Fed. 1002. *Compare* In re McBride, 12 Am. B. R. 81, 132 Fed. 285.

26. In re McDonnell, 4 Am. B. R. 230; In re Dann, 12 Am. B. R. 27, 129 Fed. 495.

27. *Compare* Property which might have been transferred or levied upon, sec. 7, *infra*.

28. In re Home Discount Co., 17 Am. B. R. 168, 147 Fed. 538.

29. Bankr. Act, 1898, sec. 70a(4). See In re Tollett, 5 Am. B. R. 305, 105 Fed. 425; Marden v. Phillips, 4 Am. B. R. 566, 103 Fed. 196; In re Brown, 1 Am. B. R. 107, 91 Fed. 358.

30. In re Yukon Woolen Co., 2 Am. B. R. 805, 96 Fed. 326; In re McNa-

equities. The trustee is vested not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or incumbered by him, and he may assail in their behalf all of such transfers and incumbrances to the same extent as though the debtor had not been declared a bankrupt.[31] The fraudulent transfers here specified are not only those made within the four months period prior to the filing of the petition but those made at any other time. The title vests regardless of the time of the fraudulent transfer.[32] Where after the filing of an involuntary

mara, 2 Am. B. R. 566. See English v. Ross, 15 Am. B. R. 370, 140 Fed. 630.

31. In re Butterwick, 12 Am. B. R. 536, 131 Fed. 371; In re Rodgers (C. C. A.), 11 Am. B. R. 79, 125 Fed. 169.

That title has passed to the fraudulent grantee is immaterial.—Lord v. Seymour, 85 App. Div. (N. Y.) 617, 83 N. Y. Supp. 88, *aff'd* 177 N. Y. 525, 69 N. E. 1126.

The right to avoid conveyance is exclusive in the trustee.—Annis v. Butterfield, 99 Mo. 181, 58 Atl. 898; Mfg. Co. v. Norden, 67 N. J. L. 493, 51 Atl. 454.

Trustee may avoid any transfer.—Johnson v. Cohn, 30 Misc. Rep. (N. Y.) 189, 79 N. W. Supp. 139.

Judgment not a condition precedent to suit.—Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; Hood v. Bank, 3 Neb. (Unoff.) 432, 447, 91 N. W. 701, 706.

Trover will lie to recover personal property conveyed in fraud of creditors. Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046.

32. In re Gray, 3 Am. B. R. 647, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp. 618, wherein the court, in construing the provisions of sections 67e and 70e, says: "It will be observed that there is here no four months' limitation, and it is plain that the limitation which runs through the act in connection with frauds upon the system was at this point advisedly omitted. The purpose of the two sections is quite apparent. One covers frauds upon the act, whether actual or constructive, committed within four months; the other actual or common law frauds exclusively, committed at any time. . . . When, however, the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditors' common law right. Such of these anterior transfers as any creditor might have avoided, he may avoid. Such as no creditor could have avoided, he cannot avoid." See also Hillyer v. Le Roy, 84 App. Div. (N. Y.) 129, 82 N. Y. Supp. 80; In re Chaplin, 8 Am. B. R. 121, 115 Fed. 162; Friedman v. Verchofsky, 105 Ill. App. 414.

petition and before adjudication a creditor attaches the bankrupt's assets, the trustee may recover the proceeds of the attachment, even though they were less than the percentage to which the creditor would have been entitled in the bankruptcy proceeding.[33] The trustee's remedy when title is claimed adversely is, as has been seen, usually a suit in the proper court. This subdivision should be read in connection with section 23, section 67e and section 70e.[34]

§ 6. **Effect of a general assignment.**—A general assignment, being not only a fraud on the act[35] but an act of bankruptcy, seems to stand on a different footing from fraudulent transfers *per se*. The assignment being void by operation of law,[36] no title passes, and the general assignee does not become an adverse claimant, but at most an agent of the assignor. Property of the bankrupt in his possession or that of his agent can, therefore, be reached summarily by proceedings in the bankruptcy court.[37]

§ 7. **Property which might have been transferred or levied upon.**—This subdivision probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision (6). All of the other subdivisions are silent as to time. Here, however, there is a distinct reference to "the filing of the petition," and the idea expressed in these words is doubtless implied as to the enumerated kinds of property. The words here are very general and seem to include every vested right and interest attaching to or growing out of property. Thus the property vesting in the trustee is what the bankrupt might have transferred prior to filing the petition, which vests in the trustee at the date of the adjudication.[38] If the property in question could have been (1) transferred by, or (2) levied on and

33. State Bank of Chicago v. Cox, 16 Am. B. R. 32, 143 Fed. 91

34. Collier, Bankr., 6th ed., p. 591.

35. In re Gray, 3 Am. B. R. 647. See also section 23 of Bankr. Act.

36. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

37. Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623.

38. In re Burka, 5 Am. B. R. 12, 104 Fed. 326; Ellison v. Ganiard, 167 Ind. 471, 79 N. E. 450.

sold under judicial process against, the bankrupt, it passes to the trustee; if, not, it does not. Whether the property has a market value is immaterial.[39] It must appear that the property in possession of the bankrupt is subject to claims or liens valid as against his creditors, otherwise it passes to his trustee.[40] Where under a State statute a plaintiff's interest in a pending action is assignable, and is of such a character as to enable his creditors to obtain a benefit therefrom upon an administration of his estate, such interest has been held to be property within the meaning of this subdivision rather than "a right of action," under subdivision (6).[41] The language of clause (5) is sufficiently broad to include not only the property belonging to the bankrupt absolutely; but also such property the title to which is, under a State law, held to be in him, as to his creditors.[42] Where a broker purchases stock for a customer and retains the stock as security for the amount due thereon, the relationship of pledgor and pledgee exists between the parties; if the broker is adjudicated a bankrupt the owner of the stock is entitled to a delivery thereof upon payment of the amount due.[43] Cases of a miscellaneous character will be found in the note below.[44] Section

39. Kizsie v. Winston, Fed. Cas. 7,835.

40. In re Miller, 14 Am. B. R. 439. And see Hewitt v. Berlin Machine Works, 11 Am. B. R. 709, 194 U. S. 296.

41. First Nat. Bank v. Staake, 202 U. S. 141, 15 Am. B. R. 639; Cleland v. Anderson (Neb. Sup.), 10 Am. B. R. 429.

42. In re Tweed, 12 Am. B. R. 648; Chesapeake Shoe Co. v. Seldner, 10 Am. B. R. 466.

43. In re Berry (C. C. A.), 17 Am. B. R. 467, 149 Fed. 176; In re Bolling, 17 Am. B. R. 399; Richardson v. Shaw, 16 Am. B. R. 842, 147 Fed. 659; Hutchinson v. Le Roy, 8 Am. B. R. 20, 113 Fed. 212; In re Swift, 7 Am. B. R. 374, 112 Fed. 315.

44. As to the property of a partnership: In re Rudnick, 4 Am. B. R. 531, 102 Fed. 750; In re Groetzinger, 6 Am. B. R. 399. As to mortgaged realty: In re Kellogg, 7 Am. B. R. 623, 113 Fed. 120; affirmed 10 Am. B. R. 7, 121 Fed. 333. As to the proceeds of a sale under a void execution still in the hands of the sheriff: In re Easley, 1 Am. B. R. 715, 93 Fed. 419; In re Kenney, 2 Am. B. R. 494, 95 Fed. 427, 3 Am. B. R. 353, 97 Fed. 554, affirmed, 5 Am. B. R. 355, 105 Fed. 897. *Compare* also In re Francis Valentine Co., 2 Am. B. R. 188, 93 Fed. 953; In re Kimball, 3 Am. B. R. 161, and Levor, Trustee, v Seiter, 8 Am. B. R. 459. As to property vested in a receiver in the State court: In re Meyers & Co., 1

70a(5) is inapplicable to property held by a bankrupt under a contract for conditional sale. The "property which prior to the filing of the petition he could by any means have transferred" is property which he could have transferred lawfully on the same terms that he transfers it by law to the trustee. It does not include property of a third party which he was authorized to transfer only on condition that he sold it for value, or on condition that he sold it and held the proceeds for its owner.[44a]

§ 8. **Remainders and interests in trust.**—Vested remainders,[45] even if contingent, pass to a trustee;[46] but do not where the con-

Am. B. R. 347; In re Tyler, 5 Am. B. R. 152, 104 Fed. 778; Hanson v. Stephens, 11 Am. B. R. 172 (Ga. Sup.). As to exercise of right to redeem: In re Goldman, 4 Am. B. R. 100, 102 Fed. 122; In re Novak, 7 Am. B. R. 27, 111 Fed. 161. As to unpaid legacy: In re May, 5 Am. B. R. 1. As to rents: In re Cass, 6 Am. B. R. 721; In re Dole, 7 Am. B. R. 21, 110 Fed. 926; In re Oleson, 7 Am. B. R. 22, 110 Fed. 796. As to a wife's interest in property vested in her husband: In re Garner, 6 Am. B. R. 596. *Compare* In re Rooney, 6 Am. B. R. 478. As to title of stocks bought by broker for customer: In re Swift, 7 Am. B. R. 374, 112 Fed. 215. As to stocks pledged by bankrupt pledgee: Hutchinson v. Le Roy, 8 Am. B. R. 20, 113 Fed. 212. As to delivery sufficient to pass title as against debtor's trustee: Allen v. Hollander, 11 Am. B. R. 753, 128 Fed. 159. As to proceeds of property belonging to another sold by a bankrupt: In re Wood & Malone, 9 Am. B. R. 615, 121 Fed. 599. As to shares of stock fraudulently carried in the name of the bankrupt as trustee, and in the names of other parties for the purpose of concealment: Fowler v. Jenks, 11 Am. B. R. 255 (Minn. Sup.). Right of trustee of bankrupt tenant to crops under lease: In re Luckenbill, 11 Am. B. R. 455, 127 Fed. 984. As to money paid upon stock subscription, to be returned on certain conditions: In re North Carolina Car Co., 11 Am. B. R. 488, 127 Fed. 178. As to bankrupt's interest in an unadministered estate: Osmun v. Galbraith, 9 Am. B. R. 339 (Mich. Sup.). Miscellaneous: In re Cobb, 3 Am. B. R. 129, 96 Fed. 821; In re Hanna, 5 Am. B. R. 127; In re Swift, 5 Am. B. R. 232; Duplan Silk Co. v. Spencer, 8 Am. B. R. 367, 115 Fed. 689; *rev'g* s. c., 7 Am. B. R. 563.

44a. In re Dunlop, 19 Am. B. R. 361.

45. In re McHarry, 7 Am. B. R. 83, 111 Fed. 498; In re Woodard, 2 Am. B. R. 339, 95 Fed. 260. *Compare* In re Mosier, 7 Am. B. R. 268, 112 Fed. 138.

46. In re Twaddell, 6 Am. B. R. 539, 110 Fed. 145; In re St. John, 5 Am. B. R. 190, 105 Fed. 234; In re Shenberger, 4 Am. B. R. 487, 102 Fed. 978.

tingency is one both of time of vesting and of person.[47] Where the interest of the bankrupt depends on the exercise of a discretionary power in trust, it does not pass to his trustee.[48] Under the New York statute[49] the surplus income derived from a trust to receive and apply the rents and profits of real property is inalienable and does not pass to the trustee of the bankrupt beneficiary.[50] Where, though title is in the bankrupt, another is the real party in interest under the doctrine of resulting trust, the trustee in bankruptcy will be directed to convey to the real owner.[51] Where the bankrupt mingles trust funds with his own so that their identity is lost, the beneficiaries must share *pari passu* with the creditors.[52] But if there has been no mingling, the trustee of a bankrupt estate takes no title, though he has the right to possession and a quasi-interest until the beneficiaries prove their right.[53] Trust funds belonging to the bankrupt,[54] and life

47. In re Gardner, 5 Am. B. R. 432; In re Hoadley, 3 Am. B. R. 780.

48. In re Wetmore, 4 Am. B. R. 335, 102 Fed. 290, *aff'd* 6 Am. B. R. 210, 108 Fed. 520. See also s. c. on application for discharge, 3 Am. B. R. 700, 99 Fed. 703. *Compare* In re Ehle, 6 Am. B. R. 476.

49. N. Y. Real Property Law, section 78.

50. McNaboe v. Marks, 16 Am. B. R. 767; Butler v. Baudoine, 16 Am. B. R. 238n, 84 App. Div. (N. Y.) 215, *aff'd* 177 N. Y. 530. *Contra*, In re Baudoine, 3 Am. B. R. 651, 101 Fed. 574; Brown v. Barker, 8 Am. B. R. 450. *Compare* Smith v. Belden, 6 Am. B. R. 432, for method of reaching such surplus.

51. In re Davis, 7 Am. B. R. 258. See also In re Coffin, 16 Am. B. R. 682, 146 Fed. 181; In re Taft, 13 Am. B. R. 417, 133 Fed. 511.

52. In re Kurtz, 11 Am. B. R. 129, 125 Fed. 992; In re Mulligan, 9 Am. B. R. 8, 116 Fed. 715; In re Marsh, 8 Am. B. R. 576, 116 Fed. 396; In re Richard, 4 Am. B. R. 700, 104 Fed. 792. But where money is entrusted to the bankrupt for safe keeping, and is deposited by him to his credit, it may be claimed by the owner out of the balance of such deposit coming into the hands of the trustee, although it cannot be specifically identified, it appearing that at all times the bankrupt's account at the bank exceeded the amount entrusted to him. In re Royea, 16 Am. B. R. 141, 143 Fed. 182.

53. In re Cobb, 3 Am. B. R. 129, 96 Fed. 821. If the trust is coupled with an interest, he becomes vested with the interest. Walker v. Siegel, Fed. Cas. 17,085.

54. Merrill v. Hussey, 101 Me. 439, 64 Atl. 819, where a father uses money of his sons without their consent to buy a farm, and thereafter sells the farm at a profit, the profits when invested become an asset in the hands of the trustee.

interests vested in him,[55] are deemed property passing to the bankrupt's trustee.[55] Reference must usually be had to the State statutes and decisions. Cases under former laws are cited in the note below.[56]

§ 9. **Dower and curtesy rights.**—Here also the State law controls. It is the general rule that, if the doweress is the bankrupt and her estate is vested, the trustee takes her interest;[57] conversely, if her interest is still inchoate, it does not pass. So also of the husband's curtesy; if vested, it passes; if merely initiate, it does not.[58] Where, however, the husband, not the wife, is the bankrupt, her inchoate interest is, in most States, sufficiently vested to endure, and the husband's title passes to the trustee subject thereto;[59] if the husband dies after his bankruptcy, she is entitled to the same interest she would have taken had he died before it.[60] On the other hand, where the wife is the bankrupt, the husband is not entitled to have his curtesy initiate admeasured. Upon the death of a bankrupt the court in which the order of adjudication was entered has exclusive jurisdiction to determine his widow's right of dower out of all the lands of which the husband died seized, including those located in a State other than the State of the bankrupt's residence.[61] Cases collaterally valuable are cited in the note below.[62]

55. Adair v. Adair's Trustee, 30 Ky. L. R. 857, 99 S. W. 925.

56. Nicholas v. Eaton, 91 U. S. 716; Sanford v. Lackland, Fed. Cas. No. 12,312; Durant v. Hospital, etc., Co., Fed. Cas. No. 4,188.

57. *Compare* In re Watterson, 95 Pa. St. 312.

58. Matter of Russell, 13 Am. B. R. 24; Hesseltine v. Prince, 2 Am. B. R. 600, 95 Fed. 802.

59. In re Forbes, 7 Am. B. R. 42; In re Schaeffer, 5 Am. B. R. 248, 104 Fed. 973; Porter v. Lazear, 109 U. S. 84; Matter of Hawkins, 9 Am. B. R. 598. But see Kelly v. Strange, Fed. Cas. No. 7,676.

60. In re Hester, Fed. Cas. No. 6,437. But see Bosteck v. Jordan, 54 Tenn. 370. The rule is different under the Arkansas statute, In re McKenzie (C. C. A.), 15 Am. B. R. 679, 142 Fed. 383.

61. Hurley v. Devlin, 18 Am. B. R. 627.

62. In re Garner, 6 Am. B. R. 596; In re Rooney, 6 Am. B. R. 478; Hawk v. Hawk, 4 Am. B. R. 463, 102 Fed. 679.

§ 10. **Licenses, franchises, and personal privileges.**—A bankruptcy, even if voluntary, is not a breach of a covenant not to assign a lease or other property right.[63] The trustee of a bankrupt tenant is therefore entitled to the leased premises for the remainder of the term.[64] A contract between a publisher and an author whereby the former undertakes to publish and market literary productions of the latter, is not assignable;[65] nor is a contract with a person for the manufacture by him of a particular commodity requiring special skill of the manufacturer.[66] The same rule would be held to apply to a contract for personal services involving trust and confidence, as one between an insurance company and its agent, although under it the agent is entitled to commissions or renewal premiums on policies written by him before his bankruptcy.[67] Whether a franchise or a license passes to the trustee on the bankruptcy of its owner depends usually on the terms of the instrument creating it, or, if that is silent, on whether it in its nature calls for personal skill or discretion.[68] It is well settled that a bankrupt's interest in a license to sell liquors passes to his trustee;[69] but this question is dependent upon the statute under which the license is issued.[70] It has been held that the bankrupt may be ordered to transfer a seat in a stock exchange to his trus-

63. Perry v. Lorillard, 61 N. Y. 214; Starkweather v. Cleveland Ins. Co., 2 Abb. (U. S.) 67, Fed. Cas. No. 13,308; In re Bush, 11 Am. B. R. 415, 126 Fed. 878, a tenant's covenant not to assign his lease without the landlord's permission in writing does not apply to an adjudication of the tenant's bankruptcy. The English rule is different. Doe v. Bevan, 3 Maule & S. 353; Doe v. Smith, 5 Taunt. 795; Dommett v. Bedford, 3 Ves. 148.

64. In re Adams, 14 Am. B. R. 23.

65. Matter of McBride, 12 Am. B. R. 81.

66. Jetter Brewing Co. v. Scollan, 15 Am. B. R. 300, 111 App. Div. (N. Y.) 925.

67. Matter of Wright, 16 Am. B. R. 778.

68. People v. Duncan, 41 Cal. 507; Stewart v. Hargrove, 23 Ala. 429; Parsons on Contracts, Part II, chapter 12, section 9.

69. In re May, 5 Am. B. R. 1; In re Becker, 3 Am. B. R. 412, 98 Fed. 407; Fisher v. Cushman, 4 Am. B. R. 646, 103 Fed. 860, *aff'g* In re Fisher, 3 Am. B. R. 406, 98 Fed. 88; In re Brodbine, 2 Am. B. R. 53, 93 Fed. 643. *Compare* In re Emrich, 4 Am. B. R. 89, 101 Fed. 231.

70. In re McArdle, 11 Am. B. R. 358, 126 Fed. 442, in which case the court applied the case of In re Fisher, *supra*, as limiting the right of a trustee to realize upon the value of a

tee.[71] But the question as to whether a seat in a stock exchange belongs to a bankrupt and is, therefore, to be administered as part of his assets by the trustee depends upon the facts in each particular case.[72] Special property, by way of lien, in securities deposited as a pledge, is not property within the meaning of the act which passes to the trustee.[73]

§ 11. **Life insurance policies.**—The test as to life insurance policies is: was the interest of the insured transferable or subject to levy? If the policy had an expressed cash surrender value, payable to the bankrupt, and enforceable by him, it is, of course, within the proviso, and unless the amount thereof is paid or secured as therein provided, it passes to the trustee.[74] This is so, even without the consent or assignment of the beneficiary, and the bankrupt may be ordered to execute any necessary papers to accomplish the

liquor license to a case where the granting authority gave its assent thereto; it was there held that a bankruptcy court should not enforce the claim of a mortgagee to the proceeds of the bankrupt's liquor license, where the granting power, on grounds of public policy and interest, declines to recognize any right in the licensee to mortgage his license, and any claim of the mortgagee therein. In re Olewine, 11 Am. B. R. 40, 125 Fed. 840; Tracy v. Ginsberg, 189 Mass. 260, 16 Am. B. R. 792; Snyder v. Bougher, 16 Am. B. R. 792, 214 Pa. St. 453, holding that although a liquor license may not be sold by the trustee, yet the fixtures and furniture may be sold on condition that the license shall be transferred by the license court; Matter of Keller, 16 Am. B. R. 727, arising under Georgia statute.

71. Matter of Hurlburt, 13 Am. B. R. 50, 68 C. C. A. 216; In re Gaylord, 7 Am. B. R. 195, 111 Fed. 717.

72. Burleigh v. Foreman (C. C. A.), 12 Am. B. R. 88, 130 Fed. 13, *rev'g* 9 Am. B. R. 237; Page v. Edmunds, 187 U. S. 596, 9 Am. B. R. 277, *aff'g* 5 Am. B. R. 707, 107 Fed. 89, a seat or partnership in a stock exchange which, by its articles, provided that a member may sell his partnership, provided there is no unsettled contract or claim against him by any other member of the exchange, arising out of the business of the exchange, subject to the approval of the proper authorities, is property which prior to the filing of the petition the bankrupt might have transferred, and which, therefore, passes to and vests in his trustee. See also Cohen v. Boyd, 17 Am. B. R. 329, 52 Misc. Rep. (N. Y.) 217, 103 N. Y. Supp. 45.

73. Matter of Berry & Co., 15 Am. B. R. 360.

74. In re Boardman, 4 Am. B. R. 620; In re McDonnell, 4 Am. B. R. 92, 101 Fed. 239; In re Diack, 3 Am. B. R. 723, 100 Fed. 770.

transfer.[75] And even though the cash surrender value is not expressed in the policy, if it appear that the company will pay a prescribed amount upon its surrender, the effect is the same and the bankrupt may retain the policy upon paying or securing the payment of such amount.[76] Where, however, there is no actual value, as, for instance, in "ordinary life" policies, nothing passes to the trustee.[77] Where a policy has been pronounced valueless and turned over to the bankrupt, and the premiums thereof are paid either by himself or his wife, and the bankrupt dies soon after the policy is so turned over, the proceeds of the policy do not belong to his estate in bankruptcy.[78] This subsection does not include policies payable to the wife or kindred of the insured, but only applies to policies payable to the insured or his personal representatives.[79] The meaning and effect of the proviso clause in subdivision (5) is considered in a later paragraph.[80] An endow-

75. In re Diack, *supra*. For the duty of the trustee touching policies of life insurance, see In re Welling, 7 Am. B. R. 340, 113 Fed. 118.

76. Hiscock v. Mertens, 17 Am. B. R. 484, 205 U. S. 202, 51 L. Ed. 771, *aff'g* 15 Am. B. R. 701, 142 Fed. 445, *rev'g* 12 Am. B. R. 712, in which case the Supreme Court expressly states that the "cash surrender value" meant by this section is the amount which would have been paid by the company had the policy been surrendered, even though no amount was stipulated in the policy. See also Holden v. Stratton, 198 U. S. 202, 14 Am. B. R. 94; Matter of Phelps, 15 Am. B. R. 170; In re Coleman (C. C. A.), 14 Am. B. R. 461, 136 Fed. 818; Clark v. Equitable Life Assur. Co., 16 Am. B. R. 137, 143 Fed. 175; Gould v. New York Life Ins. Co., 13 Am. B. R. 233, 132 Fed. 927; In re Buelow, 3 Am. B. R. 389, 98 Fed. 86. *Contra* Van Kirk v. Slate Co., 15 Am. B. R. 239, 140 Fed. 38; In re Welling, 7 Am. B. R. 340, 113 Fed. 189; In re Slingluff, 5 Am. B. R. 76, 106 Fed. 154, repudiating In re Hernich, 1 Am. B. R. 713. See also In re Becker, 5 Am. B. R. 438, 106 Fed. 54.

77. Gould v. New York Life Ins. Co., 13 Am. B. R. 233, 132 Fed. 927.

78. Benjamin v. Chandler, 15 Am. B. R. 439, 142 Fed. 217; Meyers v. Josephson, 10 Am. B. R. 687, 124 Fed. 734.

79. Pulsifer v. Hussey, 9 Am. B. R. 657, 97 Me. 434. As to assignment of policy as collateral, see In re Sanderson, 18 Am. B. R. 101.

80. Fire insurance policies are rarely an asset, unless a fire loss has occurred just prior to the bankruptcy. *Compare* In re Hamilton, 4 Am. B. R. 543, 102 Fed. 683. See also Long v. Farmers' State Bank (C. C. A.), 17 Am. B. R. 103. The bankruptcy of the insured is not such a transfer of title as to render a policy void under a clause giving that effect to a change of ownership. Starkweather v. Cleveland Ins. Co., Fed. Cas. No. 13,308.

ment policy of insurance on the life of a bankrupt, payable to him at the end of the term if living, or in case of his prior death to his wife, is one in which he has an interest which passes to his trustee.[81] Life insurance policies which have not lapsed either at the time of the filing of the petition or of the adjudication have a cash surrender value, although it may be the practice of the company not to accept a surrender until the policy has lapsed.[82]

§ 12. **Property sold to the bankrupt on condition.**—Here also the interest of the bankrupt's trustee depends on the law of the State.[83] If the bankrupt was in possession under a contract invalid as to creditors, as, for instance, because not filed in accordance with that law, both possession and title pass to the trustee.[84] But creditors are not purchasers or lienors.[85] In some jurisdictions the rule obtains that the delivery of goods, with the provision that the title shall not pass until the purchase price has been paid, is void as to the creditors of the party to whom they are delivered; in such case goods found in the bankrupt's possession, delivered under such conditions, pass to the trustee.[86] A statute requiring the filing of contracts for the conditional sale of property is not to be avoided by pretext: it will not be effectual to call a contract a "lease" which provides for the payment of rent for the use of

81. In re Schofield, 17 Am. B. R. 916, 147 Fed. 862.

82. Hiscock v. Mertens, *supra*.

83. In re Shuts Printing, etc., Co., 14 Am. B. R. 668, 136 Fed. 989. A leading case is In re Garcewich, 8 Am. B. R. 149, 118 Fed. 87. See also In re Burkle, 8 Am. B. R. 542, 116 Fed. 766, and In re Howland, *infra*.

84. In re Yukon, etc., Co., 2 Am. B. R. 805, 96 Fed. 326; In re Frazier, 9 Am. B. R. 21, 117 Fed. 575; Chesapeake Shoe Co. v. Seldner, 10 Am. B. R. 466, 122 Fed. 593; In re Press-Post Publishing Co., 13 Am. B. R. 103, 132 Fed. 301. *Compare* In re Leigh Bros., 96 Fed. 806, *aff'g* 2 Am. B. R. 606; In re Howland, 6 Am. B. R. 405, 109 Fed. 869.

85. In re Bozeman, 2 Am. B. R. 809; In re Kellogg, 7 Am. B. R. 270, 112 Fed. 52; In re Hinsdale, 7 Am. B. R. 85, 111 Fed. 502. *Compare* In re McKay, 1 Am. B. R. 292.

86. This is the rule in Pennsylvania, In re Tice, 15 Am. B. R. 97; In re Poore, 15 Am. B. R. 174, 139 Fed. 862; In re Poore, 15 Am. B. R. 407, 140 Fed. 786; Matter of Rodgers, 16 Am. B. R. 401, 143 Fed. 594; Matter of Hess, 14 Am. B. R. 635, 136 Fed. 988; In re Franklin Lumber Co., 17 Am. B. R. 443; In re Builders Lumber Co., 17 Am. B. R. 449.

an article for a prescribed time, with the right to pay the purchase price at the end of the term, all payments of rent to be applied thereon; such a contract is for a conditional sale and, unless duly filed, the property sold will vest in the vendee's trustee in bankruptcy for the benefit of his creditors.[87] Under a statute providing that an unrecorded contract of conditional sale is void only as against subsequent purchasers, pledgees or mortgagees in good faith, a failure to record such a contract prior to the adjudication in bankruptcy of the vendee does not affect the title of the conditional vendee as against the vendee's trustee.[88] Where seizure is necessary to establish the creditor's rights, title will not pass unless seizure is made before the bankruptcy.[89] Where, however the property is merely consigned for sale, the bankrupt is not a vendee on condition.[90] As to the avails of goods so consigned, but sold by him before the bankruptcy, the funds being mingled with his own, title thereto passes to the trustee.[91] Where consigned goods are found among the assets and identified by the consignor, but not otherwise, the trustee should apply for an order permitting him to release them to the real owner. In actual practice this is frequently done. Care should be taken to distinguish between goods sold on condition and goods consigned, and positive identification of the latter should be required.[92] Where the contract under

87. Unitype Co. v. Long (C. C. A.), 16 Am. B. R. 282, *aff'g* 14 Am. B. R. 668, 136 Fed. 989. But if the vendor, on finding the vendee is in financial difficulties, refuses to deliver machinery unless it be agreed that it be held under a lease, the title remaining in the vendor, the title does not vest upon delivery, In re Naylor Mfg. Co., 14 Am. B. R. 284, 135 Fed. 206.

88. Hewitt v. Berlin Machine Works, 194 U. S. 296, 11 Am. B. R. 709; Matter of Cavagnaro, 16 Am. B. R. 320, 143 Fed. 668; York Mfg. Co. v. Cassell, 15 Am. B. R. 633, 201 U. S. 344, *rev'g* 14 Am. B. R. 52. *Compare* In re Tweed, 12 Am. B. R. 648; First Nat. Bank v. Staake, 202 U. S. 141, 15 Am. B. R. 639.

89. In re Ohio, etc., Co., 2 Am. B. R. 775.

90. In re Columbus Buggy Co., 16 Am. B. R. 750, 143 Fed. 859; Deere Plow Co. v. McDavid, 14 Am. B. R. 653, 137 Fed. 802; In re Miller, 14 Am. B. R. 439, 135 Fed. 868; In re Flanders, 14 Am. B. R. 27, 134 Fed. 560; In re Galt, 13 Am. B. R. 575, 56 C. C. A. 470.

91. *Compare* Bills v. Schliep, 11 Am. B. R. 607, 127 Fed. 103.

92. Adams v. Meyers, Fed. Cas. No. 62. See In re Levin, 11 Am. B. R. 446, 127 Fed. 886.

which goods were sold to the bankrupt contained no limitation upon the right to sell and only prescribed the method of making payment, and contained a provision to the effect that the title and ownership of the goods purchased and the proceeds of the sale thereof should remain the property of the seller, such contract was held to create a secret lien constituting a fraud upon the creditors of the bankrupt, and was invalid as against his trustee in bankruptcy.[93] Where machinery is sold on trial, and retained by the bankrupt vendee for a year without offer to return, expression of dissatisfaction, or demand by vendor, the sale is absolute and title is vested in the trustee.[94]

§ 13. **Property affected by fraudulent representations.**—Since the trustee takes the bankrupt's property charged with all claims and equities against it, his title to the same is inferior to that of one who was induced to sell on materially false representations. In such cases, the claimant usually proceeds as in replevin.[95] But, where the property is in the custody of the bankruptcy court, it is immune from replevin process in the State court.[96] It has been held that the false representation need not be the sole and exclusive consideration for the credit, but only a material consideration;[97] also, that false representations to a mercantile agency are enough.[98] Other cases under the present law appear in the note below.[99]

93. In re Galt, 9 Am. B. R. 632, 120 Fed. 443; In re Corputer, 11 Am. B. R. 147, 125 Fed. 831, in which case it was held that a similar agreement passed the title to the goods sold to the vendee, to which title the trustee in bankruptcy succeeded; that there was no purpose apparent therefrom to create an agency in the vendee, nor could such agreement be sustained as a conditional sale, a mortgage, or an instrument attempting to create a lien in behalf of the seller. See also In re Tweed, 12 Am. B. R. 648; In re Butterwick, 12 Am. B. R. 536, 131 Fed. 371; Matter of Rasmussen, 13 Am. B. R. 462, 136 Fed. 704; In re Martin-Vernon Music Co., 13 Am. B. R. 276, 132 Fed. 983.

94. In re Downing Paper Co., 17 Am. B. R. 121.

95. See next paragraph.

96. In re Russell, 3 Am. B. R. 658, 101 Fed. 248; In re Mertens, 12 Am. B. R. 698.

97. In re Gany, 4 Am. B. R. 576.

98. In re Epstein, 6 Am. B. R. 60, 109 Fed. 878; In re Roalswick, 6 Am. B. R. 752; In re Weil, 7 Am. B. R. 90, 111 Fed. 897.

99. In re Davis, 7 Am. B. R. 276, 112 Fed. 294; In re O'Connor, 7 Am.

§ 14. **Reclamation proceedings.**—These may be in or out of the bankruptcy proceedings. A petition to reclaim consigned goods is an instance of the former;[1] the proceeding in the nature of a bankruptcy replevin which, in most large trade centers, has of late been so common if not notorious, is an instance of the latter. The petition in such proceedings should contain allegations sufficient to sustain a complaint in trover and conversion, or required by the strictest practice in an affidavit for replevin.[2] The evils resulting from so-called "reclamation proceedings" are patent and hard to overcome.[3] In effect, estates are often dissipated by greedy and not over-scrupulous creditors, who apply for possession, after recession, on the ground of alleged fraudulent representations, and are granted what they ask, without adequate judicial investigation of their right to it and before there is a court officer authorized to bond back the goods reclaimed.[4] Their right to possession on a proper showing cannot be doubted.[5] For instance, it is well settled that false representations as to the financial status of a buyer, made as a basis of credit, and but for which the sale would not have been made, was fraudulent, and entitled the seller to reclaim the goods

B. R. 428, 114 Fed. 777; Silvey v. Tift, 17 Am. B. R. 9, 123 Ga. 804., 51 S. E. 748.

1. See "Property sold to the bankrupt on condition," section 12, *supra*.

2. Levi v. Picard, 17 Am. B. R. 430.

3. These are pointed out with great distinctness in an address delivered by Charles A. Hough, Esq., of New York, printed in the proceedings of the fourth annual convention of the National Association of Referees in Bankruptcy, at Milwaukee, in August, 1902. See also address on "The Merits and Defects of the Bankrupt Law," by Mr. Referee Holt, before the American Social Science Association, at Washington, April, 1902.

4. See Matter of Murphy, etc., Shoe Co., 11 Am. B. R. 428, holding that the right to reclaim goods should only be granted in cases where it clearly exists, and that the burden of proof is with the creditors to establish their right clearly and by a preponderance of evidence.

5. This follows from the rule that the trustee when appointed can have no greater title than the bankrupt had. The trustee holds the goods affected with the fraud of the bankrupt. Neither law nor morals will justify the trustee in holding goods obtained by the fraud of the bankrupt for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded. In re Hamilton Furniture, etc., Co., 9 Am. B. R. 65, 117 Fed. 774.

thereby obtained.[6] He should exercise this right before he has of his own volition placed himself in the position of a creditor, for if he joins in the election of a trustee, with knowledge of the fraud perpetrated against him, he is estopped from thereafter insisting on a return of the goods.[7] Where machinery or other articles are sold upon the condition that if they are not satisfactory the purchaser may return them and such purchaser prior to his bankruptcy expressed himself as dissatisfied and declared that he would not accept such machinery or articles, the seller may reclaim them, and the receiver or trustee of the bankrupt purchaser will not be heard to say that the refusal of the bankrupt to accept was arbitrary or capricious, fraudulent and in bad faith.[8] So also reclamation should be permitted where the bankrupt was in possession of articles being manufactured by him under contracts requiring payments at stated periods which had been regularly made, it

6. Matter of Patterson, 10 Am. B. R. 748, 125 Fed. 562; In re Weil, 7 Am. B. R. 90, 111 Fed. 897; In re Epstein, 6 Am. B. R. 60, 109 Fed. 878; In re Hamilton Furniture, etc., Co., 9 Am. B. R. 65, 117 Fed. 774, in which case the rule was laid down that where a party by fraudulently concealing his insolvency, and his intent not to pay for goods, induces the owner to sell them to him on credit, the seller, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods: In re Hildebrant, 10 Am. B. R. 184; In re O'Connor, 9 Am. B. R. 18, 114 Fed. 777; Silvey v. Tift, 17 Am. B. R. 9, 123 Ga. 804, 51 S. E. 748; Matter of Levi, 16 Am. B. R. 756, holding that in the absence of fraud in making the statement, reclamation should not be allowed. In re Rose, 14 Am. B. R. 345, 135 Fed. 888, in which case it was held that the return of goods should not be permitted where the evidence is insufficient as to the making of a false verbal statement to a commercial agency; Levi v. Picard, 17 Am. B. R. 430.

7. Standard Varnish Works v. Haydock (C. C. A.), 16 Am. B. R. 286, 143 Fed. 318.

8. In re Hill Co., 12 Am. B. R. 213, note, 123 Fed. 866. *Compare* In re Simpson Mfg. Co., 12 Am. B. R. 212 (C. C. A.), 130 Fed. 207, in which case the evidence was considered, and it was held that there being no complaint made that the machinery was unsatisfactory, a sale of the machinery was completed, and that the vendor upon the bankruptcy of the purchaser was not entitled to a return of the machinery upon a claim that it was never accepted; In re Froelich Rubber Refining Co., 15 Am. B. R. 72, 139 Fed. 201, holding that where the contract contained an option to purchase within a prescribed time, the title to the property only passed to the bankrupt after such time expired.

appearing that the trustee did not intend to complete the contract and deliver the completed articles.[9] If personal property be sold upon the express condition that payment be made on delivery, and delivery is made on the faith that the condition will be immediately performed, and payment is refused upon demand, title does not pass, and the seller may properly be permitted to reclaim the property.[10] Most of the evils resulting from reclamation proceedings will be avoided if the claiming creditor is at least required in the first instance, always after a short notice to the receiver or creditors, to prove identity strictly, either before the judge or a referee sitting as special master.[11] The delay incident to such proof will check at the outset a practice which, under the State systems, has fostered perjury and made "diligence" a word at which lawyer and layman were wont to blush. Nor is it thought that such a practice will be against the well-recognized principle that adverse claims to the bankrupt's assets must be settled in a plenary suit.[12] Is the transaction whereby the bankrupt becomes possessed of the property a sale or a bailment? This question enters into the determination of nearly every case. If the property is consigned to be sold under terms and at prices fixed by the consignor the contract is not one of sale, but is a bailment and the consignor may reclaim.[13] Identity is the *sine qua non* of the right to possession. Proof of it is insisted on even in the far less important proceeding when a consignor creditor claims goods in the hands of the trustee. The court whose right to possession is questioned can, it is thought, nay, in the interest of that pro-rating which the bankruptcy law

9. In re McDonald, 14 Am. B. R. 797, 138 Fed. 463.

10. Southern Pine Co. v. Savannah Trust Co. (C. C. A.), 15 Am. B. R. 618, 141 Fed. 802.

11. For cases where the claim was judicially investigated, see In re Weil, 7 Am. B. R. 90, 111 Fed. 897; In re Davis, 7 Am. B. R. 276, 112 Fed. 294; and Bloomingdale v. Empire Rubber Mfg. Co., 8 Am. B. R. 74, 114 Fed. 1016. Read also In re O'Connor, 7 Am. B. R. 428, 114 Fed. 777.

12. In re Russell, 3 Am. B. R. 658, 101 Fed. 248.

13. In re Wells, 15 Am. B. R. 419, 140 Fed. 752; In re Tice, 15 Am. B. R. 97, 139 Fed. 52; In re Heckathorn, 16 Am. B. R. 467, 144 Fed. 499; In re Wood, 15 Am. B. R. 411, 140 Fed. 964; In re Galt, 13 Am. B. R. 575, 56 C. C. A. 470; In re Poore, 15 Am. B. R. 174.

commands, should, insist on the claimant establishing identity by proof in open court, with right to cross-examination by the adverse party, before yielding that which in bankruptcy cases is often more than "nine points of the law."[14] In such proceedings it is only recovery of the identified articles which may be had; as to the articles which have been sold or disposed of by the bankrupt, the vendor is left to his remedy as a general creditor.[15]

§ 15. **Rights of action; subd. (6).**—This subdivision is declaratory of the law. A cause of action for damages arising out of a personal wrong suffered by the bankrupt is not embraced in those rights of action which vest in the trustee of the bankrupt. The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal; it cannot be assigned, is not subject to levy and sale by judicial process, and the act does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute part of his estate in bankruptcy.[16] There are exceptions to this doctrine. Thus, where the suit is to recover usurious interest paid by the bankrupt,[17] and money lost in gaming,[18] and perhaps where the gravamen is deceit or fraud.[19] The safe rule is that stated in the text that the trustee is vested with the bankrupt's rights of action on contract and for the unlawful taking or detention of or injury to his property. An action for conspiracy, whereby the plaintiff was "driven out of business as a dealer in lumber," is an action in tort, and is not included within the rule; even though such an action is pending at the time of the plaintiff's bankruptcy, the right of action does not pass to his

14. In re Coleman & Sherman, 8 Am. B. R. 763.

15. In re Eliowich, 17 Am. B. R. 419.

16. In re Haensell, 1 Am. B. R. 286, 91 Fed. 355; Noonan v. Orton, 12 N. B. R. 405; Beckham v. Drake, 8 Mass. & W. 845.

17. Tiffany v. Boatmen's Sav. Bank, 18 Wall. (U. S.) 375; Wheelock v. Lee, 64 N. Y. 242. But see Bromley v. Smith, Fed. Cas. 1,922.

18. Meech v. Stoner, 19 N. Y. 26.

19. Crockett v. Jewett, 2 Ben. (U. S.) 514, 6 Fed. Cas. No. 3,402; Hyde v. Tuffts, 45 N. Y. Super. Ct. 56 (13 J. & Sp.).

trustee.[20] But it has been held otherwise as to a right of action for injuries causing the death of the bankrupt's son.[21] The right of a bankrupt corporation to sue for the recovery of unpaid subscriptions to capital stock passes to the trustee.[22] It has been held that a person who has been adjudged a bankrupt and obtained his discharge cannot sue upon a claim for services upon a *quantum meruit,* which arose prior to the filing of his petition, where it appears that he did not disclose the existence of the claim or any other asset, in the bankruptcy proceedings, because of which no trustee was appointed.[23] It seems that, after being vested in the trustee, such rights of action may be carried to judgment by the bankrupt for his own benefit after a composition is confirmed.[24]

§ 16. **Burdensome property.**—Here the statute is silent. The English law goes into this subject with considerable particularity, the trustee there being given twelve months in which to elect to claim or disclaim onerous property.[25] The general rules phrased into that law are, however, doubtless also the law in this country. Thus, a trustee may disclaim burdensome property and has a reasonable time in which to do it.[26] This doctrine is usually asserted as to leases,[27] though it has been applied where property is mortgaged beyond its value, in which case the court may direct that the property be released and surrendered to the mortgagee upon such conditions as it may deem just.[28] The question is not one of jurisdiction or of right, but of dis-

20. Cleland v. Anderson, 11 Am. B. R. 605 (Neb. Sup. Ct.).

21. In re Burnstine, 12 Am. B. R. 596.

22. Allen v. Grant, 14 Am. B. R. 349.

23. Rand v. Iowa Central Ry. Co., 12 Am. B. R. 164, 96 App. Div. (N. Y.) 413.

24. See Stone v. Morris, 4 Am. B. R. 568.

25. Act of 1883, section 55, as amended by act of 1890, section 13.

26. *Compare* Glenny v. Langdon, 98 U. S. 20; Sparhawk v. Yerkes, 142 U. S. 1; In re Scheermann, 2 N. B. N. Rep. 118, and cases cited.

27. Collier, Bankr., 6th ed., p. 604.

28. Equitable Loan & Security Co. v. Moss & Co., 11 Am. B. R. 111 (C. C. A.), 125 Fed. 609; In re Jersey Island Packing Co., 14 Am. B. R. 689 (C. C. A.), 138 Fed. 625.

cretion.[29] The doctrine has no application to property which the bankrupt has concealed, and of the existence of which the trustee has no knowledge and has not therefore had the opportunity to make an election.[30] The practice is simple. The trustee, if satisfied, after appraisal or even on an independent investigation, that some or all of the property which has vested in him is of no value or will be a charge on the estate, should file a report to that effect and ask for instructions. The referee may, it is thought, act without calling a meeting of creditors or even submitting the application to a pending meeting; but safe practice suggests that the creditors be consulted and their wishes observed. If the trustee is instructed to disclaim the property as onerous, an order should be entered to that effect. This in effect revests the title in the bankrupt.[31] Leases should be accepted or disclaimed promptly, but a continuance in possession will not usually be construed an election to accept the burdens and obligations of the lease.[32] Another method of disposing of burdensome property is to sell it at a meeting of creditors called for that purpose. This is often done at final meetings, and sometimes at the instance of lien creditors, who thereby get title without the usual delays and costs attending foreclosures and judicial sales.

§ 17. **Exempt property.**—The trustee does not take title to property exempt by the law of the State, but, until the exempt property is set off, has possession.[33] The reference to exemptions in this section does not show an intent to require a claim for an exemption to be made prior to adjudication.[34] The proviso clause in subdivision (5) has already been often considered by the courts. It was doubtless inserted to prevent the hardship which might result to beneficiaries of life insurance policies did the lat-

29. In re Cogley, 5 Am. B. R. 731, 107 Fed. 73; In re Dillard, Fed. Cas. 3,912.

30. First Nat. Bank v. Lasater, 13 Am. B. R. 698, 196 U. S. 115.

31. Sessions v. Romadka, 145 U. S. 29.

32. Collier, Bankr., 6th ed., p. 604.

33. In re Castleberry, 16 Am. B. R. 159, 143 Fed. 1018; In re Sullivan, 16 Am. B. R. 87; McKenney v. Cheney, 11 Am. B. R. 54 (Ga. Sup.).

34. In re Fisher, 15 Am. B. R. 652.

ter pass to the insured's trustee absolutely. In effect, the bankrupt may retain the advantage which years of premiums may have given him, provided he pays or secures to the estate the cash surrender value of the policy. The practice is sufficiently indicated by the words of the statute. But the question generally discussed is whether, since most of the States declare life insurance policies exempt, the clause here is subject to section 6,[35] or a limitation on it. The Supreme Court has now declared that the provisions of this section do not apply to life insurance policies which are exempt under a State law; as to such policies the State law must control regardless of whether they had a cash surrender value.[36] To policies which are so exempt section 6 applies; this is since the opening clause of the section vests the trustee with the bankrupt's title except as to "property which is exempt." This qualification necessarily controls all the enumerations, and therefore excludes exempt property from all the provisions contained in the respective enumerations. It controls the proviso as well as other parts of the section and makes the life insurance policies which are exempt by State statutes subject in all respects to the provisions of section 6.[37]

§ 18. **Exemptions in property fraudulently conveyed or concealed.**—The bankruptcy law provides that the act shall not affect the allowance to bankrupts of the exemptions which are pre-

35. Section 6 of the Bankruptcy Law provides as follows:

§ 6. **Exemptions of bankrupt.**—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. *Compare* sections 2(11) and 47a(11), Bankr. Act and General Order XVII.

36. Holden v. Stratton, 14 Am. B. R. 94, 198 U. S. 202, *rev'g* 7 Am. B. R. 615, 113 Fed. 141; Steele v. Buel, 5 Am. B. R. 165, 104 Fed. 968, *rev'g* 3 Am. B. R. 549, 98 Fed. 78. See also explaining effect of proviso, Hiscock v. Mertens, 17 Am. B. R. 484, 205 U. S. 202. The following cases are opposed to this doctrine: In re Lange, 1 Am. B. R. 189, 91 Fed. 361; In re Scheld, 5 Am. B. R. 102, 104 Fed. 870; In re Welling, 7 Am. B. R. 340, 113 Fed. 189.

37. Collier, Bankr., 6th ed., p. 605.

scribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.[38] In some States, the bankrupt is denied his exemptions, if he has been guilty of a fraud on creditors generally or has intentionally transferred or concealed any portion of his property, whether exempt or not.[39] This is probably due to local statutes.[40] The rule, however, is that, exemptions, being a matter of right, should not be denied, even if asserted in property fraudulently transferred or concealed and later recovered by the trustee.[41] Where the bankrupt acquires property by fraud, he can have no exemption.[42] Where the bankrupt has scheduled property out of which he claims exemptions, and the trustee later recovers other property which had been preferentially transferred, it is held by some authorities that the former will not be permitted to abandon his previous claim and assert it against such property,[43] but other authorities hold to the contrary.[44] Where the alleged fraudulent transaction involves the sale of non-exempt property, and the use of the avails in reducing an incumbrance against an exempt homestead, it will not avail.[45] And where, pending suit in a State court to set aside a deed of

38. Section 6a.

39. Matter of Alex, 15 Am. B. R. 450, 141 Fed. 483; In re Allen, 13 Am. B. R. 519, 134 Fed. 620; In re Duffy, 9 Am. B. R. 358; In re Yost, 9 Am. B. R. 153, 117 Fed. 792; In re Long, 8 Am. B. R. 591, 116 Fed. 113; In re Tollett, 5 Am. B. R. 505, 105 Fed. 425, *overruled* in 5 Am. B. R. 404, 106 Fed. 866; In re Waxelbaum, 4 Am. B. R. 120, 101 Fed. 228; McDowell v. McMuria, 107 Ga. 812, 73 Am. St. Rep. 155.

40. Collier, Bankr., 6th ed., p. 101.

41. In re Rothschild, 6 Am. B. R. 43; In re Park, 4 Am. B. R. 432, 102 Fed. 602; Wilcox v. Hawley, 31 N. Y. 648; In re Noll, 2 N. B. N. R. 789; In re Buckingham, 2 N. B. N. R. 617. Thus even in Georgia, where the "good faith" rule is in the local statute; In re Talbott, 8 Am. B. R. 427, 116 Fed. 417, *aff'd* Bashinski v. Talbott, 9 Am. B. R. 513, 119 Fed. 337; In re Neal, 14 Am. B. R. 550.

42. In re Wolcott, 15 Am. B. R. 386, 140 Fed. 460.

43. In re Coddington, 11 Am. B. R. 122, 126 Fed. 891; In re White, 6 Am. B. R. 451, 109 Fed. 635.

44. In re Falconer, 6 Am. B. R. 557, 110 Fed. 111. See also In re Neal, *supra;* In re Evans, 8 Am. B. R. 730, 116 Fed. 909.

45. In re Boston, 3 Am. B. R. 388, 98 Fed. 587.

land, the debtor obtains a reconveyance of the land and executes a proper deed of homestead under the State law, and is adjudicated a bankrupt prior to a decree setting aside the conveyance, the bankruptcy court may determine the claim of homestead exemption in the land.[46] A general assignment is not sufficiently fraudulent to come within the rules previously stated.[47]

§ 19. **Transfers fraudulent under State laws may be avoided by trustee; subs. e.**—The Bankruptcy Act provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."[48] This subsection has been referred to elsewhere.[49] It is the corollary of section 67b,[50] and simply means that if a creditor could have avoided any transfer (not merely a lien) under the laws of the State, the trustee can do the same,[51] and it is immaterial that the creditors of the bankrupt were not in a position to attack the transfer.[52] The trustee is subrogated to the rights of creditors and may sue to avoid and set aside any conveyance or transfer

46. In re Allen, 13 Am. B. R. 519, 134 Fed. 620.

47. In re Tilden, 1 Am. B. R. 300, 91 Fed. 500; In re Noll, 2 N. B. N. R. 789.

48. Bankr. Act, 1898, section 70e.

49. See under sections 60 and 67, Bankr. Act, and section 5, *supra*.

50. Section 67b provides that "whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

51. Mueller v. Bruss, 8 Am. B. R. 442, 112 Wis. 406, 88 N. W. 229; Hunt v. Doyal (Ga.), 57 S. E. 489.

52. Sheldon v. Parker, 11 Am. B. R. 152, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015.

made by the bankrupt, which any creditor could have avoided under the laws of the State, regardless of the time when made and although made more than four months prior to the adjudication of bankruptcy.[53] Such trustee may proceed for such purpose by bill in equity, and will not be required to seek his remedy at law.[54] Such a suit may be maintained, although neither the trustee nor any creditor has reduced the claim against the bankrupt to a judgment.[55] The trustee in bankruptcy of a mortgagor may attack the validity of a chattel mortgage although the claims of creditors are not in judgment.[56] The presumption is that the trustee has complied with the provisions of the Bankruptcy Act, and is qualified to act.[57] In many cases, the trustee will be able to sue under section 67e or section 70e. If under

53. Bush v. Export Storage Co., 14 Am. B. R. 138, 136 Fed. 918; In re Rodgers, 11 Am. B. R. 79, 125 Fed. 169, 60 C. C. A. 567; In re Carpenter, 125 Fed. 831; Joseph v. Raff, 82 App. Div. (N. Y.) 47, 81 N. Y. Supp. 546, *aff'd* 176 N. Y. 611, 68 N. E. 1118; Lewis v. Bishop, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp. 618; Beasley v. Coggins, 12 Am. B. R. 355 (Fla. Sup. Ct.), 57 So. 213; Cox v. Wall, 132 N. C. 730, 44 S. E. 635; In re Mullen, 4 Am. B. R. 224, 101 Fed. 413, 416, where it is said: "13 Eliz. makes void as against creditors, conveyances in fraud of creditors, but provides that the operation of the statute shall not extend to any estate conveyed upon good consideration and *bona fide*. In inserting a like exception in section 70e, I think Congress meant to substantially re-enact the exception placed in the statute of Elizabeth, and not to give to *bona fide* purchasers for value greater or less rights than those which that statute gives them. The reference to *bona fide* purchasers in section 70e should, therefore, receive the same construction that a like reference has received in the statute of 13 Eliz. and its American substitutes." In this case it was attempted to defeat a prior attachment made by the creditor of the fraudulent grantee, who had no notice of the fraud or of the bankruptcy proceedings. The court held that where property conveyed in fraud of creditors is first attached by creditors of the transferee, who have no knowledge of the fraud, such attachment will prevail as against the rights of defrauded creditors of the transferrer, and that, therefore, the attachment could not be defeated, unless notice of the bankruptcy proceedings had been given to the attaching creditor.

54. Beasley v. Coggins, 12 Am. B. R. 355, 57 So. 213; Wall v. Cox, 4 Am. B. R. 659, 101 Fed. 403.

55. Mueller v. Bruss, 8 Am. B. R. 442, 112 Wis. 406; Beasley v. Coggins, *supra*.

56. Mitchell v. Mitchell, 17 Am. B. R. 382.

57. Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176.

the latter, he must bring himself within the elements of pleading and proof recognized by the statutes and decisions of his State.[58] The important difference is that, if the suit is based on the State law, the State statute of limitations applies. Thus, many fraudulent transactions, which could not be brought under section 67e, will be timely if resting on section 70e.[59] A mortgagee who knows that the mortgagor is selling mortgaged chattels for his own use, and who consents to his doing so, is not a *bona fide* holder and the mortgagee's trustee in bankruptcy may avoid the chattel mortgage, and recover the property transferred thereby, or its value.[60] The cases turn on the law of the State, some of the doctrines of which are summarized in the cases cited in the note below.[61]

§ 20. **The saving clause.**—That clause in this subsection is similar to those found in section 67e and section 67f, and is for the same purpose. What has already been said of them will not be repeated here. This saving of the rights of *bona fide* holders for value is also merely expressive of the law.[62] But, after adjudi-

58. Halbert v. Pranke, 11 Am. B. R. 620 (Minn. Sup.); In re Gray, 3 Am. B. R. 647; Mueller v. Bruss, *supra*.

59. Collier, Bankr., 6th ed,, p. 613.

60. Skillen v. Endelman, 11 Am. B. R. 766, 39 Misc. Rep. (N. Y.) 261, 79 N. Y. Supp. 413.

61. Cohen v. Wagar, 16 Am. B. R. 381, 183 N. Y. 33, as to sufficiency of complaint in an action to recover moneys collected by a stock association from debtors of the bankrupt; Lesser v. Bradford Realty Co., 15 Am. B. R. 123, 47 Misc. Rep. (N. Y.) 463, as to sufficiency of complaint in action to set aside chattel mortgage made within four months period; Barber v. Coit (C. C. A.), 16 Am. B. R. 419, 144 Fed. 381, holding that under the Ohio statute declaring that a creditor may sue to set aside fraudulent conveyances, actual fraud need not be shown; Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176, as to sufficiency of evidence in action to recover preferential payments; Durham v. Wick, 14 Am. B. R. 385, 210 Pa. St. 128; Wright v. Skinner, 14 Am. B. R. 500, 136 Fed. 694, as to allegations as to citizenship in bill where jurisdiction depends on diverse citizenship; Horskins v. Sanderson, 13 Am. B. R. 101, 132 Fed. 415, as to jurisdiction over property within the district when the defendant resides elsewhere; Mueller v. Bruss, 8 Am. B. R. 442, 112 Wis. 406, judgment and return of execution unnecessary; In re Mullen, 4 Am. B. R. 224, 101 Fed. 413; In re Phelps, 3 Am. B. R. 396 (N. Y.).

62. In re Mullen, 4 Am. B. R. 224, 101 Fed. 413.

cation, the filing of the petition amounting to constructive notice, there can be no *bona fide* holder.[63]

§ 21. **The amendment of 1903.**—Here the words added are the same as those added to section 60b and section 67e. Their purpose and effect have been considered in the discussion of those sections.[64] The effect of the omission from section 23b of all reference to section 70e has been questioned. It has been held, however, that such omission operates to bring actions under section 70e within the general rule as laid down in section 23b, and that while a bankruptcy court has general jurisdiction over the subject-matter it can only be exercised under the conditions imposed by section 23b, that is, by the consent of the proposed defendants.[65]

§ 22. **Jurisdiction of courts; statutory provision.**—The Bankruptcy Act of 1898 provides as follows:

§ 23. *Jurisdiction of United States and State courts.*—(a) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.**

63. Harrell v. Beale, 17 Wall. (U. S.) 590. *Compare* In re Lake, Fed. Cas. 7,992.

64. See chapter XXII and chapter XXIII, *supra.*

65. Skewis v. Barthell, 18 Am. B. R. 429; Gregory v. Atkinson, 11 Am. B. R. 495, 127 Fed. 183.

* Amendment of 1903 in italics.

(c) The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

§ 23. **Jurisdiction of courts generally.**—This section, other than its last subsection, has to do only with suits at law or in equity outside the bankruptcy proceeding proper;[66] subsection b only with suits by, not against, the trustee.[67] Practice under section twenty-three is, therefore, regulated, if in equity, by the Equity Rules, if in law, by the State procedure as supplemented or modified by Federal rules applicable to such cases.[68] The former law gave concurrent jurisdiction to the Circuit and District Courts of both law and equity actions, as distinguished from proceedings in bankruptcy *per se,* where the assignee (trustee) was plaintiff or defendant.[69] It was also the settled doctrine of the courts that the statute meant that, when the holding of a third party against the assignee (trustee) was adverse, a summary remedy within the bankruptcy proceeding was not proper, but resort must be had to a plenary suit.[70] The law of 1898, as originally enacted, evidenced an intention to transfer all controversies, other than those strictly within the bankruptcy procedure, as, for instance, a contest on a proof of debt, to the State tribunals. Such was the purpose as indicated by the debates in Congress accompanying its passage,[71] and such seems the literal meaning of the words. The amendatory act of 1903 has, however, re-enacted the doctrine of concurrent jurisdiction, at least as to all suits by the trustee to recover property fraudulently or preferentially transferred or encumbered within the four months period.

§ 24. **Jurisdiction of suits to recover property.**—The contro-

66. Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163.

67. In re McCallum, 7 Am. B. R. 596, 113 Fed. 393.

68. Collier, Bankr., 6th ed., p. 280.

69. Claflin v. Houseman, 93 U. S. 130; Lathrop v. Drake, 91 U. S. 516; Olney v. Tanner, 10 Fed. 101. So under the law of 1841. McLean v. Lafayette Bank, Fed. Cas. 8,885; Hallack v. Tritch, Fed. Cas. 5,956; Brown v. White, 16 Fed. 900.

70. Moyer v. Dewey, 103 U. S. 301; Glenny v. Langdon, 98 U. S. 20; Eyster v. Gaff, 91 U. S. 521.

71. But see In re Murphy, 3 Am. B. R. 499.

versy as to the property forum for suits or proceedings to recover property brought by the bankrupt's trustee, prior to the amendatory act of 1903, was settled in May, 1900, by the Supreme Court.[72] To meet the reasoning of that decision the Bankruptcy Act was amended in section 23b, section 60b, section 67e and section 70e, and that case became no longer controlling.[73] The broad and elastic phrasing of subdivisions (7) and (15) of section 2[74] is, now, no longer limited by section 23b, and it is well settled that courts of bankruptcy as such have, within their respective territorial limits, ample, though, as to suits, not exclusive, jurisdiction to do everything "which may be necessary for the enforcement of the provisions of the act."[75]

§ 25. **Jurisdiction of the Circuit Courts.**—If (a) diverse citizenship or a controversy where the amount in dispute exceeds $2,000[76] arises, between (b) the trustee and an adverse claimant,[77] concerning (c) property acquired or claimed by the trustee,[78] an appropriate suit, (d) either in law or equity, can be laid in the Circuit Court; but not otherwise.[79] A suit by a trustee or receiver

72. Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163.

73. For some confusion growing out of the omission in the amendment of section 23b to except suits for the recovery of property under section 70e, see discussion of those sections, *infra.*

74. Subdivision (7) of section 2 of the Bankruptcy Act of 1898 gives courts of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Subdivision (15) gives jurisdiction to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

75. See discussion of the subject under sections 26-30, *infra.* For the general question of jurisdiction prior to the amendatory act of 1903, see Bardes v. Bank, *supra.*

76. See act of March 3, 1887, 25 Stat. at Large, 433.

77. See, for cases on meaning of "adverse claimant," *infra.*

78. *Compare* Leroux v. Hudson, 109 U. S. 468; Schott v. Hudson, 109 U. S. 477. And see Bachman v. Packard, Fed. Cas. No. 709.

79. Goodier v. Barnes, 2 Am. B. R. 328, 94 Fed. 798. *Compare* Chattanooga Bank v. Rome Iron Co., 3 Am. B. R. 582, 99 Fed. 82. Observe, also, for transfer of cases from the district court to the circuit court, thus giving the latter the former's jurisdiction in certain contingencies. R. S., sections 601, 637.

in bankruptcy cannot be removed from a State court into a Circuit Court unless the amount involved exceeds $2,000.[80] If a suit be transferred from a State court to the Circuit Court on the ground of diversity of citizenship it is placed there as if it had been originally commenced there on the ground of jurisdiction, and not as if had been commenced there by consent of the defendant under this section; the judgment of the Circuit Court of Appeals reversing the judgment of the Circuit Court is, therefore, final.[81] In the Circuit Court, the trustee may be either plaintiff or defendant; while, like the adverse claimant, he has the option of proceeding in the State court, or, if the requisite diversity of citizenship and amount in controversy exists, in the Circuit Court. Conversely, the trustee only can sue in the District Court, but only to recover property or annul liens, and suits there need not show diversity of citizenship and $2,000 in dispute.[82] Thus, the jurisdiction of the Circuit Court is much more limited than it was under the former law while that of the District Court is not limited to so marked an extent. The Circuit Court may not review a judgment of the bankruptcy court.[83] It cannot disturb or interfere with the control of a court of bankruptcy over the property in the possession of the trustees, by injunction or otherwise.[84] This clause is intended to prevent the extension of the jurisdiction of the Circuit Court because of the institution of proceedings in bankruptcy. If the suit could have been brought in such court by the bankrupt prior to his bankruptcy, for diverse citizenship, it may be brought there by his trustee, although as between the trustee and the defendant there is no such diversity.[85]

80. Henrie v. Henderson, (C. C. A.), 16 Am. B. R. 617, 145 Fed. 316; Swofford v. Cornucopia Mines, 15 Am. B. R. 564, 140 Fed. 957, the amount allowed as attorney's fees in an action to enforce a miner's lien should not be added to the amount in controversy so as to permit of its removal.

81. Spencer v. Duplan Silk Co., 11 Am. B. R. 563, 191 U. S. 526.

82. Suits laid in the district court by the adverse claimant against the trustee must be under general law and not this section of the bankruptcy law. Consult In re McCallum, 7 Am. B. R. 596.

83. Hatch v. Curtin, 16 Am. B. R. 629, 146 Fed. 200.

84. Treat v. Wooden, 14 Am. B. R. 736, 138 Fed. 934.

85. Bush v. Elliott, 15 Am. B. R. 656, 202 U. S. 477.

§ 26. Jurisdiction of District Courts.—The District Courts have, since the act of 1800, always had exclusive jurisdiction of "proceedings in bankruptcy." Under the act of 1867, their jurisdiction, while not exclusive, also extended "to the marshaling of . . . assets,"[86] and also to "all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt."[87] The same general jurisdiction to "cause the estate of bankrupts to be collected . . . and determine controversies in relation thereto" is conferred on the District Court by the present law, with the qualification "except as herein otherwise provided."[88] There being no other grant of ordinary jurisdiction to the District Court in the statute, subsection b of section twenty-three has been held to be a limitation on that power.[89] The District Court of the domicile of the bankrupt, upon the filing of his petition, takes exclusive jurisdiction of the property of the bankrupt situated anywhere within the United States; it becomes its duty to administer the estate, and distribute the proceeds among the creditors according to their respective rights.[90] The filing of the petition is a caveat to all the world and is in effect an injunction and an attachment. Thereupon, in respect to the control and distribution of the bankrupt's estate, the jurisdiction of the District Court is exclusive.[91] Prior to the amendment of 1903 the rule was settled that District Courts did not have jurisdiction over a suit brought by the trustee to recover property from a stranger

86. Act of 1867, section 1; R. S., section 4972. See Cook v. Whipple, 55 N. Y. 150; Kelly v. Smith, Fed. Cas. No. 7,675.

87. Act of 1867, section 2; R. S., section 4979; Main v. Glen, Fed. Cas. No. 8,973; In re Sabin, Fed. Cas. No. 12,195.

88. Act of 1898, section 2(7). This jurisdiction was not granted by, and it cannot be revoked, annulled or impaired by the law or act of any State. In re Dunlop, 19 Am. B. R. 361.

89. Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163.

90. In re Hobbs, 16 Am. B. R. 544, 145 Fed. 211; In re Granite City Bank (C. C. A.), 14 Am. B. R. 404, 137 Fed. 818.

91. Mueller v. Nugent, 7 Am. B. R. 224, 184 U. S. 1.

to the bankruptcy proceeding, unless by the latter's consent.[92] Where the adverse party had consented, the District Courts had jurisdiction.[93] Where the holding of the proposed defendant was adverse, such a suit could be brought only in the State court, or in the Circuit Court if the usual facts showing Federal jurisdiction appeared.[94]

§ 27. **Amendment of 1903.**—The amendment of 1903 to subsection b of section 23 and the changes made in section 60b, 67c, and 70e restored concurrent jurisdiction, at least as to suits to recover property. Under these sections, which should be read together, since a suit to recover property cannot be brought by a trustee save under one of these sections, the law now is that suits to recover property either preferentially or fraudulently transferred[95] or incumbered, may be laid either in the proper State court or in a District Court, even without the consent of the proposed defendant.[96] If brought in a State court, a federal question is presented, which may be certified to the United States Supreme Court.[97] If in the District Court, it need not be in the district where the bankruptcy proceeding is pending.[98] Such

92. Wall v. Cox, 181 U. S. 244, 5 Am. B. R. 727, 4 Am. B. R. 659, 101 Fed. 403; Hicks v. Knost, 178 U. S. 541, 2 Am. B. R. 153, 94 Fed. 625; Mitchell v. McClure, 178 U. S. 539, 91 Fed. 621; Bardes v. Bank, *supra*.

93. In re Durham, 8 Am. B. R. 115, 114 Fed. 750; Philips v. Turner, 8 Am. B. R. 171, 114 Fed. 726.

94. Bush v. Elliott, 15 Am. B. R. 656, 202 U. S. 477.

95. If preferentially transferred, it must have been within four months of the bankruptcy (section 60b); if fraudulently, the State statute of limitations controls (section 70e). See Gregory v. Atkinson, 11 Am. B. R. 495, 127 Fed. 183, except as to conveyances or preferences made within the four months' period the law remains as it was before the amendment. See also Bowman v. Alpha Farms, 18 Am. B. R. 700.

96. Horner-Gaylord Co. v. Miller, 17 Am. B. R. 257; Lawrence v. Lowrie, 13 Am. B. R. 297, 133 Fed. 995.

97. Rector v. City Deposit Bank Co., 15 Am. B. R. 336, 200 U. S. 409, where an action was brought by a trustee to recover what is asserted to be an asset of the bankrupt estate, a federal question is presented, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.

98. See Lathrop v. Drake, 91 U. S. 516. And *compare* Sherman v. Bingham, Fed. Cas. No. 12,762, with Shearman v. Bingham, Fed. Cas. No. 12,733.

a suit can be brought, under certain circumstances, in the Circuit Court, as has already been shown.[99] A trustee in bankruptcy is vested with all the rights and title of the bankrupt, as well as with the rights of his creditors, and when he seeks to enforce rights to recover property in a district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has acquired and can only resort to the same courts, State or Federal, and is confined to the same remedies, subject to the exceptions made by the amendments of 1903 to sections 23b and 70e.[1] The widening of jurisdiction by the amendment of 1903 is probably available only to the trustee. The adverse claimant cannot sue under section 23b in the District Court,[2] nor can he by consent confer summary jurisdiction upon the court to determine the merits of a real adverse claim in property alleged to belong to the bankrupt but in the claimant's possession.[3] There is doubt as to the receiver's power to sue at all;[4] that he can under section 2(7) has already been held and is probably the law.[5] But the trustee is rarely defendant and rarely does he resort to suits other than those specified in the sections already mentioned. "To recover property" undoubtedly includes a suit, the real purpose of which is to annul an incumbrance, other than through legal proceedings.[6] The amendment of 1903, conferring jurisdiction upon courts of bankruptcy in common with State courts for the recovery of property fraudulently transferred by the bankrupt under section 70e must be read in connection with section 23b, and when so read means that jurisdiction over the subject matter of section 70e is conferred upon the bankruptcy court, but can be exercised only upon the

99. Section 26, *supra;* Bush v. Elliott, *supra.*

1. Hull v. Burr, 18 Am. B. R. 541.

2. Viquesney v. Allen (C. C. A.), 12 Am. B. R. 402.

3. In re Teschmacher & Mrazay, 11 Am. B. R. 547, 127 Fed. 728.

4. Boonville Bank v. Blakey, 6 Am. B. R. 13, 107 Fed. 891. But see In re Fixen & Co., 2 Am. B. R. 822, 96 Fed. 748.

5. In re McCallum, 7 Am. B. R. 596, 113 Fed. 393.

6. Note the use of the word "incumbrance" in section 67e. *Compare* Chapman v. Brewer, 114 U. S. 158. See Real Estate Trust Co. v. Thompson, 7 Am. B. R. 520, 112 Fed. 945.

condition imposed by section 23b, of securing the consent of the proposed defendants.[7] A District Court may not entertain a plenary suit in equity to annul a cancellation of a mortgage, made by the bankrupt to himself as executor under a will, brought by beneficiaries, where the general creditors of the bankrupt have no interest.[8] Where neither of the parties was a party to the bankruptcy proceeding, this section confers no jurisdiction.[9] If the property in controversy is not a part of the bankrupt estate and may not be distributed in the proceeding, the controversy cannot be determined therein.[10] In whichever court the suit is laid, it at once becomes subject to the rules and practice there followed.[11]

§ 28. **Summary jurisdiction.**—The amendments of 1903 have not changed the effect of present precedents against the exercise of jurisdiction summarily. If the party proceeded against is "an adverse claimant," he should not, under the present law, be asked to respond to a petition, order to show cause, or motion, any more than he was under the law of 1867, as it was interpreted by the courts.[12] If the party is in possession adversely of the property

7. Skewis v. Barthell, 18 Am. B. R. 429; Gregory v. Atkinson, 11 Am. B. R. 495, 127 Fed. 183.

8. Brumley v. Jones, 15 Am. B. R. 578, 141 Fed. 318, 72 C. C. A. 466. *Compare* Horner-Gaylord Co. v. Miller, 17 Am. B. R. 257.

9. Henrie v. Henderson, 16 Am. B. R. 617, 145 Fed. 316.

10. Matter of Girard Glazed Kid Co. (2), 14 Am. B. R. 485, 136 Fed. 511.

11. Collier Bankr., 6th ed., p. 286.

12. Eyster v. Gaff, 91 U. S. 521. *Compare* Burbank v. Bigelow, 92 U. S. 179; Smith v. Mason, 81 U. S. 419; Marshall v. Knox, 83 U. S. 551; also In re Cohn, 3 Am. B. R. 421, 98 Fed. 75; In re Baudouine, 3 Am. B. R. 651, 101 Fed. 547; In re Franks, 2 Am. B. R. 634, 95 Fed. 635; In re Kelly, 1 Am. B. R. 306, 91 Fed. 504; In re Rockwood, 1 Am. B. R. 272, 91 Fed. 363. Cases *contra*, like In re Francis-Valentine Co., 2 Am. B. R. 522, 94 Fed. 793, are omitted, because, since the amendatory act of 1903, the reasoning of Bardes v. Bank and the analogies of the whole statute are against them. But when the claimant also is a bankrupt, summary jurisdiction exists. In re Rosenberg, 8 Am. B. R. 624, 116 Fed. 402. See also cases decided by the Supreme Court under the present law cited in subsequent notes to this section. See also In re Tune, 8 Am. B. R. 285, 115 Fed. 906, as to when summary jurisdiction should be assumed and when not.

claimed by the bankrupt or his trustee he cannot be deprived of the right to litigate the disputed right to possession or ownership in a plenary suit brought either in a District Court or the proper State court.[13] As a matter of right, he should have his day in court in the regular way, by pleadings, trial, and judgment. On the other hand, if the claim is not strictly adverse, summary process is permissible, even that of contempt.[14] Summary jurisdiction may not be exercised to determine adverse claims to property not in the possession of the trustee, whether the adverse claimant asserts absolute title or merely a lien.[15] The court of bankruptcy may ascertain whether in a particular instance the claim asserted is an adverse claim existing at the time the petition was filed,[16] and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits.[17] If it be ascertained by proper inquiry that a real adverse claim existed, no matter how ill-supported it might appear to be, the court cannot summarily decide as to the validity of the claim.[18] Where a receiver in bankruptcy petitions for the seizure of certain goods in the possession of a third person, upon the ground that they had been transferred by the alleged bankrupt without consideration and in fraud of creditors, and the answer, after denying the allegations of the petition, alleges a purchase of the goods in the ordinary course of business, and that the prices paid were full and

13. Matter of Andre, 13 Am. B. R. 132, 68 C. C. A. 374; In re Rochford (C. C. A.), 10 Am. B. R. 608, 124 Fed. 182; In re Knickerbocker, 10 Am. B. R. 381, 121 Fed. 1004.

14. In re Davis, 9 Am. B. R. 670, 119 Fed. 950.

15. Morning Telegraph Pub. Co. v. Hutchinson (Mich.), 17 Am. B. R. 425; First Nat. Bank v. Chicago Title & Trust Co., 14 Am. B. R. 102, 198 U. S. 280.

16. In re Briskman, 13 Am. B. R. 57, 132 Fed. 201, where the property was taken from the possession of the bankrupt after the appointment of a receiver in bankruptcy the claim of the replevying creditor is not adverse.

17. In re New York Wheel Works, 13 Am. B. R. 61, 132 Fed. 203; Matter of Andre, 13 Am. B. R. 132, 68 C. C. A. 374; In re Scherber, 12 Am. B. R. 616; In re Davis, 9 Am. B. R. 670, 119 Fed. 950; Louisville Trust Co. v. Comingor, 7 Am. B. R. 421, 184 U. S. 18. See In re Baird, 8 Am. B. R. 649, 116 Fed. 765.

18. In re Kane, 12 Am. B. R. 444, 131 Fed. 386; In re Teschmacher & Mrazay, 11 Am. B. R. 547, 127 Fed. 728; In re Davis, 9 Am. B. R. 670, 119 Fed. 950. But see In re Scherber, 12 Am. B. R. 616.

adequate, the bankruptcy court may not summarily determine the question of ownership, but must relegate the parties to some proper plenary action.[19] If the court, through its referee, voluntarily delivers property to a claimant, the possession of the court is lost, and the claim of the claimant becomes adverse, precluding the court from summarily determining the claimant's right to the property without his consent.[20] But if the surrender of the property is unauthorized, the court's jurisdiction is not affected and it may determine all controversies, either by plenary suit or summary action as though such surrender had not been made.[21] Where property was taken from the custody of the court upon a writ of replevin from a State court it was held that the bankruptcy court had jurisdiction by summary proceeding to compel its return.[22] So, the vendee of a general assignee of the bankrupt within four months of the bankruptcy, and with knowledge of its existence,[23] or the bankrupt's son, to whom, just prior to bankruptcy, he has delivered a large amount of property which the son refused to restore to the trustee,[24] is not an adverse claimant, and is therefore amenable to summary process. But an assignee for the benefit of creditors has the right to have his claims for the amount paid to counsel or retained by him on account of commissions as assignee, before the bankruptcy of his assignor, adjudicated in the State court in the customary mode of proceeding, and the bankruptcy court has no jurisdiction to finally adjudicate the merits of his claims unless by his consent, and then only by a plenary suit. He is constructively an adverse claimant.[25] The surety on a bankrupt's bail bond in whose hands

19. Matter of Sunseri (Pa.), 18 Am. B. R. 231.

20. Hinds v. Moore (C. C. A.), 14 Am. B. R. 1, 134 Fed. 221.

21. In re Schemerhorn (C. C. A.), 16 Am. B. R. 507, 145 Fed. 341; Whitney v. Wenman, 198 U. S. 539, 14 Am. B. R. 45.

22. White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178.

23. Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623. *Compare* Smith v. Belford, 5 Am. B. R. 291, 106 Fed. 658.

24. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, *rev'g* 5 Am. B. R. 176, 105 Fed. 581, *rev'g* 4 Am. B. R. 747, 104 Fed. 530.

25. Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421,

money was deposited as an indemnity is an adverse claimant and cannot be proceeded against summarily in the bankrupt court unless by his consent.[26] If the adverse claimant consents to a summary disposition of his claim, the trustee's objection to the jurisdiction of the court may be overcome.[27] The meaning of the words "adverse claimant" has been construed in a number of cases cited in the note below.[28] Since the amendatory act of 1903, when a trustee in bankruptcy, in pursuit of property of the bankrupt alleged to have been fraudulently disposed of, goes out of the district of his appointment, he may resort either to a State court competent to dispose of the case or to the United States District Court covering the same territory.[29] The only change accomplished by the amendment is to give jurisdiction of suits at law and in equity to recover property to the District Courts as well as to the courts of the State. A court of bankruptcy may now inquire in a summary way as to an adverse claim, made by a stranger, to the property which belongs to the bankrupt. If it appears that the claim is manifestly without foundation, it may order the property turned over to the trustee, and punish refusal as a contempt, without compelling the trustee to resort to a plenary suit to recover the property. But the summary jurisdiction is ousted if determination of the validity of adverse claims

aff'g Sinsheimer v. Simonson, 5 Am. B. R. 537, 107 Fed. 898. As to right of the bankruptcy court to require an assignee to account for property coming into his hands under an assignment made within four months of the assignor's bankruptcy, see Matter of Thompson, 10 Am. B. R. 242, 122 Fed. 174, *aff'd* 11 Am. B. R. 719, 128 Fed. 575.

26. Jacquith v. Rowley, 9 Am. B. R. 525, 188 U. S. 620.

27. In re Hadden Roder Co., 13 Am. B. R. 604, 137 Fed. 886.

28. In re Adams, 12 Am. B. R. 367; In re Flynn & Co., 11 Am. B. R. 318, 126 Fed. 492; In re Howard, 10 Am. B. R. 601, 123 Fed. 991; In re Waterloo Organ Co., 9 Am. B. R. 427, 118 Fed. 904; McFarlan Carriage Co. v. Solanas, 5 Am. B. R. 442, 106 Fed. 145; In re Scheinbaum, 5 Am. B. R. 187, 107 Fed. 247; Blumberg v. Bryan, 6 Am. B. R. 20, 107 Fed. 673; In re Green, 6 Am. B. R. 270; In re Silberhorn, 5 Am. B. R. 568, 105 Fed. 809; In re Waukesha Water Co., 8 Am. B. R. 715, 116 Fed. 1009; In re Macon Sash & Door Co., 7 Am. B. R. 66, 112 Fed. 323, *rev'd* as Carling v. Seymour Lumber Co., 8 Am. B. R. 29, 113 Fed. 483; In re Young, 7 Am. B. R. 14, 111 Fed. 158.

29. Lawrence v. Lowrie, 13 Am. B. R. 297, 136 Fed. 995.

involves the decision of matters *in pais* and the weighing of conflicting evidence and finding of facts, which, when presented, leave room for fair doubt as to the invalidity of the claim, since such a claim is not merely colorable. Delivery must then be compelled by suit in plenary proceedings in a proper court.[30] Under certain facts, as we have seen, summary jurisdiction should be exercised.[31] Under other facts, amounting to an adverse holding under a legal title before the bankruptcy, it usually will not. For example, where transfers were made by the bankrupt two years prior to filing the petition in bankruptcy, the court has no jurisdiction of an action to set them aside on the ground of fraud against creditors, without the consent of the proposed defendants.[32] Where a receiver in bankruptcy has unlawfully surrendered property in his possession to claimants, the trustee may bring a suit in equity in the District Court to recover the property surrendered.[33] Though a trustee cannot by a petition in bankruptcy recover from a third party property alleged to belong to the bankrupt estate if objection is seasonably taken to the form of the proceedings, the court will still have the right to authorize a proceeding by way of petition where the court has jurisdiction to proceed by way of plenary suit, where no seasonable objection is taken to the form of the procedure, and where under the form of the petition in bankruptcy the rights of the respondent are secured as substantially as in a plenary suit.[34]

§ 29. **Effect of auxiliary remedies.**—So also of the different auxiliary remedies. Where the right to stay should have been exercised before *Bardes v. Bank,* it should be exercised now,[35] the

30. In re Tune, 8 Am. B. R. 285, 115 Fed. 906; Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; In re Scheinbaum, *supra;* In re San Gabriel Sanitarium Co., 7 Am. B. R. 206, 111 Fed. 892.

31. See notes 22, 23 and 24, *supra.*

32. In re Davis Tailoring Co., 16 Am. B. R. 486, 144 Fed. 285; Gregory v. Atkinson, 11 Am. B. R. 495, 127 Fed. 183.

33. Whitney v. Wenman, 14 Am. B. R. 45, 198 U. S. 539.

34. In re Steuer, 5 Am. B. R. 209, 104 Fed. 976. See In re Mundle, 14 Am. B. R. 680, 139 Fed. 691.

35. See In re Currier, 5 Am. B. R. 639. And *compare,* for an extreme and, since Bryan v. Bernheimer,

amendments having accomplished no change here.[36] So also of orders to show cause resulting in contempt.[37] The question is not one of jurisdiction, but of comity, of propriety. The court can, but often should not.[38] Likewise, too, of that much mooted question whether a District Court can summarily bring in a stranger who has a lien on the bankrupt's property and determine its validity, against his protest.[39] If the bankrupt had the title at the time of the bankruptcy, it has the jurisdiction and may assert it. If the court, through its officers, had acquired peaceable possession of the property, under such conditions as to place it and the proceeds thereof *in custodia legis,* it may determine the ownership of such property and proceeds,[40] and the relative priorities of conflicting claims thereto.[41] If the bankrupt had not the title, as in the case of chattel mortgages in New York,[42] its jurisdiction is doubtful; and surely not if both title were vested

doubtful authority, In re Seebold, 5 Am. B. R. 358, 105 Fed. 910.

36. As to stays generally, see Bankr. Act, sections 2 and 11.

37. See Bankr. Act, sections 2 and 41.

38. Thus *compare* In re Young, 7 Am. B. R. 14, 111 Fed. 158, *rev'g* and *aff'g* In re Bender, 5 Am. B. R. 632, 106 Fed. 873; also In re Green, *supra;* In re Sheinbaum, *supra;* In re Moore, 5 Am. B. R. 151, 104 Fed. 869; In re Macon Grocery Co., 8 Am. N. R. 751, 116 Fed. 143, suggests a way to assert a provisional remedy against an adverse claimant indirectly.

39. For one of the earliest and most vigorous cases in favor of asserting such jurisdiction, see Carter v. Hobbs, 1 Am. B. R. 215, 92 Fed. 594; also a chain of cases holding the same way, but on differing facts; for one of the latest and best reasoned, see In re Kellogg, 7 Am. B. R. 623, 113 Fed. 120, *aff'g* 6 Am. B. R. 389; as to right to determine controversies between lienors holding mechanics' liens, see In re Hobbs, 16 Am. B. R. 544, 145 Fed. 211.

40. In re Rodgers, 11 Am. B. R. 79 (C. C. A.), 125 Fed. 169; Haven & Geddes Co. v. Pierek, 9 Am. B. R. 569 (C. C. A.), 120 Fed. 244; In re Antigo Screen Door Co., 10 Am. B. R. 359, 123 Fed. 249; Crosby v. Spear, 11 Am. B. R. 613, 98 Me. 542; In re Leeds Woolen Mills, 12 Am. B. R. 136, 129 Fed. 922, holding that the possession once being obtained, the court's authority and control accompanies the property whenever it is, without its consent, taken into the possession of another; In re Kellogg, 10 Am. B. R. 7, 121 Fed. 332; In re Rochford, 10 Am. B. R. 608, 124 Fed. 182.

41. Chauncey v. Dyke Bros., 9 Am. B. R. 444 (C. C. A.), 119 Fed. 1.

42. Bank v. Jones, 4 N. Y. 497; Blake v. Corbett, 120 N. Y. 327.

in, and *res* were in the possession of, the mortgagee. Further, if the court has such jurisdiction, the referee has also.[43] Cases will arise where it should be exercised. But, in the long run, unless it is absolutely essential to preserve assets, or carry out the purpose of the act, a summary disposition of such controversies in the proceeding and not by suit, should not be asked.[44] Even a lienor on property vested in and in the possession of the trustee is generally an adverse claimant.[45] The analogies of the statute seem to entitle him, if he desires, to a plenary suit; and the District Court will be slow to take it from him. This view is strengthened by the fact that this law, unlike its predecessor,[46] contains no clause authorizing the trustee to sell incumbered property free from existing liens. The true test here is the same as that which applies where a stay or order to show cause which may result in contempt is asked; a test sufficiently indicated in the preceding paragraphs. Of course, what goes before does not in any way limit the right of the court to take possession summarily of the property of an alleged bankrupt which is found in his possession or that of his agent.[47] The section does not authorize a federal court to entertain a bill in equity at the instance of a simple contract creditor to set aside an alleged fraudulent conveyance.[48] But the court may entertain a suit by the trustee to set aside a mortgage on lands in his possession because given within four months prior to bankruptcy.[49] Auxiliary proceedings for the protection of the assets of the bankrupt should be brought in the District Court of the district in which the proceedings are pending.[50]

43. See Bankr. Act, section 38a(4), and Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; In re Drayton, 13 Am. B. R. 602, 135 Fed. 883; In re Platteville Foundry & Machine Co., 17 Am. B. R. 291.

44. In re Rochford, 10 Am. B. R. 608 (C. C. A.), 124 Fed. 182; In re Moody, 12 Am. B. R. 718.

45. In re Rochford, 10 Am. B. R. 608 (C. C. A.), 124 Fed. 182. *Compare* Marshall v. Knox, 83 U. S. 551. See also Burbank v. Bigelow, 92 U. S. 179.

46. R. S., section 5075.

47. *Compare* Bankr. Act, sections 3 and 69.

48. Viquesney v. Allen, 12 Am. B. R. 401 (C. C. A.).

49. In re McMahon (C. C. A.), 147 Fed. 658, 17 Am. B. R. 530.

50. In re Williams, 9 Am. B. R.

§ 30. **Jurisdiction of State courts.**—"Any State court which would have had jurisdiction had not bankruptcy intervened" now has concurrent jurisdiction[51] of any suit which can be brought by the trustees in the United States District Court arising under section 60b and section 67e,[52] but suits arising under section 70e must be prosecuted in the State court, except where the defendant consents to their prosecution in the courts of bankruptcy jurisdiction.[53] State courts are invested with complete and plenary jurisdiction over fraudulent transfers and conveyances and to entertain jurisdiction and try suits for any cause of action whatever, brought by the trustee of a bankrupt against parties who fraudulently or otherwise are in possession of the bankrupt's estate, or who are indebted to the bankrupt, which jurisdiction is co-ordinate with the jurisdiction of the bankruptcy court.[54] A State court has jurisdiction of a plenary suit by an adverse claimant to establish a lien

741, 120 Fed. 38; Ross-Mecham Co. v. Southern Car & F. Co., 10 Am. B. R. 624, 124 Fed. 403.

51. Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176, the court of common pleas has jurisdiction of a suit by a trustee in bankruptcy to recover the amount alleged to have been paid by the bankrupt in fraud of creditors; Des Moines Sav. Bank v. Morgan Jewelry Co., 12 Am. B. R. 781, 123 Iowa, 432, a trustee in bankruptcy, by intervening in an action to enforce a specific lien upon an insolvent, pending in a State court, cannot thereby oust the court of jurisdiction; Bindseil v. Smith (N. J.), 5 Am. B. R. 40, the jurisdiction of a State court to set aside an assignment of choses in action by a bankrupt is not affected by the fact that the United States District Court has enjoined the defendant from disposing of the property so assigned to him; French v. Smith, 4 Am. B. R. 785 (Minn.), 84 N. W. 44, the provisions of section 23b, as construed by the Supreme Court in Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163, conferring jurisdiction in such cases upon the State courts, are constitutional. But see Lyon v. Clark, 2 N. B. N. R. 792.

52. Under sections 60b, 67e.

53. Skewis v. Barthell, 18 Am. B. R. (Iowa) 429, under section 70e, as amended, which provides that for the purpose of a recovery of property fraudulently transferred by the bankrupt "any court of bankruptcy and any State court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction," a suit by a trustee, to set aside a transfer of real estate made by the bankrupt anterior to the four months' period, is not within the jurisdiction of the bankruptcy court except by defendant's consent.

54. Robinson v. White (Ind.), 3 Am. B. R. 88.

on property in the possession of the trustee,[55] and to set aside an alleged voidable transfer, notwithstanding an adjudication of bankruptcy.[56] If, at the time of the bankruptcy, a suit or proceeding is pending in the State court, of which the Federal court might otherwise have jurisdiction, the adjudication does not oust the State court of jurisdiction, and the State court can proceed unless stayed.[57] This is peculiarly true of actions *in rem;* the court which first takes the property into its custody retains it.[58] Where the property in controversy is rightfully in possession of a State court or its officers prior to a period of four months before a petition is filed, the adjudication of bankruptcy does not deprive the State court of a right to continue in possession of such property, or of its jurisdiction to determine the controversy.[59] However, when such taking amounts to a fraud on the law, as through a general assignment or a preference or an attachment, the State court, while not, strictly speaking, ousted, in effect, ceases to exercise jurisdiction, the assignee, or sheriff, or parties being permanently restrained.[60] The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizures made within four months; it has the force and effect of an attachment and an injunction, and is a caveat to all the world. After such adjudication a State court has no jurisdiction to determine any rights affecting the bankrupt's estate, and is

55. Skilton v. Codington, 15 Am. B. R. 810, 185 N. Y. 80; Crosby v. Miller, 16 Am. B. R. 805.

56. Bryan v. Madden, 15 Am. B. R. 388, 109 App. Div. (N. Y.) 876.

57. Matter of Bay City Irrigation Co., 14 Am. B. R. 370, 135 Fed. 850; In re English (C. C. A.), 11 Am. B. R. 674, 127 Fed. 940; In re Girdes, 4 Am. B. R. 346, 102 Fed. 318.

58. *Compare* Crosby v. Spear, 11 Am. B. R. 613, 98 Me. 542, an action of replevin cannot be commenced and maintained against a trustee to recover property in the possession of the bankrupt at the time of the adjudication; In re Lemmon, 7 Am. B. R. 291, 112 Fed. 296; In re Russell, 3 Am. B. R. 658, 101 Fed. 248; In re Chambers, 3 Am. B. R. 537, 98 Fed. 865; Southern Loan & Trust Co. v. Benbow, 3 Am. B. R. 9, 96 Fed. 514; Keegan v. King, 3 Am. B. R. 79, 96 Fed. 758.

59. In re Heckman, 15 Am. B. R. 500, 740 Fed. 859, 72 C. C. A. 8; In re English, *supra.*

60. See Matter of Hornstein, 10 Am. B. R. 308, 122 Fed. 266; Collier, Bankr., 6th ed., p. 293.

powerless to enforce any of its judgments as to such estate.[61] Questions of conflicting jurisdiction have arisen and been determined in many cases, some of which are cited in the note below.[62]

§ 31. **Suits by and against bankrupt; statutory provision.**—The Bankruptcy Act of 1898 provides as follows:

§ 11. *Suits by and against bankrupts.*—(a) A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

(b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

(c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

(d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 32. **Suits by trustees generally.**—Vested with the title of the bankrupt,[63] the trustee is also the representative of the creditors.[64]

61. In re Kaplan, 16 Am. B. R. 267, 144 Fed. 159; In re Muskoka Lumber Co., 11 Am. B. R. 758, 127 Fed. 760; In re Knight, 11 Am. B. R. 1, 125 Fed. 35.

62. In re Spitzer (C. C. A.), 12 Am. B. R. 346; Small v. Muller, 8 Am. B. R. 448; In re Emslie, 4 Am. B. R. 126, 102 Fed. 290; In re Russell, *supra;* Robinson v. White, *supra;* In re Woodbury, 3 Am. B. R. 457, 98 Fed. 833; Heath v. Shaffer, 2 Am. B. R. 98, 93 Fed. 647; In re Pittlekow, 1 Am. B. R. 472, 92 Fed. 91; In re Sievers, 1 Am. B. R. 117, 91 Fed. 366.

63. Bankr. Act, 1898, section 70a.

64. In re Gray, 3 Am. B. R. 647; In re Griffith, 1 N. B. N. 546; In re Kindt, 2 N. B. N. R. 369. *Compare* Batchelder & Lincoln Co. v. Whitmore, 10 Am. B. R. 641, 122 Fed. 355, the trustee represents those who were creditors at the time the

He is, further, a quasi officer of the court.[65] He must proceed to "collect and reduce to money the property of the estate for which he is trustee under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."[66] He may do so, when necessary, by suit or proceeding to set aside fraudulent transfers[67] or preferential liens.[68] In many matters the law requires him to consult the wishes of the creditors.[69] He only should sue.[70] Before doing so, he ought to submit the reasons for the suit to the creditors and secure an order, based on their action, from the referee.[71] How far the question at issue should be gone into on the preliminary hearing is discretionary with the referee. He should at least be sure that there is a probable cause of action.[72] The proposed defendant, if a creditor and interested in the fund, may appear in opposition to a motion for permission to sue. If suit is ordered, it should be in the name of "John Doe," as trustee of "Richard Doe," a bankrupt.[73] Whether in no-asset cases security may be demanded by the proposed defendant is for the court in which

petition was filed; Dudley v. Easton, 104 U. S. 99; Glenny v. Langdon, 98 U. S. 20; Eyster v. Gaff, 91 U. S. 521; Crooks v. Stewart, 7 Fed. 800; In re Rockford, etc., Co., Fed. Cas. No. 11,978; Barker v. Bankers' Assoc., Fed. Cas. No. 986.

65. McLean v. Mayo, 7 Am. B. R. 115; In re Ryan, Fed. Cas. No. 12,182.

66. Bankr. Act, 1898, section 47a(2); In re Stein, 1 Am. B. R. 662, 94 Fed. 124.

67. See, for instance, Barber v. Franklin, 8 Am. B. R. 468, and cases cited under discussion of section 60 of the Bankruptcy Law, *infra*.

68. See Bankr. Act, 1898, section 67, and discussion thereof, *supra*.

69. Bankr. Act, 1898, sections 11-b-c, 26; In re Baber, 9 Am. B. R. 406, 119 Fed. 520.

70. Bankr. Act, 1898, section 11. *Compare*, for when suit should not be brought, Reade v. Waterhouse, 52 N. Y. 587; Dulcher v. Bank, Fed. Cas. 4,203. See also In re Baird, 7 Am. B. R. 448, 112 Fed. 960, where referee erroneously directed trustee to sue until the moving creditor should indemnify the estate against the expense of a possibly unsuccessful controversy.

71. In re Mersman, 7 Am. B. R. 46. *Compare* Chism v. Bank, 5 Am. B. R. 56. See also In re McCallum, 7 Am. B. R. 596, 113 Fed. 393; In re Mallory, Fed. Cas. 8,990; Traders' Bank v. Campbell, 14 Wall. (U. S.) 87.

72. In re Phelps, 3 Am. B. R. 396.

73. Collier, Bankr., 6th ed., p. 390.

the suit is brought to determine.[74] For suits to avoid preferences under section 60 of the Bankruptcy Law,[75] to annul preferential or fraudulent liens under section 67,[76] and for suits under State laws to avoid fraudulent transfers under section 70,[77] the appropriate subjects should be consulted. The trustee's duty as to suits already pending in the name of or against the bankrupt will be considered in subsequent sections, as well as the limitation on suits brought by and against him.

§ 33. **Stay of suits begun after filing of petition.**—When property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control, and as between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain it.[78] But a court of bankruptcy will not generally stay a suit brought for the purpose of asserting a valid lien which attached before the beginning of the bankruptcy proceeding.[79] To protect its jurisdiction a court will enjoin all parties from proceedings looking to the same remedy in another court of concurrent jurisdiction.[80]

§ 34. **Stays of suits against bankrupt.**—The basis of jurisdiction for the stay of a suit against the bankrupt is the dischargeability of the debt. The suit must be founded upon a claim from which a discharge would be a release. If the debt which is the foundation of an action in a State court is one from which the bankrupt will not be discharged, the suit in the State court should

74. Joseph v. Makley, 8 Am. B. R. 18, where the suit is on a cause of action antedating the adjudication security for costs will be required in New York.

75. See chapter XXIII, section 14, *supra*.

76. See chapter XXII, section 28, *supra*.

77. See section 19, this chapter.

78. In re Russell, 3 Am. B. R. 658, 101 Fed. 248. *Compare* In re Chambers, 3 Am. B. R. 537, 98 Fed. 865.

79. In re San Gabriel Sanitarium Co., 7 Am. B. R. 206, 111 Fed. 892.

80. Moran v. Sturgis, 154 U. S. 256, 273; Texas & Pac. R. R. Co. v. Johnson, 151 U. S. 81. See also In re Gutman, 8 Am. B. R. 252, 114 Fed. 1009; In re Kleinhaus, 7 Am. B. R. 604, 113 Fed. 107; In re Basch, 3 Am. B. R. 235, 97 Fed. 761.

not be enjoined.[81] The words, "from which a discharge would be a release," are, however, construed broadly, and suits not strictly within them are sometimes stayed.[82] The word "suits" is also given a wide meaning. It includes actions at law, suits in equity, and, in fact, any legal proceedings where the personal liability of the debtor is sought to be fixed.[83] Thus, it embraces legal steps after judgment, such as supplementary proceedings,[84] sheriff's sales on execution,[85] the distribution of the proceeds of such sales,[86] as well as a wide range of proceedings discussed later;[87] though, were it not for other sections of the law, it may be doubted whether the word could be extended so far.[88] Where the suit involves nothing but the question of fraud, to which a discharge cannot be pleaded, its prosecution should not be stayed.[89] The character of an action brought against a bankrupt in a court of the State of New York must be determined by the pleadings, and the bankruptcy court, upon a motion to vacate and modify its order restraining the prosecution thereof, is not required to enter into an investigation *de hors* the pleading, to ascertain the nature of the action.[90] The right to enjoin has sometimes been broadly expressed.[91] The present tendency is toward limitations of the power.[92]

81. Mackel v. Rochester, 14 Am. B. R. 429, 135 Fed. 904.

82. In re Hilton, 4 Am. B. R. 774; In re Basch, 3 Am. B. R. 235, 97 Fed. 761; Ex parte Christy, 3 How. (U. S.) 292.

83. Bailey v. Glover, 21 Wall. (U. S.) 342; In re Rosenberg, Fed. Cas. No. 12,054; McKay v. Funk, 13 N. B. R. 334.

84. In re Burke, 19 Am. B. R. 51; In re De Lany & Co., 10 Am. B. R. 634, 124 Fed. 280; In re Kletchka, 1 Am. B. R. 479, 92 Fed. 901; In re De Long, 1 Am. B. R. 66; In re Adams, 1 Am. B. R. 94.

85. In re Northrup, 1 Am. B. R. 427.

86. In re Lesser, 3 Am. B. R. 815, 100 Fed. 433, *aff'd* 5 Am. B. R. 320, *rev'd* in Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; In re Kenney, 2 Am. B. R. 494, 95 Fed. 427.

87. In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337; Lea v. West Co., 1 Am. B. R. 261, 91 Fed. 237.

88. In re Globe Cycle Works, 2 Am. B. R. 447, 456. *Compare* In re Southern Loan & Trust Co., 3 Am. B. R. 9, 96 Fed. 514.

89. Mackel v. Rochester, 14 Am. B. R. 429, 135 Fed. 904; In re Wollock, 9 Am. B. R. 685, 120 Fed. 516.

90. In re Adler, 18 Am. B. R. 240.

91. In re St. Albans Foundry Co., 4 Am. B. R. 594; In re Rogers, 1 Am. B. R. 541.

92. In re Currier, 5 Am. B. R. 630; In re Ward, 5 Am. B. R. 215, 104 Fed. 985; In re Remington Auto

§ 35. **Of suits or proceedings in rem.**—The general rule is that the court that first acquires jurisdiction will retain it. Thus, a Federal court will restrain a replevin creditor proceeding in a State court against property in the custody of the Federal court,[93] but will refuse a stay in most cases where the State court is in possession,[94] or where the bankrupt had no legal or equitable title to the property sought to be replevined.[95] But the rule yields, however, where the possession of the State court is (1) the result of a fraud on the law, or (2) of a lien declared void or voidable under the law. But if the lien is by a judgment creditor's suit begun more than four months before the bankruptcy a stay will not be granted.[96] Where a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the State court, a bankruptcy court cannot enjoin the proceedings or order the property turned over to the trustee in bankruptcy.[97] Where, before filing a petition against an involuntary bankrupt, a creditor brings an attachment suit in a State court and such court acquires jurisdiction of the property attached, such

& Motor Co., 9 Am. B. R. 533, 119 Fed. 441, prosecution of claim against stockholders of a bankrupt corporation for unpaid subscriptions.

93. In re Russell, 3 Am. B. R. 658, 101 Fed. 248.

94. In re Seebold, 5 Am. B. R. 358, 105 Fed. 910; Keegan v. King, 3 Am. B. R. 79, 96 Fed. 758; In re Russell, *supra;* In re Price, 1 Am. B. R. 606, 92 Fed. 987; Carter v. Hobbs, 1 Am. B. R. 215, 92 Fed. 594. *Compare* In re Neely, 5 Am. B. R. 836, 108 Fed. 371, 7 Am. B. R. 312, 113 Fed. 210.

95. In re Smith, 9 Am. B. R. 590, 119 Fed. 1004; Matter of Kanter & Cohen, 9 Am. B. R. 372, 121 Fed. 984, 58 C. C. A. 260.

96. Metcalf v. Barber, 187 U. S. 165, 9 Am. B. R. 30, *rev'g* In re Lesser, 5 Am. B. R. 320, 3 Am. B. R. 815; White v. Thompson, 9 Am. B. R. 653, 119 Fed. 868, 56 C. C. A. 308, an injunction restraining proceedings in the disposition of property duly levied on under an execution, issued upon a judgment more than a year prior to the adjudication in bankruptcy of the debtor, is unwarranted. *Contra* In re Vastbinder, 13 Am. B. R. 148; In re Baughman, 15 Am. B. R. 23, 138 Fed. 742, a sale of the bankrupt's property under an execution issued upon a judgment more than four months prior to his adjudication may be stayed; Matter of Pollman, 16 Am. B. R. 144. See also Nat. Bank v. Hobbs, 9 Am. B. R. 190, 118 Fed. 626.

97. Pickens v. Dent, 187 U. S. 177, 9 Am. B. R. 47, *aff'g* 5 Am. B. R. 644, 106 Fed. 663.

suit should not be stayed.[98] A creditor's suit to set aside a fraudulent conveyance is an action *in rem,* and not against the debtor personally; his discharge in bankruptcy is no bar thereto.[99]

§ 36. **To enforce a lien.**—Such stays usually are sought either to prevent the enforcement of an execution or an attachment levied within the four months period, or the foreclosure of a valid mortgage. If the former, there seems little doubt about the power to halt the lien creditor or of the wisdom of exercising it.[1] If the latter, while the power exists, the mortgaged premises being in the custody of the court,[2] yet, provided the mortgage is valid, it will not as a rule be exercised, and certainly not unless it appears that the equity of redemption vested in the trustee is of some value.[3] The decisions under the former class of cases are fairly uniform,[4] and, where there is a difference, now that the doctrine of *Bardes v. Bank* has been eliminated, turn, as a rule, on whether the action sought to be stayed is or rests upon a transaction which is void or voidable under the present law. Those under the latter class, declaring against the exercise of jurisdiction and remitting the party who seeks to stay to the State court, are equally

98. Tennessee Producer Marble Co. v. Grant, 14 Am. B. R. 288, 135 Fed. 332.

99. Flint v. Chaloupka, 18 Am. B. R. 293.

1. In re Eastern Com. & Imp. Co., 12 Am. B. R. 305, 129 Fed. 847.

2. *Quaere:* Whether the mortgagee, being a secured creditor, is not, under section 57h, a party who is already within the jurisdiction of the court of bankruptcy.

3. In re Sabine, 1 Am. B. R. 315. *Compare* In re Pittelkow, 1 Am. B. R. 472, 92 Fed. 901.

4. In re Tune, 8 Am. B. R. 285, 115 Fed. 906; In re Kenney, 5 Am. B. R. 355, 105 Fed. 897; In re Seebold, *supra;* In re Lesser, *supra;* Bear v. Chase, 3 Am. B. R. 746; In re Kimball, 3 Am. B. R. 161, 97 Fed. 29. Most of the cases *contra* rest on Bardes v. Bank, 178 U. S. 524, 4 Am. B. R. 163, and since the amendatory act of 1903, are no longer the law (for instance, In re Wells, 8 Am. B. R. 75, 114 Fed. 222, and In re Shoemaker, 7 Am. B. R. 437, 112 Fed. 648). But see In re Ogles, 1 Am. B. R. 671, and In re Franks, 2 Am. B. R. 634, 95 Fed. 635. Even were this not so, the power to enjoin the consummation of a fraud on the law is by no means negatived by Bardes v. Bank. *Compare* Bryan v. Bernheimer, 175 U. S. 274, 5 Am. B. R. 623.

uniform,[5] and the earlier cases *contra*[6] are no longer controlling. Nor was this latter result appreciably affected by *Bardes v. Bank.*[7] However, in extreme cases,[8] and in cases where the mortgage itself is voidable under the terms of the law, the right to stay will usually be exercised. Where the lien creditor voluntarily makes himself a party to the proceedings,[9] as when he appears at the first meeting and asks that his security be ascertained for the purpose of voting on that part of his debt which may be unsecured, the rule is, of course, different. Such a creditor may later be stayed. But not, if the suit is a creditor's bill of long standing.[10] A suit to enforce a mechanic's lien against real property of the bankrupt may be brought against the trustee without leave of the court.[11] Where distress has been made by a landlord and afterwards the property has been transferred to another person who has become bankrupt, the result is to place the property under the control of the bankruptcy court, and such court may restrain further proceedings under the distress.[12]

§ 37. **General assignments.**—Prior to *Bardes v. Bank,*[13] the cases were uniform in holding that a general assignment being an act of bankruptcy and a constructive fraud on the law, the general assignee might be halted by an injunction from the court of bankruptcy.[14] Whatever doubt resulted from that case was eliminated by the same court's decision in *Bryan v. Bernheimer.*[15] Nor

5. In re Porter, 6 Am. B. R. 259; In re Gerdes, 4 Am. B. R. 346, 102 Fed. 318; Heath v. Shaffer, 2 Am. B. R. 98, 93 Fed. 647; In re Holloway, 1 Am. B. R. 659, 93 Fed. 638.

6. In re San Gabriel Sanitarium Co., 4 Am. B. R. 197, 102 Fed. 310; In re Pittelkow, *supra;* In re Sabine, *supra.*

7. In re San Gabriel Sanitarium Co., 7 Am. B. R. 206, 111 Fed. 892.

8. See In re Sabine, 1 Am. B. R. 315.

9. In re Riker, 5 Am. B. R. 720, 107 Fed. 96.

10. Pickens v. Roy, 187 U. S. 177, 9 Am. B. R. 47.

11. In re Smith, 9 Am. B. R. 603, 121 Fed. 1014.

12. In re Lines, 13 Am. B. R. 318, 133 Fed. 803.

13. 178 U. S. 524, 4 Am. B. R. 163.

14. In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475, *aff'd* 1 Am. B. R. 338, 92 Fed. 337; Lea v. West, 1 Am. B. R. 261, 91 Fed. 237; In re M. Solomon & Co., 2 N. B. N. Rep. 460.

15. 181 U. S. 188, 5 Am. B. R. 623.

was the doubt restored by that court's decision in *Louisville Trust Co. v. Comingor,*[16] a case which applied the Bardes rule only to the assignee and his attorneys and that, too, only when they had become vested with an adverse title prior to the bankruptcy. Since the amendatory act of 1903, *Bardes v. Bank* being no longer the law, there can now be no doubt about the power of a court of bankruptcy to restrain general assignment proceedings; indeed, it becomes its duty *proprio motu*, at once a petition, especially an involuntary petition, is filed.[17]

§ 38. **Of suits or proceedings in personam.**—Much that goes before might be repeated here. Two classes of proceedings are, however, peculiarly against the person, (a) ordinary suits for the collection of simple debts, and (b) proceedings which may result in the attachment and detention of the body of the debtor. Stated broadly, the former, subject to limitations already discussed, especially where the debt proceeded on is the result of a fraudulent preference,[18] will always be stayed. On the other hand the latter class of cases will rarely be stayed, for the reason that, as a rule, arrest on civil process rests on obligations which are not dischargeable in bankruptcy.[19] To this generalization there are, of course, exceptions, as where the remedy on a simple contract debt given by the State law includes arrest;[20] or where a stay is granted to proceedings in a State court for contempt for nonpayment of alimony.[21] Where an attempt is made to enforce a dischargeable claim in a State court by proceedings to punish the bankrupt for contempt, the bankruptcy court may, in its discretion, restrain such proceedings.[22] An injunction restraining further proceedings in an action in a State court operates in

16. 184 U. S. 18, 7 Am. B. R. 305. See also In re Carver, 7 Am. B. R. 539, 113 Fed. 128.

17. Collier on Bankruptcy, 6th ed., p. 147.

18. In re Nathan, 92 Fed. 590.

19. See in re Cole, 5 Am. B. R. 780, 106 Fed. 837. For what debts are not discharged, see Bankr. Act, 1898, section 17; Collier on Bankruptcy, 6th ed., pp. 216 *et seq.*

20. In re Grist, 1 Am. B. R. 89.

21. In re Houston, 2 Am. B. R. 107, 94 Fed. 119; on appeal, Wagner v. Houston, 4 Am. B. R. 596, 104 Fed. 133.

22. Matter of Adler, 16 Am. B. R. 414, 144 Fed. 195.

restraint of proceedings in such court to punish the bankrupt for an alleged contempt committed before the adjudication in bankruptcy.[23] In addition to the cases already cited, those found in the note below will prove suggestive.[24]

§ 39. **Practice.**—The jurisdiction conferred on the court of bankruptcy by this section is not exclusive. Application may be made to the State court, and the mandatory provisions of the section are as binding on that court as on the federal court.[25] Ordinarily, the application should be made in that court in the first instance.[26] In that event, the practice will be that provided by the State law. The production of a certified copy of the petition or of the adjudication will be enough to establish the fact that such a proceeding has been begun. But it is in no sense the duty of the State court to stay merely because it hears of the bankruptcy of a suitor. It must be informed of the facts by proper pleadings.[27] If the application is made to the court of bankruptcy, it should be made to the judge if there has yet been no order of reference; otherwise, to the referee in charge.[28] Where upon an application for an injunction the parties submit the question at issue between them to the referee for disposition, they are bound, as the court might have referred the matter to the referee in the first instance; but the right of a referee to

23. In re Fortunato, 9 Am. B. R. 630, 123 Fed. 622. See In re De Lany & Co., 10 Am. B. R. 634, 124 Fed. 280.

24. Suits or acts which have been restrained.—In re Krinsky, 7 Am. B. R. 535, 112 Fed. 658; In re St. Albans Foundry Co., 4 Am. B. R. 594; In re Booth, 2 Am. B. R. 770, 96 Fed. 943; Vietor v. Lewis, 1 Am. B. R. 667; In re Northrop, 1 Am. B. R. 427; In re Adams, 1 Am. B. R. 94; In re McKee, 1 Am. B. R. 311; In re Jackson, 2 Am. B. R. 501, 94 Fed. 797.

Suits or acts where restraint has been refused.—In re Greater American Exposition Co., 4 Am. B. R. 486, 102 Fed. 986; In re Sullivan, 2 Am. B. R. 30; Reid v. Cross, 1 Am. B. R. 34; In re Meyers, 1 Am. B. R. 347; Mather v. Coe, 1 Am. B. R. 504, 92 Fed. 333.

25. In re Rosenberg, Fed. Cas. No. 12,054; In re Metcalf, Fed. Cas. No. 4,494.

26. In re Geister, 3 Am. B. R. 228, 97 Fed. 322.

27. Johnson v. Bishop, Fed. Cas. No. 7,373.

28. See Bankr. Act, 1898, section 38a(4).

award an injunction cannot be regarded as finally settled.[29] The power of referees have been restrictd in some instances, by the rules of the courts of bankruptcy, to the granting of temporary restraining orders only.[30]

§ 40. **Papers and procedure.**—Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary. Suits, except remedies incident to valid liens, should, as a rule, be stayed. Unless there has been an abuse of discretion, the stay will not be interfered with on appeal.[31] Application is usually made by a petition setting out the jurisdictional facts such as the name of the suit, in what court, for what it is brought, the names of the persons sought to be enjoined, of their attorneys of record, and the like, and, if on information and belief, accompanied by sustaining affidavits,[32] the reasons why the stay should be granted must clearly appear. If there be a trustee, he should apply, though, if he refuses or neglects so to do, or if a trustee be not yet appointed, any party in interest, including the bankrupt, may do so. Before adjudication, the petitioning creditors are the proper persons, but any party interested in the proceeding may also apply. The stay is granted *ex parte*, and endures until it is modified or dissolved, unless limited in time by its terms. If a stay proper, as distinguished from a mere temporary injunction coupled with an order to show cause, the granting of it may be indorsed on the petition by the judge or the referee, and the clerk must then issue a writ of in-

29. In re Benjamin, 15 Am. B. R. 351, 140 Fed. 320.

30. See Rule XXI, Northern and Western Districts of New York. "When a motion for an injunction is pending or is about to be made, the referee may, in order to prevent injury to the property of the bankrupt, or otherwise, grant a temporary restraining order staying proceedings until the hearing and decision of said motion. In case all parties in interest agree that said motion be heard by the referee in charge, they may file with the referee a written stipulation to that effect. The decision of the referee on such motion shall be filed with the clerk, and if the referee decides that an injunction shall issue, an order to that effect may be made by the judge."

31. In re Lesser, 3 Am. B. R. 758, 99 Fed. 913.

32. In re Keiler, Fed. Cas. 7,647.

junction, which, in turn, must be served by the marshal, in the same manner as other federal writs. If a temporary restraining order, the practice of the State courts usually controls as to recitals, the signature of the judge or referee, and the method of service.[33] Omnibus stays are not frequent and the writ or order will, as a rule, be addressed to the party stayed *eo nomine;* however, stays directed generally "to all other persons" seem to bind all persons served.[34] Whether, if the person to be stayed is not a party to the proceedng, he must be brought in by a subpoena served at the same time, is a question. There is high authority for the practice,[35] even under the present law; but the wording of the subsection under discussion does not seem to make it necessary. In actual practice, it is rarely essential, and much less rarely done. Motions to modify or vacate are made in the usual way, on notice and affidavits, and are often subject to district rules or the practice of the local State courts. How far courts will investigate the merits of contested applications depends largely on the conscience and industry of the judge or referee. The authority seems to be that a court of bankruptcy will, if necessary, determine such merits, even swearing witnesses or ordering a referee to ascertain the facts. It will, indeed must, determine whether the debt is dischargeable or not.[36] To do this, it must often declare the legal effect of pleadings in the State court, and sometimes of a judgment there granted.[37]

§ 41. **Duration of stays.**—If granted before the adjudication, a stay is dissolved by the adjudication, though of course, it may be renewed. If granted after the adjudication, it must be in the words of the statute; these clearly indicate its duration.[38] If the

33. Collier on Bankruptcy, 6th ed., p. 150.

34. In re Lady Bryon Mining Co., Fed. Cas. 7,980.

35. Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623.

36. In re Basch, 3 Am. B. R. 235, 97 Fed. 761.

37. Burnham v. Pidcock, 5 Am. B. R. 590; Knott v. Putnam, 6 Am. B. R. 80, 107 Fed. 907.

38. "Until twelve months after the date of such adjudication, or, if within such time, such person applies for a discharge, then until the question of such discharge is determined."

year goes by and the bankrupt obtains the extension permitted by section 14a, it is questionable whether another stay could be granted under the terms of this section of the law; but it probably could under the general equity powers of the court. It is thought however, that the words "the question of such discharge is determined" are sufficient to embrace the time consumed on an appeal, seasonably taken and diligently prosecuted. Once the discharge is granted or refused, the stay is dissolved. No order to that effect is required. Better practice, however, suggests the application for and entry of such an order, though it is the duty of the court to make such entry, in any event.[39]

§ 42. **Continuance of suits — Where bankrupt is defendant.**— The words here are not the same as those of the former law,[40] but their effect is similar.[41] One option is with the trustee—he may or may not decide to defend[42]—though, when in doubt, he should report at a meeting of creditors for instructions. The other option is with the court; it may,[43] but need not, order the trustee to intervene. The State court, on the other hand, cannot compel him to intervene.[44] He can plead to the jurisdiction, or make any defense which the bankrupt could have made, or even any defense which any creditor could have asserted affirmatively.[45] Once a party to such suit, he is bound by the judgment therein.[46] If the judgment is already entered, and the State court refuses to open it on a motion of the trustee, the court of bankruptcy cannot, it seems, force the State court to open the case by restraining the enforcement of its judgment.[47] It would also seem that a trustee,

39. In re Rosenthal, 5 Am. B. R. 799, 108 Fed. 368.

40. Act of 1867, section 16; R. S., section 5047.

41. Price v. Price, 48 Fed. 823.

42. Traders' Bank v. Campbell, 14 Wall. (U. S.) 87; Reade v. Waterhouse, 52 N. Y. 587.

43. In re Porter & Bros., 6 Am. B. R. 259, 109 Fed. 111.

44. Oliver v. Cunningham, Fed. Cas. 19,493. But *compare* Bear v. Chase, 3 Am. B. R. 746, 99 Fed. 920.

45. Loudon v. Blandford, 56 Ga. 150; Sanford v. Sanford, 58 N. Y. 67; Knox v. Bank, 12 Wall. (U. S.) 379.

46. In re Skinner, 3 Am. B. R. 163, 97 Fed. 190; In re Van Alstyne, 4 Am. B. R. 42, 100 Fed. 929.

47. In re Franklin, 6 Am. B. R. 285, 106 Fed. 666, *aff'd* Jaquith v.

when once a party, could, on showing the required facts, secure a removal of the cause to the proper Federal court; there are, however, no cases in point. If a trustee does not intervent, he is bound by the judgment to the same extent that any party acquiring an interest pending suit would be bound.[48]

§ 43. **Where bankrupt is plaintiff.**—The words of this subsection are strikingly similar to those of the law of 1867.[49] They have, however, been given a somewhat limited meaning. Thus, only such suits as may be beneficial to the estate should be continued by the trustee.[50] If, then, actions not beneficial to the estate are pending, what may the bankrupt do? The authorities are not uniform.[51] The analogy between such a right of action and any other valueless or burdensome property is striking, and, it is thought, on proper application to the referee in charge, the trustee may be excused from prosecuting such a suit, and the bankrupt authorized to do so for his own benefit.[52] The consent of the bankruptcy court to the substitution of the trustee for the bankrupt in the State court should first be obtained and affirmatively shown.[53] If the trustee intervenes, the suit will be continued in his name,[54] but the trustee is liable only for costs after he intervenes, and for costs personally only when guilty of mismanagement or bad faith.[55]

§ 44. **Practice.**—Application should first be made by petition or motion for leave to ask to intervene; and this application should, as a rule, be heard at a meeting of creditors. It may, however, be

Rowley, 188 U. S. 620, 9 Am. B. R. 525. *Compare* Neiman v. Shoolbraid, 2 N. B. N. Rep. 668.

48. Thatcher v. Rockwell, 105 U. S. 467.

49. Act of 1867, section 16; R. S., section 5047.

50. In re Haensell, 1 Am. B. R. 286, 91 Fed. 355; In re Franks, 2 Am. B. R. 634, 95 Fed. 635.

51. Towle v. Davenport, 16 N. B. R. 478; Noonan v. Orton, 12 N. B. R. 405; Gilmore v. Bangs, 55 Ga. 403; Sutherland v. Davis, 42 Ind. 26.

52. Griffin v. Mutual Life Ins. Co., 11 Am. B. R. 622, 119 Ga. 664, 46 S. E. 870.

53. Hahlo v. Cole, 15 Am. B. R. 591, 112 App. Div. (N. Y.) 636.

54. Ames v. Gilman, 51 Mass. 239.

55. Norton v. Switzer, 93 U. S. 355; Reade v. Waterhouse, 52 N. Y. 587.

granted *ex parte*. How far an adverse party in the State court should be heard in opposition to the motion is an open question. He certainly should not, if he is not a creditor, and any effort on his part summarily to determine the controversy on the merits should be checked; the State court is the forum for such determination. Permission once granted, the scene shifts to the State court, and the application there will, of course, be in accordance with the rules and practice of that court.[56] Throughout, the practice under these subsections is closely analagous to that where a trustee initiates a suit, discussed under the appropriate sections.[57]

§ 45. **Limitation on suits by trustee and when it begins to run.** —This subsection has reference to suits initiated by the trustee, rather than those pending at the time of the bankruptcy.[58] It is similar to the corresponding clause under the act of 1867 in the period only, two years. The time under that statute began to run when the cause of action accrued in or against the assignee. The time does not now begin to run "until the estate has been closed."[59] This subsection constitutes an arbitrary limitation on suits, as to computation of time at least superseding all statutes, whether State or Federal,[60] provided the action is not barred by the State statute at the time the petition in bankruptcy was filed.[61] It seems also that the character of the suit is immaterial, provided it amounts to the prosecution of a demand in a court of justice,[62] in respect to the property or rights of property of the bankrupt.[63] It applies also to writs of error sued out to review a State judgment, as well as to suits initiated by the trustee.[64] It does not apply to

56. Bank of Commerce v. Elliott, 6 Am. B. R. 409.

57. See chapters XXII, XXIII and XXIV, *supra*.

58. But *compare* Maybin v. Raymond, Fed. Cas. 9,338.

59. For a somewhat remarkable example of the effect of the limitation under the former law, see Scott v. Devlin, 89 Fed. 970.

60. Freelander v. Holloman, Fed. Cas. 5,081.

61. Sheldon v. Parker, 11 Am. B. R. 152 (Neb.), 92 N. W. 923.

62. Bailey v. Glover, 21 Wall. (U. S.) 342; Ames v. Gilman, *supra;* Union Canal Co. v. Woodside, 11 Pa. St. 176.

63. In re Conant, Fed. Cas. 3,086; Stevens v. Hauser, 39 N. Y. 302.

64. Jenkins v. Bank, 106 U. S. 571; Walker v. Towner, Fed. Cas. 17,089.

an application to reopen a case upon the ground that the proceeding was closed before the estate was fully administered.[65] Under familiar principles, this limitation does not affect jurisdictions; to be available, it must be pleaded.[66] "After the estate has been closed" is a new phrase. It surely does not mean the date of the discharge or refusal to discharge. Nor yet does it mean the day the referee remits the papers of a closed case to the clerk.[67] It rather refers to the date when the final decree approving the trustee's account and discharging him is granted.[68] Even this is, however, not accurate, for in no-assets bankruptcies, no trustee may be appointed, and yet a cause of action may develop; while in many cases when a trustee is appointed, he finds himself unable to find assets and, there being no funds with which to pay the expenses incident to a meeting for his discharge, files no report and is not discharged. There are as yet no decisions construing the meaning of this phrase. It is suggested that, where no trustee is appointed, the two years will begin to run from the day when the order dispensing with a trustee is granted, and that, when a trustee is appointed who does not report or seek a final discharge, it will not begin until such discharge is granted.[69] It has been held that where an estate is declared closed, but is subsequently reopened, the two year period begins to run from the subsequent closing of the estate.[70]

65. Matter of Paine, 11 Am. B. R. 351, 127 Fed. 246.

66. Chemung Bank v. Judson, 8 N. Y. 254.

67. See section 39a(7), Bankr. Act, 1898.

68. See section 2(8), Bankr. Act, 1898.

69. Collier on Bankruptcy, 6th ed., p. 154.

70. Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318.

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