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Donald E. Bridgman

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UNIFORM FRAUDULENT CONVEYANCE ACT  
IN MINNESOTA

BY DONALD E. BRIDGMAN\*

ORIGIN AND PURPOSE OF THE ACT

THE Uniform Fraudulent Conveyance Act was passed in Minnesota in 1921, Laws of 1921, Chapter 415, to take effect January 1st, 1922. It was drafted by the National Conference of Commissioners on Uniform State Laws, and approved and recommended by it for passage in all the states at its annual conference in 1918. This is the same conference which prepared the Uniform Negotiable Instruments Act, and other Uniform Acts.<sup>1</sup> The Fraudulent Conveyance Act has already been enacted in eleven states<sup>2</sup> which, with the year of enactment, are as follows: Arizona, 1919, Delaware, 1919, Maryland, 1920, Michigan, 1919, Minnesota, 1921, New Hampshire, 1919, New Jersey, 1919, Pennsylvania, 1921, South Dakota, 1919, Tennessee, 1919, Wisconsin, 1919. Considering the short time the act has been out of the conference, this is a very good showing.

The purpose of the act is to give greater certainty and also uniformity to the law of fraudulent conveyances, rather than to change the law; and in general the existing common law is followed. The explanatory note prefixed to the official edition of the act<sup>3</sup> gives the reason for drafting the act, as follows:

“Existing confusions in the law relating to conveyances in fraud of creditors make the adoption by the several states of an act which shall put an end to the confusions by concise and clear statements of legal principles pertaining to the subject a matter of practical importance.

“The confusions and uncertainties of the existing law are due primarily to three things:

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\*Member of the Bar of the City of Minneapolis.

<sup>1</sup>The Uniform Commercial Acts in force in Minnesota are as follows:—

Uniform Negotiable Instruments Act, G.S. 1913, Secs. 5813-6009; Uniform Warehouse Receipts Act, G.S. 1913, Secs. 4514-4575; Uniform Sales Act, Laws 1917, Ch. 465; Uniform Bills of Lading Act, Laws 1917, Ch. 399; Uniform Partnership Act, Laws 1921, Ch. 487; Uniform Limited Partnership Act, Laws 1919, Ch. 498; Uniform Fraudulent Conveyance Act, Laws 1921, Ch. 415.

<sup>2</sup>This does not include whatever states may pass the act at the 1923 session.

<sup>3</sup>A reprint of the official text of the act with notes is to be found in 44 Am. Bar Ass'n Rep. 341 and in 5 Am. Bar Ass'n Journal 491.

"First, the absence of any well recognized, definite conception of insolvency.<sup>4</sup>

"Second, failure to make clear the persons legally injured by a given fraudulent conveyance.

"Third, the attempt to make the Statute of Elizabeth cover all conveyances which wrong creditors, even though the actual intent to defraud does not exist.

"The Statute of Elizabeth condemns conveyances as fraudulent only when made with the 'intent' to 'hinder, delay or defraud.' There are many conveyances which wrong creditors where an intent to defraud on the part of the debtor does not in fact exist. In order to avoid these conveyances, the courts have called to their assistance presumptions of law as to intent, and in equity have pushed presumption of fraud as a fact to an unwarranted extent; with the result that, while in the main the decisions under the facts do justice, the reasoning supporting them leaves much to be desired.

"In the act as drafted all possibility of a presumption of law as to intent is avoided. Certain conveyances which the courts have in practice condemned, such as a gift by an insolvent, are declared fraudulent irrespective of intent.<sup>5</sup> On the other hand, while all conveyances with intent to defraud creditors<sup>6</sup> are declared fraudulent, it is expressly stated that the intent must be 'actual intent, as distinguished from intent presumed as a matter of law.'

"The act as drafted makes few changes in the law of any state. In this subject, as in many others in our law, need for definite statutory statement does not arise so much from actual conflict between the law of different jurisdictions arising out of clear cut differences in judicial opinion, as from the confusion of thought manifested in judicial opinion, which renders the law in a great degree uncertain in all jurisdictions.

"The chief benefit to be derived from the adoption of a uniform act on conveyances in fraud of creditors is that, if properly enforced, it will give a known certainty to the law which it does not now possess."

The advantages of this act are also found in the fact that the law is brought into uniformity with other states. Business is conducted to a large extent between different states; and in granting and obtaining credit the law governing fraudulent conveyances is an important feature. A certain and uniform law aids in extending credit. Further, the law of fraudulent conveyances is closely related to bankruptcy; and with a federal Bankruptcy Act the same in all states, it is desirable to have fraudulent conveyances also governed by a uniform law.

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<sup>4</sup>Covered by sections 1 and 2 of Uniform Act.

<sup>5</sup>Sec. 4, also sec. 5, 6 and 8.

<sup>6</sup>See sec. 7.

The Fraudulent Conveyance Act was prepared by the Committee on Commercial Law of the National Conference of which Sampson R. Child of Minneapolis was a member, also Prof. Samuel Williston of Harvard Law School. Prof. William Draper Lewis, of University of Pennsylvania Law School, was draftsman of the act. Tentative drafts of the act were before the National Conference for three years for consideration, before final adoption in 1918.

#### SCOPE OF THE ACT

The scope of the act is to put into statutory form the Statute of Elizabeth<sup>7</sup> relating to conveyances fraudulent as to creditors and the rules of construction which have developed around it. This statute, in one form or another, is the law in every state; and is found in Minnesota in section 7013,<sup>8</sup> General Statutes 1913, and also in sections 7014, 7015, 7016 and 7019<sup>9</sup> in so far as the last four sections apply to section 7013. Section 7013 is therefore expressly repealed in section 14 of the Uniform Act, because superseded; but the other four sections are not expressly repealed, since by their terms they are general in nature and apply to the entire subdivision or chapter, and therefore remain to govern the interpretation of sections 7011, 7018, etc. The topics covered by these four sections, in so far as they applied to section 7013, are largely provided for expressly in the Uniform Act, but in a somewhat different way.<sup>10</sup>

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<sup>7</sup>13 Eliz. C. 5, (1570).

<sup>8</sup>This section is as follows:—

“Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or of any rents or profits issuing therefrom, and every charge upon lands, or upon the rents or profits thereof, made with intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, and order or judgment suffered, with like intent, as against the persons so hindered, delayed or defrauded, shall be void.”

<sup>9</sup>These sections provide that the conveyances fraudulent against creditors are fraudulent against their successors and assigns, etc., that fraudulent intent is a question of fact, that the title of a bona fide purchaser shall not be impaired, and that “conveyance” covers every creation, assignment, etc., of any estate or interest in lands.

<sup>10</sup>The source of section 7013, and of the four subsequent sections relating to it, is as follows: statute 13 Eliz., chap. 5, (1570) provided that all conveyances, etc., of lands, and goods, and all bonds or judgments, etc., made with intent to delay, hinder or defraud creditors and others of their debts, etc., shall as against such persons, their representatives and assigns be void, but this was not to extend to conveyances, etc., on good consideration, bona fide to a person without notice of the fraud.

The courts gradually built around this statute rules that certain facts constituted constructive fraudulent intent, regardless of the actual

Many states do not have a statute corresponding to section 7010 relating to transfers of goods and things in action in trust for the grantor; and since the law under this section is usually regarded as practically in the same field with the Uniform Act, the repeal of section 7010 by section 14 of the Uniform Act is in aid of statutory uniformity.<sup>11</sup> It is to be noted that section

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intent, until in 1818, in *Reade v. Livingston*, (1818) 3 John. Ch. 481, Chancellor Kent in New York held that a voluntary conveyance was constructively fraudulent as to creditors, if the grantor had any debts, although sufficient assets remained to care for the debts. There was a legislative reaction against this rule; and in 1829 an act was passed in New York, following the provisions of the Statute of Elizabeth, but adding a section to the effect that fraudulent intent was a question of fact, and that no conveyance should be adjudged fraudulent solely because it was without consideration. New York, Revised Statutes 1829, part ii, Ch. vii, title iii, vol. ii, p. 137. This New York statute was copied directly or indirectly in a number of states; and the Minnesota statute, sections 7013 to 7016, and 7019, G.S. 1913, was originally taken from it in 1851 (Ch. 64 R.S. 1851) almost verbatim. For some reason, in the 1866 revision, "goods or things in action" were omitted, leaving the statute applying in terms only to land; but the Minnesota court has held that the Statute of Elizabeth is merely declaratory of the common law, and that by common law transfers of chattels and things in action with intent to defraud creditors are void as to creditors, although not expressly mentioned in the statute. *Byrnes v. Volz*, (1893) 53 Minn. 110, 54 N.W. 942. Thus the Minnesota Statute of 1913 was derived from the Statute of Elizabeth with some slight modifications, and a revised terminology; and as construed by our courts it represented in a general way the law, statutory or common, in most of the states. This is the situation the Uniform Act was drafted to meet. It, also, is based on the Statute of Elizabeth, as construed by the courts; and there should not be great difficulty in using the Uniform Act in Minnesota. Many of the decisions of the court under the former statute should still be effective under the new act.

It may be of interest to note that chapters 62, 63, and 64, R.S. 1851, relating to Fraudulent Conveyances and Statute of Frauds, are almost verbatim the same as chapter vii, part ii, R.S. 1829, of New York, omitting some sections on retention of possession by a vendor of goods. The New York chapter had three titles. The division was (1) Fraudulent Conveyances and Contracts Relative to Lands, (2) Relative to Chattels and Things in Action, and (3) General Provisions. The last included the Statute of Elizabeth. In General Statutes, Minnesota, 1866, the arrangement was changed to the present one; and chapter 41 of Minn., G.S. 1866 has the three titles: Conveyances Fraudulent as to Purchasers, Statute of Frauds, and Conveyances Fraudulent as to Creditors. This was a return to the original English statutory arrangement; and is the same as chapter 68, Minn., G.S. 1913, except that the Statute of Frauds now comes first, Section 7010 dated from 1851, being originally in the chapter relating to chattels. Sections 7011 and 7012 on retention of possession appear in 1866. Section 7018, Bulk Sales law, was passed in 1899. Section 6707, regarding a resulting trust for creditors, dates from 1851, as does section 6719. The requirement for filing a chattel mortgage appears in 1866.

<sup>11</sup>The comment of Prof. Williston on the effect of the Uniform Act on section 7010 is:

"I should suppose that section 7010 would also be superseded, leading to the consequence which would, I suppose, have represented the common law in many states, that a conveyance by a solvent grantor

7010 relates only to personal property, and that the Minnesota supreme court has held that at least in some of its aspects it merely states the common law which applies also to reality.<sup>12</sup> Now section 11 of the Uniform Act provides that in any case not provided for in the act, the rules of law and equity shall govern, which means that in such case the common law is in force. The common law rule, therefore, which corresponds to section 7010, but which governs land as well as chattels and choses in action, would appear to remain in force under the Uniform Act.

It would seem that the provisions of the Uniform Act might also apply, as well as section 6707, General Statutes 1913, to the rights of creditors where the debtor furnishes the consideration for a conveyance to another party. If an insolvent debtor instead of making a direct gift of his property to C, uses it as consideration to B for B conveying to C, should not this be regarded as a conveyance void as to creditors under section 4 of the Uniform Act, and not merely presumptively fraudulent under section 6707? The Uniform Act in its protection of subsequent creditors and in other particulars is broader than section 6707. There is division of opinion among the states as to whether or not such a purchase of property in the name of a third person by the debtor, comes within the Statute of Elizabeth;<sup>13</sup> but there is an indication in several Minnesota cases<sup>14</sup> that the statute on resulting trusts for creditors<sup>15</sup> and on fraudulent conveyances<sup>16</sup> are closely related, and that the securing of a conveyance to another when the debtor furnishes the consideration, may be treated as a conveyance fraudulent as to creditors. The word "conveyance" in section 1 of the Uniform Act, which is defined as including certain transfers, etc., but not to the exclusion of others, is easily open to the interpretation that it includes a conveyance by an outside person, where the debtor pays for it, in view of the fact

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to another person in trust for the grantor is not fraudulent in the absence of fraudulent intent, and the creditors of the grantor could not treat the conveyance as void, but would be obliged to proceed in an appropriate manner to secure the benefit of the grantor's equitable interest in the same way as if the trust had been created by a third person."

<sup>12</sup>Wetherill v. Canney, (1895) 62 Minn. 341, 64 N.W. 818; Anderson v. Lindberg, (1896) 64 Minn. 476, 67 N.W. 538; Stephon v. Topic, (1920) 147 Minn. 263, 266, 180 N.W. 221.

<sup>13</sup>27 C.J. 452, 453; Bigelow, *Fraudulent Conveyances*, 127-132.

<sup>14</sup>Blake v. Boisjoli, (1892) 51 Minn. 296, 53 N.W. 637; Leonard v. Green, (1885) 34 Minn. 137, 24 N.W. 915; Stone v. Myers, (1864) 9 Minn. 303.

<sup>15</sup>Sec. 6707.

<sup>16</sup>Sec. 7013.

that the Statute of Elizabeth has been held to apply to such conveyances.

It would seem that payment of premiums on life insurance policies would come within the terms of the Uniform Act, as well as being governed by section 3465, General Statutes 1913, which provides that:

"All premiums paid for insurance in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof in writing."

The section quoted does not attempt to define when the payments are in fraud of creditors. This is for the Uniform Act to do. Although there is difference among the states<sup>17</sup> it appears that in Minnesota, in view of the above statute, payments of life insurance premiums in connection with the payment of the policy are regarded as a "conveyance" to the beneficiary and fall within the terms of the Uniform Act. A discussion of payment of life insurance premiums, showing them to be in substance payments to the beneficiary, is found in *Merchants' and Miners' Transportation Co. v. Borland*.<sup>18</sup>

There is also the question whether the Uniform Act does not also apply to chattel mortgages as well as the chattel mortgage act, section 6966. For instance, if a chattel mortgage is given for a disproportionately small sum by an insolvent debtor, is it not absolutely fraudulent as to creditors under sections 3 and 4 of the Uniform Act, although duly filed and given in good faith? A chattel mortgage falls clearly within the meaning of the word "conveyance" in section 1 of the act. Are the words "purpose of hindering, delaying or defrauding any creditor" in section 6966 to be construed as referring to what the provisions in the Uniform Act say is fraudulent as to creditors? Or are they to retain the meaning which they have been given heretofore in the decided cases,<sup>19</sup> and is a chattel mortgage also fraudulent if it is given in a manner described as fraudulent in the Uniform Act? A chattel mortgage seems to be regarded as falling within the Statute of Elizabeth, and therefore the Uniform Act, in matters not provided for in the chattel mortgage statute.<sup>20</sup>

<sup>17</sup>27 C.J., 427, et seq.

<sup>18</sup>(1895) 53 N.J. Eq. 282, 31 Atl. 272.

<sup>19</sup>Dunnell's Digest, sec. 3884, et seq.

<sup>20</sup>Bigelow, *Fraudulent Conveyances* 400; 27 C.J. 451.

Prior to the passage of the chattel mortgage statute, the court held such mortgages were governed by the chapter on fraudulent conveyances, *Chophard v. Bayard*, (1860) 4 Minn. 533 (418); and after the

The Uniform Act contains provisions relating to the remedies of creditors,<sup>21</sup> not found in our statutes, outside of the attachment statute.

There are matters which the act does not cover, that should be referred to in discussing its scope. Sections 7011, and 7012, relating to retention of possession by a seller of goods as presumptively fraudulent, and section 7018, General Statutes 1913, the Bulk Sales law, though included in the same subdivision with section 7013, yet are supplemental provisions relating to additional matters in fraud of creditors. Section 7017, requiring an assignment of debt to be filed, is in the same category. These sections are not superseded by the Uniform Act, and it is expressly provided in Section 14 of the act that they are not repealed. Nor does the Uniform Act cover the effect of omitting a trust in a conveyance, section 6719. The rights of personal representatives and assignees for creditors, under sections 7313, 7314 and 8332, to recover back property fraudulently conveyed, remain unaffected.

#### OUTLINE OF ACT

What is the effect of the Uniform Act within the field which it covers? After a brief resumé of its provisions, we will take up the separate sections.

The first three sections constitute a definition of important terms. "Conveyance" is made broad in section 1 to cover any form of transfer of property; also "creditor" is broadly defined, so the one word can cover persons having the various kinds of claims. The definition of "insolvent" in section 2, uses the words "assets" and "debts" defined in section 1, and is important in relation to section 4, which declares certain conveyances by an insolvent, fraudulent. "Fair consideration" defined in section 3 to exclude inadequate consideration, is used in sections 4, 5, 6 and 8, where certain conveyances, if made without fair consideration, are declared fraudulent.

Sections 4 to 8 state what conveyances are fraudulent as to creditors, and whether fraudulent as to present or both present and future creditors. Sections 4, 5 and 6 declare that certain conveyances without fair consideration are fraudulent as to creditors without actual intent to defraud; that is, they are con-

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passage of that statute, the court indicated that the law in that respect had not been changed, *Horton v. Williams*, (1875) 21 Minn. 187, 189, 191.

<sup>21</sup>Secs. 9 and 10.

structively fraudulent because of the circumstances under which made,—thus conveyances by an insolvent,<sup>22</sup> conveyances by persons in business leaving them with unreasonably small capital,<sup>23</sup> and conveyances by a person about to incur debts.<sup>24</sup> Section 7 deals with conveyances where there is actual intent to defraud. Section 8 states when conveyances by a partnership are fraudulent.

Sections 9 and 10 provide for the rights of creditors,—against whom and how they can proceed to reach the property fraudulently conveyed. One section treats of creditors whose claims have matured, the other of creditors whose claims have not matured.

Sections 11 to 15 are provisions common to all uniform acts. Section 11 provides expressly for the existing law to govern in cases not provided for in the act, while section 12 provides that the act shall be construed to promote uniformity, that is, the decisions of other states under the act shall have special weight. A short name, "Uniform Fraudulent Conveyance Act,"<sup>25</sup> a repealing clause,<sup>26</sup> and a provision that the act shall take effect Jan. 1, 1922,<sup>27</sup> complete the act.

#### SEPARATE SECTIONS OF THE ACT

"Section 1. [Definition of Terms.] In this act 'assets' of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"'Conveyance' includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

"'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"'Debt' includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

The term "assets," defined in this section, is used only in section 2 in defining insolvency. It is apparent that "assets" should not include exempt property which cannot be reached by creditors, when being compared with "debts" to ascertain whether there is a condition of insolvency such as produces a fraud on creditors. In Minnesota with its liberal exemption laws, fixing no value limit on the homestead exemption, this definition is of special importance. A gift of his property by a person leaving him without unexempt assets to cover his debts, should be fraudu-

<sup>22</sup>Sec. 4.

<sup>23</sup>Sec. 5.

<sup>24</sup>Sec. 6.

<sup>25</sup>Sec. 13.

<sup>26</sup>Sec. 14.

<sup>27</sup>Sec. 15.

lent under section 4, regardless of how great the value of his exempt property may be.

This definition probably states the former law as to fraudulent conveyances, since it delays and defrauds creditors if the debtor gives away his property leaving only exempt property, that cannot be reached, as well as if he leaves himself with no property.<sup>28</sup> The rule under the Bankruptcy Act, sec. 1a(15), that exempt property of the debtor shall be counted in ascertaining insolvency, is adopted because the statute clearly requires it.<sup>29</sup>

"Conveyance" is given a very broad meaning to cover any possible form of transfer of property of any kind, or giving it as security. It would cover the release of a debt. While this is a larger meaning than the word usually has, yet when conveyances fraudulent as to creditors are spoken of, the broadest use of the word is understood. Certainly it is a convenience in the other sections of the act to be able to use one word and avoid the repetition of a long clause.

This full definition doubtless states the former law existing prior to the passage of the Uniform Act. It covers all that section 7013 was intended to cover; and one word is used instead of thirty-five words. It is true that the former statute, section 7013, only referred in terms to land; but the court has held that transfers of goods and choses in action in fraud of creditors are void as to creditors at common law.<sup>30</sup>

Reference has already been made to the fact that "conveyance" may well be construed to include conveyances to a third person where the debtor furnishes the consideration, and payment of life insurance premiums in connection with payment of the policies.<sup>31</sup>

The definition does not expressly exclude conveyance of exempt property; but since fraudulent conveyance statutes have all been construed not to apply to conveyances of exempt property, to which the creditor has no right,<sup>32</sup> this act will without doubt be construed the same way. Section 11 expressly provides

<sup>28</sup>Bigelow, *Fraudulent Conveyances* 225; *Underleak v. Scott*, (1912) 117 Minn. 136, 142, 134 N.W. 731.

<sup>29</sup>In *re Baumann*, (1899) 96 Fed. 946; In *re Crenshaw* (1907) 156 Fed. 638.

<sup>30</sup>Dunnell's *Digest*, sec. 3853.

<sup>31</sup>See secs. 6707 and 3465, Minn., G.S. 1913.

<sup>32</sup>*Blake v. Boisjoli*, (1892) 51 Minn. 296, 53 N.W. 637; Dunnell's *Digest*, sec. 3850; Bigelow, *Fraudulent Conveyances* 52 et seq.; Glenn, *Creditor's Rights and Remedies*, sec. 97.

for existing rules of law to govern in cases not provided for in the act.

The definition of "conveyance" does not exclude property supposedly mortgaged to its full value. It has been held in Minnesota<sup>33</sup> that the conveyance of such an equity is not fraudulent because of no value. There is much to be said for the dissenting opinion in the case, that it is for the creditor, not the jury, to determine whether there is a value in the equity, and that the creditor should have the equity if he wishes it. The dissent appears to represent the better rule, as well as the weight of authority,<sup>34</sup> and since section 12 calls for uniform construction of the act, the act may well change the law of Minnesota on this point. Of course, the rule of *Aretz v. Kloos*,<sup>35</sup> is not affected, that conveyance of property mortgaged to its full value, in satisfaction of the mortgage debt, is not fraudulent, since the release of the debt is consideration.

In the definition of "creditor," also, the word is given the broadest meaning, to include a person having any kind of a legal claim. The word "creditor" thus includes all that was signified by "creditors or other persons" in the former statute. There would be included under the term "unmatured," any claim on a debt not yet due, under the term "unliquidated," a claim for damages in tort though no suit had been brought,<sup>36</sup> and under the term "contingent," the right against a guarantor, or indorser of a note, although the principal has given no indication of defaulting. All of these are protected as claims of a "creditor" against fraudulent conveyances.

This broad definition apparently represents the weight of authority,<sup>37</sup> although there is some conflict on several points. Although a person having an unliquidated or contingent claim, cannot have it satisfied out of the property fraudulently conveyed, until it is liquidated, or the contingency has happened, yet the definition is of significance in relation to section 4, since such person is protected as a creditor against conveyances by an insolvent without fair consideration, and is regarded as a present

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<sup>33</sup>*Aultman v. Pikop*, (1894) 56 Minn. 531, 58 N.W. 551.

<sup>34</sup>Bigelow, *Fraudulent Conveyances*, 38. Glenn, *Creditors' Rights and Remedies*, sec. 27.

<sup>35</sup>(1903) 89 Minn. 432, 95 N.W. 216, 769.

<sup>36</sup>An example of protection of one having a tort claim for damages as existing creditor from the time the cause of action arose in *Eschmann v. Lords*, (1920) 92 N.J. Eq. 382, 112 Atl. 488.

<sup>37</sup>Bigelow, *Fraudulent Conveyances* 163, et seq.; 27 C. J. 472, 473, 476, 477.

existing creditor, and not a future or subsequent creditor. The definition apparently makes no change in the law of Minnesota, except to make a clear and definite rule and remove any doubt. Existing cases attach a broad significance to the words "creditors or other persons" of the former statute.<sup>38</sup>

The term "debt" is defined to include any legal liability, corresponding to the definition of "creditor" to include a person having any legal claim. It includes in one word all that section 7013 meant by "lawful actions, damages, forfeitures, debts or demands;" and is a more modern and simpler mode of expression. The significance of the words "unmatured," "unliquidated" and "contingent" has been referred to under the definition of "creditor." The same remarks, that this is a clarification of the law, rather than a change, also apply to this definition.

"Section 2. [Insolvency.] (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

"(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription."

The importance of this section is that a conveyance by an "insolvent" as here defined is declared fraudulent as to creditors in section 4, if without fair consideration. A person cannot give away his property as against creditors if he is or thereby becomes "insolvent," regardless of intent.

This section clears up a doubtful point. It is true that under the Minnesota state insolvency law, "insolvent" means unable to pay debts as they come due in the ordinary course of business,<sup>39</sup> and that this is the common-law definition of insolvency for the purpose of insolvency acts.<sup>40</sup> However, "insolvency" is also used to denote the fact that the value of a person's property is not equal to his obligations,<sup>41</sup> and this comparing of assets with debts

<sup>38</sup>Stone v. Myers, (1864) 9 Minn. 303 (287); Byrnes v. Volz, (1893) 53 Minn. 110, 54 N.W. 942; Dougan v. Dougan, (1903) 90 Minn. 471, 97 N.W. 122; Murphy v. Casey (1922) 151 Minn. 480, 187 N.W. 416.

<sup>39</sup>Daniels v. Palmer, (1886) 35 Minn. 347, 29 N.W. 162; Dunnell's Digest, sec. 4533.

<sup>40</sup>Glenn. Creditors' Rights and Remedies, sec. 370.

<sup>41</sup>Daniels v. Palmer, (1886) 35 Minn. 347, 29 N.W. 162.

is a more fundamental test, than whether or not at a particular moment, a person has the ready money to pay accruing debts. This comparison of property with obligations is the test of insolvency adopted in the Bankruptcy Act,<sup>42</sup> and in this Uniform Act. There are indications that for the purpose of determining whether a conveyance was fraudulent, the Minnesota court, prior to the passage of the Uniform Act would have used the same broad test.<sup>43</sup> There are cases holding that if a debtor is embarrassed, and cannot readily turn his assets to pay his debts, a voluntary conveyance is void as to creditors, though the value of the assets may exceed his debts.<sup>44</sup> The Uniform Act is more favorable to the debtor on this point, requiring insolvency to make the conveyance constructively fraudulent under section 4. However, the use of the words "present fair salable value" of the assets in the definition and especially the provisions of section 5 and 6 are to be noted. The fact that the debtor was embarrassed, although not insolvent, would, of course, be evidence of actual intent to defraud under section 7 of the act, if he made a gift of part of his property, not sufficient to render him insolvent.

In determining insolvency "probable liability on his existing debts as they become absolute and matured" raises some interesting questions of fact. What is the probable liability on contingent, and unliquidated debts? The likelihood of the contingency happening is an important factor. It would seem that in cases of serious doubt the debtor should take the risk rather than the creditor, and should not give away his property, when subject to contingent liability that is likely to become absolute.

The second part of section 2 prescribes rules for determining the solvency or insolvency of a partnership, providing that the surplus assets of the individual partners above their debts, shall be added to the partnership property in making the comparison with partnership debts. This clears up a point on which there is considerable doubt and an absence of decisions in Minnesota.

"Section 3. Fair Consideration. Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in amount

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<sup>42</sup>Sec. 1 a (15).

<sup>43</sup>Filley v. Register, (1860) 4 Minn. 391 (296).

<sup>44</sup>Bigelow, Fraudulent Conveyances 226.

not disproportionately small as compared with the value of the property, or obligation obtained."

"Fair consideration" as here defined, is used in sections 4, 5, 6 and 8, to declare certain conveyances fraudulent regardless of intent if made without "fair consideration." It is to be noted that there must be a fair equivalent and good faith of the grantee. A conveyance for an inadequate consideration, or where a gift is primarily intended, but some incidental consideration is involved, is constructively fraudulent under the four sections mentioned, as well as a gift with no consideration. The presence of consideration sufficient for a binding contract is not enough. There must be "fair consideration" as here defined.<sup>45</sup> However, if a purchaser gives less than a fair consideration in good faith, he is entitled to hold the property as security for repayment under section 9 (2).

Prior to the passage of the act, the decisions regarded inadequate consideration as evidence of a fraudulent intent,<sup>46</sup> and the section may involve some change of the law in treating an inadequate consideration like no consideration, as regards hindering and defrauding creditors. Of course, if the debtor sells his property for an inadequate price, not a fair equivalent, he has decreased his property which the creditor can reach, and hindered the collection of the debt. It is chiefly a matter of extent of the wrong to the creditor, whether the debtor gives away his property, or gets some inadequate price in return.

In cases where there is no constructive fraud, lack of fair consideration would, of course, be evidence of actual intent to defraud under section 7 of the act.

Satisfaction of an antecedent debt is "fair consideration" under the definition. The rule is thus continued that a preference of one creditor is not a fraudulent conveyance,<sup>47</sup> and that the remedy

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<sup>45</sup>An example of lack of fair consideration would be where the debtor conveys his property to a relative, who in return pays some debts of the debtor not at all equal to the value of the property, the motive back of the conveyance being the debtor's desire to provide for the relative or give the property to him. While the payment of the debts would be consideration for a binding contract, it would not be "fair consideration;" and the conveyance would be fraudulent under section 4, if made by an insolvent.

<sup>46</sup>*Carson v. Hawley*, (1901) 82 Minn. 204, 84 N.W. 746; *Bond v. Stryker*, (1898) 73 Minn. 265, 76 N.W. 26. In some instances the court has treated a conveyance where a fair equivalent in property was not obtained, the same as a gift, for instance, conveyance on an agreement to support. *Tupper v. Thompson*, (1880) 26 Minn. 385, 4 N.W. 621; *McCord v. Knowlton*, (1900) 79 Minn. 299, 82 N.W. 589. See *Bigelow, Fraudulent Conveyances* 608 et seq.; 27 C.J. 544.

<sup>47</sup>*Dunnell's Digest*, sec. 3852.

is under the Bankruptcy Act which provides for the recovery back of certain preferences. The section requires good faith of the grantee; but it is hardly to be supposed that it is intended to change the rule that even though the debtor prefers a friendly creditor with intent to spite a hostile creditor, and prevent him from recovering his debt, as the friendly creditor knows, it is not a fraudulent conveyance.

The intent of the section is obviously to require the debtor to use his property either in paying his debts or in securing property in return which may be available for creditors unless exempt.<sup>48</sup> There is no provision that moral obligations, relationship, "meritorious consideration" or executory agreements constitute "fair consideration." There must be actual property. This raises many interesting questions. How under this section can there be "fair considerations" to sustain, if made by an insolvent, or otherwise constructively fraudulent, the following conveyances: settlements either before or after marriage, conveyance on promise to support, conveyance on any moral obligation or duty, conveyance on agreement to render services in the future, on agreement to pay money or convey property in the future, or conveyance on any other executory consideration? Of course, if the promise to pay money or convey property is subsequently carried out, "fair consideration" has been received. But can services ever constitute "fair consideration" except as the basis of an antecedent debt? In construing the words "antecedent debt," however, it is not unlikely that the court would hold to the present rule, that a debt outlawed by the Statute of Limitations furnishes consideration.<sup>49</sup> While the right to sue is barred by statute, the outlawed debt still exists as a debt.

This section, while in general stating the former law, apparently makes some changes; and it is to be hoped that the courts in construing it may bear in mind section 11 of the act, and strive for uniform interpretation in the different states.

*(To be concluded.)*

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<sup>48</sup>There is nothing in the section to the effect that a debtor may not receive property in exchange which is exempt under statute. *Jacoby v. Parkland, etc., Co.*, (1889) 41 Minn. 227, 43 N.W. 52. But see *Kangas v. Roby*, (1920) 264 Fed. 93, 45 A.B.R. 209, and discussion of case in 5 MINNESOTA LAW REVIEW 383.

<sup>49</sup>*Frost v. Steele*, (1891) 46 Minn. 1, 48 N.W. 413; 27 C.J. 539.

The broad definition of "debt" in section 1 is to be borne in mind. It would apparently include an agreement for alimony and settlement of property rights, such as was sustained in *McNally v. Emmetsburg Nat'l Bank*, (Ia. 1922) 192 N.W. 925. In such a case the question is one of fraudulent intent under section 7 of the act.