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VALIDITY OF BONA FIDE VOLUNTARY CONVEY-
ANCES BY SOLVENT DEBTORS, AS AGAINST PRIOR
CREDITORS.

THE question of whether or not gifts and voluntary conveyances, made without any dishonest intent, by solvent debtors, can be upheld against the claims of pre-existing creditors, is a vexed one. Its answer depends upon what interpretation should be given to the statute of 13 Eliz. c. 5, and the various state statutes, which have been modelled upon it, and which are for the most part, simply re-enactments of it. The text of the English act will be found in a note below.¹

¹ "13 Eliz. c. 5. For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants, &c., * * * have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, &c., * * * not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevasance between man and man, without the which no common-wealth or civil society can be maintained or continued:

"Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose

It is said to have been declaratory of the common law (*Twyne's Case*, 1 Smith's L. C. 1; *Hamilton v. Russell*, 1 Cr. 309; *Cadogan v. Kennett*, 2 Cowp. 432; Fonblanque's Eq. *278), which upon the subject under discussion, seems to have resembled the civil law. Under that law all dispositions of property, on the score of liberality by debtors, were invalid as against pre-existing creditors, in case the latter were thereby prejudiced: 1 Domat's Civ. Law, §§ 1634, 1639.

ENGLISH DOCTRINE.—The English authorities upon this subject are not harmonious. *Twyne's Case*, 1 Smith's L. Cas. 1, is the leading one upon the statute. In that case the conveyance was by an insolvent debtor, who retained possession, to a creditor who was not related to him, and hence it does not bear directly upon the subject of this article; but it contains an expression of opinion by Lord COKE, the reporter, which should carry weight because uttered so soon after the passage of the 13th Eliz. by a judge of such great learning. It is as follows: "And when a man being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.*, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want, who had made such gift to him, *vide* 33 H. 6, 33, by Prisot, if the father enfeoffs his son and heir apparent within age, *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust, either expressed or implied: by which it appears that, as a gift made on a

before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and assigns and every of them, whose actions, suits, debts, &c., * * * by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

"Provided, that this act or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and *bona fide*, lawfully conveyed or assured to any person or persons, or bodies politic 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 as is aforesaid."

good consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration, is not within the proviso, but it ought to be on a good consideration and also *bona fide*." Chancellor HARDWICKE appears to have agreed with Lord COKE. In *Townshend v. Windham*, 2 Ves. Sr. 1, where the conveyance was to the grantor's child, and left him solvent, and the attacking party was a prior creditor, the learned chancellor said: "I know no case on the 13th Eliz. where a man indebted at the time makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors. * * * A man actually indebted and conveying voluntarily, always means to be in fraud of creditors, I take it."

In *Spirett v. Willows*, 3 DeG., J. & S 293 (1864), the question was as to the validity of a post-nuptial settlement which had left the grantor perfectly solvent but considerably indebted. The settlement was attacked by a prior creditor as fraudulent. There was no direct evidence of a fraudulent intent, but it was shown that shortly after making the settlement the grantor had converted his assets into money and spent it in the payment of debts, costs and family and other expenses, and sometime afterwards became insolvent. In delivering the opinion of the Court of Appeals, Lord Chancellor WESTBURY said: "There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded: If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settler made the settlement with express intent 'to delay, hinder or defraud creditors, or that, after the settlement, the settler had not sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency: in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void. It is obvious that the fact of a voluntary settler retaining money

enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute. It still remains a voluntary alienation, or deed of gift whereby in the event the remedies of creditors are delayed, hindered or defrauded.

The only English case directly involving the rights of a prior creditor which is squarely opposed to the rule in *Spirett v. Willows*, is, I believe, *Henderson v. Lloyd*, 3 F. & F. 7 (1862), a case in which a post-nuptial settlement which had left the grantor with nothing that could be seized under an execution except a sum of money in his wife's hands, which was insufficient to pay his debts, was attacked by a prior creditor. ERLE, C. J., in charging the jury, told them that the validity of the settlement depended entirely upon the settler's, "object and intent" without reference to the result, and that the question of intent was for them to decide.

This case goes so far as to overthrow itself. It does not appear to have been passed upon by a court of last resort.

In *Freeman v. Pope*, L. R., 5 Ch. App. Cas. 538 (1870), however, the conclusions reached by Chancellor WESTBURY were criticised and characterized as *dicta*, unnecessary to the decision of the case before him, because as it was thought, it was a case in which the facts proved showed fraud in fact. It is noteworthy, however, that the vice-chancellor in deciding *Freeman v. Pope*, L. R., 9 Eq. Cas. 206, expressed the opinion, that no fraudulent intent whatever was shown in *Spirett v. Willows*.

At any rate, the criticism of Chancellor WESTBURY'S conclusions seems to have been entirely unnecessary, for the conveyance in *Freeman v. Pope* had left the grantor insolvent, and it was held fraudulent for that reason. The complainant was a subsequent creditor, but he was thought to have the same rights as a prior creditor, because there was a prior creditor who might have filed a bill. The court seems to have been of the opinion that mere prior indebtedness is not sufficient to render a voluntary conveyance void as to pre-existing creditors; but laid down the rule that if after deducting the property conveyed, sufficient available assets are not left for the payment of the grantor's debts an intent to defraud is conclusively presumed at law as well as in equity. The rule as thus laid down is supported by considerable *dicta*: *Cadogan v. Kennett*, 2 Cowp. 432; *Lush v. Wilkinson*, 5 Ves. Jr. 384; *Jemkyn v. Vaughan*, 3 Drew. 419; *French v. French*, 6 DeG., M. &

G. 95; *Shears v. Rogers*, 3 B. & Ad. 362; *Corlett v. Radcliffe*, 14 Moore P. C. 121; *Holmes v. Penny*, 3 Jur. N. S. 80.

The conveyance in *Freeman v. Pope*, was to a stranger, and the case goes farther than the American decisions in placing it upon an equality with conveyances, in consideration of natural love and affection. The case has been cited as settling the English rule, but *Spirett v. Willows*, appears to the writer to be entitled to quite as much weight.

AMERICAN DOCTRINE.—*Reade v. Livingston*, 3 Johns. Ch. 481 (1818), is a leading case upon this subject. The conveyance there involved was a post-nuptial settlement, which though *bona fide*, left the grantor insolvent. It was decided by Chancellor KENT, who after a careful examination of the English cases, arrived at a conclusion similar to the one since reached by Chancellor WESTBURY. "The conclusion to be drawn from the cases," said the learned chancellor, "is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect of such debts, and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of the creditors to prove an intent to defraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. This is the clear and uniform doctrine of the cases."

The rule thus broadly laid down has been condemned, however, in New York: *Jackson v. Seward*, 5 Cowen 67; s. c. 8 Id. 406; *Van Wyck v. Seward*, 1 Ed. Ch. 327; s. c. 6 Paige 64; 18 Wend. 375; and in order to prevent further discussion, a statute has been passed, providing that the question of fraud shall be deemed one of fact, and that no conveyance shall be considered fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration: 3 R. S. N. Y., p. 2329, § 3.

The two cases above referred to involved the same facts. The debt in question was a guaranty of a judgment. The judgment was a lien upon real property, amply sufficient to satisfy it, if sold

at its real value. The property was sold to satisfy the lien, and bought in for a trifle by the owner of the judgment. The voluntary conveyance in question was to the grantor's children. It was made in good faith, and left the grantor in possession of sufficient property to pay his debts, and was held valid as against pre-existing creditors. In *Van Wyck v. Seward*, the vote in the Court of Errors was 15 to 14. *Jackson v. Seward*, can hardly be considered authority of itself for anything, because of the different reasons of the judges for voting for a reversal, and it is thought that *Van Wyck v. Seward* is not authority for any broader proposition than that laid down in *Salmon v. Bennett*, a case which will be referred to hereafter.

EXTENT TO WHICH THE DOCTRINE OF *READE v. LIVINGSTON* HAS BEEN ADOPTED.—So far as voluntary conveyances to strangers are concerned, the doctrine of *Reade v. Livingston* is believed to be the law throughout the United States, in the absence of any statute changing the rule, at least in those cases where pre-existing debts would be uncollectible without resort to the property conveyed: *McLean v. Weeks*, 65 Me. 411; *Clark v. Depew*, 25 Penn. St. 509.

It is true that courts have in a number of cases laid down the rule that a voluntary conveyance by a debtor which leaves him in possession of property out of which all his pre-existing debts might at the time have been collected by process of law, are valid; but upon reference to the facts involved, it will be found in every case of the kind, that the conveyance in question was to a relative, and the language of the court should of course be taken in connection with the facts to which it was intended to apply.

In Alabama and New Jersey the doctrine of *Reade v. Livingston* is accepted in its entirety. No distinction is made between conveyances to children and those to strangers, or between those which leave the grantor solvent and those which make him insolvent: *Miller v. Thompson*, 3 Porter 196; *Doe v. McKinney*, 5 Ala. 719; *Moore v. Spence*, 6 Id. 506; *Foote v. Cobb*, 18 Id. 585; *Gannard v. Eslava*, 20 Id. 732; *Spencer v. Godwin*, 30 Id. 355; *McLemore v. Mucolls*, 37 Id. 662; *Crawford v. Kirksey*, 55 Id. 282; *McAnnally v. O'Neal*, 56 Id. 299; *Early v. Owens*, 68 Id. 171; *Den v. De Hart*, 6 N. J. L. 450; *Den v. Lippincott*, Id. 473; *Cook v. Johnson*, 12 N. J. Eq. 51; *Smith v. Vreeland*, 16 Id. 198; *Gardner v. Short*, 19 Id. 341; *Kuhl v. Martin*, 26 Id. 60; *Phelps v. Morrison*, 25 Id. 538; *Haston v. Castner*, 31 Id. 697; *National*

Bank v. Hamilton, 34 N. J. 158; *Aber v. Brant*, 36 Id. 116; *Satterthwaite v. Emley*, 4 N. J. Eq. 489.

And the rule seems to be the same in Michigan: *Fellows v. Smith*, 40 Mich. 689; *Matson v. Melchor*, 42 Id. 477. In both of the above cases the conveyance was to the grantor's wife, and it does not appear in either, whether sufficient property was retained to pay pre-existing debts or not. In *Fellows v. Smith*, CAMPBELL, C. J. (with whom the other judges concurred), said: Where a conveyance from a husband to a wife is a voluntary one, without valuable consideration, it is void in law as against creditors, because it transfers property they could have reached had no such transfer been made. An actually fraudulent design is not necessary to defeat a voluntary conveyance as against existing creditors.

In *Cutter v. Griswold*, Walker's Ch. 437 (1844), which involved the validity of a voluntary conveyance to a son as against a pre-existing creditor, Chancellor MANNING laid down the rule adopted in *Salmon v. Bennett*, 1 Conn. 525, but it did not appear that the grantor had reserved anything, and the learned chancellor considered the conveyance fraudulent in fact.

In South Carolina the test is whether or not the creditor has been in the end prevented from collecting his debt by the conveyance. If he has, the retention by the debtor, of property sufficient at the time of the conveyance to pay all pre-existing debts, will not prevent the creditor from having recourse to the property conveyed: *Izard v. Izard*, 1 Bailey Eq. 228; *O'Daniel v. Crawford*, 4 Dev. 197; *Blakeney v. Kirkley*, 2 Nott & McC. 544; *Simpson v. Graves*, Riley's Ch. Cas. 232.

Two exceptions to the general rule are recognised, however. Where a voluntary conveyance of an inconsiderable portion of the grantor's estate is made to a wife or child, and sufficient property to satisfy all pre-existing debts is retained, and the grantor subsequently becomes insolvent in consequence of sudden unforeseen and extraordinary events beyond his control (*Buchanan v. McNinch*, 3 S. C. 498), or the creditor's failure to collect his debt is the result of his own laches (*Richardson v. Rhodus*, 14 Rich. Law 95; *Brock v. Bowman*, Rich. Eq. Cas. 185; *Buchanan v. McNinch*, 3 S. C. 498), the conveyance will be upheld.

The same rule seems to have been adopted in Iowa, though the cases in that state are not entirely harmonious. *Stephenson v. Cook*, 20 N. W. Rep. 182; *Moore v. Orman*, 56 Ia. 39; *Boulton v.*

Hahn, 58 Id. 518. *Carson v. Foley*, 1 Id. 524, and *Gwyer v. Figgins*, 37 Id. 519, contain *dicta* in favor of the rule in *Salmon v. Bennett*.

CONVEYANCES TO RELATIVES.—*Salmon v. Bennett*, 1 Conn. 525 (1816), has exercised a much more powerful influence over the course of American decisions than *Reade v. Livingston*. It introduced an exception to the general rule against voluntary conveyances by debtors, in favor of those made to relatives in consideration of natural love and affection, which is now recognised in most of the states.

The case was an action of ejectment for land which had been voluntarily conveyed by one Sherwood to his son, under whom the defendant claimed. The plaintiff claimed by virtue of the levy of an execution in his favor, against the grantor. The conveyance was made without fraudulent intent, and left the grantor in possession of ample means to pay all pre-existing debts.

SWIFT, C. J., in delivering the opinion of the court said, "Fraudulent and voluntary conveyances are void as to creditors: but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied. Nor will all such conveyances be valid, for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in many instances, where the conveyance ought not to be established. * * * Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child, in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts; then such conveyance will be valid against creditors existing at the time. But though there be no fraudulent

intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors.

The latter branch of the rule was acted upon in Connecticut in *Freeman v. Burnham*, 36 Conn. 469.

STATES IN WHICH THE DOCTRINE OF *SALMON v. BENNETT* HAS BEEN ADOPTED.—The rule laid down in *Salmon v. Bennett*, as to voluntary conveyances to children, has been adopted in Arkansas, Georgia, Illinois, Kansas, Maryland, Minnesota, Missouri, New Hampshire, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and the courts of the United States; and in Maine and Massachusetts it is supported by *dicta*. It has generally been extended so as to embrace conveyances to wives: *Clayton v. Dempsey*, 17 Ga. 217; *Weed v. Davis*, 25 Id. 684; *Clayton v. Brown*, 30 Id. 490; *Koster v. Hiller*, 4 Bradw. 21; *Sweeney v. Damron*, 47 Ill. 450; *Goodman v. Wineland*, 18 Rep. (Md.) 622; *Kipp v. Hanna*, 2 Bland Ch. 26; *Filby v. Register*, 14 Minn. 391; *Walsh v. Ketchum*, 12 Mo. App. 580; *Patten v. Casey*, 57 Mo. 118; *Potter v. McDowell*, 31 Id. 62; *Ammon's Appeal*, 63 Penn. St. 284; *Carl v. Smith*, 8 Phila. 569; *Perkins v. Perkins*, 1 Tenn. Ch. 537; *Yost v. Hudiburg*, 66 Tenn. 627; *Morrison v. Clark*, 55 Tex. 437; *Belt v. Raguet*, 27 Id. 471; *Smith v. Vogdes*, 92 U. S. 183; *Lloyd v. Fulton*, 91 Id. 479; *French v. Holmes*, 67 Me. 186; *Winchester v. Charter*, 12 Allen (Mass.) 606; as well as those to children: *Dodd v. McCraw*, 8 Ark. 83; *Smith v. Yell*, 8 Id. 470; *Clayton v. Dempsey*, 17 Ga. 217; *Patterson v. McKinney*, 97 Ill. 41; *Worthington v. Bullitt*, 6 Md. 172; *Worthington v. Shipley*, 5 Gill 449; *Smith v. Lowell*, 6 N. H. 67; *Brice v. Myers*, 5 Ohio 121; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Grotenkemper v. Harris*, 25 Id. 510; *Miller v. Wilson*, 15 Ohio 108; *Posten v. Posten*, 4 Wharton (Pa.) 27; *Chambers v. Spencer*, 5 Watts 404; *Mateer v. Hissim*, 3 P & W. 160; *Burkey v. Self*, 4 Sneed (Tenn.) 121; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Brackett v. Waite*, 4 Vt. 384; s. c. 6 Vt. 411; *Church v. Chapin*, 35 Id. 223; *Lerow v. Wilmarth*, 9 Allen 386; *Laughton v. Harden*, 68 Me. 208; *Stevens v. Robinson*, 72 Id. 381; and the same principles have been applied in cases involving conveyances in consideration

of natural love and affection to grandchildren: *Bird v. Bolduc*, 1 Mo. 702; *Williams v. Banks*, 11 Md. 198. In New Hampshire the exception seems to be extended to conveyances to nephews; *Abbott v. Tenney*, 18 N. H. 109; sons-in-law: *Smith v. Smith*, 11 Id. 459; and other near relatives: *Pomeroy v. Bailey*, 43 Id. 118.

In a few of the cases in which conveyances to near relatives, leaving the grantor solvent, have been upheld against prior creditors, the courts have laid down the rule broadly that prior indebtedness is only presumptive and not conclusive proof of fraud, and that fraud is a question of fact and not of law. Such is the language used by Mr. Justice SWAYNE, in *Lloyd v. Fulton*, 91 U. S. 479, and *Smith v. Vodges*, 92 Id. 183, but such language must not be taken literally. An analysis and comparison of the cases will show that the courts mean where they express themselves in that way, that mere indebtedness, regardless of the debtor's financial condition and the value of the property conveyed, is not conclusive proof of fraud. They do not mean that a voluntary conveyance which leaves the grantor insolvent will ever be upheld. There is no American case in which a voluntary conveyance, which left the grantor unable to pay pre-existing debts, has been held valid as against prior creditors. And under the rule in *Salmon v. Bennett*, it is not sufficient for the grantor to retain property, the assessed value of which is barely equal to the amount of his indebtedness. In one case where the debts amounted to \$6848, and the property reserved was worth \$7250, the reserved fund was held insufficient: *Black v. Sanders*, 1 Jones (N. C.) 67. In another, \$48,061.93 was held insufficient to meet debts amounting to about \$47,000: *Crumbaugh v. Kugler*, 2 Ohio St. 373. Property must be retained out of which all debts, together with the cost of collection, can be collected by process of law: *Church v. Chapin*, 35 Vt. 223.

GENERAL PRINCIPLES.—The underlying principle upon which those cases which hold all voluntary conveyances void as against prior creditors, seem to proceed is, that all property possessed by a debtor, whether owned at the time he became indebted or acquired subsequently, is a trust fund for the payment of his debts, and is held by him as a *quasi* trustee, with power to exchange it for other property, or sell it, or carry on business with it, or appropriate it to the payment of any particular debt, or the support of his family and himself, but having no right to diminish it by giving it away either to strangers or relations. Upon this fund every creditor is