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THE FIRST ACT OF BANKRUPTCY IN LOUISIANA

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Before a debtor may be made an involuntary bankrupt, he must, within four months of filing of the petition against him,¹ have committed an act of bankruptcy. The first act of bankruptcy is thus defined:

“§ 3. *Act of Bankruptcy.* a. Acts of bankruptcy by a person shall consist of his having (1) concealed, 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 made or suffered a transfer of any of his property, fraudulent under the provisions of section 67 or 70 of this Act”²

“Intent to hinder, delay, or defraud his creditors or any of them” is a requirement drawn from the Statute of 13 Elizabeth c. 5 (1570), the basic English statute on fraudulent conveyances, either substantially re-enacted or otherwise considered of force in all of the United States³ except Louisiana.

The latter part of section 3a(1) declares that a transfer of any of one's property, if it is fraudulent under section 67 or section 70 of the Bankruptcy Act, shall amount also to the first act of bankruptcy. Here 67d and 70e are specifically the provisions that are meant. Most of 67d is taken from the Uniform Fraudulent Conveyance Act,⁴ which is substantially a re-statement of the common law of fraudulent conveyances.⁵ 67d⁶ makes voidable by the trustee in bankruptcy, except as to a bona

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1. Bankruptcy Act § 3b, 11 U.S.C. § 21b (1964), provides in part: “A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time . . . with respect to the first . . . act of bankruptcy . . . shall not expire until four months after the date when the transfer . . . became so far perfected that no bona fide purchaser from the debtor could therefore have acquired any rights in the property so transferred . . . superior to the rights of the transferee”

2. 11 U.S.C. § 21a(1) (1964).

3. 4 COLLIER, BANKRUPTCY 369 (14th ed. 1964).

4. 9B UNIFORM LAWS ANNOTATED 48 (1957). It now is in force in twenty-two states and the Virgin Islands. *Id.* at 32 (Supp. 1965).

5. 4 COLLIER, BANKRUPTCY 1536 (14th ed. 1964): “The Uniform Fraudulent Conveyance Act . . . is generally deemed declaratory of the best decisions of American courts under the statute of 13 Elizabeth.”

6. 11 U.S.C. § 107d (1964).

bona fide purchaser, lienor, or obligee for a present fair equivalent value, any transfer made or obligation incurred within a year of bankruptcy⁷ that is fraudulent by the terms of 67d against creditors having claims provable in bankruptcy. 70e⁸ makes voidable by the trustee any transfer made or suffered or obligation incurred that is fraudulent against or voidable as to a creditor with a provable claim, under any applicable federal or state law. Thus, in Louisiana a simulation⁹ or a transfer subject to a revocatory action,¹⁰ can be set aside by the trustee in bankruptcy of the transferor by virtue of 70e. Also, in Louisiana a transfer within 67d, that is, one amounting to a fraudulent conveyance *at common law*, can generally be set aside by the transferor's trustee in bankruptcy whether or not it is voidable under Louisiana law. And such a transfer within 67d or 70e necessarily amounts to the first act of bankruptcy.¹¹

In most states the trustee's power of avoidance under 67d and that under 70e will not differ greatly in extent. This is true for the reason that the Uniform Fraudulent Conveyance Act, the substantive parts of which are set out in 67d, is largely an expression of common law rules. The trustee will have to weigh his choice only insofar as the local law of fraudulent conveyances, accessible to him through 70e, may vary from the principles of

7. Note, however, that transfers of the sort described in 67d(3) may be avoided only if made within four months of bankruptcy. 67d(3) which is derived from the decision in *Dean v. Davis*, 242 U.S. 438 (1917), is not discussed in this paper. For the purposes of 67d, "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition." § 67d(5), 11 U.S.C. § 107d(5) (1964).

8. 11 U.S.C. § 110e (1964).

9. See Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 TUL. L. REV. 22 (1954).

10. See Comment, 9 TUL. L. REV. 422 (1935).

11. 70e makes voidable by the trustee any "transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act. . . ." 3a(1) in relevant part provides: ". . . or made or suffered a transfer of any of his property, fraudulent under the provisions of section 67 or 70 of this Act. . . ." Hence: "Section 3 does not refer to transfers voidable under sections 67 or 70, but only to transfers fraudulent thereunder. Transfers voidable by a creditor or creditors under state statutes or doctrines omitting to stigmatize the transfers as fraudulent can be avoided by the trustee in bankruptcy under section 70e, but such transfers would not come within the description of transfers fraudulent under section 70, and therefore are not within the first act of bankruptcy." MACLACHLAN, *BANKRUPTCY* § 53 (1956). In Louisiana a simulation or a transfer subject to revocatory action is fraudulent, see LA. CIVIL CODE art. 1978 (1870), and consequently will amount to the first act of bankruptcy.

67d. One might think that in states where the Uniform Fraudulent Conveyance Act is in force it will make no difference which remedy the trustee chooses, but this is not entirely correct. If the transfer was made more than a year before bankruptcy, the use of 67d is precluded and the trustee will proceed under 70e if he can proceed at all.¹² Apart from this, the trustee may be aided by such local rules as the presumption that a gratuitous transfer by one owing debts is fraudulent¹³ where he sues under 70e, but not where he sues under 67d, or there may be rules developed by the federal courts under 67d that have no counterpart in the local law, and in the latter case it may be advisable to bring action in a federal rather than a state court.¹⁴ Generally, however, where the question is whether to invoke one or the other version of the common law of fraudulent conveyances the choice is narrow. But in Louisiana the common law of fraudulent conveyances is not in effect, and there are wide differences between the remedy available to the trustee in bankruptcy under 70e and that available to him under 67d. It seems therefore that the first act of bankruptcy, defined partly with reference to sections 67 and 70, is broader in Louisiana than in any other state.

FRAUDULENT CONVEYANCES AT COMMON LAW

If he is to be able to advise whether the first act of bankruptcy has been committed, or whether a particular transfer can be avoided by the trustee, the Louisiana lawyer must be familiar not merely with the local law of simulation and of revocatory actions but also with the common law of fraudulent conveyances. Further, section 14c of the Bankruptcy Act provides that a discharge in bankruptcy shall not be granted if the bankrupt has: "(4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the peti-

12. 4 COLLIER, BANKRUPTCY 328 (14th ed. 1964): "In jurisdictions having The Uniform Act § 70e may be invoked where the trustee is enabled to avoid a transfer by virtue of a more liberal statute of limitations given by state law."

13. See 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 268 (rev. ed. 1940).

14. 4 COLLIER, BANKRUPTCY 456-57 (14th ed. 1964): "A body of rules developed by the federal courts to handle the troublesome problems of proof arising under § 67d would properly qualify as 'substantive' in a case presented to a state court under the subdivision. It is perhaps too much to hope, however, that the state tribunal will apply any rules with respect to burden of proof and presumptions other than those developed under its local law of fraudulent conveyances. The disinclination to heed federal rules where they diverge from the rule of the forum would be especially strong among the courts of states which have adopted the Uniform Act."

tion in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors";¹⁵ this ground for denial of a discharge likewise is expressed in common law terms. It seems worthwhile to state the common law of fraudulent conveyances in a summary way and thereafter to specify some of the particulars in which this law differs from Louisiana law.

At common law a fraudulent conveyance is a true transfer effective to carry ownership from transferor to transferee,¹⁶ and consequently no distinction is recognized such as that in Louisiana between simulations and transfers subject to revocatory action. Not only is the transfer good between the parties and not subject to be undone by either of them;¹⁷ it also is effective against others until attacked by a qualified creditor in a recognized way.¹⁸ Notwithstanding a provision in the Statute of Elizabeth that the fraudulent transfer "shall be . . . utterly void, frustrate and of no effect," the cases establish that the transfer is voidable merely.¹⁹

Despite the innumerable forms they may take, fraudulent conveyances fall into two general classes. A conveyance is fraudulent:

(a) if made for less than fair consideration by one who is insolvent or will thereby be rendered insolvent,²⁰ or

15. 11 U.S.C. § 32c(4) (1964). See 1 COLLIER, BANKRUPTCY § 14.47 (14th ed. 1964): "In order to justify a refusal of discharge under § 14c(4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent, moreover, must be an actual fraudulent intent as distinguished from constructive intent. The fact, however, that valuable property has been gratuitously transferred raises a presumption that such transfer was accompanied by the actual fraudulent intent necessary to bar a discharge under clause (4)."

16. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 55 (rev. ed. 1940).

17. *Id.* §§ 114, 120.

18. *Id.* § 56.

19. See, for example, *City of New York v. Johnson*, 137 F.2d 163 (2d Cir. 1943), where Judge A. N. Hand, discussing the New York Bulk Sales Law, said: "We can imagine no reason for holding that the words 'shall be void as against the creditors of the seller', etc., were intended to go further than the similar words which have been held to make the sale merely voidable under the other statutes to prevent fraudulent conveyances which have been enacted from the time of the Statute of Elizabeth to the present day."

20. *Cf.* UNIFORM FRAUDULENT CONVEYANCE ACT § 4, 9B UNIFORM LAWS ANNOTATED 80 (1957).

(b) if made with actual fraudulent intent known to the transferee.²¹

"Fair consideration" exists if the transferee gives fair equivalent value. In transfers for security it is required that the debt secured be not disproportionately small in relation to the value of the security.²²

A debtor is insolvent if he is unable to pay his debts as they mature.²³ For the purposes of section 67d of the Bankruptcy Act a person is insolvent "when the present fair salable value of his property is less than the amount required to pay his debts."²⁴

Where an insolvent transfers for less than fair equivalent value property that was subject to be seized to satisfy claims against him, it is obvious that his creditors are harmed. Even if the debtor's remaining assets are sufficient to pay some or most of his creditors, others must suffer. Consequently, though the parties may have acted honestly and though the transferee may not have known the transferor was insolvent, the transfer can be attacked as a fraudulent conveyance or treated as the first act of bankruptcy and made the basis of a petition in bankruptcy against the transferor. It should be noted that a transfer in payment of a debt, or one to secure a debt in an amount not disproportionately small in relation to the value of the security, is made for fair consideration and cannot be a fraudulent conveyance in the absence of actual fraudulent intent. Such a transfer is a preference; it may be the second act of bankruptcy²⁵ and may in certain circumstances be avoided by the trustee as a preference.²⁶

Transfers fall within the first class of fraudulent conveyance by reason of harm to creditors quite apart from any question of intent. If a transferee paid less than fair consideration he must not be surprised if the transfer is avoided, but in such an event the transferee may reclaim the consideration he gave and, except where he had actual fraudulent intent, he may keep the subject

21. *Cf.* UNIFORM FRAUDULENT CONVEYANCE ACT § 7, 9B UNIFORM LAWS ANNOTATED 105 (1957).

22. *Cf.* UNIFORM FRAUDULENT CONVEYANCE ACT § 3, 9B UNIFORM LAWS ANNOTATED 61 (1957).

23. See MACLACHLAN, BANKRUPTCY 10 (1956): "Insolvency, apart from the National Bankruptcy Act, usually means inability to pay debts as they mature."

24. Bankruptcy Act § 67d(1)(d), 11 U.S.C. § 1074d(1)(d) (1964).

25. See Bankruptcy Act § 3a(2), 11 U.S.C. § 21a(2) (1964).

26. See Bankruptcy Act § 60a, 60b; 11 U.S.C. § 96a, 96b (1964).

matter of the transfer until what he gave up has been returned to him.²⁷

The second class of fraudulent conveyance is dependent on actual fraudulent intent of the transferor that was known to the transferee. Even in the absence of immediate harm to creditors, they may attack a transaction of this sort, as, for example, where a debtor sells property for its fair value in cash, intending, to the purchaser's knowledge, to abscond with the proceeds. Here the transfer was made for fair consideration, but it is voidable nonetheless. If the fraudulent intent of the transferor had not been known to the purchaser, the transaction would have been invulnerable. This rule is clearly expressed in the Statute of Elizabeth.

Naturally, in most cases of this class fraudulent intent of the transferor and harm to his creditors will coexist, but fraudulent intent is the essence. How is such intent to be proved? Direct evidence will not often be available, but proof may be made of circumstances that forbid any conclusion but that of a purpose to defraud. Instances were provided in 1601 in *Twyne's Case*,²⁸ where a debtor who had secretly transferred all his property while action was pending against him, nevertheless remained in possession of the property and used it as his own. Coke treated these several circumstances as "badges of fraud," and many other circumstances might be listed that have been held to justify an inference of fraudulent intent.²⁹

A creditor whose claim arose after the making of a fraudulent conveyance by the person now his debtor, may avoid the transfer upon proof of an intent to defraud future creditors.³⁰ In addition, under section 5 of the Uniform Fraudulent Convey-

27. Cf. UNIFORM FRAUDULENT CONVEYANCE ACT § 9(2), 9b UNIFORM LAWS ANNOTATED 145 (1957).

28. 3 Co. Rep. 80b, 76 Eng. Rep. 809 (1601).

29. See 4 COLLIER, BANKRUPTCY § 67.37(3) (14th ed. 1964): "Circumstances from which courts have been willing to infer fraud include concealment of facts and false pretences by the transferor, reservation by him of rights in the transferred property, his absconding with or secreting the proceeds of the transfer immediately after their receipt, the existence of an unconscionable discrepancy between the value of property transferred and the consideration received therefor . . . While no finding of fraud can be predicated solely on the fact that . . . a transfer . . . is between relatives or members of a family, such transactions are generally subject to close scrutiny. . . ."

30. See on the many facets of the topic, 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 553-90 (rev. ed. 1940). A statute of 27 Eliz. c. 4 (1584) extended the principle of the Stat. 13 Eliz. c. 5 (1570) to transfers of realty to "defraud and deceive" subsequent purchasers.

ance Act,³¹ every conveyance made without fair consideration by one engaged in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and those who become creditors during the continuance of the business or transaction without regard to actual intent. Under section 6,³² every conveyance made or obligation undertaken without fair consideration by a person then intending to incur or believing that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors. And both these provisions have been carried over to 67d.³³

Two anomalies should be mentioned. With respect to fraudulent conveyances of the first type, that is, transfers by an insolvent for less than fair consideration, marriage or a promise to marry is treated as fair consideration. This was always true at common law and is apparently still true under the Uniform Fraudulent Conveyance Act³⁴ and 67d;³⁵ the interest of creditors is sacrificed to what is thought a more important interest. With respect to fraudulent conveyances based on actual fraudulent intent, the cases recognize that a debtor, even if insolvent, may exchange property subject to levy by his creditors for exempt property, on the eve of bankruptcy, without necessarily committing a fraudulent conveyance.³⁶ Justification for the result can perhaps be found in the policy of the exemption statutes.

Finally, something may be said about remedies. At common law only the creditor with a judgment is permitted to attack a fraudulent conveyance.³⁷ (The requirement of a judgment has been removed, however, by the Uniform Fraudulent Conveyance Act,³⁸ by statute in some states that have not adopted the Uniform Act,³⁹ and by rule 18b of the Federal Rules of Civil Pro-

31. 9B UNIFORM LAWS ANNOTATED 102 (1957).

32. *Id.* at 104.

33. Bankruptcy Act § 67d(2)(b), 67d(2)(c); 11 U.S.C. § 107d(2)(b), 107d(2)(c) (1964).

34. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 297 (rev. ed. 1940).

35. 4 COLLIER, BANKRUPTCY 354 (14th ed. 1964).

36. *Id.* at 380: "It seems generally to be held . . . that an insolvent may exchange property subject to levy by his creditors for exempt property without being charged with intent to hinder, delay, or defraud his creditors." See also 1 *id.* at 853.

37. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 65 (rev. ed. 1940).

38. *Id.* § 76.

39. See, e.g., MISS. CODE ANN. § 1327 (1956).

cedure.⁴⁰) The judgment creditor may attack the fraudulent conveyance by causing execution to be levied on the property in the hands of the transferee — a right first recognized in 1571 in *Mannocke's Case*,⁴¹ but presently explained on the basis not that the transfer is a nullity (as is a simulation in Louisiana) but rather that this is a permissible means to avoid a transfer otherwise effective. Execution sale in these conditions will seldom bring a satisfactory price, and so the judgment creditor may sue to remove the fraudulent conveyance as an obstruction to enforcement of his lien, and then may proceed to sale.⁴² Or, after execution has been issued⁴³ (or in many states, issued and returned *nulla bona*) he may maintain a creditor's action to have the conveyance adjudged fraudulent, and to cause the property to be sold under the decree and the proceeds applied to his claim.⁴⁴ As among creditors of the transferor, the first to acquire a lien on the property will have the prior right.⁴⁵ Unless the fraudulent conveyance has been set aside, however, creditors of the transferee also may obtain liens on the property, and in this respect there is a race of diligence between creditors of the transferor and creditors of the transferee.⁴⁶ But the transfer becomes invulnerable to attack by anyone if the property passes to a bona fide purchaser for value without notice of the fraud.⁴⁷

COMMON LAW AND LOUISIANA LAW

From this summary of the common law of fraudulent conveyances it can be seen that there are areas of identity with Louisiana law. There also are points of difference. One to which reference has been made is the absence at common law of any such distinction in principle as that taken in Louisiana between a simulation and a genuine but fraudulent transfer, between the action *en déclaration de simulation* and the revocatory action. Other differences inhere in the revocatory action itself. Some of these will be noted, with attention first to instances where the

40. Rule 18b provides, in part: "[A] plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing a claim for money."

41. 3 Dyer 293b (1571).

42. 1 GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES*. § 72 (rev. ed. 1940).

43. *Id.* § 87.

44. *Id.* § 91.

45. *Id.* § 93a.

46. *Id.* § 238: "The courts hold that, as against the creditor who seeks to set aside his debtor's fraudulent conveyance, the grantee's personal creditors will prevail, to the extent that they have attached or levied under judgment. . . ."

47. *Id.* § 236.

remedy in Louisiana seems narrower than that at common law.

1. The revocatory action can be maintained, except where there has been a cession, only if the debtor lacks sufficient property to pay the complaining creditor's claim.⁴⁸

This is a restriction not often found at common law,⁴⁹ which permits creditors to attack a transfer made for less than fair consideration provided only that the debtor-transferor was insolvent, that is, that he lacked the means to pay the claims of *all* his creditors as they matured, and which allows even transfers by a solvent debtor to be avoided if they were made with actual fraudulent intent known to the transferee.

2. A revocatory action will lie only if the transfer to be avoided was made in bad faith *and* was injurious to creditors.⁵⁰ If the transferor was insolvent to the transferee's knowledge bad faith will be presumed.⁵¹

At common law a transfer may be successfully attacked either for fraudulent intent of the transferor known to the transferee regardless of insolvency *or* for injury to creditors through transfer by an insolvent for less than fair consideration, regardless of good faith.

3. An onerous contract, made in bad faith by the debtor but in good faith by his transferee, may be annulled only if the value of the property transferred exceeds by one-fifth the price or consideration given for it.⁵²

At common law a transfer cannot be annulled for the fraudulent intent of the transferor unless it was known to the transferee. A transfer for less than fair consideration may be annulled, however, regardless of intent and without any need to establish a particular ratio of discrepancy in value, provided only that the transferor was insolvent or that the transfer made him insolvent.

4. A creditor cannot annul any contract made before the time his debt accrued.⁵³ This rule, a corollary of the notion that

48. LA. CIVIL CODE art. 1971 (1870).

49. For an exceptional case holding that a fraudulent conveyance may not be set aside without a showing that the debtor had, at the time of the transfer, no other property available to satisfy the creditor's claim, see *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 15 L.R.A. 784 (1892).

50. LA. CIVIL CODE art. 1978 (1870).

51. Cf. LA. CIVIL CODE art. 1984 (1870).

52. *Id.* art. 1981.

53. *Id.* art. 1993.

a debtor's property is the common pledge of his creditors,⁵⁴ has been compared unfavorably to the rule in France where, in the absence of provision in the French Civil Code, the commentators state that future creditors may annul a contract that was made with intent to injure them.⁵⁵

The result at common law is similar to that apparently reached in France. Subsequent creditors may annul a transfer on proof that it was made with intent fraudulent as to them.

Instances may now be noticed where the remedy in Louisiana seems broader than that at common law.

1. A purely gratuitous contract is presumed fraudulent in Louisiana unless, at the time it was made, the debtor's net assets amounted to more than twice the value of the property transferred.⁵⁶

In a few states there is a presumption of law that a gratuitous transfer by one owing debts is fraudulent.⁵⁷ Generally, however, a gratuitous transfer can be annulled only if it was made by an insolvent, or was made with actual fraudulent intent.⁵⁸ It is apparent that in Louisiana a gratuitous transfer may sometimes be annulled though it was made honestly by a debtor who was solvent, a result not possible under the usual common law rule.

2. A transfer to a creditor is fraudulent if it gives the transferee an advantage over other creditors and if the transferee knew that the transferor was insolvent.⁵⁹ This rule does not apply, however, to contracts in the usual course of the debtor's business or to payment in money of a just debt, nor does it extend to the giving of security for a just debt more than one year before a revocatory action is brought.⁶⁰

At common law, in the absence of actual fraudulent intent,⁶¹ a transfer to a creditor of fair equivalent value as payment of a

54. *Id.* art. 3183.

55. COMMENT, 9 TUL. L. REV. 422, 425-26 (1935).

56. LA. CIVIL CODE art. 1980 (1870).

57. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 268 (rev. ed. 1940).

58. *Id.* §§ 269, 270.

59. LA. CIVIL CODE art. 1984 (1870).

60. *Id.* art. 1987.

61. Presence of fraudulent intent may make a transaction "invalid both as a preference [under the Bankruptcy Act] and as a fraudulent transfer." 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 289 (rev. ed. 1940).

debt or fairly proportioned value as security for a debt cannot be a fraudulent conveyance.⁶² Under the Bankruptcy Act a transfer by an insolvent debtor to a creditor on account of an antecedent debt within four months of bankruptcy usually will be a preference,⁶³ which may be avoided by the trustee if the preferred creditor had reasonable cause to believe the debtor was insolvent.⁶⁴ With the important exceptions noted for contracts in the usual course of business, payment of a debt in money, or giving of security for a debt more than a year before action brought, whatever would amount under the Bankruptcy Act to a voidable preference will be subject in Louisiana to a revocatory action, with two results: (a) the transfer may be used as the second act of bankruptcy, or as the *first* act of bankruptcy, on a petition filed within four months, and (b) it may be avoided by the trustee either under 60b or under 70e. In treating a preferential transfer as fraudulent, Louisiana law goes much further than does the common law.

3. *Dation en paiement* or giving of a thing in payment of a debt is treated as fraudulent if the debtor was insolvent⁶⁵ whether or not the creditor knew this and regardless of the actual good faith of the parties.⁶⁶

In the absence of actual fraudulent intent, this would be only a preference which the common law permits and which might be set aside under the Bankruptcy Act only if the preferred creditor had knowledge of insolvency and the debtor became bankrupt within four months. It would not be a fraudulent conveyance.

4. Mortgages given within three months of the debtor's failure, for an antecedent debt, are presumed to be fraudulent.⁶⁷

Here again, there would be only a preferential transfer such as might be avoided if the debtor became bankrupt within four months of making the transfer and if the preferred creditor could be proved to have had knowledge of insolvency, but which would not otherwise be subject to attack.

5. Renunciation of a succession may be avoided by creditors

62. *Id.* § 289: "If there is in our law one point which is more ungrudgingly accepted than others, it is that the preferential transfer does not constitute a fraudulent conveyance."

63. Bankruptcy Act § 60a, 11 U.S.C. § 96a (1964).

64. Bankruptcy Act § 60b, 11 U.S.C. § 96b (1964).

65. LA. CIVIL CODE art. 2658 (1870).

66. *Southland Inv. Co. v. Michel*, 149 So. 177 (La. App. 1933), noted 8 TUL. L. REV. 277 (1934).

67. LA. CIVIL CODE art. 3359 (1870).

when it was prejudicial to them,⁶⁸ and when a debtor refuses or neglects to accept an inheritance, his creditors may accept it and exercise all his rights in order to make the property available for payment of their debts.⁶⁹

In these circumstances most American courts cannot see that anything had passed to the debtor to be transferred by him; consequently, creditors usually are denied a remedy at common law.⁷⁰

CONCLUSION

It may be said in summary that if a transfer in Louisiana is voidable as a fraudulent conveyance at common law but is not void or voidable by Louisiana law, the transferor's trustee in bankruptcy will attack it under 67d, granted that the transfer was made within a year of bankruptcy. If a transfer is not voidable as a fraudulent conveyance at common law but is void or voidable by Louisiana law, the trustee in bankruptcy will attack it under 70e.⁷¹ If it is subject to attack both at common law and under Louisiana law, the trustee may choose⁷² between 67d and 70e, and in any of these instances the trustee may bring action in a court of bankruptcy or a state court.⁷³ Finally, the transfer will amount to the first act of bankruptcy if the trustee might successfully attack it either at common law or under Louisiana law. For these reasons, lawyers practicing in Louisiana need a working knowledge of the common law of fraudulent conveyances. It is hoped that this paper may serve as an introduction to the subject.

68. *Id.* art. 1989.

69. *Id.* art. 1990.

70. See Note, 27 VA. L. REV. 936, 938 (1941): "The prevailing American view is that renunciation of a devise or legacy by a devisee or legatee for the purpose of defrauding creditors is not a fraudulent conveyance." For a decision *contra*, see Note, 29 CALIF. L. REV. 531 (1941).

71. A transfer within the common law of fraudulent conveyances that the trustee in bankruptcy will not attack under 67d is the bulk sale of merchandise. See GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 309-315 (rev. ed. 1940). "The term, sale in bulk, describes a venerable badge of fraud. . . . [T]he experience of the ages . . . recognized the transaction as a harbinger of travel abroad. . . ." *Id.* § 309. In every state, however, there is a bulk sales law which makes a sale of all or a major part of a merchant's stock, not in the ordinary course of business, void against creditors of the seller unless they are given a prescribed notice and other requirements are fulfilled; and the trustee will prefer to invoke this law and 70e. See *Holahan v. Misuraca*, 112 F. Supp. 504 (E.D. La. 1953). The Louisiana Bulk Sales Law, R.S. 9:2961-2968, applies not only to sales in bulk but also to mortgages and pledges.

72. For instances where a trustee chose to use 70e to attack what amounted to a simulation in Louisiana law, see *Gayle v. Jones*, 63 F. Supp. 481 (W.D. La. 1945) and 74 F. Supp. 262 (W.D. La. 1947), and *Harper v. Rosenblath*, 227 La. 507, 79 So. 2d 863 (1955).

73. Bankruptcy Act § 67e, § 70e(3); 11 U.S.C. § 107e, § 110e(3) (1964).