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E. Cader Howard

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dealing with an individual. It does, however, give the individual substantial opportunities to assure the accuracy of the information and to be compensated when harmed by inaccurate information. The FCRA also represents a major shift in policy with respect to credit reporting, and it offers the courts an opportunity to re-evaluate the law applied to credit reporting agencies and to make such adjustments as may be found to be beneficial.

GEORGE S. KING, JR.

The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act

INTRODUCTION

For centuries the law in most civilized countries has limited the right of an individual freely to dispose of his property if such disposition adversely affects the rights of creditors. In the Anglo-American context this law, termed the law of fraudulent conveyances, has always occupied a prominent place in the realm of property, principally because the protection of creditors has been essential for the development and preservation of the English and American economic systems. Generally, any conveyance or transfer by a debtor that lessens the fund from which his creditors can expect to be paid may have a tendency to hinder or delay them and is subject to being treated as fraudulent.¹ The conditions under which such a conveyance or transfer can be set aside are the focal area for the law of fraudulent conveyances.

Common law principles of fraudulent conveyances were first seen in statutory form as early as 1570 in the Statute of 13 Elizabeth.² This statute was designed to prevent creditors from being defeated or delayed by a debtor's conveyance of land or personalty. To this end, it applied to all transfers made with actual intent to defraud and enabled a creditor of the debtor to void the transfer unless the rights of a bona fide purchaser would be thereby affected. 13 Elizabeth protected not only the interests of creditors who had claims against the transferor at the time of transfer but also the interests of persons who subsequently became

¹*O'Daniel v. Crawford*, 15 N.C. 197, 205-06 (1833).

²An Act Against Fraudulent Deeds, Alienations, & Conveyances, 13 Eliz., c. 5, §§ 1-6, at 268 (1570).

creditors. The later Statute of 27 Elizabeth³ extended protection to subsequent purchasers of land.⁴

Many American jurisdictions, including North Carolina, have adopted these Elizabethan statutes on fraudulent conveyances with only slight alterations. In North Carolina, section 39-15⁵ of the *General Statutes* represents essentially a re-enactment of 13 Elizabeth⁶ with the deletion of a clause protecting the rights of bona fide purchasers. Such protection for bona fide purchasers is provided, however, by section 39-19⁷ of the *General Statutes*. Section 39-16⁸ is modeled after 27 Elizabeth

³An Act Against Covinous and Fraudulent Conveyances, 27 Eliz., c. 4, § 2, at 356 (1585).

⁴*Garrison v. Brice*, 48 N.C. 85, 86 (1855).

⁵N.C. GEN. STAT. § 39-15 (1966) provides:

For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set gifts, grants, alienations, and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption; Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt by homestead.

⁶*Bank of New Hanover v. Adrian*, 116 N.C. 537, 547, 21 S.E. 792, 795 (1895).

⁷N.C. GEN. STAT. § 39-19 (1966); see note 135 and accompanying text *infra*.

⁸N.C. GEN. STAT. § 39-16 (1966) provides:

Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same.

with several important modifications. In 1840 the North Carolina General Assembly amended the statute to provide a remedy only to those subsequent purchasers who bought without notice of the grantor's fraud and who paid "full value."⁹ The statute was further amended to afford a remedy to subsequent purchasers of personalty as well as land.¹⁰ The latter amendment brought section 39-16 in line with decisions that achieved the same result on common law principles notwithstanding the limitations of 27 Elizabeth.¹¹ Sections 39-15, 39-16, and 39-19 constitute the principal sources of the law of fraudulent conveyances as it has developed in North Carolina.

In 1918 the Uniform Fraudulent Conveyance Act was approved by the National Conference of Commissioners on Uniform State Laws. Since that time it has been adopted in twenty-seven states, not including North Carolina. The Commissioners in their Prefatory Note to the Act stated what they considered to be the reasons for the confusion that surrounded the law of fraudulent in jurisdictions relying on either Elizabethan-type statutes or judicial decisions recognizing the Elizabethan statutes as part of the common law:

The confusion and uncertainties of the existing law which have been referred to are due primarily to three things:

First, the absence of any well recognized, definite conception of insolvency.

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.¹²

The Uniform Act has been characterized as substantially a restatement of 13 Elizabeth, with the exception that under the Uniform Act certain conveyances are declared to be fraudulent irrespective of the grantor's actual intent.¹³ Indeed, under section eleven¹⁴ of the Uniform Act, resort must be had to common law principles where specific provisions of

⁹Ch. 28, §§ 1-2, 1840 N.C. Sess. L. 59-60. *See also* *Hiatt v. Wade*, 30 N.C. 340, 343 (1848).

¹⁰The second amendment to 27 Elizabeth was first codified in N.C. CODE § 34-1546 (1883). A careful search, however, has failed to locate the amending session law.

¹¹*See, e.g., Plummer v. Worley*, 35 N.C. 423, 424 (1852).

¹²UNIFORM FRAUDULENT CONVEYANCE ACT, Prefatory Note.

¹³*See* 37 AM. JUR. 2d *Fraudulent Conveyances* § 3 (1968), *citing* *Neal v. Clark*, 75 Ariz. 91, 251 P.2d 903 (1952).

¹⁴UNIFORM FRAUDULENT CONVEYANCES ACT § 11 [hereinafter cited as UFCA].

the Act are not dispositive.¹⁵ A question thus arises as to why the Uniform Act, which purports only to eliminate confusion through restatement and not to abrogate existing common law principles, has not been more widely adopted. The primary object of this comment is to analyze the law of fraudulent conveyances as it has developed in North Carolina; the secondary purpose is to determine if there are indeed areas of confusion that could be elucidated by adoption of the Uniform Fraudulent Conveyance Act.¹⁶

The law of fraudulent conveyances in North Carolina has been reduced to the five principles articulated in the landmark case of *Aman v. Walker*.¹⁷ With few exceptions, in all subsequent cases the North Carolina courts have resolved any questions concerning fraudulent conveyances with reference to one or more of the *Aman v. Walker* principles. Accordingly, these principles provide a convenient framework for analyzing North Carolina law in this area and comparing with it the provisions of the Uniform Fraudulent Conveyance Act.¹⁸

THRESHOLD CONSIDERATIONS

Before proceeding with consideration of the *Aman v. Walker* principles, it is helpful to examine certain fundamental concepts that have general applicability to the entire law of fraudulent conveyances.

The Concept of Conveyance

The term "conveyance" has been regarded by the North Carolina courts and those of other Elizabethan jurisdictions as being broad enough to cover any transaction involving fraud.¹⁹ Accordingly, the North Carolina Supreme Court has brought a great variety of transfers

¹⁵*Shapiro v. Wilgus*, 287 U.S. 348 (1932).

¹⁶Fraudulent conveyances in a bankruptcy context are beyond the scope of this comment. It should be noted, however, that the fact of a debtor's fraudulent conveyance of property may have important ramifications under the law of bankruptcy. First, under Bankruptcy Act § 3(a)(1), 11 U.S.C. § 21(a)(1) (1964), a fraudulent transfer by a debtor is an act of bankruptcy. Secondly, under Bankruptcy Act § 14(c)(4), 11 U.S.C. § 21(c)(4) (1964), a bankrupt who has made a fraudulent transfer may be prevented from obtaining a discharge. Finally, the trustee in bankruptcy can invalidate fraudulent transfers under Bankruptcy Act § 67(d), 11 U.S.C. § 107(d) (1964), or under Bankruptcy Act § 70(e), 11 U.S.C. § 110(e) (1964).

¹⁷165 N.C. 224, 81 S.E. 162 (1914).

¹⁸Certain provisions of the Uniform Act have been construed differently by the courts. This comment, however, does not purport to deal extensively with such case law under the Uniform Act.

¹⁹37 AM. JUR. 2d *Fraudulent Conveyances* § 58 (1968).

within the scope of the fraudulent conveyance statutes.²⁰ Similarly, section one of the Uniform Act defines "conveyance" to include "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."²¹ Thus, under either the Elizabethan-type statute or the Uniform Act, the *form* of a transfer or conveyance will never be determinative of its validity.

Type Property Affected

Generally, any property of a debtor that can be reached by his creditors is within the purview of both the Elizabethan statute and the Uniform Act. Property that is exempt could not be reached by creditors under any circumstances and hence could not be the subject matter of a fraudulent conveyance.²² Accordingly, it has been held in North Carolina that a debtor who fraudulently conveys property to his wife but continues to occupy the premises is still entitled to claim his homestead exemption and resist the efforts of his creditors to invalidate the conveyance.²³ It has also been held in North Carolina that a debtor's conveyance to his wife of property owned by the entirety is not subject to invalidation.²⁴ Similarly, under section one of the Uniform Act any property of the debtor that is "not exempt from liability for his debts" is considered to be part of the debtor's assets and any conveyance of such assets is subject to invalidation under the Act's other provisions.²⁵

²⁰See, e.g., *Moore v. Greenville Banking & Trust*, 173 N.C. 180, 91 S.E. 793 (1917) (transfer of money by debtor to wife's bank account); *Michael v. Moore*, 157 N.C. 462, 73 S.E. 104 (1911) (investment in capital improvements upon wife's property); *Burton v. Farinholdt*, 86 N.C. 260 (1882) (assignment of life insurance policy); *Powell v. Howell*, 63 N.C. 283 (1869) (feigned confession of judgment).

²¹U.F.C.A. § 1.

²²See *Wright v. Bond*, 127 N.C. 39, 37 S.E. 65 (1900).

²³*Rose v. Bryan*, 157 N.C. 173, 72 S.E. 960 (1911).

²⁴*L & M Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968). The court reached its result on the grounds that a creditor's lien could never attach to property held by the entirety and that the creditor in the action was seeking to reach not the rents or profits accruing from the property but the property itself. *Id.* at 550, 161 S.E.2d at 27. See also *Kelly Springfield Tire Co. v. Lester*, 190 N.C. 411, 130 S.E. 45 (1925), which holds that a transfer of land held in resulting trust cannot be invalidated by creditors of the trustee.

²⁵U.F.C.A. § 1 reads in part: "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." It is interesting to note that the Uniform Act defines "conveyance" in terms of "property" and not in terms of "assets." See text accompanying note 21 *supra*. One commentator has suggested that a literal reading of these Uniform Act definitions affords an argument that exempt property can be the subject of a fraudulent conveyance. D.

Fair or Valuable Consideration

General Concepts. Highly important in the law of fraudulent conveyances is the concept of fair or valuable consideration. Under the Elizabethan statutes, a determination that a conveyance was not made for valuable consideration means that the conveyance was "voluntary" and more subject to invalidation than if valuable consideration had passed. A conveyance is deemed not for value, or voluntary, when the purchaser does not pay a "reasonably fair price;"²⁶ moreover, this failure is regarded as indicative of unfair dealing and suggestive of fraud.²⁷ Notably, the first three principles stated in *Aman v. Walker* apply only to voluntary conveyances, and the law of fraudulent conveyances leans much harder on voluntary conveyances than on those where valuable consideration passed.²⁸

In North Carolina the question of valuable consideration is important in two other contexts. Before a purchaser can under section 39-19 protect a title obtained from a grantor proven to have had actual fraudulent intent, he must show that he gave "good consideration."²⁹ "Good consideration" does not mean that the purchaser paid every dollar the property conveyed was worth, but only a "reasonably fair price."³⁰ Thus, what is "good consideration" amounts to "valuable consideration," and case law applicable in determining whether a conveyance was voluntary is also applicable to the issue of whether good consideration passed in a bona fide purchaser context. Before a purchaser can avoid a conveyance under section 39-16, he must show that "full value" was paid for the property conveyed.³¹ North Carolina courts treat the term "full value" as being synonymous with the terms "valuable consideration" and "good consideration." Easily seen at this point is the importance of the concept of valuable consideration to the law of fraudulent conveyances in North Carolina; less easily seen is why a concept so important has not been more adequately defined.

Under the Uniform Fraudulent Conveyance Act, it is also highly

Epstein, Materials on Debtor-Creditor Relations, IV-41a, 1971 (unpublished manuscript in University of North Carolina Law School Library). Courts applying the Uniform Act, however, have not taken this view. *Id.*

²⁶*L. & M Gas Co. v. Leggett*, 273 N.C. 547, 549, 161 S.E.2d 23, 25 (1968).

²⁷*Id.*

²⁸See text accompanying notes 134-37 *infra*.

²⁹See note 135 *infra*.

³⁰*Austin v. Staten*, 126 N.C. 783, 788-89, 36 S.E. 338, 340 (1900).

³¹See note 8 *supra*.

important whether a transfer was for "fair consideration." In order for conveyances to be invalidated under section four,³² section five,³³ or section six³⁴ of the Uniform Act, it must first be established that no "fair consideration" was paid. Moreover, the limitation on the remedies of creditors that is presented in section nine of the Act as against bona fide purchasers arises only upon proof that the latter paid "fair consideration."³⁵ The Uniform Act in section three does make an attempt to define "fair consideration" in a manner more helpful than the definitional treatment rendered "valuable consideration" by the North Carolina courts. Section three states:

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 not disproportionately small* as compared with the value of the property, or obligation obtained.³⁶

It is readily apparent that the Uniform Act's definition of "fair consideration" is at best a slight improvement over the Elizabethan-judicial definition of "valuable consideration" because of the uncertain meaning of such key phrases as "fair equivalent therefor" in section 3(a) and "amount not disproportionately small" in section 3(b). In practice the courts applying the Uniform Act definition to various types of consideration appear to arrive at the same conclusions as do courts in North Carolina applying their own definitions.

Jury Question. Ordinarily the North Carolina courts leave undisturbed the finding of the jury on the issue of whether valuable consideration passed. The wide latitude accorded juries on this issue was expressed in an early North Carolina case:

Prices may range between the extremes of what close men would call a good bargain on one hand and a bad or even a hard bargain on the other, and the law may not interfere. But when such a price is given, or pretended to be given, that everybody who knows the estate will exclaim at once, "why he has got the land *for* nothing," the law would

³²UFGA § 4. For further discussion *see* note 78 and accompanying text *infra*.

³³UFGA § 5. For further discussion *see* note 91 and accompanying text *infra*.

³⁴UFGA § 6. For further discussion *see* note 192 and accompanying text *infra*.

³⁵*See* note 148 and accompanying text *infra*.

³⁶UFGA § 3 (emphasis added).

be false to itself if it did not say sternly and without qualification, to such person, that he had not entitled himself to the grace and protection of the statute.³⁷

The court continued in this same case to say that it takes more than a "peppercorn" to constitute valuable consideration.³⁸ It can be seen that the inquiry here is not into the "adequacy" of the consideration. In North Carolina, a jury determination that valuable consideration was paid is overturned only when the court finds that the value of the consideration was grossly inadequate compared to the value of the goods sold.³⁹ This appears to be the practice, too, in jurisdictions following the Uniform Act.⁴⁰ Thus, under either North Carolina law or the Uniform Act, consideration that has a value reasonably disproportionate to the value of the land or goods purchased can still be found "valuable" or "fair."

Past Indebtedness as Qualifying. One issue frequently raised in this area is whether a conveyance to secure past indebtedness or to secure a present loan is for valuable consideration. In North Carolina the general rule is that past or present indebtedness can serve as valuable consideration so long as the debt is not grossly inadequate when compared with the value of the interest conveyed.⁴¹ Some authority, however, has it that in a bona fide purchaser context the degree of protection varies as between one who purchases by satisfying or securing past indebtedness and one who advances new consideration or incurs new liability. In *Wallace v. Cohen*⁴² the North Carolina court acknowledged the general rule that past or presently incurred debt could serve as valuable consideration, but with the qualification that any purchaser such as an assignee for the benefit of a defrauding vendee's creditors would take subject to any equities that arose while the property was in the hands of the

³⁷Fullenwider v. Roberts, 20 N.C. 420, 429-30 (1839).

³⁸*Id.* at 431.

³⁹The notion of grossly inadequate consideration has been applied in North Carolina purely on a case-by-case approach. *See, e.g.,* Wachovia Loan & Trust Co. v. Forbes, 120 N.C. 355, 27 S.E. 43 (1897) (a difference of \$1,500 between the purchase price of \$7,000 and actual value of \$8,500 was not grossly inadequate); Reiger v. Davis, 67 N.C. 185 (1872) (court refused to hold that the consideration of \$2,000 and rents reserved for land worth \$3,000 was not grossly inadequate); Harris v. DeFraffenreid, 33 N.C. 89 (1850) (one who gives one-half or two-thirds of the actual value of goods as consideration has not given full value).

⁴⁰*See* 37 AM. JUR. 2d *Fraudulent Conveyances* § 19 (1968) and authorities cited therein.

⁴¹*See* Fowle v. McLean, 168 N.C. 537, 541, 84 S.E. 852, 854 (1915); Brem v. Lockhardt, 93 N.C. 191, 193-95 (1885).

⁴²111 N.C. 103, 15 S.E. 892 (1892).

debtor.⁴³ Thus, although past indebtedness may be valuable consideration so as to qualify one for the protection of section 39-19, that protection has been limited by judicial doctrine. Section three of the Uniform Act makes a distinction not upon whether new credit was extended or new liability incurred but according to whether property was conveyed as security (section 3a) or in satisfaction for an antecedent debt (section 3b).⁴⁴ The effect of this distinction seems to be that the value of property conveyed to satisfy an antecedent debt must be fairly equivalent to the amount of the debt, but the value of property conveyed to secure either an antecedent debt or a present advance need only not be "disproportionately small as compared with the value of the property, or obligation obtained," to qualify as fair consideration.

Executory Promises as Qualifying. Under both North Carolina law⁴⁵ and the Uniform Act as applied in a few jurisdictions,⁴⁶ executory promises of support can serve as consideration. However, this general statement is subject to considerable qualification. Where personal services are asserted to have been the consideration in a transaction between relatives, there arises under the Elizabethan statutes in North Carolina a rebuttable presumption that the services were gratuitous.⁴⁷ Moreover, the relationship of the parties in such a conveyance, if coupled with other circumstances suggestive of fraud, may raise a strong presumption of fraud⁴⁸ that in the absence of rebuttal would compel a finding renders moot the question of whether a conveyance was voluntary.⁴⁹ Under the Uniform Act it is likely that the relationship of the parties in such a situation and the nature of the consideration would be indicative of a lack of "good faith." This would aid an attacking creditor in his efforts to bring the conveyance under one of the Act's invalidating provisions

⁴³*Accord*, *Carpenter v. Duke*, 144 N.C. 291, 56 S.E. 938 (1907).

⁴⁴See text accompanying note 36 *supra*.

⁴⁵*Worthy v. Brady*, 91 N.C. 265 (1884); *Cansler v. Cobb*, 77 N.C. 30 (1877).

⁴⁶*Manello v. Bornstine*, 44 Wash. 2d 769, 270 P.2d 1059 (1954); *Massey-Harris Co. v. Rich*, 233 Mo. App. 509, 122 S.W.2d 858 (1909).

⁴⁷*Farmer's Bank v. McCullers*, 201 N.C. 412, 160 S.E.2d 494 (1931).

⁴⁸See *Peeler v. Peeler*, 109 N.C. 628, 14 S.E. 59 (1891).

⁴⁹See note 116 and accompanying text *infra*.

⁵⁰Where there has been a transfer to a party who has partly performed an executory promise of support serving as consideration, the North Carolina courts will uphold the transfer to the extent of support actually provided. *People's Bank & Trust Co. v. Mackorell*, 195 N.C. 741, 143 S.E. 518 (1928). This situation, however, arises only where the grantee in a fraudulent conveyance has not been guilty of actual fraud but has been charged with knowledge of facts making him guilty of constructive fraud.

that requires an absence of fair consideration.⁵¹ It would also defeat any claim by the grantee of bona fide purchaser status in an effort to limit the remedies available to opposing creditors under section nine.⁵²

PRINCIPLE ONE

*"If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid."*⁵³

The first principle of *Aman v. Walker* indicates that the mere fact of a conveyance having been made for less than valuable consideration does not by itself make the conveyance fraudulent. Where there is not any actual intent to defraud⁵⁴ on the part of the grantor such as to enable creditors or purchasers under section 39-15 or section 39-16 to invalidate a conveyance, and where the grantor was not insolvent at the time of conveyance so as to raise any presumption of fraud,⁵⁵ a conveyance is valid even if voluntary.

PRINCIPLE TWO

*"If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally."*⁵⁶

A literal reading of 13 and 27 Elizabeth seems to suggest that only conveyances made with actual intent to defraud are voidable.⁵⁷ Frequently, however, a debtor will make a transfer for less than valuable consideration—in other words, a voluntary transfer—that has the effect of injuring his creditors and yet may not have been made with actual

⁵¹See text accompanying notes 32-34 *supra*.

⁵²See notes 148-49 *infra*.

⁵³165 N.C. at 227, 81 S.E. at 164 (emphasis added).

⁵⁴The concept of actual fraudulent intent is more fully developed at notes 93-133 and accompanying text *infra*.

⁵⁵The presumption of fraud that arises upon proof of a grantor's insolvency at the time he makes a voluntary conveyance is treated at notes 57-79 and accompanying text *infra*.

⁵⁶165 N.C. at 227, 81 S.E. at 164 (emphasis added).

⁵⁷See text accompanying note 148 *infra*. The concept of actual fraud is more fully developed in the text accompanying notes 93-133 *infra*.

fraudulent intent. Courts in North Carolina early developed presumptions of fraud to deal with this type of situation. One such presumption arose from the mere fact of a debtor making a voluntary conveyance;⁵⁸ it arose without regard to whether the debtor had retained enough property after the conveyance to satisfy the claims of his creditors. In 1840 the North Carolina legislature altered this judicial practice with the passage of section 39-17, which reads as follows:

No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settlor prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settlor; but the indebtedness of the donor or settlor at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.⁵⁹

In short, the statute destroyed any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settlor, and made the failure to retain property fully sufficient and available for the satisfaction of his [the debtor's] creditors a requisite of such presumption.⁶⁰ Expressed otherwise, a presumption of fraud will arise only upon proof that the transfer was voluntary and that after the transfer the debtor was insolvent.

What, then, is "property . . . fully sufficient and available for the satisfaction of his then creditors"? In dealing with this problem of defining insolvency, the North Carolina courts have consistently refused to establish any fixed proportion of retained assets to liabilities that will be determinative.⁶¹ One reason that case law is so indecisive regarding

⁵⁸It should be noted that this presumption differs from the presumption that is sometimes said to rise where a combination of certain suspicious circumstances or badges of fraud are present. The matter of presumed fraud here also differs from the situation in which "the fraudulent character of the deed depends on a variety of facts and circumstances connected with the transaction going to show the motive and intent 'where it is entirely for the jury to decide.'" *McCanless v. Flinchum*, 89 N.C. 373, 374-75 (1883).

⁵⁹N.C. GEN. STAT. § 39-17 (1966).

⁶⁰*Hood v. Cobb*, 207 N.C. 128, 130, 176 S.E. 288, 289 (1934).

⁶¹*See, e.g., Black v. Sanders*, 46 N.C. 67 (1853).

a definition of insolvency is that the issue is a matter for the jury.⁶² With few reported exceptions,⁶³ the jury's factual determination of solvency or insolvency after hearing testimony as to the nature and extent of a transferor's assets and liabilities remains undisturbed. The North Carolina courts have limited themselves to general suggestions, such as saying that it is necessary to ask whether a lender would extend credit for the amount of existing debt with such security as the assets transferor retained.⁶⁴ Guidelines for the jury are, however, available in the case law. Clearly the nature of the retained assets—for example, whether they are perishable⁶⁵—must be considered. Also, the jury must discount any exempt property in its calculation of the value of retained assets.⁶⁶ Where the debtor has a debt in the form of a surety obligation, such factors as the principal's solvency are looked to in an effort to ascertain the debtor's *ultimate liability*.⁶⁷ It should be noted, too, that the debtor's solvency is determined as of the time of the conveyance. Insolvency that subsequently occurs because of an act of God, business misfortune, or other fortuitous happening does not invalidate an earlier conveyance, although such facts may be offered as evidence on the issue of actual fraudulent intention.

Determining whether a debtor was solvent at the time he made a conveyance is obviously a difficult task under the North Carolina-Elizabethan case-by-case approach. The Uniform Fraudulent Conveyance Act offers the following definition of insolvency in an effort to facilitate such a determination: "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."⁶⁹ The Uniform Act definition also focuses on the transferor's financial condition at the time of transfer. In addition, according to the Act's definition of "assets,"⁷⁰ exempt property is

⁶²Garland v. Arrowood, 177 N.C. 371, 373, 99 S.E. 100, 102 (1919).

⁶³See Williams v. Hughes, 136 N.C. 58, 48 S.E. 518 (1904), for a rare case in which the court ruled as a matter of law that the property retained was insufficient to meet the claims of creditors. See also the dissent in Shuford v. Cook, 169 N.C. 52, 85 S.E. 142 (1915), in which the court had refused to find insolvency as a matter of law.

⁶⁴Black v. Sanders, 46 N.C. 67, 69 (1853).

⁶⁵Williams v. Hughes, 136 N.C. 58, 48 S.E. 518 (1904).

⁶⁶*Id.* See also Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934).

⁶⁷Shuford v. Cook, 169 N.C. 52, 85 S.E. 142 (1915).

⁶⁸Unaka & City Nat'l Bank v. Lewis, 201 N.C. 148, 156, 159 S.E. 312, 317 (1931).

⁶⁹UFCA § 2(1). UFCA § 2(2) deals with the question of partnership insolvency.

⁷⁰See note 25 *supra*.

not considered. Another similarity between the Uniform Act approach to defining insolvency and that of the North Carolina courts lies in the treatment of liabilities. The Uniform Act looks to a debtor's "probable liability," just as the North Carolina courts look to a debtor's "ultimate liability,"⁷¹ and both approaches provide a realistic treatment of contingent liabilities. The primary difference seems to be in the Uniform Act's singular insistence on looking to the "salable value" of assets rather than leaving the matter in the hands of a jury with only general instructions. The appraisal of "salable value" is of course in itself a difficult problem for the jury, but the overall approach of the Uniform Act appears preferable to that followed in North Carolina.

The question of burden of proof on the issue of solvency has long troubled the North Carolina courts. Notwithstanding the 1840 statute, an early line of decisions held that there arose a presumption of fraud upon the mere showing that a conveyance was voluntary and that the burden of proof on the issue of "sufficiency of property retained" or solvency rested upon the party seeking to uphold the conveyance.⁷² A recent case, however, clearly overrules these decisions and places the ultimate burden of providing insolvency upon the party attacking the conveyance.⁷³ Apparently, however, courts still impose a burden of producing at least some evidence tending to show solvency upon the party seeking to uphold a conveyance found by a jury to have been voluntary.⁷⁴

The effect of a party's establishing that sufficient property was not retained by the grantor—in other words, that a grantor was insolvent—is to raise a presumption that a voluntary conveyance was fraudulent. Expressed differently, the presumption that "formerly arose merely from the fact of a voluntary conveyance made by a debtor"⁷⁵ arises now upon a showing of grantor insolvency at the time of conveyance. This presumption is apparently conclusive, and the conveyance is

⁷¹See note 67 and accompanying text *supra*.

⁷²See, e.g., *Hobbs v. Cashwell*, 152 N.C. 183, 67 S.E. 495 (1910); *McCanless v. Flinchum*, 89 N.C. 373 (1883).

⁷³*Virginia-Carolina Laundry Supply Corp. v. Scott*, 267 N.C. 145, 148 S.E.2d 1 (1966). See also *Hood v. Cobb*, 207 N.C. 128, 176 S.E.2d 288 (1934); *Wallace v. Phillips*, 195 N.C. 665, 143 S.E. 244 (1928); *Taylor v. Eatman*, 92 N.C. 602 (1885).

⁷⁴*Virginia-Carolina Laundry Supply Corp. v. Scott*, 267 N.C. 145, 154, 148 S.E.2d 1, 6 (1966); *Garland v. Arrowood*, 177 N.C. 371, 99 S.E. 100 (1919).

⁷⁵*Hood v. Cobb*, 207 N.C. 128, 130, 176 S.E. 288, 289 (1934).

void in law without regard to actual fraudulent intent.⁷⁶ There is no opportunity for the party defending the conveyance to rebut such presumption, unlike the situation in which a presumption of actual fraudulent intent has arisen because of the presence of certain badges of fraud of suspicious circumstances surrounding the transaction.⁷⁷ Thus, under North Carolina law, if a proper party establishes that a conveyance was voluntary and that the grantor was insolvent at the time of the conveyance, the conveyance is void without regard to the grantor's actual intent.

The Uniform Act adopts essentially the same rule in section four, which provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."⁷⁸ Under section four there are no problems with presumptions or burdens of proof. If a creditor can establish that a debtor is or will be rendered insolvent by a conveyance and that the conveyance was made without fair consideration,⁷⁹ the conveyance is declared fraudulent as to him. The burden of proof according to the language of the provision clearly rests upon the party attacking the conveyance. North Carolina, therefore, by virtue of section 39-17 and unlike many other Elizabethan jurisdictions, is closely in line with the Uniform Act in its treatment of voluntary conveyances made by an insolvent debtor. The main difference lies in the fact that North Carolina relies on contrived presumptions of fraud that strain the language of sections 39-15 and 39-16 to arrive at the same result that can be easily reached under a clear statutory provision in the Uniform Act.

The effect of a party's establishing that "sufficient property" was retained by a grantor is to prevent any presumption of fraud from arising.⁸⁰ The existence of an unpaid debt is, however, evidence of actual

⁷⁶*Michael v. Moore*, 157 N.C. 462, 466, 73 S.E. 104, 105 (1911). See also *Burton v. Farinholdt*, 86 N.C. 261, 262-63 (1882), in which the court stated:

Being indebted to a state of clear insolvency at the time of voluntary assignment . . . the debtor's act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not . . . From the fact that he was at the time insolvent and that his transfer to his daughters was without valuable consideration, it results as a conclusion of law that the assignment was void as to his creditors.

⁷⁷See text accompanying notes 107-119 *infra*.

⁷⁸UFCA § 4.

⁷⁹See text accompanying note 36 *supra*.

⁸⁰*Virginia-Carolina Laundry Supply Corp. v. Scott*, 267 N.C. 145, 154, 148 S.E.2d 1, 6 (1966); *Shuford v. Cook*, 169 N.C. 52, 55, 85 S.E. 142, 144 (1915).

fraudulent intent and is by itself enough to take a creditor to the jury on that issue under section 39-17.⁸¹

At this point it is necessary to determine *who* can attack a fraudulent conveyance. Generally, creditors and others actually defrauded have standing to set aside a conveyance under section 39-15.⁸² Under section 39-16,⁸³ subsequent purchasers who pay full value and have no notice of a grantor's fraud can void a conveyance that was made with the intent to defraud them. Once a creditor or purchaser has shown actual fraud on the part of the grantor, the transfer is void as to the former, whether his claim was in existence at the time of the conveyance or arose subsequently. To these general statements, however, there are several qualifications. First, the attacking party must have been injured by the conveyance.⁸⁴ In other words, a conveyance that does not harm a creditor's interests can hardly be said to have been with intent to "delay, hinder and defraud" him. Secondly, if the ground for attacking the conveyance is not actual fraudulent intent on the part of the grantor but fraud presumed from the fact of the grantor's having made a voluntary conveyance while insolvent, it makes a difference whether the attacking party stands as an existing or a subsequent creditor.

It is clear under the second principle of *Aman v. Walker* that a subsequent creditor cannot impeach a conveyance that was voluntary and made while the debtor was insolvent unless he can show the existence of a prior creditor who remains unpaid. Moreover, before any subsequent creditor can reach the property transferred, it appears necessary not only that an existing unpaid creditor be found but also that the latter have brought suit and had the conveyance declared void.⁸⁵ The effect of this is to preclude a subsequent creditor from relying on presumptive or constructive fraud to avoid a conveyance.⁸⁶ This does not necessarily mean, however, that the subsequent creditor is without a remedy. He can still prove actual fraudulent intent on the part of the

⁸¹Helms v. Green, 105 N.C. 251, 262, 11 S.E. 470, 474 (1890).

⁸²See note 7 *supra*. Cases arising under the Elizabethan statute recognize that the term "creditor" is broad enough to embrace any persons whose interests are prejudicially affected by a transfer of assets by one against whom a right of action exists. 37 AM. JUR. 2d *Fraudulent Conveyances* § 134 (1968).

⁸³See note 8 *supra*.

⁸⁴People's Oil Co. v. Richardson, 271 N.C. 696, 700, 157 S.E.2d 369, 373 (1967); Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

⁸⁵Powell Bros. v. McMullan Lumber Co., 153 N.C. 52, 58, 68 S.E. 926, 929 (1910); Clement v. Cozart, 112 N.C. 412, 422, 17 S.E. 486, 489 (1893).

⁸⁶See Harris v. Carolina Distrib. Co., 172 N.C. 14, 16, 89 S.E.2d 789, 790 (1916).

grantor and void the conveyance; or, if an existing creditor voids the conveyance on grounds of presumptive or actual fraud, the subsequent creditor can subject the remains of the property conveyed to his claims on the principle that "a conveyance in fraud of one creditor is void as to all creditors."⁸⁷

The Uniform Fraudulent Conveyance Act broadly defines a creditor as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."⁸⁸ In the Act's five invalidating provisions, however, some distinctions can be drawn between the rights of existing and subsequent creditors. Section seven⁸⁹ of the Uniform Act adopts the Elizabethan statutory rule and declares that where a conveyance is made with actual intent to defraud as to "either present or future creditors," it is "fraudulent as to both present and future creditors." Section four⁹⁰ declares only that certain conveyances are void as to "creditors." Since section four, unlike section seven, does not specifically invalidate conveyances as to both present and future creditors, presumably only existing or present creditors are protected. This, too, is in line with the North Carolina rule. The Uniform Act, however, has two other invalidating provisions that are made available specifically to subsequent creditors. Section five provides:

Every conveyance made without fair consideration when the person making it is engaged or about to engage 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 *as to other persons who become creditors* during the continuance of such business or transaction without regard to his actual intent.⁹¹

In North Carolina, a subsequent creditor in the above situation could use the fact of a conveyance leaving the business with "unreasonably small capital" as evidence of fraud, but he would nevertheless have to prove actual fraudulent intent in order to void the conveyance. Section six of the Uniform Act provides:

Every conveyance made and every obligation incurred without fair

⁸⁷Hoke v. Henderson, 14 N.C. 12 (1831).

⁸⁸UFCA § 1.

⁸⁹UFCA § 7 provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

⁹⁰UFCA § 4; see note 69 and accompanying text *supra*.

⁹¹UFCA § 5 (emphasis added).

consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is *fraudulent as to both present and future creditors*.⁹²

Section six may appear to afford a subsequent creditor more protection than he would enjoy in an Elizabethan jurisdiction such as North Carolina. But under Elizabethan case law and that of North Carolina, proof of such subjective intent as is required by section six would undoubtedly necessitate a jury finding of actual fraud.

PRINCIPLE THREE

*"If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property not sufficient and available to pay existing debts is retained."*⁹³

Under both the Statute of Elizabeth as adopted in North Carolina and section seven⁹⁴ of the Uniform Fraudulent Conveyance Act, a voluntary conveyance made with actual fraudulent intent is fraudulent and voidable. This third principle of *Aman v. Walker* can be so stated without fear of ignoring the rights of bona fide purchasers, since by definition a voluntary conveyance is one made without valuable consideration, and proof of valuable consideration is a requisite for asserting bona fide purchaser status under either section 39-19⁹⁵ or the Uniform Act.⁹⁶ The concept of actual fraudulent intent, as opposed to fraud presumed upon proof of insolvency and lack of valuable consideration, lies at the heart of the law of fraudulent conveyances. Intent has been described as the "essential and poisonous element" that makes a transaction fraudulent.⁹⁷ Intent is said to involve an inquiry looking to the grantor's purpose in making a transfer, going beyond the mere effect it may have on his creditors.⁹⁸

In spite of the ostensibly subjective nature of the inquiry into a debtor's intent or purpose in making a conveyance, at times the North

⁹²UFCA § 6 (emphasis added).

⁹³165 N.C. at 227, 81 S.E. at 164 (emphasis added).

⁹⁴See note 89 *supra*.

⁹⁵See text accompanying note 135 *infra*.

⁹⁶See text accompanying note 148 *infra*.

⁹⁷Moore v. Hinnant, 89 N.C. 455, 459 (1883).

⁹⁸*Id.*

Carolina courts have tended to treat this element objectively. The North Carolina Supreme Court put it thusly:

Acts fraudulent in view of the law because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to intend the fraud inseparable from the act.⁹⁹

In other words, the effects that a conveyance has upon the interests of a transferor's creditors may cause his intent to be regarded as fraudulent.¹⁰⁰ Moreover, the object of a debtor need not have been the complete defeat of a creditor on his claims; it is sufficient "if the object was to blind him [the creditor], to put him to a difficulty as to his remedy, so as to delay him of a direct one, and hinder him"¹⁰¹

Proof of fraudulent intent in North Carolina is a complicated matter involving several different presumptions that the courts have developed. Fraudulent intent can be proved in North Carolina on three different levels, with the procedural path varying according to the relative likelihood of fraud in view of the facts of a particular case. On the first level, a court may pronounce a conveyance to be void at law or may conclusively presume its fraudulence. This most often occurs where fraud clearly appears on the face of a deed or other instrument.¹⁰² Fraudulent intent may also be conclusively presumed from the declarations of the grantor, either in the deed itself or by some other form of binding admission.¹⁰³ But ordinarily courts are very reluctant to find fraud as a matter of law, since intent is an operation of the mind and should be proven and found as a fact by the jury.¹⁰⁴ The conclusive presumption of fraud arises only where the suspicious circumstances that appear cannot be explained by other facts and circumstances.¹⁰⁵

⁹⁹*Cheatham v. Hawkins*, 80 N.C. 161, 163-64 (1879).

¹⁰⁰*Stone v. Marshall*, 52 N.C. 300, 302 (1859).

¹⁰¹*Purcell v. McCallum*, 18 N.C. 221, 226 (1835).

¹⁰²*See Brown v. Mitchell*, 102 N.C. 347, 348, 9 S.E. 702, 703 (1889). One example is where the parties set out in the deed itself that a secret trust was created. *Sturdivant v. Davis*, 31 N.C. 365 (1849).

¹⁰³*Royster v. Stallings*, 124 N.C. 55, 64, 32 S.E. 384, 386 (1889).

¹⁰⁴*See Sills v. Morgan*, 217 N.C. 662, 666, 9 S.E.2d 518, 520 (1940), and cases cited therein.

¹⁰⁵*Howell v. Elliot*, 12 N.C. 76, 78 (1826). Thus, it has been held that the retention of property by a vendor after sale is not conclusively fraudulent since it can be explained. *Vick v. Kegs*, 3 N.C. 126 (1800). But a conveyance absolute on its face that is shown to have been intended as security for a debt is conclusively fraudulent. *Bernhardt v. Brown*, 122 N.C. 587, 591, 29 S.E. 884, 885 (1898).

Where fraud does not appear on the face of a deed or in the declarations of the parties, the creditor or purchaser attacking the conveyance must resort to the second- and third-level approaches by presenting facts and circumstances surrounding the transaction that tend to prove fraudulent intent. The nature of this inquiry has been described as follows:

Since intent is an operation of the mind it should be proven and found as a fact and is rarely to be inferred as a matter of law. It should clearly be made to appear by the evidence, and the best evidence of intention is to be found in the language used by the parties, though it may appear in their conduct. The true inquiry is what was done, said or written, and whether it indicated the alleged intention.¹⁰⁶

The second-level approach is characterized by the rebuttable presumption. If the party alleging fraud can show a certain quantum of facts and circumstances suggestive of a fraudulent intention on the part of the grantor, there arises a *rebuttable presumption* that the conveyance was made fraudulently. To raise such a presumption, an attacking party will ordinarily attempt to show circumstances or facts that arouse suspicion as to the *bona fides* of the transaction. These circumstances are commonly referred to as "badges of fraud."¹⁰⁷ Badges of fraud have been described as facts that are "calculated to throw suspicion on the transaction, and call for explanation."¹⁰⁸ No single badge of fraud by itself will raise the presumption, but proof of certain combinations of different badges of fraud may do so.¹⁰⁹

As to what combination of circumstances will raise this presumption, there is no well-formulated rule in North Carolina. One crucial factor is the relationship of the parties. Although the mere relationship of husband and wife by itself is not sufficient, when this factor is coupled with other circumstances the presumption may arise.¹¹⁰ For example, a conveyance by an insolvent father to his son is presumed to have been made with fraudulent intent.¹¹² North Carolina courts also have tradi-

¹⁰⁶Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co., 177 N.C. 103, 107, 97 S.E. 718, 720 (1919).

¹⁰⁷The notion of "badges of fraud" is said to have originated with the early common law decision in *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601). See generally J. HANNA & J. MACHLACHLAN, *CASES AND MATERIALS ON CREDITORS RIGHTS* 144-52 (5th ed. 1957).

¹⁰⁸Peebles v. Horton, 64 N.C. 374, 377 (1870).

¹⁰⁹Brown v. Mitchell, 102 N.C. 347, 368-70, 9 S.E. 702, 703-04 (1889).

¹¹⁰Sanford, Chamberlain, & Albers Co. v. Eubanks, 152 N.C. 697, 699, 68 S.E. 219, 221 (1910).

¹¹¹Peeler v. Peeler, 109 N.C. 628, 631, 14 S.E. 59, 61-62 (1891).

¹¹²Unaka & City Nat'l Bank v. Lewis, 201 N.C. 148, 155, 159 S.E. 312, 317 (1931).

tionally regarded any retention of possession by a vendor after sale as a highly suspicious circumstance.¹¹³ Another factor looked to is whether the transaction was conducted in secret. Thus, a conveyance in secret by an insolvent debtor to a near relative has been held to be presumptively fraudulent.¹¹⁴ The mere fact of a private sale, however, has been held to be only evidence of fraudulent intention.¹¹⁵ The basis for the presumption seems to be that the circumstances shown indicate a peculiar knowledge on the part of parties to the transaction, so that if they fail to come forward with rebutting evidence explaining their good faith the transaction will be voided.¹¹⁶

If the presumption arises and the jury believes the attacking party's evidence, fraudulent intent must be found in the absence of sufficient rebutting evidence regarding the *bona fides* of the transaction.¹¹⁷ To rebut the presumption of fraud, it is usually necessary for the parties to the transaction to take the witness stand and explain the suspicious circumstances that form the basis of the presumption. If the jury believes the rebutting witnesses' testimony the presumption is deemed rebutted and the matter of fraudulent intent becomes purely a factual question for the jury.¹¹⁸ The effect of rebuttal is to downgrade facts or suspicious circumstances that have formed the basis of the presumption to mere badges of fraud that are only strong evidence of the fraud, which must be affirmatively proved.¹¹⁹

The third level of proving fraudulent intent in North Carolina is quite similar to the second in that the party attacking the conveyance

¹¹³Messick v. Fries, 128 N.C. 450, 451, 39 S.E. 59, 60 (1901). See also Piedmont Sav. Bank v. Levy, 138 N.C. 274, 50 S.E. 657 (1905). However, under the Uniform Commercial Code certain types of transactions are declared to be nonfraudulent even though possession is retained by a seller or other debtor. See N.C. GEN. STAT. § 25-2-402(2) (1968); N.C. GEN. STAT. § 25-9-305 (1968).

¹¹⁴Reiger v. Davis, 67 N.C. 185 (1872).

¹¹⁵Burgin v. Burgin, 23 N.C. 453, 459 (1841).

¹¹⁶Helms v. Green, 105 N.C. 251, 265, 11 S.E. 470, 474-75 (1890).

¹¹⁷Redmond v. Chandley, 119 N.C. 575, 578, 26 S.E. 255, 256 (1896).

¹¹⁸*Id.* at 578-79, 26 S.E. at 256-57. For cases in which the presumption was found to be rebutted, see Young v. Booe, 33 N.C. 347 (1850); Lee v. Flannigan, 29 N.C. 741 (1847). For cases in which the presumption was found not to have been rebutted, see Morris Plan Bank v. Cook, 55 F.2d 176 (4th Cir. 1932); Blanton Grocery v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913). The case of Peeler v. Peeler, 109 N.C. 628, 14 S.E. 59 (1891), illustrates the shifting of burdens of proof that occurs in cases of this nature. There the fact of an insolvent debtor conveying land to his wife was said to raise a presumption of fraud. However, once the wife had shown to the satisfaction of the jury that valuable consideration had passed, the presumption was deemed to have been rebutted and the burden shifted again to the party attacking the conveyance to prove actual fraud. *Id.* at 631, 14 S.E. at 61-62. See also Eddleman v. Lentz, 158 N.C. 65, 72 S.E. 1011 (1911).

¹¹⁹Helms v. Green, 105 N.C. 251, 263-64, 11 S.E. 470, 474 (1890).

must present evidence of the circumstances surrounding the transaction and satisfy the jury that the transaction was not conducted in good faith. However, at the third level the attacking party has a clear burden of proof to sustain and no presumption upon which to rely. One court has suggested in dictum that there is little difference between saying that a presumption did not arise and saying that a presumption arose but was rebutted.¹²⁰ There is an element of truth in this observation. At both the second and third levels of proving actual fraud in North Carolina badges of fraud are relied on. At the second level, however, only certain badges in combination will raise a presumption of fraud. These particular badges of fraud include secrecy, retention of possession, family relationship, and insolvency. At the third level these badges and many others are utilized as strong evidence from which a jury can draw an inference of fraud. Other suspicious circumstances that are treated as badges of fraud include gross inadequacy of consideration,¹²¹ delay in registration of a deed,¹²² extension of credit to a financially pressed debtor,¹²³ and pendency of a lawsuit at the time of transfer.¹²⁴ In addition, the judge can comment to the jury upon the suspiciousness of a refusal to testify by a party with peculiar knowledge of the transaction in issue.¹²⁵

Questions of fraudulent intent frequently arise where a debtor confers a preference on some of his creditors by making a conveyance to the satisfaction of some claimants and to the exclusion of others. It is well established in North Carolina and other jurisdictions that a debtor has a right to discharge his honest debts through such a transfer, and the mere fact that a preference has been conferred is not a badge of fraud that will get an attacking creditor to a jury on the issue of fraudulent intent.¹²⁶ But if the debtor reserved any benefit for himself or if the jury finds that the purpose of either the debtor or a participating creditor was other than that of satisfying the claims of preferred creditors, the transfer is void as against all creditors.¹²⁷

Thus, in most instances a jury will look at evidence concerning the

¹²⁰Kreth v. Rogers, 101 N.C. 269, 270, 7 S.E. 682, 684 (1888).

¹²¹Jessup v. Johnston, 48 N.C. 335 (1856).

¹²²Redmond v. Chandley, 119 N.C. 575, 579, 26 S.E. 255, 257 (1896).

¹²³*Id.*

¹²⁴Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

¹²⁵Peebles v. Horton, 64 N.C. 374, 377 (1870).

¹²⁶Barber v. Buffaloe, 111 N.C. 206, 213, 16 S.E. 386, 387 (1892).

¹²⁷Hafner v. Irwin, 23 N.C. 490, 497-98 (1841). Statements of the *Hafner* court indicate that in cases involving preferences the question of fraudulent intent is almost exclusively a subjective inquiry. *Id.* at 498.

relation of the parties, the nature of the transaction, the financial condition of the transferor, and other circumstances existent at the time of the transfer in question. But evidence of the subsequent actions of the parties is also important in determining if their intent at the time of the conveyance was fraudulent. For example, a voluntary conveyance by an indebted father to his son is a badge of fraud. But if the father remains solvent or pays all his debts, any inference of an intention to defeat his creditors is destroyed.¹²⁸ Conversely, if the father in this example afterwards became insolvent or failed to pay his debts, fraud would likely be imputed to the earlier transaction.¹²⁹ Along this same line, where a debtor who executes a deed to his creditor in purported payment of a debt is allowed to remain on the land and consume any crops grown thereon without further payment, there is strong evidence of fraud in the execution of the deed.¹³⁰

Under section seven of the Uniform Fraudulent Conveyance Act, all conveyances made and obligations "incurred with *actual intent, as distinguished from intent presumed in law,*" to defraud are fraudulent.¹³¹ Sections four, five, and six of the Uniform Act each in effect declare that fraud will be conclusively presumed under certain conditions without proof of actual fraud.¹³² It would seem from the language of section seven and the general approach of the other invalidating provisions that neither conclusive nor rebuttable presumptions could be relied on to establish actual fraud in jurisdictions that have adopted the Uniform Act. In other words, in a Uniform Act jurisdiction an attacking party could proceed only on the third of the three levels of proof available to his counterpart in North Carolina on the issue of actual fraud. Such a party would have to satisfy the jury that by the weight of the evidence there was actual fraud before he could invoke section seven. Some courts, however, have read the Uniform Act as destroying only the use of conclusive presumptions in proving actual fraud and have continued to apply rebuttable or prima facie presumptions as is done in North Carolina. The result, according to one commentator, has been a serious lack of uniformity, which the Uniform Act was designed to provide.¹³³

¹²⁸Smith v. Reavis, 29 N.C. 341, 343 (1847). See also Halcombe v. Ray, 23 N.C. 340 (1840).

¹²⁹Smith v. Reavis, 29 N.C. 341, 343 (1847).

¹³⁰Burgin v. Burgin, 23 N.C. 453 (1841).

¹³¹UFCA § 7 (emphasis added).

¹³²See text accompanying notes 32-34 *supra*.

¹³³See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 423-25 (1933).

PRINCIPLE FOUR

*"If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid."*¹³⁴

The preceding three sections have been concerned only with conveyances that were not made for valuable consideration. When a conveyance is shown to have been made for valuable consideration, the party attacking the conveyance may be faced with additional problems in seeking to reach the property transferred. First, under Section 39-19 he will be unable to reach the property if title is in the hands of a bona fide purchaser. Secondly, he must prove not only that the grantor had actual fraudulent intent but also that the grantee either participated in or had notice of the fraud.

In North Carolina, section 39-19 protects bona fide purchasers of fraudulently conveyed property. The statute provides: "Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud."¹³⁵ Under section 39-19, if a purchaser can establish that he paid good consideration and that he lacked notice of any fraud, his title even to goods fraudulently conveyed is absolutely protected. Expressed otherwise, section 39-19 operates as a qualification to any Elizabethan statutory provisions or judicial presumptions that would otherwise invalidate a conveyance for fraud.¹³⁶ The scope of protection afforded a bona fide purchaser has been articulated as follows by the North Carolina Supreme Court:

The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the *bona fides* and the full valuable consideration of the second conveyance to supply the want of these qualities in the first, so as to perfect the title of the first purchase from being impeached and made void.¹³⁷

The requisite element of good or valuable consideration has been

¹³⁴165 N.C. at 227, 81 S.E. at 164 (emphasis added).

¹³⁵N.C. GEN. STAT. § 39-19 (1966).

¹³⁶Young v. Lathrop, 67 N.C. 63, 72 (1872).

¹³⁷*Id.*

discussed previously.¹³⁸ Regarding *lack of notice*, the second element that is necessary for bona fide purchaser status, some other jurisdictions with Elizabethan-type statutes place the burden of proof on the party attacking a conveyance to show that a defendant-purchaser had *notice* once the latter has established that he paid valuable consideration. The rule in North Carolina, however, is that the burden of proof as to both valuable consideration and lack of notice is on the party seeking to uphold the transfer. This was established in *Cox v. Wall*¹³⁹ after some confusion in earlier case law.

The difficulty in proving *lack of notice* led Justice Robert M. Douglas in *Cox v. Wall* to dissent:

The mere fact that a fair price is paid is in itself the strongest evidence of good faith. It may be said that the vendee knows whether or not he knew of the vendor's fraudulent intent, and that he can disprove such knowledge by his testimony. This is the only way such a negative can be proved; but is it any easier for the vendee to prove his want of knowledge than for the plaintiff to prove his knowledge? That the vendee had knowledge might be proved by one witness, but a thousand witnesses could not prove that he had no knowledge. All that they could prove would be that they did not give him any information to put him on notice, and that he had no knowledge *as far as they knew*.¹⁴⁰

Despite the *Cox v. Wall* majority's holding on the burden of proof for the issue of lack of notice, the North Carolina Supreme Court through its practice of favorably receiving testimony of putative bona fide purchasers as to their good faith in essence has come to place a *de facto* burden of showing *lack of notice* upon the party who is attacking a conveyance or asserting that his claim is superior to that of the purchaser. In fact, apparently no other reported cases in North Carolina discuss the concept of "lack of notice." Instead, the cases involving a bona fide purchaser claim invariably focus on what constitutes "notice."

A purchaser will be denied the protection of section 39-19 if he is

¹³⁸See text accompanying notes 26-52 *supra* for a discussion of the concept of valuable consideration.

¹³⁹132 N.C. 730, 44 S.E. 635 (1903); *accord*, *Saunders v. Lee*, 101 N.C. 3, 7 S.E. 590 (1888). The latter case distinguishes the situation in which a party attacking a conveyance is attempting to show that the grantee participated in the fraud or had notice of the fraud and the situation in which a purchaser is trying to assert the superiority of his title as a bona fide purchaser. In the former situation, the attacking party has the burden of proof on the issue of *notice*. In the latter situation the purchaser must show *lack of notice*. *Id.* at 6-7, 7 S.E. at 592.

¹⁴⁰132 N.C. at 742, 44 S.E. at 639 (emphasis in original).

found to have had either actual or constructive notice of the grantor's fraud. Frequently the line of demarcation between actual and constructive notice is not clear, but the effect of denying the protection of the statute to a purchaser is the same.¹⁴¹ Generally, actual notice consists of actual knowledge of or participation in the fraudulent intentions of a grantor. Direct evidence that a purchaser knew that a debtor was making a conveyance to him in fraud of creditors or that the purchaser in any way assisted the grantor in an attempt to defraud creditors would of course preclude a purchaser from asserting that he lacked notice. Such direct evidence is not always available, however.

Proof that a purchaser had notice can also be made constructively. Constructive notice may be found where facts should have led the transferee to inquire as to the *bona fides* of a transaction.¹⁴² A vendee is charged with knowledge of facts recited in his deed, and if the deed is fraudulent on its face, the vendee will be regarded as having shared in the fraud.¹⁴³ Moreover, where a vendee knows of a prior transfer by a debtor to the vendee's immediate vendor, the vendee will be charged with notice of any fraudulent intent apparent on the face of the first deed.¹⁴⁴ If a party purchases from a vendor with the knowledge that another is in possession, he is deemed to have notice of such facts as a reasonable inquiry into the vendor's title would disclose.¹⁴⁵ But knowledge of circumstances indicating fraud on the part of a grantor will not be imputed to a grantee simply because she is the grantor's wife.¹⁴⁶ Prior registration of a deed or other instrument affords notice as to all matters

¹⁴¹Arrington v. Arrington, 114 N.C. 151, 163, 19 S.E. 351, 355 (1894).

¹⁴²Cansler v. Cobb, 77 N.C. 30 (1877). In this case the court gave the following example of facts that constitute constructive notice:

[Suppose] A says to B, "I find I owe more than I can pay. My object is to get money and go to Texas. You can have my land for a fair price in cash." B agrees to buy the land and pays the money. The creditors can take the land from B on the ground that although he purchased at a fair price yet he had notice. True, B had no *actual* intent to defraud the creditors of A. His purpose was to buy the land. Still he had notice that the intent of A was to defraud creditors, and such notice fixes on him a *constructive* intent.

Id. at 33-34 (emphasis by the court). This quotation reflects the North Carolina court's practice of failing to distinguish *constructive notice*, which will defeat a bona fide purchaser claim, and *constructive intent* on the part of a grantee, which must be proven before a creditor can void a transaction in which valuable consideration has passed. For discussion on the requirement of mutuality of fraudulent intention, see notes 151-54 and accompanying text *infra*.

¹⁴³*Cf.* Eigenbrun v. Smith, 98 N.C. 207, 209, 4 S.E.122, 123 (1887).

¹⁴⁴*Id.* at 212, 4 S.E. at 124-25.

¹⁴⁵Bost v. Setzer, 87 N.C. 187, 190 (1882).

¹⁴⁶Sanford, Chamberlain & Albers Co. v. Eubanks, 152 N.C. 697, 699, 68 S.E. 219, 221 (1910).

that could be discovered by reasonable inquiry, and a *lis pendens* serves as constructive notice where the "claim is *contra* or in derogation of the record."¹⁴⁷

Under the Uniform Fraudulent Conveyance Act, a bona fide purchaser receives the same protection that he would in North Carolina. Section 9(1) of the Uniform Act provides that a creditor against whom a conveyance or obligation is fraudulent has certain remedies, except as against "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser."¹⁴⁸ The language of section 9(1) apparently places the burden of proving fair consideration as defined by section three of the Act upon the putative bona fide purchaser, as is the case in North Carolina. Under section 9(2) of the Uniform Act, a purchaser may be protected to the extent of the consideration he paid even though it has been determined that he paid less than a fair consideration if he did not share in the grantor's actual fraudulent intent. Some North Carolina authority affords similar protection to the purchaser in that situation.¹⁵⁰

Closely related to the problem of notice in a bona fide purchaser context is the problem of mutuality of fraudulent intention. Where a transfer was for valuable consideration, an attacking party must show not only that the debtor-grantor had actual fraudulent intent but also that the grantee either had knowledge of such intent or participated in the fraud.¹⁵¹ Such a requirement of mutuality of fraudulent intention can be regarded as an essential element in proving actual fraud. It is clear that if a party attacking a conveyance fails to introduce evidence of a grantee's lack of good faith—in other words, evidence of the grantee's participation in or knowledge of the grantor's fraud—he is subject to nonsuit.¹⁵²

¹⁴⁷*Massachusetts Bonding & Ins. Co. v. Knox*, 220 N.C. 725, 728, 18 S.E.2d 436, 439 (1941). But where a grantee has no notice other than a *lis pendens* filed prior to a creditors' complaint, he has no notice that would prevent him from establishing that he is a bona fide purchaser. *Morgan v. Bostic*, 132 N.C. 743, 754, 44 S.E. 639, 642 (1903). For a case that construes the Registration Acts with section 39-16 and the latter's requirements of full value and lack of notice, see *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900).

¹⁴⁸U.F.C.A. § 9(1), quoted in text accompanying note 159 *infra*.

¹⁴⁹U.F.C.A. § 9(2) provides that "a purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment."

¹⁵⁰See note 50 *supra*.

¹⁵¹*Bunn v. Harris*, 216 N.C. 366, 5 S.E.2d 149 (1939); *Aman v. Walker*, 165 N.C. 224, 227-28, 81 S.E. 162, 164 (1914).

¹⁵²*Murphy v. Hacker*, 265 N.C. 448, 449, 144 S.E.2d 260, 261 (1965).

Some Elizabethan jurisdictions require proof of actual knowledge or actual participation by the grantee to prove mutuality of fraudulent intention and refuse to impute knowledge from purely circumstantial evidence.¹⁵³ It is not settled in North Carolina whether mere proof of circumstances putting a grantee on notice as to his grantor's intent is sufficient. Probably it will suffice to prove facts putting a grantee on notice or constructive knowledge. Reported cases reflect the North Carolina court's failure to distinguish the notice issues with respect to mutuality of fraudulent intention and regarding the status of a putative bona fide purchaser.¹⁵⁴ Such a failure suggests that constructive knowledge of fraud may be shown on the former as well as the latter question. Under section seven of the Uniform Act, as noted before, actual fraud must be proven; therefore, if mutuality of fraudulent intention is an essential element of actual fraud in a particular jurisdiction, the same would be true under the Uniform Act.

PRINCIPLE FIVE

*"If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he had notice, it is void."*¹⁵⁵

The fifth principle of *Aman v. Walker* restates what has been discussed in the immediately preceding section. A conveyance made for valuable consideration is void if it can be established that the grantor acted with the intent to defraud his creditors or purchasers and that his grantee shared in the fraudulent intent either directly as a participant or constructively as one with notice. This statement, however, must be qualified in several ways. First, despite the clear language of sections 39-15¹⁵⁶ and 39-16,¹⁵⁷ a fraudulent conveyance is not void, but merely voidable. A conveyance is good as between the parties, and only a creditor or purchaser who has been defrauded can impeach the conveyance.¹⁵⁸ Secondly, it must be remembered that the interest of any bona

¹⁵³37 AM. JUR. 2d *Fraudulent Conveyances* § 6 (1968) and authorities cited therein.

¹⁵⁴See note 142 *supra*. See also *Eigenbrun v. Smith*, 98 N.C. 207, 4 S.E. 122 (1887); *Reiger v. Davis*, 67 N.C. 185 (1872).

¹⁵⁵165 N.C. at 227-28, 81 S.E. at 164 (emphasis added).

¹⁵⁶See note 5 *supra*.

¹⁵⁷See note 8 *supra*.

¹⁵⁸*Lane v. Becton*, 225 N.C. 457, 461, 35 S.E.2d 334, 336 (1945). But note that a court may refuse to enforce as between parties in *pari delicto* a transfer such as a bond executed for the purpose of defrauding creditors, as distinguished from an executed conveyance such as a deed to land, which does not need the act of a court to give it effect. *Powell & Co. v. Inman*, 53 N.C. 436, 438-39 (1862).

fide purchaser will always be protected whether the ground upon which a conveyance is voidable is actual or presumptive fraud.

REMEDIES OF THE DEFRAUDED CREDITOR

When a conveyance is void as to a creditor upon grounds of either actual or presumptive fraud, what remedies does a creditor have? Section 9(1) of the Uniform Act provides a creditor whose claim has matured with two alternatives:

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.¹⁵⁹

Section 9(1) accurately states the remedies that are available to the defrauded creditor in North Carolina. It is not necessary for a creditor in North Carolina to obtain a judgment on his claim before seeking to set aside a fraudulent conveyance in equity.¹⁶⁰ The creditor can elect to seek to set aside a transfer and in the same action establish his own claim as well as subject the property conveyed to sale under decree of court for the satisfaction of his claim.¹⁶¹ Such a suit is in the nature of a general creditor's bill and if successful will have the effect of voiding a conveyance as to the creditors of a grantor. A creditor can also elect to treat the fraudulent conveyance as void and, after obtaining a judgment on his claim, levy upon the property and have it sold under execution.¹⁶² The latter course of action leaves undecided the question of whether a conveyance was fraudulent; but if in a subsequent separate action the conveyance is held *not* fraudulent, the creditor may be held liable for substantial damages.¹⁶³

¹⁵⁹UFCA § 9(1).

¹⁶⁰Dawson Bank v. Harris, 84 N.C. 206 (1881).

¹⁶¹Armstrong Grocery Co. v. Banks, 185 N.C. 149, 152, 116 S.E. 171, 173 (1923). It should be observed, however, that a prior judgment upon claims of creditors is not necessary where all creditors join in a suit to subject to the payment of their claims property conveyed fraudulently by the debtor. Mebane v. Layton, 86 N.C. 571 (1882).

¹⁶²Thigpen v. Pitt, 54 N.C. 49 (1853). This case discusses at length the various remedies available to defrauded creditors in North Carolina. Cf. UFCA §§ 9(1), 10.

¹⁶³Thigpen v. Pitt, 54 N.C. 49 (1853).

CONCLUSIONS

The following chart summarizes the five principles of *Aman v. Walker*¹⁶⁴ and the law of fraudulent conveyances as it has developed in North Carolina.

Nature of Conveyance ¹⁶⁵	Debtor's Financial Condition ¹⁶⁶	Debtor's Intention ¹⁶⁷	Transferee's Notice or Participation ¹⁶⁸	Purchaser-Defendant Status ¹⁶⁹	Validity of Conveyance
voluntary	solvent	non-fraudulent	—	—	valid
voluntary	insolvent	—	none	non-BFP ¹⁷⁰	invalid as to existing creditors
voluntary	solvent	fraudulent	none	non-BFP	invalid as to all creditors
for valuable consideration	—	fraudulent	none	—	valid
for valuable consideration	—	fraudulent	yes	non-BFP	invalid as to all creditors

It should be observed that if the Uniform Fraudulent Conveyance Act were adopted in North Carolina, the above chart would continue to represent the law of fraudulent conveyances in this jurisdiction. Both the Uniform Act and the Elizabethan-type statutes are designed to protect creditors against the fraud of their debtors, and this common policy dictates that with few exceptions similar results be reached with respect to similar factual patterns.

Although the Uniform Act purports to offer a much less tortuous route to reaching these results, its attempts to define such troublesome concepts as "insolvency" and "fair consideration" present at best only

¹⁶⁴165 N.C. 224, 81 S.E. 162 (1914). A dash ("—") in the chart denotes that the particular factor is of no consequence and will not affect the validity of the conveyance.

¹⁶⁵See text accompanying notes 26-52 *supra*.

¹⁶⁶See text accompanying notes 61-74 *supra*.

¹⁶⁷See text accompanying notes 93-133 *supra*.

¹⁶⁸See text accompanying notes 151-54 *supra*.

¹⁶⁹See text accompanying notes 135-47 *supra*.

¹⁷⁰"BFP" means bona fide purchaser. A "non-BFP" is a purchaser who either did not pay good consideration or had notice of the grantor's fraud. See text accompanying notes 132-44 *supra*.

a slightly preferable substantive alternative to the present case-by-case definitional approach in North Carolina. Nevertheless, adoption of the Uniform Act would on the whole substitute clear, relatively simple statutory provisions for the complex, confusing, and sometimes strained interpretations of the present North Carolina statutes. Perhaps the main effect of adoption would be to eliminate the procedural conundrum that now faces a creditor seeking to prove actual fraud on the part of his debtor. This prospect alone makes the Uniform Act deserving of legislative consideration by the North Carolina General Assembly.

E. CADER HOWARD