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The fraudulent conveyance is of significant importance in bankruptcy. It constitutes an act of bankruptcy; it can be avoided by the trustee in bankruptcy; and it can be used to deprive the bankrupt of his discharge. Professor Hartman in this article surveys these three roles of the fraudulent conveyance.

I. Introduction

No debtor should be permitted to conceal or dispose of his property for the purpose of preventing his creditors from satisfying their legal claims. In ethical terms which have become classic, a debtor should be just to his creditors before he can rightfully be generous with his property for the benefit of others. The original and primary purpose of bankruptcy legislation has been,[1] and continues to be,[2] a just distribution of the bankrupt's property among his creditors.

To help effectuate the purpose of bankruptcy legislation, the fraudulent conveyance is of major importance in three distinct respects. In the first place, the so-called fraudulent conveyance or concealment constitutes an act of bankruptcy.[3] In the second place, the trustee in bankruptcy is empowered by the Bankruptcy Act to set aside such transactions and bring the property back into the bankrupt's estate as an asset for the payment of claims of creditors.[4] In the third place, the debtor's fraudulent conveyance can be used to deprive him, as a bankrupt, of his discharge.[5] As the title to this article indicates, the writer has undertaken only to survey these three facets of the field of the fraudulent conveyance; there is no attempt to give an exhaustive treatment.

Legal condemnation of fraudulent conveyances is not new. Our

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1. See Wilson v. City Bank, 84 U.S. (17 Wall.) 473 (1873).
2. Simonson v. Granquist, 369 U.S. 38 (1962).
3. Bankruptcy Act § 3a(1), as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(a)(1) (1958).
4. Bankruptcy Act § 67d, as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d) (1958); Bankruptcy Act § 70e, as amended, 52 Stat. 897 (1932), as amended, 11 U.S.C. § 110(e) (1958).
5. Bankruptcy Act § 14c(4), as amended, 52 Stat. 850 (1938), 11 U.S.C. § 32(c)(4) (1958).

notions of fraudulent conveyances, by and large, trace to the Statute of 13 Elizabeth (commonly called the Statute of Fraudulent Conveyances), enacted in England in 1570.[6] In fact, even as early as 1542[7] English bankruptcy law regarded it as essential to the achievement of the main purpose of such legislation that provisions be made to recover for the benefit of creditors, property fraudulently disposed of by the bankrupt; this concern has continued to the present day. In 1603 the English Bankruptcy Act and the Fraudulent Conveyances Act were made complementary. The Bankruptcy Act was amended to provide, first, that a fraudulent conveyance itself should be an act of bankruptcy, and second, that the estate available for the creditors should include property which the debtor had previously transferred in fraud of creditors.[8]

The Statute of 13 Elizabeth, regarded as the source of the American law of conveyances in fraud of creditors,[9] became part of our inheritance. Colonial enactments more or less repeated the words, and certainly emphasized the principle.[10] After the American Revolution, the Statute of Elizabeth was re-enacted in some states, and in others the courts considered it as part of the common law in force.[11] Of course, there have been divergencies in form among the states, but fundamentally this legislation remained pretty true to the original enactment in 13 Elizabeth.

The Statute of Elizabeth declared that conveyances "to the end, purpose and intent, to delay, hinder or defraud creditors" were "clearly and utterly void, frustrate and of no effect."[12] This statute also had additional provisions. It provided that the parties to such a fraudulent conveyance were to forfeit one year's value of real property fraudulently conveyed and the whole value of goods and chattels, as well as the face value of any feigned bond. One moiety of the forfeitures was to go to the Queen, her heirs and successors, and the other moiety to the "persons aggrieved." Recovery could be had in any of the Queen's courts without essoin or protection of wager of law. Upon conviction, the parties would also be imprisoned for one-half year without bail.[13] The Statute of 13 Elizabeth contained a saving clause protecting the bona fide purchasers upon good consideration.[14] Neither

6. See 1 GLENN, FRAUDULENT CONVEYANCES & PREFERENCES § 58 (1940) [hereinafter cited as GLENN].
7. See 4 COLLIER, BANKRUPTCY ¶ 67.01 (14th ed. 1962) [hereinafter cited as COLLIER].
8. 1 GLENN § 61e.
9. 1 GLENN § 58.
10. See O'Neill v. Kilduff, 81 Conn. 116, 70 Atl. 640 (1908).
11. See Hall v. Alabama Terminal Co., 143 Ala. 464, 39 So. 285 (1905).
12. 13 Eliz. c. 5 (1571).
13. 13 Eliz., c. 5, § 3 (1571).
14. *Ibid.*

the criminal nor the forfeiture provisions of the Statute of Elizabeth found lodgement in the fraudulent conveyance statutes enacted in the United States.

The Uniform Fraudulent Conveyance Act, which streamlined and broadened considerably the scope of the earlier enactments stemming from the Statute of Elizabeth, has been enacted in twenty-two states.[15] In 1938, the Uniform Act was substantially incorporated into section 67d of the Bankruptcy Act. This incorporation was done because it was thought that the Uniform Act not only codified the better decisions of American courts applying the Statute of 13 Elizabeth but also because it represented the best and the most recent legislative experience on the subject.[16]

II. Fraudulent Conveyances and Concealments as Acts of Bankruptcy

Earlier we saw that in our present day bankruptcy jurisprudence the fraudulent conveyance is of major importance in three distinct respects, one of those being that it constitutes an act of bankruptcy. The first act of bankruptcy is the fraudulent conveyance or concealment. Showing the impact of the Statute of Elizabeth, prior to 1952 this act of bankruptcy was set forth essentially in the classic fraudulent conveyance language of the Statute of 13 Elizabeth, requiring a concealment or transfer by a debtor with intent to hinder, delay, or defraud his creditors. Specifically, the first act of bankruptcy consisted of a person's having "conveyed, transferred, 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."[17] The essential ingredients of this act of bankruptcy were, therefore, the (a) disposition of the bankrupt's property either by himself or with his permission (b) with the intent to interfere with creditors' remedies.[18]

In 1952 the fraudulent conveyance as an act of bankruptcy was substantially revamped. The 1952 amendment of the Bankruptcy Act changed the first act of bankruptcy by adding an alteruative ground by which the debtor could make a fraudulent conveyance that would constitute an act of bankruptcy. This amendment, which remains in our present Bankruptcy Act, added as an alternative first act of bankruptcy the making or suffering of a transfer "fraudulent under the pro-

15. See 9B Uniform Laws Annotated 45 (Supp. 1962).
16. 4 Collier ¶ 67.02.
17. Bankruptcy Act § 3a, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(a) (1958).
18. See 1 Collier ¶ 3.101.

visions of Section 67 or 70" of the Bankruptcy Act.[19] So, the first act of bankruptcy now set out by section 3a of the Bankruptcy Act consists of a person's having 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 sections 67 or 70 of the Bankruptcy Act.

As we shall see in more detail later,[20] the upshot of this 1952 amendment is to abrogate, in part, the so-called "fraudulent intent" as an essential element of the fraudulent conveyance as an act of bankruptcy. This results from the fact that a transfer of property may be fraudulent under the provisions of sections 67 or 70 of the Bankruptcy Act, thus constituting an act of bankruptcy, without regard to actual fraudulent intent. Certain provisions in section 67d of the Bankruptcy Act, following the Uniform Fraudulent Conveyance Act, expressly stigmatizes specific types of transactions as fraudulent without regard to actual intent. All that is now necessary to establish a fraudulent conveyance as an act of bankruptcy is a showing of a transfer of the bankrupt's property either by himself or with his permission which will be regarded as fraudulent under sections 67 or 70 of the Bankruptcy Act.

According to the reports of the Congress which passed the 1952 amendment to the Bankruptcy Act, providing that a transfer that is fraudulent under sections 67 or 70 of the Act should constitute an act of bankruptcy, the purpose of that amendment was to effect a correlation between section 3a of the Bankruptcy Act and sections 67 and 70. The intended result was, first, that a transfer fraudulent under the latter two sections should also constitute an act of bankruptcy under section 3a of the Act and, second, that under section 3a(1) of the Act as thus amended an intent to hinder, delay, or defraud creditors no longer be a requisite for the commission of the first act of bankruptcy.[21] It is not completely certain, however, that some courts consider this congressional objective of correlating section 3a with sections 67 and 70 to be completely achieved. In refusing to hold that a debtor's bulk sales contract constituted an act of bankruptcy, Judge Frank, speaking for the Court of Appeals for the Second Circuit, declared: "The fact that a trustee in bankruptcy, under Section 67, sub. d(2), can set aside such an 'obligation' as fraudulent does not render the incurring of the 'obligation' an act of bankruptcy."[22]

Later, we will have occasion to consider somewhat in detail parts

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19. Bankruptcy Act § 3a, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21a (1958).
20. See notes 24-35 & 62-73 *infra* and accompanying text, where this is discussed.
21. H.R. REP. No. 2320, 82d Cong., 2d Sess. (1952).
22. Allen v. Camp Ganeden, Inc., 214 F.2d 467, 469 (2d Cir. 1954).

of sections 67 and 70 of the Act, when we have a look at the bankruptcy trustee's arsenal of weapons for attacking transactions made by the debtor prior to bankruptcy.[23] Perhaps it will be enough at this point simply to summarize the pertinent provisions of sections 67 and 70, which describe actions of the debtor that can be regarded as fraudulent conveyances, which the Act says will constitute the first act of bankruptcy.

A. *Summary of Section 67 of the Bankruptcy Act*

Section 67d of the Bankruptcy Act, which adopts in substance sections 4 to 7 inclusive of the Uniform Fraudulent Conveyance Act, contains four paragraphs under which transfers are considered fraudulent and, therefore, presumably within the first act of bankruptcy, if the transaction occurred within one year of the bankruptcy petition, as defined by the Act.[24]

The first provision of section 67d of the Bankruptcy Act perhaps finds its most frequent application in the case of gifts by an insolvent debtor. Thus, clause 2a of section 67d, taken from section 4 of the Uniform Fraudulent Conveyance Act, provides that every transfer made and every obligation incurred by a debtor is fraudulent as to existing creditors, if made or incurred without fair consideration when the debtor is insolvent or thereby rendered insolvent, without regard to the debtor's actual intent.[25] However, it must be observed that the Act provides that only *existing* creditors are declared to be defrauded under this clause.

The second provision of section 67d concerns the debtor who engages in business with unreasonably small capital. Clause 2b of section 67d, also from the Uniform Fraudulent Conveyance Act, provides that every transfer made and every obligation incurred by a debtor is deemed fraudulent, without regard to the debtor's actual intent, where the transfer is made or an obligation is incurred without fair consideration by a debtor about to engage or who is engaged in a business transaction, for which the property remaining in his hands is an unreasonably small capital.[26] Both existing creditors and those becoming creditors during the continuation of the debtor's business are declared to be defrauded by this clause.

23. See material on the power of the trustee in bankruptcy to set aside fraudulent conveyances, pp. 397-418 *infra*.

24. Bankruptcy Act § 3b, as amended, 66 Stat. 421 (1942), 11 U.S.C. § 21(b) (1958).

25. Bankruptcy Act § 67d(2)(a), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2)(a) (1958).

26. Bankruptcy Act § 67d(2)(b), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2)(b) (1958).

The third provision of section 67d deals with the problem of transfers without fair consideration by a debtor who intends to incur debts beyond his ability to pay as they mature. This, too, comes from the Uniform Fraudulent Conveyance Act. Clause 2c of section 67d condemns as fraudulent, without regard to the debtor's actual intent, transfers made or obligations incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature.[27] Such transactions are expressly made fraudulent as to both existing and future creditors.

The fourth provision of section 67d of the Act deals with transfers made with actual intent to hinder, delay, or defraud creditors. Clause 2d of section 67d condemns as fraudulent those transfers made and obligations incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud creditors.[28] Both existing and future creditors are declared to be defrauded by this clause of the Act. In essence, this clause incorporates the main fraudulent conveyance provisions of the Statute of 13 Elizabeth, and is again taken from the Uniform Fraudulent Conveyance Act.[29]

The fifth provision of section 67d has no counterpart in the Uniform Fraudulent Conveyance Act. It stigmatizes as fraudulent certain types of security transactions. Thus, paragraph 3 of section 67d brands as fraudulent a transfer made with intent to use the consideration to finance a preference. Specifically, this provision of the act condemns as fraudulent a transfer of security by an insolvent debtor, contemplating bankruptcy, where the debtor gives the security for a loan and the lender has knowledge that the money is to be used to pay off debts.[30] The security transaction is declared fraudulent regardless of whether the payment to the creditor constituted a voidable preference under section 60 of the Bankruptcy Act.[31] It seems clear, however, that in order for the security transaction to be regarded as fraudulent, the transferee of the security must have knowledge of the use to be made of the consideration for the transfer.[32] This provision of section 67d has a four-month limitation before the date of bankruptcy in which the security must have been given in order for it to be fraudulent and voidable.

27. Bankruptcy Act § 67d(2)(c), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2)(c) (1958).
28. Bankruptcy Act § 67d(2)(d), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2)(d) (1958).
29. Bankruptcy Act § 67d(2)(c), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2)(c) (1958).
30. Bankruptcy Act § 67d(3), as amended, 66 Stat 427 (1952), 11 U.S.C. § 107(d)(3) (1958).
31. This is the situation as developed in Dean v. Davis, 242 U.S. 438 (1917).
32. Rittenberg v. Kaplan, 12 F.2d 95 (S.D.N.Y. 1925).

The sixth provision of section 67d, derived from section 8 of the Uniform Fraudulent Conveyance Act, deals with fraudulent conveyances by partnerships. Thus, section 67d(4) makes fraudulent any transfer of firm property to partners, or for consideration moving to partners, which leaves the firm insolvent.[33] A one-year limitation is imposed here, and the transaction is fraudulent as to partnership creditors existing at the time of such transfer, without regard to actual intent.[34]

There is a saving clause in section 67d of the Bankruptcy Act. While all the transactions stigmatized as fraudulent conveyances under section 67d are declared null and void against the trustee in bankruptcy, nevertheless section 67d(6) provides that such transactions shall not be void as against a bona fide purchaser, lienor, or obligee for a present fair consideration.[35]

We will have considerably more to say about the provisions of section 67d when we explore the powers of the trustee in bankruptcy to set aside fraudulent conveyances.[36]

B. *Summary of Transactions as Acts of Bankruptcy Under Section 70e of the Bankruptcy Act*

Already we have seen that a transfer will be regarded as fraudulent and therefore within the scope of the first act of bankruptcy when it is fraudulent under the provisions of section 70 of the Bankruptcy Act.[37] Section 70e is the main provision here. That section provides, in substance, that the trustee may avoid any transfer by a debtor which by applicable federal or state law is fraudulent or voidable as to any creditor having a provable claim in bankruptcy.[38] The scope of section 70e will be considered much more in detail a bit later when we have a look at the powers of the trustee in bankruptcy to avoid a fraudulent conveyance and bring the asset back into the estate for payment of creditors.[39]

C. *Elements of the Fraudulent Conveyance as an Act of Bankruptcy*

1. *The Fraudulent Transfer—(a) What Constitutes a Transfer.*—In

33. Bankruptcy Act § 67d(4), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(4) (1958).
34. *Ibid.*
35. Bankruptcy Act § 67d(6), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(6) (1958).
36. See material on power of trustee in bankruptcy to set aside fraudulent conveyances, pp. 397-418 *infra.*
37. See notes 19-22 *supra* and accompanying text.
38. Bankruptcy Act § 70e, as amended, 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(e) (1958).
39. See material on the trustee's power to set aside fraudulent transfers under § 70e of the Bankruptcy Act, pp. 397-418 *infra.*

essence, the debtor can commit the first act of bankruptcy either by a concealment of his property or by a fraudulent transfer of his property.[40] Presently we will have a look at the meaning of "concealment." At this point we are concerned with the meaning of "transfer." A "transfer" as defined by the Bankruptcy Act of 1938 (as amended in 1952) is quite comprehensive in scope, and includes all sorts of security devices. Section 1(30) of the Act provides that:

> "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, a voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien encumbrances, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.[41]

It can readily be seen that "transfer" within the meaning of the Act defining "acts of bankruptcy" is quite inclusive, and several types of transactions may now constitute fraudulent transfers, although they were not so treated prior to the 1938 amendment of the Act.[42] Most frequently a fraudulent conveyance consists of a voluntary transfer to a third person. However, the present enlarged definition of "transfer" appears sufficiently broad to include virtually every type of transfer, whether voluntary or involuntary.

(b) *Time When the Transfer Occurs.*—Section 3b of the Bankruptcy Act provides that a petition may be filed against a person within four months after the commission of an act of bankruptcy.[43] Reading further in the Act, complications arise as to when the four-month period expires as to the "transfer" allegedly constituting the first act of bankruptcy, the fraudulent conveyance. Section 3b of the Act provides that the four-month period 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 thereafter have acquired rights in the property so transferred superior to the rights of the transferee therein.[44] Thus it will be seen that for purposes of com-

40. Bankruptcy Act § 3a, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(a) (1958).

41. Bankruptcy Act § 1(30), as amended, 66 Stat. 420 (1952), 11 U.S.C. § 1(30) (1958).

42. See 1 COLLIER ¶ 3.102.

43. Bankruptcy Act § 3b, as amended, 66 Stat. 421 (1952), 11 U.S.C. 21(b) (1958).

44. *Ibid.* Although there is no requirement that a transfer of corporate stock be recorded, the four months' period for using a fraudulent stock transfer as an act of bankruptcy did not start running, in the absence of knowledge by the petitioning creditors, at least until the transferee took "notorious, exclusive, or continuous" posses-

puting the time under section 3b of the Act the transfer is deemed to be made when the parties to the transfer have done everything necessary in the way of recording or taking possession to fulfill the requirements of relevant state law so that the transfer would be good as against subsequent transfers by the transferring debtor. In short, a transfer is not made until it becomes known or discoverable by the exercise of reasonable diligence. The purpose of such requirement is, of course, to prevent fraudulent transfers from becoming unassailable as fraudulent conveyances by reason of being kept secret until the limitation period has expired.

(c) *Constructive Notice to Subsequent Creditor as Negating Fraudulent Aspect of Transfer.*—In order for a recordable transfer to constitute the first act of bankruptcy, it seems clear that the bankruptcy petition must be filed within four months after the date of the recordation, since recording perfects the transfer and starts the four-month period. But what about the impregnability of the fraudulent transfer as against a creditor who became such after the date of recording and who, as a petitioning creditor, joins in the filing of the bankruptcy petition before the four-month period has expired? Has the first act of bankruptcy been committed as to this creditor? We have seen that under section 67d of the Act certain types of transfers are fraudulent as to existing creditors, as well as to creditors who became such after the questioned transfer.[45] Does the constructive notice of the fraudulent transfer, by virtue of its recordation, prevent the subsequent creditor from claiming that he was defrauded? That is to say, is the creditor charged with constructive knowledge of a transfer that turns out to be fraudulent, so that he cannot successfully claim that the transfer was fraudulent as to him?

The only relevant law that has been found regarding the effect of recordation as negating, as to a subsequent creditor, the fraudulent aspect of a recorded transfer concerns the right of the subsequent creditor and the trustee in bankruptcy to set aside such recorded transfers. Such cases, especially those construing the sections of the Uniform Fraudulent Conveyance Act that corresponds to the relevant sections of the Bankruptcy Act, are persuasive, but of course they are not decisive, particularly those decided by state courts. Unfortunately, such cases as have been found are not in agreement on whether the recordation of a fraudulent transfer prevents it from being fraudulent as to creditors who become such after the recordation. As will be seen in an analysis of the cases, even the courts of a single state have

sion of the stock, as then required by the Act to start the four-month period. Theard v. Fidelity & Deposit Co., 202 F.2d 880 (5th Cir. 1953).

45. See notes 26-32 *supra* and accompanying text.

taken opposite positions on this question from time to time.

If the creditor actually knows when he gives credit that his debtor has made a fraudulent conveyance, there is authority to the effect that the conveyance is not fraudulent as to him; it might be found that such subsequent creditor impliedly approved the prior fraudulent conveyance.[46] "But it is one thing to know of the conveyance," as Mr. MacLachlan, an authority in the field, has so aptly said, "and another to know of the fraud."[47] Continues Mr. MacLachlan, in speaking of the subsequent creditor's right to attack a fraudulent conveyance: "The law will not tolerate the concealment of assets with evil intent, even if empowering the creditor to reach such assets permits him to get satisfaction in a manner somewhat different from that which he had anticipated."[48] Consequently, a good many jurisdictions passing on the point have taken the position that the subsequent creditor is not precluded from attacking a fraudulent conveyance by anything except knowledge, or actual notice, that the conveyance was fraudulent. The subsequent creditor is thus not prejudiced in his efforts to set aside a fraudulent conveyance solely by the constructive notice that is afforded by recordation of the fraudulent transfer.[49]

Moreover, when the trustee in bankruptcy seeks to set aside a fraudulent conveyance on behalf of those who become creditors subsequent to the recordation of such conveyance, he has not been prevented from upsetting the conveyance by reason of the constructive knowledge of the recordation of the transfer.[50] There is authority, however, to the effect that where the fraudulent transfer is recorded before the creditor's claim arises, the creditor is charged with constructive knowledge of the conveyance, which is not, therefore, fraudulent as to the creditor.[51]

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46. *In re* Campbell's Estate, 164 Misc. 632, 299 N.Y. Supp. 442 (Surr. Ct. 1937); Long v. True, 149 Tenn. 673, 261 S.W. 669 (1924); see State v. Nashville Trust Co., 28 Tenn. App. 388, 418-19, 190 S.W.2d 785, 796-97 (M.S. 1944); 1 GLENN, § 343c; 24 AM. JUR. *Fraudulent Conveyances* § 145 (1939). However, there is some authority which seems to say that the subsequent creditor can successfully attack a fraudulent conveyance even though he had knowledge of the fraudulent conveyance before he extended credit. Pope v. Bain, 6 N.J. 351, 78 A.2d 820 (1951).

47. McLaughlin (MacLachlan), *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 430 (1932).

48. *Id.* at 431.

49. McCanless v. Smith, 51 N.J. Eq. 505, 25 Atl. 211 (Ch. 1892); Marshall v. Roll, 139 Pa. 399, 20 Atl. 999 (1891); see Davis v. Cassels, 220 Fed. 958, 966 (N.D. Ala. 1915). In Bailey v. Way, 266 Mass. 437, 165 N.E. 388 (1929), a subsequent mortgagee was not prevented from upsetting a prior fraudulent mortgage by reason of the record, although complainant's mortgage recited that it was subject to all mortgages of record.

50. McBride v. Bertsch, 58 F.2d 797 (W.D. Mich. 1930), *modified*, 58 F.2d 799 (6th Cir. 1932); see 4 COLLIER, ¶ 67.35, at 364.

51. Butler v. Holland, 200 Tenn. 57, 289 S.W.2d 701 (1956); Ledford v. Lee, 29 Tenn. App. 660, 200 S.W.2d 393 (E.S. 1946). There have been intervals, however, when Tennessee seemed committed to the contrary view. See Churchill v. Wells, 47

As we have already seen, section 67d of the Bankruptcy Act condemns certain types of transactions as fraudulent conveyances (and therefore treats them as constituting the first act of bankruptcy) even as to those who became creditors *subsequent* to the making of transfers.[52] It cannot, therefore, with reason be said that the trustee's or subsequent creditors' rights depend upon being misled by the debtor. The reason for nullifying such conveyances is that the law simply should not permit a debtor to conceal his assets with the evil intent of defrauding his subsequent creditors. To hold that such recordation prevents a transfer from being fraudulent as to subsequent creditors devitalizes, in so far as recordable transactions are concerned, those provisions of section 67d of the Bankruptcy Act (and of the Uniform Fraudulent Conveyance Act as well) which expressly declare that certain types of transfers are fraudulent conveyances as to existing as well as to subsequent creditors. Such decisions open an avenue whereby a scheming debtor can make fraudulent conveyances foolproof as to future creditors by making a prompt recordation of his fraudulent transactions.

Moreover, in the writer's opinion, courts that refuse to permit a subsequent creditor to set aside a fraudulent conveyance solely because of constructive notice of the recorded deed misapply the recording statutes. The purpose of such statutes is to *make void*, as to certain purchasers and creditors, transactions because they are not recorded. It is difficult to believe that one of the purposes of the recording statutes is to serve as a balm of Gilead to cleanse the mephitic stench from a fraudulent conveyance.

2. *Concealment or Removal of Property as a Fraudulent Conveyance.*—The first act of bankruptcy (fraudulent conveyance) can also be committed where the debtor is guilty of concealment of his property, as well as where he has actually transferred his property. Specifically, section 3a(1) of the Bankruptcy Act declares that the first act of bankruptcy is committed when the debtor has concealed, removed, or permitted to be concealed or removed any of his property, with intent to hinder, delay, or defraud his creditors or any of

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Tenn. 364, 372-73 (1870); Hartnett v. Doyle, 16 Tenn. App. 302, 311-12, 64 S.W.2d 227, 232-33 (M.S. 1932). Likewise wedded to the view that constructive notice is enough to prevent the subsequent creditor from upsetting a fraudulent conveyance are Kentucky and Texas. See First Nat'l Bank v. Holbrook, 309 Ky. 326, 217 S.W.2d 787 (1949); Perry v. Brown, 76 S.W.2d 230 (Tex. 1934). See also 24 AM. JUR. *Fraudulent Conveyances* § 145 (1939).

52. See notes 26-32 *supra* and accompanying text. Thus, sections 67d(2)(b)-(d) and 67d(3) all make certain types of transfers fraudulent both as to existing and future creditors. Bankruptcy Aet §§ 67d(2)(b)-(d), 67d(3), as amended, 66 Stat. 427 (1952), 11 U.S.C. §§ 107(d)(2)(b)-(d), 107(d)(3) (1958).

them.[53] In the definitional sections, the Bankruptcy Act provides that "conceal" shall include secrete, falsify, and mutilate.[54] This definition does not purport to be exclusive. Consequently, interpretations given that term by the courts must be looked to in order to determine the full scope of its meaning. The courts have construed "conceal" to mean to hide or withdraw from observation, to carry or keep from sight, to prevent discovery of, or to withhold knowledge of the existence, ownership, or location of property.[55] Proof of concealment does, however, require something more than a mere failure to volunteer information to creditors.[56] The 1952 amendment of the Bankruptcy Act, which substantially broadened the scope of the fraudulent conveyance as an act of bankruptcy, did not affect that facet of the first act of bankruptcy dealing with "concealments." "Concealments" still retain the terminology of the ancient Statute of 13 Elizabeth to the effect that in order to constitute the act of bankruptcy, property must have been concealed with intent to hinder, delay, or defraud creditors or any of them.[57]

The first act of bankruptcy also specifies that the act can be committed where the debtor removed any part of his property with intent to hinder, delay, or defraud his creditors or any of them.[58] "Removal" includes an actual or physical change in the position or locality of property of the debtor resulting in a depletion of his estate.[59] Where a debtor, contemplating voluntary bankruptcy, consigns his property to a person outside the district with intent to keep such property from the trustee, he has committed an act of bankruptcy.[60] A debtor who absconds and takes a portion of his property with him not only "conceals" his property, but he also "removes" it so as to fall within the first act of bankruptcy.[61]

(3) *The Element of Intent in the Fraudulent Conveyance as an Act of Bankruptcy.*—The basic idea of fraudulent conveyances is that the transferor and transferee have done a wicked thing. An essential feature is that a debtor has meant to defraud some creditor, or that the debtor has acted in such a reckless manner by transferring his

53. Bankruptcy Act § 3a, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(a) (1958).
54. Bankruptcy Act § 1(7), reenacted without change, 52 Stat. 840 (1938), 11 U.S.C. § 1(7) (1958).
55. 1 Collier ¶ 3.103[1], at 416.
56. Continental Bank & Trust Co. v. Winter, 153 F.2d 397 (2d Cir. 1946), *cert. denied*, 329 U.S. 717 (1946); *In re* Napco Mfg. Co., 72 F. Supp. 555 (D. Neb. 1947).
57. *Supra* note 52.
58. *Ibid.*
59. See *In re* McCraw, 254 Fed. 442 (D.C.W. Va. 1918).
60. *In re* Hammond, 11 Fed. Cas. 380 (No. 5,999) (D.C. Mass. 1869).
61. *In re* Terry, 97 F. Supp. 635 (E.D. Ark. 1951); *In re* Filer, 108 Fed. 209 (D.N.Y. 1900).

property without consideration that a fraudulent intent will be inferred as an objective fact, without regard to actual state of mind. Already it has been suggested that an actual fraudulent intent is an element in a fraudulent conveyance under only certain types of transfers. Thus, under section 3a(1) of the Bankruptcy Act (as amended in 1952), an intent to hinder, delay, or defraud creditors is no longer an essential requirement for the commission of the first act of bankruptcy, unless the creditors elect to make it so under the first part of that section, concerning concealing, removing, or permitting to be removed or concealed any part of his property with intent to hinder, delay, or defraud his creditors.[62] The creditors may be able to show a fraudulent conveyance under the second part of section 3a(1) of the Act by showing a transfer that is fraudulent by reasons of sections 67 or 70 of the Bankruptcy Act, without showing an actual intent to hinder, delay, or defraud creditors. An actual fraudulent intent is an element only in certain types of transactions under these two sections of the Act.[63] Thus, intent to defraud is no longer an element of a fraudulent transfer, except insofar as it is made an element by sections 67d or 70e of the Act, relative to the questioned transfer. While there remains the basic notion that in a fraudulent conveyance the grantor has the purpose to defraud, yet that intent may be inferred in some instances without regard to actual state of mind, as in the case of a gift by an insolvent debtor. As we shall see, this is made a positive rule of law by section 67d.[64]

Section 70e provides that any transfer by a debtor which by applicable federal or state law is fraudulent or voidable against a creditor is vulnerable to an attack by the trustee.[65] Are all of the transactions condemned by this section to be regarded as falling within the purview of the first act of bankruptcy? Likely not all such transactions will qualify as acts of bankruptcy, even though they fall under the condemnation of section 70e. It must be observed that the present section 3a(1) of the Act does not declare that transfers merely voidable under sections 67 or 70 of the Act are fraudulent conveyances that will constitute an act of bankruptcy. Specifically, section 3a(1) condemns as acts of bankruptcy only those transfers that are "fraudulent" within the meaning of sections 67 and 70 of the Act. Presently we will see that some transactions that are condemned by section 70e of the Act can be upset by the trustee merely because they are voidable;

62. See 1 COLLIER ¶ 3.101.

63. See notes 101-22 *infra* and accompanying text for a fuller discussion of this point.

64. See notes 101-22 *infra* and accompanying text for a discussion of the provisions of section 67d where intent will be inferred as a matter of law.

65. Bankruptcy Act § 70e(1), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110(e)(1) (1958).

they need not also be characterized as fraudulent under the relevant state law in order for the trustee to strike them down.[66] Thus, transfers that can be avoided by the trustee in bankruptcy under section 70e of the Act because they are voidable under state law would seem not to constitute an act of bankruptcy, unless the state law also characterizes such voidable transfers as "fraudulent."[67] However, as we have also seen, if the alleged first act of bankruptcy is bottomed solely on the "concealment" of property by the debtor, then intent to hinder, delay, or defraud creditors is still a requirement.[68]

When intent to hinder, delay or defraud is an element, at what time must the intent by the debtor have existed? Section 3b of the Act answers that question for us. It expressly provides that it is sufficient if the intent exists either at the time when the transfer was made, or at the time when the transfer was perfected.[69] While section 3b of the Act requires that the fraudulent transaction must have occurred within four months of the filing of the petition in order to be an act of bankruptcy, nevertheless, as we have already seen, the four-month period does not start running until the transaction becomes so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein.[70]

Where fraudulent intent is an element of the first act of bankruptcy it may be implied. Thus, where it appears that the purpose of certain transfers was to put the debtor's property beyond the reach of his creditors and where the debtor professes to be unable to show the disposition of the money received, intent to defraud may be implied.[71] The adequacy of the consideration received for a conveyance which is alleged to be fraudulent is a material factor in proving the existence of a fraudulent intent. If the consideration received is full, fair, and adequate, it may be virtually impossible for the petitioning creditors to carry the burden of proving the bankrupt's fraudulent intent.[72] Of course, a transfer is presumptively fraudulent when the debtor transfers all of his property and there has been no provision for the pay-

66. See material on the trustee's power to set aside fraudulent transfers under section 70e of the Bankruptcy Act, pp 397-418 *infra.*

67. See MACLACHLAN, BANKRUPTCY 43-44 (1956) [hereinafter cited as MACLACHLAN]. For cases illustrating the various types of transfers from which this act of bankruptcy may be spelled out, see 1 REMINGTON, BANKRUPTCY § 119 (5th ed. Henderson 1950).

68. See notes 53-61 *supra* and accompanying text for a discussion of this point.

69. Bankruptcy Act § 3b, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(b) (1958).

70. Time when the transfer occurs, pp. 388-89 *supra.*

71. See *In re* Minard, 156 Fed. 377 (D. Ore. 1907).

72. Johnson-Baillie Shoe Co. v. Bardsley, 237 Fed. 673 (8th Cir. 1916).

ment of his debts.[73] However, an intention to defraud clearly cannot be found unless at the time of the transaction the debtor knew or had reason to know of the existence of one or more creditors who could not be satisfied out of the remaining assets.[74]

(4) *Meaning of "Creditor."*—Since the thrust of fraudulent conveyance law is aimed at preventing the debtor from harming his creditors, there naturally arise questions regarding the meaning of "creditor." The meaning of that term is not completely free from uncertainty in determining whether a fraudulent transfer amounts to an act of bankruptcy. Troublesome questions may arise as to whether the party (petitioning creditor) alleging a fraudulent conveyance must possess a claim that will be provable against the debtor's estate if the debtor is thrown into bankruptcy, and that will thus share in the bankrupt's assets, if any. Section 1(11) of the Bankruptcy Act is a source of some question whether the claimant must hold a provable claim. That section provides that "creditor" shall include anyone who owns a debt, demand or claim provable in bankruptcy.[75] It will be seen that this definition describes a "creditor" only in terms of somebody having a "provable" claim. It is doubtful, however, that the meaning of "creditor" is thus limited in determining whether a transfer is in fraud of creditors so as to constitute an act of bankruptcy.[76] First, it should be noted that this definition does not purport to be all-inclusive; rather it belongs to that definition class which is couched in terms of "shall include." In *American Surety Co. v. Marotta*,[77] the Supreme Court refused to limit "creditor" to mean one having a provable claim. Rather, *Marotta* concluded that the statutory phrase "shall include" cannot reasonably be read to be the equivalent of "shall mean" or "shall include only."[78] The Court defined "creditor" in terms of common law concepts, and held that a party was entitled to file an involuntary petition and to charge, as an act of bankruptcy, a transfer with intent to defraud creditors, even though at the time of the transfer the claim against the debtor was contingent and thus regarded as not provable under the Bankruptcy Act governing the matter in question.[79] The

73. Boston W. Africa Trading Co. v. Quaker City Morocco Co., 261 Fed. 665 (1st Cir. 1919), *cert. denied*, 253 U.S. 429 (1920).

74. *In re* Fersko, Inc., 250 Fed. 357 (2d Cir. 1918).

75. Bankruptcy Act § 1(11), as amended, 44 Stat. 662 (1938), 11 U.S.C. § 1(11) (1958).

76. For discussion of meaning of creditor, see 1 COLLIER ¶ 1.11.

77. 287 U.S. 513 (1933).

78. See American Sur. Co. v. Marotta, 287 U.S. 513, 517-18 (1933).

79. In *Marotta*, the transfer by an indemnitor of a surety of the indemnitor's property after verdict against the principal, but before judgment, constituted an act of bankruptcy as made with intent to defraud the surety who was a creditor for the purpose, although the surety's claim against the indemnitor was at the time of the transfer only contingent. The Bankruptcy Act now expressly permits contingent claims to be proved.

Court emphasized that under the common law rule a creditor having only a contingent claim is protected against fraudulent conveyances.

We must not lose sight of the fact that a transaction that is fraudulent under section 67d of the Bankruptcy Act constitutes a conveyance that will be regarded as the first act of bankruptcy.[80] For the purpose of determining whether there has been a conveyance in fraud of creditors within the purview of section 67d, the Bankruptcy Act now contains a special definition of the term "creditor."[81] That section now provides that a "creditor" is a person in whose favor a "debt" exists.[82] Further, for the exclusive purpose of 67d of the Act it is provided that "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.[83] These definitions of "debt" and "creditor" in section 67d of the Act do not purport to limit "creditor" to persons holding only provable claims. Thus, a person having a tort claim based on the debtor's negligence would appear to be a "creditor"; yet his claim would not be provable unless suit is pending at the time of the filing of the bankruptcy petition.[84] However, as we will see more fully later,[85] the trustee in bankruptcy cannot avoid a fraudulent transaction under section 67d of the Act unless he represents a creditor having a provable claim. Some uncertainty is injected into the term "creditor" by reason of the fact that the definition of "debt" in the definitional sections of the Act provides merely that the term "shall include" any debt, demand, or claim provable in bankruptcy.[86]

(5) *Solvency of the Debtor as a Defense.*—As we have had occasion to see earlier, insolvency need not necessarily be alleged or proved in connection with the fraudulent conveyance as an act of bankruptcy, although where fraudulent intent is alleged as an element, insolvency is helpful in establishing the "fraudulent intention."[87]

Bankruptcy Act § 63(8), added by 52 Stat. 873 (1938), 11 U.S.C. § 103(a)(8) (1958).

80. See Bankruptcy Act § 3a, as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(a) (1958).

81. Bankruptcy Act § 67d(1), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(1) (1958).

82. Bankruptcy Act § 67d(1)(c), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(1)(c) (1958).

83. Bankruptcy Act § 67d(1)(b), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(1)(b) (1958).

84. Bankruptcy Act § 63a(7), as amended, 48 Stat. 923 (1934), 11 U.S.C. § 103(a)(7) (1958).

85. Bankruptcy Act § 67d(6), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(6) (1958).

86. Bankruptcy Act § 1(14), as amended, 66 Stat. 420 (1952), 11 U.S.C. § 1(14) (1958).

87. Bookey v. King, 236 F.2d 871 (9th Cir. 1956); see *In re* Mingo Valley Creamery Ass'n, 100 Fed. 282 (E.D. Pa. 1900); 1 COLLIER ¶ 3.109.

However, both prior to and since the 1952 amendment of the Bankruptcy Act, the debtor in proceedings under the first act of bankruptcy has a complete defense if he can establish that he was not insolvent at the time the petition was filed against him. Section 3(c) of the Act expressly provides that if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed, but in such proceedings the burden of proving solvency is upon the debtor.[88]

(a) *Definition of "Insolvency."*—The meaning of "insolvency" used by the courts can be of crucial importance in determining whether the debtor is insolvent at the time the petition was filed against him. The Bankruptcy Act provides that the debtor should not be deemed insolvent unless his assets at a fair valuation are less than the amount of his debts.[89] This bankruptcy definition of insolvency differs from ordinary commercial insolvency, frequently called insolvency in the "equity sense," which means inability to pay debts as they mature.[90] Seemingly to give the debtor a further break, the bankruptcy definition of insolvency is coupled with the requirement that the bankrupt's exempt assets be included in his property in determining whether the debtor is insolvent.[91] In a very real sense, therefore, the debtor may be insolvent and yet the creditors may be unable to shift him into bankruptcy because, including his exempt property on the asset side of the ledger, he may not be regarded as insolvent in the bankruptcy sense. Nevertheless, the creditors cannot lay a finger on the debtor's exempt property even though it is an asset for the purposes of keeping him out of bankruptcy. However, in determining whether the debtor is insolvent, fraudulently transferred or concealed property is excluded.[92]

III. The Power of the Trustee in Bankruptcy To Set Aside Fraudulent Conveyances

We now move to the second important facet of the fraudulent conveyance. Having had a look at the fraudulent conveyance as an act of bankruptcy, let us now examine the arsenal of weapons with which

88. Bankruptcy Act § 3c, as amended, 52 Stat. 844 (1938), 11 U.S.C. § 21(c) (1958).
89. Bankruptcy Act § 1(19), as amended, 52 Stat. 841 (1938), 11 U.S.C. § 1(19) (1958).
90. See MacLachlan 12.
91. Bankruptcy Act § 1(19), as amended, 52 Stat. 841 (1938), 11 U.S.C. § 1(19) (1958). For criticisms of the requirement that debtor's exempt assets are included in the debtor's property in determining his solvency, see MacLachlan 56-57; Joslin, *Insolvency in Bankruptcy: A Synthesis*, 38 Ind. L.J. 23, 25 (1962).
92. Bankruptcy Act § 1(19), as amended, 30 Stat. 841 (1938), 11 U.S.C. § 1(19) (1958).

the trustee in bankruptcy may attack a fraudulent transfer and bring property back into the estate as an asset for equitable distribution among creditors.

The trustee has a variety of armaments for attacking a fraudulent transfer. There are three main provisions in the Bankruptcy Act having a direct bearing on the trustee's power to avoid such transfers: section 70a(4), section 70e, and section 67d. Section 70a(4) vests the trustee, as of the date of the filing of the bankruptcy petition, with title to property transferred by the bankrupt in fraud of his creditors.[93] Under section 70e, the trustee may avoid any transfer by a debtor which by applicable federal or state law is fraudulent or voidable as to any creditor having a provable claim under the Bankruptcy Act.[94] We have already had occasion to summarize the relevant provisions of 67d.[95] As we have there seen, it incorporates into the Bankruptcy Act most of the provisions of the Uniform Fraudulent Conveyance Act and contains some provisions not found in the Uniform Act.

A. *Scope of Section 67d of the Bankruptcy Act*

It becomes necessary at this juncture to examine section 67d of the Act in more detail than we previously did. Paragraph 2 of that section telescopes into one sentence four substantive sections of the Uniform Fraudulent Conveyance Act.[96] The trustee can avoid transactions that are fraudulent under this paragraph of section 67d if the transactions are vulnerable against creditors, provided the transfer was perfected within one year of the bankruptcy. For the purpose of the entire section 67d, as we have seen, a transfer is deemed to have been made at the time it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired rights in the property so transferred superior to the rights of the transferee therein.[97] This requirement as to the time when a transfer is made has no counterpart in the Uniform Fraudulent Conveyance Act. Thus, under the one-year time limitation of section 67d, as well as in the four-month period of section 3b[98] of the Act (applicable to the fraudulent conveyance as an act of bankruptcy), a transfer is not deemed to have been made for the

93. Bankruptcy Act § 70a(4), as amended, 66 Stat. 429 (1952), 11 U.S.C. § 110(a)(4) (1958).

94. Bankruptcy Act § 70e(1), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110(e)(1) (1958).

95. See notes 24-35 *supra* and accompanying text.

96. Bankruptcy Act § 67d(2), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2) (1958).

97. Bankruptcy Act § 67d(5), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(5) (1958).

98. Bankruptcy Act § 3(b), as amended, 66 Stat. 421 (1952), 11 U.S.C. § 21(b) (1958).

purpose of the respective time limitations of each section until it has become so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property transferred superior to the rights of the transferee. The purpose of postponing the commencement of the limitation period in both sections until the perfection of the transfer is, of course, to protect against secret transfers, and to prevent fraudulent transfers from becoming impregnable to attack as fraudulent conveyances by reason of their being kept secret until the limitation period has expired.

"Transfer," for the purposes of section 67d, as well as for the Act generally, is so broadly defined in section 1(30), as we have already seen, that it will include virtually every conceivable type of transfer, whether voluntary or involuntary.[99]

Earlier it was necessary to have a look at the provisions of section 67d in order to explore the fraudulent conveyance as an act of bankruptcy.[100] Now a somewhat different and more detailed examination of the pertinent provisions is in order, so as to understand the power of the trustee to upset the fraudulent conveyance and bring the property back into the debtor's estate.

The first provision of section 67d applies to conveyances by insolvents. Thus, section 67d(2)(a) condemns as fraudulent, as to creditors existing at the time, transfers made without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent.[101] Here the manifest purpose seems to be to set up a test of constructive, as distinguished from actual, fraud—a test of fraud in law as distinguished from fraud in fact. While the fundamental concept of fraudulent conveyances is that the grantor has the evil purpose to defraud, nevertheless that intent will be inferred without regard to his actual state of mind, where, as in the case of a gift, a debtor is insolvent or makes himself insolvent. If the two conditions are present, namely, lack of fair consideration and insolvency or resulting insolvency, there should be a conclusive presumption of fraud, any intention to the contrary notwithstanding.[102] That is what this section of the Bankruptcy Act, taken from section 4 of the Uniform Fraudulent Conveyance Act, does; it makes a positive rule of law.

"Insolvency" within this provision of section 67d is not the same as the general definition of that term in section 1(19), which was discussed in connection with whether the debtor could defeat a bank-

99. See notes 40-42 *supra* and accompanying text.

100. See material on the fraudulent conveyance as an act of bankruptcy, pp. 383-97 *supra*.

101. Bankruptcy Act § 67d(2), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(2) (1958).

102. See 4 COLLIER, ¶ 67.34.

ruptcy proceeding by showing that he was solvent at the time the petition was filed.[103] There we saw that a person is insolvent whenever the aggregate of his property, including the debtor's exempt property, is not at a fair valuation sufficient in amount to pay his debts. On the other hand, a person is insolvent within the intendment of section 67d of the Act when the present fair salable value of his property is less than the amount required to pay his debts.[104] Construing the corresponding provision of the Uniform Fraudulent Conveyance Act, the courts have made it clear that the test of a debtor's insolvency is inability to pay his debts in the ordinary course, not inability to raise the money for them in the ordinary course.[105] Moreover, the debtor's "property," under section 67d, includes only his nonexempt property.[106]

Section 67d also contains a special provision dealing with the problem of determining when a partnership is insolvent. To determine partnership insolvency there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner.[107]

The expression "without fair consideration" is used in describing most of the transfers or obligations declared to be fraudulent in section 67d. The Act provides that consideration given for property or an obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.[108]

A second provision of section 67d which the trustee can use to set aside a transaction applies to conveyances by persons who engage in business with an unreasonably small capital. Section 67d(2)(b) describes as fraudulent as to existing and future creditors a transfer made or an obligation incurred without fair consideration while the debtor is engaged, or is about to engage, in business for which his

103. See notes 89-91 *supra* and accompanying text for that discussion.

104. Bankruptcy Act § 67d(1)(d), as amended, 52 Stat. 877 (1938), 11 U.S.C. § 107(d)(1)(d) (1958).

105. See Fidelity Trust Co. v. Union Nat'l Bank, 313 Pa. 467, 169 Atl. 209, 215 (1933), *cert. denied*, 291 U.S. 680 (1934).

106. Bankruptcy Act § 67d(1)(a), as amended, 52 Stat. 877 (1938), 11 U.S.C. § 107(d)(1)(a) (1958).

107. Bankruptcy Act § 67d(1)(d), as amended, 52 Stat. 877 (1938), 11 U.S.C. § 107(d)(1)(d) (1958).

108. Bankruptcy Act § 67d(1)(e), as amended, 52 Stat. 877 (1938), 11 U.S.C. § 107(d)(1)(e) (1958).

remaining capital will be unreasonably small.[109] This type of transaction can be struck down as fraudulent by the trustee in bankruptcy without regard to the debtor's actual intent.[110] Here, again, the fraudulent intent will be inferred without regard to the debtor's actual state of mind.[111] Where one who is engaged, or is about to engage, in a hazardous business, makes a voluntary conveyance of the bulk of his property, so that if he succeeds he may make a fortune and if he fails he can leave the loss to fall upon his creditors, such conveyance will be held to have been made in fraud of his creditors.[112] There is no statutory requirement that insolvency be the result of the transfer or the obligation.[113] While insolvency of the debtor, as such, is not mentioned as an element in the Act, nevertheless there is some judicial thought that it is practically necessary to show that the transferor was insolvent, or that he intended to incur debts beyond his ability to pay, in order to establish that his remaining property left with him unreasonably small capital.[114] This provision of section 67d condemns as fraudulent such a transaction not ouly as to existing creditors, but also as to all those who became such during the continuance of the business or transaction.[115]

Whether within the purview of this part of section 67d the amount of property remaining in the hands of a person about to launch a business transaction or a series of transactions is unreasonably small

109. Bankruptcy Act § 67d(2)(b), as amended, 52 Stat. 877 (1938), 11 U.S.C. § 107(d)(2)(b) (1958).

110. "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent . . . (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent . . . ." Bankruptcy Act 67d(2)(b), as amended, 52 Stat. 875 (1938), 11 U.S.C. 107(d)(2)(b) (1958). In the case of *In re* Atlas Foundry, 155 F. Supp. 615 (D.N.J. 1957, this section was applied to strike down a mortgage, where the purchasers of corporation gave mortgage on plant realty to selling stockholders and also used almost all of corporation's cash to pay for the stock, resulting in the corporation having an unreasonably small capital to carry on the business.

111. McBride v. Bertsch, 58 F.2d 797 (W.D. Mich. 1930), *aff'd*, 58 F.2d 799 (6th Cir. 1932); see Fidelity Trust Co. v. Union Nat'l Bank, *supra* note 105 (decided under the corresponding section of the *Uniform Fraudulent Conveyance Act*, which had been adopted in Pennsylvania).

112. See State v. Nashville Trust Co., 28 Tenn. App. 388, 190 S.W.2d 785 (M.S. 1944) (decided under the corresponding section of the *Uniform Fraudulent Conveyance Act*, which had been adopted in Tennessee).

113. Fidelity Trust Co. v. Union Nat'l Bank, *supra* note 111.

114. Barr & Creelman Mill & Plumbing Supply Co. v. Zoller, 109 F.2d 924 (2d Cir. 1940).

115. Bankruptcy Act § 67d(2)(b), as amended, 52 Stat. 875 (1938), 11 U.S.C. § 197(d)(2)(b) (1958).

is, of course, a question of fact.[116] In order for the transfer to fall within the condemnation of this provision, it is not necessary for the debtor to be entering a new field of endeavor; it is enough if he contemplates expansion of his existing business.[117] The trustee, of course, has the burden of proving that the transfer by the debtor was a reduction of the debtor's property to an unreasonably small capital.[118]

A third provision of section 67d which is available to the trustee to upset a transaction applies to conveyances by a person about to incur debts beyond his ability to pay. Section 67d(2)(c), taken in substance from section 6 of the Uniform Fraudulent Conveyance Act, renders fraudulent as to existing and future creditors any transfers made without fair consideration by a debtor who expects to incur obligations beyond his ability to pay as they mature.[119] Such transactions are fraudulent as to both present and future creditors. Solvency of the debtor at or after the time of the transfer in question presumably is no defense to an attack by the trustee under this provision.[120] Where the trustee proceeds under this provision, he must show more than a chronological relation between the act of bankruptcy and the subsequently incurred debts. He must adduce proof sufficient to warrant the conclusion that the debtor's transfer or obligation was contemporaneous with an intent or belief that his subsequent creditors would be injured; that is to say, the trustee must show that the debtor expected that he would be unable to take care of his debts as they matured.[121] Here, again, the trustee must carry the burden of proving that the debtor intended to incur obligations beyond his ability to pay as they matured.[122]

A fourth provision of section 67d available to the trustee for striking down fraudulent transfers applies to conveyances made with actual intent to defraud. Section 67d(2)(d) of the Bankruptcy Act condemns as fraudulent as to then existing and future creditors any transfer, if made with actual intent, as distinguished from intent presumed

116. Lackawanna Pants Mfg. Co. v. Wiseman, 133 F.2d 482 (6th Cir. 1943) (construing and refusing to apply statute similar to this provision of Bankruptcy Act, where debtor, giving a purchase money mortgage, had no property to begin with); Fidelity Trust Co. v. Union Nat'l Bank, *supra* note 105; *cf.* Kindom Uranium Corp. v. Vance, 269 F.2d 104 (10th Cir. 1959) (decided under § 67d(2)(c) of Act).

117. McBride v. Bertsch, *supra* note 111 (applying corresponding section of *Uniform Fraudulent Conveyance Act*).

118. Barr & Creelman Mill & Plumbing Supply Co. v. Zoller, *supra* note 114 (trustee failed to carry burden); *In re* Bette Jane Shoe Corp., 87 F. Supp. 932 (E.D.N.Y. 1949) (trustee failed to carry burden).

119. Kindom Uranium Corp. v. Vance, *supra* note 116; Bankruptcy Act § 67d(2)(c), as amended, 52 Stat. 875 (1938) 11 U.S.C. § 107d(2)(c) (1958).

120. See 4 COLLIER ¶ 67.36.

121. *Ibid.*

122. Kindom Uranium Corp. v. Vance, *supra* note 116 (trustee carried the burden); Barr & Creelman Mill & Plumbing Supply Co. v. Zoller, *supra* note 114.

in law, designed to hinder, delay, or defraud either existing or future creditors.[123] This is taken virtually verbatim from section 7 of the Uniform Fraudulent Conveyance Act, and is a recast of the Fraudulent Conveyance Statute of 13 Elizabeth, examined earlier.[124] It should be noticed that this provision does not speak in terms of a conveyance made without fair consideration, as did all the preceding provisions of 67d which we have considered. Consequently, where a conveyance is made with the requisite actual intent to hinder, delay, or defraud creditors, the factor of fair consideration may not be material.[125] When the trustee assails a transaction under this provision, it is not necessary in order to establish a fraudulent intent to show that the transaction was consummated during the bankrupt's insolvency or that it precipitated his insolvency.[126] Thus, for the trustee to recover property fraudulently conveyed within the purview of this clause of section 67d, the fraudulent intent can be shown without proving the insolvency of the transferring debtor.[127] On the other side of the coin, neither does the existence of insolvency at the time of the questioned transaction necessarily prove the fraudulent intent required by section 67d(2)(d).[128]

Seldom will a fraudulent debtor disclose his fraudulent intent, when making a transfer, in a manner capable of direct proof. Consequently, the court must find the requisite intent from the circumstances surrounding the transfer.[129] The intent required by section 67d(2)(d) may be predicated upon the concurrence of facts which, while not direct evidence of the fraudulent intent, are sufficient to lead to the firm conclusion that the transferor's conduct was motivated by such intent.[130] It has been suggested by an authority in the field that, unless this provision of 67d is to have a severely restricted scope, it would seem to cover cases where the trustee shows that the transferor acted under circumstances which forbid any reasonable conclusion other than that the purpose of the transfer was fraudulent

123. Bankruptcy Act § 67d(2)(d), as amended, 52 Stat. 875 (1938), 11 U.S.C. § 107(d)(2)(d) (1958).

124. See notes 6-16 *supra* and accompanying text for this discussion.

125. See 4 COLLIER ¶ 67.37 at 370.

126. Ryan v. Jones, 92 F. Supp. 308 (E.D. Pa. 1950).

127. Senft v. Lewis, 239 Fed. 116 (2d Cir. 1917) (decided under former § 67e).

128. *In re* Peacock Food Mkts., Inc., 108 F.2d 453 (7th Cir. 1939), *cert. denied*, Title v. Smith, 309 U.S. 676 (1940) (court found fraudulent conveyance).

129. Chorost v. Grand Rapids Factory Show Rooms, Inc., 172 F.2d 327 (3d Cir. 1949); Wilson v. Robinson, 83 F.2d 397 (2d Cir. 1936) (dubious story about conveyance; court held fraudulent conveyance).

130. Chorost v. Grand Rapids Factory Show Rooms, Inc., *supra* note 129; McWilliams v. Edmonson, 162 F.2d 454 (5th Cir.), *cert. denied*, 332 U.S. 835 (1947); see Karkus v. Siefert, 169 F. Supp. 662 (D.N.J.), *aff'd per curiam* 263 F.2d 333 (3d Cir. 1958).

as to his creditors.[131] We have learned that other provisions of section 67d take care of situations where fraud is presumed as a matter of law, despite the lack of proof of actual fraudulent intent.

There are numerous circumstances from which courts may infer the requisite fraudulent intent of the debtor when the trustee attacks a transfer under this clause of the Bankruptcy Act.[132] These include the concealment of facts, false pretenses, and reservation by the transferor of rights in the property transferred.[133] Another circumstance from which fraudulent intent may be inferred is the existence of a gross discrepancy between the value of property transferred and the consideration received for the transferred property.[134] A circumstance from which the debtor's intent to defraud can be inferred is the fact that he absconded or secreted the proceeds of the transfer immediately after he received them.[135] However, in order for the trustee to prove the requisite fraudulent intent on the part of the debtor so as to have the transfer declared fraudulent within section 67d(2)(d), the courts have said that the evidence must be clear, cogent, unequivocal and convincing.[136]

A fifth provision of section 67d which is available to the trustee to torpedo fraudulent transactions condemns as fraudulent any transfer to obtain funds with which to finance a preference.[137] This provision, which has no counterpart in the Uniform Fraudulent Conveyance Act, involves the *Dean v. Davis*[138] situation. The facts of that case are relatively simple. There the insolvent debtor, fearful of arrest at the instance of a creditor bank because of forged endorsements, explained the matter to his brother-in-law, who loaned him the money to pay off the bank. The brother-in-law took a mortgage on the insolvent debtor's property as security for the loan. Shortly thereafter the debtor became bankrupt. It was not established that the transfer to the bank was a voidable preference, and the trustee apparently did not proceed against the bank. Nevertheless, the trustee was successful in having the mortgage to the brother-in-law uprooted as a fraudulent conveyance, even though the loan which the mortgage secured was an ade-

131. See 4 COLLIER ¶ 67.37, at 375.

132. 4 COLLIER ¶ 67.37(3) (for collection of cases on the many and varied circumstances from which fraud may be inferred).

133. See Fidelity Trust Co. v. Union Nat'l Bank, *supra* note 105 (construing corresponding section of the *Uniform Fraudulent Conveyance Act*).

134. Wilson v. Robinson, *supra* note 129.

135. See Irving Trust Co. v. State Bankers' Financial Corp., 40 F.2d 88 (S.D.N.Y. 1930).

136. See Nicholson v. Scott, 50 F. Supp. 209, 212 (E.D. Mich. 1943) (trustees unable to carry the burden).

137. Bankruptcy Act § 67d(3), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(3) (1958).

138. 242 U.S. 438 (1917).

quate present consideration.

After being revamped by Congress a number of times, the present section 67d(3) of the Bankruptcy Act apparently codifies the rule of *Dean v. Davis.* It now invalidates every transfer made and every obligation incurred by a debtor who is or will be thereby rendered insolvent within four months prior to the filing of the bankruptcy petition. The transaction is invalid as to existing and future creditors. In order to be vulnerable to attack under this section, however, the transfer must have been made in contemplation of bankruptcy, with intent to use the consideration obtained by the questioned transfer to pay off debts. On the other hand, it would appear that the payment need not constitute a voidable preference under section 60 of the Bankruptcy Act. Apparently it is enough to show that the creditor was preferred as a result of the transaction. Moreover, in order for the transaction to be subject to attack by the trustee the person furnishing the consideration to the debtor must know or believe that the debtor intends to use the consideration to pay off debts.[139]

There is one remaining section 67d arrow in the trustee's quiver for shooting down fraudulent transactions. It concerns the conveyance of partnership property. This is paragraph 4 of section 67d, which is similar to section 8 of the Uniform Fraudulent Conveyance Act. It strikes at transfers of partnership property to partners and transfers of partnership property to third parties in consideration of payments to partners. In summary, section 67d(4) gives the quietus to the transfer of partnership property and the incurring of partnership obligations within one year of the filing of the bankruptcy petition, when the partnership is insolvent or will thereby be rendered insolvent, without regard to actual intent, if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership, as distinguished from consideration to the individual partners. Such transfers are fraudulent as to partnership creditors existing at the time of such transfer or obligation.[140] If no consideration passes to the partnership itself in connection with a transfer of its property to another, the transaction can be avoided by the trustee irrespective of benefits obtained therefrom by one of the partners.[141]

Already we have raised the question whether either actual knowledge of a fraudulent conveyance, or mere constructive notice of a

139. See Bankruptcy Act § 67d(3), as amended, 11 U.S.C. § 107 ("if the transferee or obligee . . . knew or believed that the debtor intended to make such use of the consideration.").
140. Bankruptcy Act § 67d(4), as amended, 66 Stat. 427 (1952), 11 U.S.C. § 107(d)(4) (1958).
141. *In re* Venie, 80 F. Supp. 250 (W.D. Mo. 1948).

conveyance that turns out to be fraudulent, will prevent the conveyance from being set aside by a creditor whose claim arose after receiving such knowledge or such constructive notice by a recording of the document.[142] We saw that the courts are in disagreement in this area. A federal court has permitted a trustee in bankruptcy to set aside such a conveyance on behalf of such subsequent creditors.[143] Apparently it was of no consequence that the subsequent creditors had constructive notice of the transfer by virtue of recordation. As the writer has earlier indicated, such constructive notice given through a recorded conveyance that turns out to be fraudulent should not prejudice the right of a subsequent creditor or the bankruptcy trustee to set the conveyance aside.[144] The leading authorities in the field are of the same view.[145]

Presently we will look at the status of a bona fide purchaser where the conveyance has been declared fraudulent.[146]

B. *Limitations on the Power of the Trustee to Avoid a Fraudulent Transfer*

1. *Necessity for Creditor with Provable Claim.*—It seems clear that in order for the trustee to invalidate a transaction under section 67d of the Bankruptcy Act the transaction must be fraudulent against creditors who have claims provable in bankruptcy. Thus, section 67d(6) makes void as against the trustee in bankruptcy any transfer or obligation declared fraudulent under section 67d "against creditors of such debtor having claims provable under this act."[147] To this extent the trustee's rights under section 67d are derivative. That is to say, the trustee must prove the existence of a creditor with a provable claim, as against whom the questioned transaction was fraudulent when it was made.

While section 67d(6) of the Act gives the trustee power to set aside as fraudulent only those transfers which are fraudulent against creditors having provable claims under section 63,[148] nevertheless, for the purpose of determining whether a transfer is fraudulent as to creditors

142. See material on constructive notice to subsequent creditor as negating fraudulent aspect of transfer, pp. 389-91 *supra.*

143. McBride v. Bertsch, *supra* note 111 (trustee set aside a recorded trust arrangement under a situation arising under section 67d(2)(b), which makes engaging in business with inadequate capital fraudulent as to subsequent creditors).

144. See material on constructive notice to subsequent creditor as negating fraudulent aspect of transfer, pp. 389-91 *supra.*

145. See 4 COLLIER ¶ 67.35, at 364; 1 GLENN, § 343c.

146. See material on the protection of the bona fide purchaser, pp. 408-10 *infra.*

147. Bankruptcy Act § 67d(6), as amended, 66 Stat. 427 (1942), 11 U.S.C. § 107(d)(6) (1958).

148. Bankruptcy Act § 63a, as amended, 48 Stat. 923 (1934), 11 U.S.C. § 103(a) (1958).

under sections 67d(2)-(4), the Act does not limit "creditor" to one having a provable claim.[149] Thus, in defining "creditor" for the purpose of determining whether a transfer is in fraud of creditors, section 67d(1) defines a "creditor" as a person in whose favor a debt exists; "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.[150] So, "creditor" under this section could include the holder of a claim not provable in bankruptcy. Thus, a transfer made for the purpose of defrauding a tort claimant for negligent injuries could, it seems, clearly be fraudulent because the injured party is a "creditor." But unless the tort claimant has a suit pending at the time of the filing of the bankruptcy petition, the claimant does not have a provable claim under the Act.[151] Consequently, if the tort claimant is the only creditor into whose shoes the trustee can step, ostensibly the transfer could not be nullified by the trustee, although a transfer to defeat the injured tort claimant seems fraudulent under section 67d.[152]

The result of providing under section 67d(6) that the trustee cannot set aside a transfer as fraudulent unless there is a creditor with a provable claim is that certain transfers are fraudulent conveyances so as to constitute an act of bankruptcy and yet cannot be set aside by the trustee. These ostensibly anomalous positions can perhaps be reconciled on a rational basis. Section 67d(6), which limits the trustee's powers to set aside a transfer to situations where there is a creditor with a provable claim, is quite properly concerned only with nullifying transfers and obligations that are fraudnlent as against creditors entitled to participate in the bankruptcy distribution, *i.e.*, creditors having provable claims. That is to say, the trustee is permitted by the Act to set aside a transaction only for creditors who can share in the bankrupt's estate. The trustee is thus not given power under section 67d(6) to upset a transfer unless it injures a creditor who has a provable claim and is thus entitled to share in the assets of the bankrupt debtor. On the other hand, the broad definition of "creditor" for determining whether the transfer is fraudulent under section 67d(1) has its purpose also. There the tort claimant, who has no provable claim at the time of the transfer, nevertheless seems to be

149. See notes 75-86 *supra* and accompanying text for discussion of this aspect.

150. Bankruptcy Act § 67d(1), as amended, 11 U.S.C. § 107(d)(1) (1958).

151. Bankruptcy Act § 63a(7), as amended, 48 Stat. 923 (1934), 11 U.S.C. § 103(a)(7) (1958).

152. In non-bankruptcy cases, a tort claimant generally is considered as a creditor for the purpose of setting aside a fraudulent conveyance, sometimes on the theory that his debt, when liquidated by jndgment, relates back to the time of its origin. Babirecki v. Virgil, 97 N.J. Eq. 315, 127 Atl. 594 (1925); Washington Nat'l Bank v. Beatty, 77 N.J. Eq. 252, 76 Atl. 442 (1910); Henry v. Yost, 88 Wash. 93, 152 Pac. 714 (1915). See also 4 COLLIER ¶ 67.41.

a creditor, so that sections 67d(2)-(4) are operative to determine whether the transfer is fraudulent as to him. If the tort claimant as to whom the transfer is fraudulent, but who then has no provable claim, institutes his tort action for negligence prior to the filing of the bankruptcy petition, the fraudulent transfer not only is voidable by the trustee, but also the tort claimant is then entitled to share in he distribution of the estate.[153]

2. *Protection of the Bona Fide Purchaser.*—There is a further limitation on the power of the trustee in bankruptcy to vitiate a transfer found to be fraudulent. That limitation is contained in section 67d(6) of the Act.[154] This section, in nullifying transfers and obligations as against the trustee, does so except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value. Around these claimants is thrown a screen of protection into which two interdependent elements enter—their good faith and also their having paid a present fair equivalent value. If the grantee can show that he has (a) given the requisite value (b) in good faith, he goes free, regardless of the fact that the grantor's intent was fraudulent. However, in order for the transferee completely to withstand an attack by the trustee, there must be present both these elements.[155]

As we have already learned, the bona fide purchaser has been protected from early times, beginning with the ancient statute of 13 Elizabeth,[156] and continuing through the Uniform Fraudulent Conveyance Act.[157]

Section 67d(6) also gives partial protection to purchasers, lienors, and obligees who have given less than fair consideration, but who entered into the transaction without "actual fraudulent intent."[158] Such claimants are permitted to retain the property or obligation as security until they are reimbursed.[159] But such a transferee cannot come within this protecting pale of section 67d(6) where the transferee is not a good faith purchaser but instead is a guilty participant in the fraud.[160]

Two distinct safety valves are thus found in section 67d(6). The

153. See 4 COLLIER ¶ 67.41.

154. Bankruptcy Act § 67d(6), as amended, 66 Stat. 427 (1942), 11 U.S.C. § 107(d)(6) (1958).

155. See 4 REMINGTON, BANKRUPTCY § 1652.2 (Henderson ed. 1957).

156. See notes 9-11 *supra* and accompanying text.

157. UNIFORM FRAUDULENT CONVEYANCE ACT § 9; 9B UNIFORM LAWS ANNOTATED 45 (Supp. 1962).

158. Bankruptcy Act § 67d(6), as amended, 66 Stat. 427 (1942), 11 U.S.C. § 107 (d)(6) (1958).

159. *Ibid. In re* Peoria Braumeister Co., 138 F.2d 520 (7th Cir. 1943) (permitted chattel mortgagee to keep his lien as security to the extent of value given, where not guilty of fraud).

160. Chorost v. Grand Rapids Factory Show Rooms, Inc., *supra* note 129.

first one completely exempts bona fide purchasers, lienors, and obligees for a present fair equivalent value from invalidation of their rights by the trustee. The second safety valve allows purchasers, lienors, and obligees who have given less than fair consideration, but who had no actual fraudulent intent, to retain their rights until they are reimbursed.

When the fraudulent intent of the grantor has been shown, then the burden of proving that the transferee qualifies as a bona fide purchaser shifts to the transferee. If he caunot carry that burden, he loses and the fraudulent conveyance will be set aside by the trustee.[161] "Good faith" on the part of the transferee, so as to be protected under section 67d(6) of the Act, seems to presuppose lack of knowledge of such facts as would put a reasonably prudent person on inquiry.[162] Such knowledge may be inferred from the circumstances surrounding the transfer.[163]

Lack of honest belief on the part of the transferee invoking the protection of section 67d(6) has been considered fraudulent.[164] A man cannot, it is said, successfully claim that he is acting honestly when he willfully shuts his eyes for fear that leaving them open will reveal unpleasant facts.[165] As the court has rather strikingly put it, where only inexcusable naivete would allow one to believe that transfers made by the bankrupt were not made with fraudulent intent, the trustee has made out a prima facie case to have the transfer set aside.[166]

One particular type of transaction that the courts will carefully scrutinize is the intra-family transfer. Completely upsetting one such transfer, the court made this telling observation in denying the transferee the protection accorded a bona fide purchaser:

> The statute deals with and protects substantial claims of persons who have dealt in fairness and good faith and who, because they have done so, are entitled to equitable protection. It has no application to nepotic and fictitious arrangements of this kind entered into by members of a debtor's family to defeat creditors while keeping the property safely in the family.[167]

161. *Ibid.* Karkus v. Siefert, 169 F. Supp. 662 (D.N.J. 1958) (trustee suceessfully invoked New Jersey Uniform Fraudulent Conveyance Act, as well as section 67d of the Bankruptcy Act, to upset the conveyance).

162. Davis v. Hudson Trust Co., 28 F.2d 740 (3d Cir. 1928), *cert. denied*, 278 U.S. 655 (1929) (trustee invoked New Jersey Uniform Fraudulent Conveyance Act to set transfer aside); Hartzman v. Lynch, 54 F.2d 38 (1st Cir. 1931) (decided when present provision of Bankruptcy Act was found in section 67e of the Act).

163. Chorost v. Grand Rapids Factory Show Rooms, Inc., *supra* note 129; *In re* Messenger, 32 F. Supp. 490 (E.D. Pa. 1940) (trustee used local faudulent conveyance law, as well as section 67d of the Bankruptcy Act).

164. Chorost v. Grand Rapids Factory Show Rooms, Inc., *supra* note 129.

165. *Id.* at 329.

166. *Ibid.*

167. McWilliams v. Edmonson, 162 F.2d 454, 457 (5th Cir. 1947) (trustee upset

(a) *Adequacy of Consideration as Relevant to the Grantee's Good Faith.*—Inadequacy of consideration is one circumstance tending to show lack of good faith by a transferee seeking protection as a bona fide purchaser. Inadequacy of consideration, of course, is connected with both facets of the fraudulent conveyance. As we have learned,[168] it will help to show the debtor's intent to defraud. Since the buyer knows what he is getting, inadequacy of consideration will also help to show the grantee's bad faith. Hence when consideration for a transfer is allegedly insufficient, it is then necessary not only to consider the fraudulent intent of the debtor, but the same evidence can be used to test the good faith of the grantee.

In testing the good faith of the grantee, we are concerned, as we have seen, with whether he had knowledge or notice of the debtor's fraudulent intent. Mere inadequacy of price is not enough of itself to require a finding of bad faith on the part of the grantee. Something more than a bad bargain is necessary. There must be gross disparity in values to justify the conclusion that the transfer was fraudulent; one must be able to conclude that there was bad faith as distinct from a tight trade.[169]

A well-known authority on the law of fraudulent conveyances has summed up the matter in this fashion:

> It may be stated, therefore, that an inadequacy of price which (a) remains unexplained at the close of the case and (b) is so great as to show, without the necessity for argument, that the parties could not have bargained with each other as people normally trade, requires the setting aside of the transaction.[170]

C. *The Position of the Creditor Who Takes a Conveyance as Payment for His Antecedent Debt*

Before leaving this aspect of the subject of fraudulent conveyances, perhaps a word should be said about the position of a creditor who takes a conveyance in payment for his antecedent debt, knowing that the grantor-debtor is trying to fleece his other creditors. Does the mere fact that the creditor who receives this preferential payment of his antecedent debt, knowing of the debtor's intent to defraud other creditors, render the transfer to him a fraudulent conveyance?

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conveyance by using section 67d of the Bankruptcy Act). To the same effect is Wilson v. Robinson, 83 F.2d 397 (2d Cir. 1936) (trustee successfully invoked New York fraudulent conveyance statute).

168. See notes 71-73 & 134 *supra* and accompanying text on this point.

169. See 1 GLENN § 296. Where debtor sold a potential judgment for personal injuries up to 7,500 dollars on its face, for the release of a 500 dollar debt, it was held a fraudulent conveyance under the New York Uniform Fraudulent Conveyance Act. *In re* Friedman, 72 F.2d 412 (2d Cir. 1934).

170. 1 GLENN § 298 (collecting many non-bankruptcy cases).

The position of the purchaser in bad faith must be sharply contrasted with the creditor who takes a conveyance as security for, or in payment of, a debt which the debtor owes him, although the creditor may be fully aware of not only the debtor's insolvency but also of the fact that the debtor is trying to defraud his other creditors. The purchaser who takes in bad faith is, as we have seen, guilty of participating in a fraudulent conveyance, and the transfer can be set aside by the trustee in bankruptcy.[171] The purchaser is really a volunteer. In such a situation, he has nothing at stake—no self-interest to serve. He may, with perfect safety, keep out of the transaction. Knowing the evil purpose of the grantor-debtor, a putative grantee can very easily refuse to have anything to do with the matter. If the purchaser falls in with the debtor's mephitic purpose to defraud his creditors, the grantee-purchaser has only himself to blame when the transaction is set aside. With his eyes open, he has aided the debtor in defrauding his creditors.

On the other hand, the man with the pre-existing debt wrongs no one in seeking payment of, or security for his debt. All that the creditor receives by way of a conveyance from his debtor is a preferential payment of his debt, and there is nothing morally wrong with paying one's debts. Hence, in non-bankruptcy cases at least, if all that has occurred is a preference there is no fraudulent conveyance, regardless of the debtor's wicked intent and the grantee's knowledge upon the matter.[172] In short, the mere fact that the preferred creditor knows of the debtor's intent to defraud other creditors does not render him a participant in the fraud. The creditor takes the property in payment of, or as security for, a pre-existing indebtedness. Taking a transfer in payment of or to secure an antecedent indebtedness is fair value under the fraudulent conveyance sections of the Bankruptcy Act, as well as under the Uniform Fraudulent Conveyance Act.[173] The creditor, in such circumstances, has an interest to serve. He can keep out of the transaction only at the risk of taking a loss on the claim which the debtor owes him. The law throws upon such a creditor no duty of protecting other creditors. So the fact that the creditor knows of the debtor's intent to defraud his other creditors, when the creditor takes a conveyance in payment of his antecedent debt, does not render the conveyance fraudulent.[174]

The idea that payment of a pre-existing debt is not a fraudnlent

171. See protection of the bona fide purchaser, pp. 408-10 *supra*.

172. See 1 GLENN § 298a.

173. Bankruptcy Act § 67d(1)(e), as amended, 11 U.S.C. § 107(d)(1)(e) (1958); Uniform Fraudulent Conveyance Act § 3(b).

174. Non-bankruptcy eases: English v. Brown, 229 Fed. 24 (3d Cir. 1916); Hogeboom v. Milliman, 202 Iowa 817, 211 N.W. 396 (1926); Lockren v. Rustan, 9 N.D. 43, 81 N.W. 60 (1899).

conveyance cannot, of course, be carried too far. If, for example, the grantee with a pre-existing debt takes, as payment, property which goes beyond the debt in value, the difference being made up by a false and spurious claim, the transaction will be *wholly* set aside as a fraudulent conveyance. At common law, the creditor-grantee has been denied the right to hold the property as security for the debt which was actually due him.[175] We have learned that under the Bankruptcy Act the grantee is permitted, where the consideration paid was not fair, but where he has not been guilty of actual fraud, to hold the property as security for the amount he has paid.[176] The grantee-creditor, who takes property beyond the value of his claim as payment, has gone beyond his right to secure a preferential payment and has allowed the debt to be used as part of a larger transaction by which the debtor has tried to defraud his creditors.

D. *The Trustee's Powers To Set Aside Fraudulent Transfers Under Section 70e of the Bankruptcy Act*

Under section 70e of the Bankruptcy Act any transfer by a debtor which by applicable federal or state law is fraudulent or voidable as to any creditor having a provable claim under the Act may be avoided by the trustee.[177] This section of the Act makes available to the trustee the entire law of fraudulent conveyances and other transactions by a debtor which are voidable at the instance of creditors. The voidability of transactions and obligations of the bankrupt, under this section, are entirely dependent upon local law or federal law outside the Bankruptcy Act. New causes of action are not created by section 70e; the trustee merely succeeds to existing causes of action. He is simply remitted to the rights of creditors to avoid transfers under non-bankruptcy law. The rights of action which pass to the trustee under section 70e are those which, had bankruptcy not intervened, could have been enforced by creditors.

Since the trustee's rights are solely dependent upon relevant local law, there is no federally fixed time limitation within which the voidable transaction must have occurred. In this regard, section 70e of the Act is in sharp contrast with the situation in which the trustee is attacking a transaction under section 67d, where the transaction in question must have occurred within one year of the bankruptcy.[178]

In order for section 70e of the Bankruptcy Act to be available to

175. Baldwin v. Short, 125 N.Y. 553, 26 N.E. 928 (1891) (non-bankruptcy case).

176. See notes 158-60 *supra* and accompanying text.

177. Bankruptcy Act § 70e(1), as amended, 52 Stat. 879 (1938), 11 U.S.C. § 110(e)(1) (1958).

178. See Stellwagen v. Clum, 245 U.S. 605 (1918).

the trustee, however, there must be at least one existing, actual, flesh and blood creditor of the bankrupt, with a claim provable under the Act, who could have, in the absence of bankruptcy, successfully attacked the transfer or obligation in question as voidable as against him.[179] Since the trustee's right to avoid a transfer or obligation under section 70e is in the nature of a right by subrogation to, and wholly dependent upon the existence of rights of creditors with a provable claim who could have avoided the transaction in the absence of bankruptcy, defenses good as against such a creditor are likewise good as against the trustee. Thus, the trustee may be barred by statutes of limitations or laches, where these defenses would have barred the way of the creditor.[180]

The great variety of transactions within the scope of section 70e of the Bankruptcy Act, including fraudulent conveyances which might otherwise be voidable under section 67d of the Act, gives the trustee a choice of weapons with which to attack the particular transaction. There may thus be an overlapping of the Bankruptcy Act and state fraudulent conveyance law. Under section 70e, it is common-place for the trustee to invoke the applicable state Uniform Fraudulent Conveyance Act.[181] Or the trustee may successfully launch a two-pronged offensive, going under the local fraudulent conveyance law as well as under the fraudulent conveyance provisions of the Bankruptcy Act.[182] Under the local law the trustee may have a longer period in which he can attack a transfer than under a corresponding section of the Bankruptcy Act.[183]

1. *Fraudulent Retention of Possession and Ostensible Ownership.*— Within the announced purpose of this article to survey the fraudulent conveyance in bankruptcy, it is not possible to explore all the myriad situations which fall within the omnibus sweep of section 70e of the Bankruptcy Act. It will be enough to mark out the guide lines of some of the more troublesome and recurring types of transactions.

179. See Hartman v. Lauchli, 238 F.2d 881, 887 (8th Cir. 1956); *In re* Cable-Link, 135 F. Supp. 277, 281 (E.D. Mich. 1955). In Costello v. Bank of America Nat'l Trust & Sav. Ass'n, 141 F. Supp. 225 (N.D. Cal. 1956), an assignment was originally vulnerable because not recorded, but since the account was collected before bankruptcy, the trustee had no rights.

180. Heffron v. Duggins, 115 F.2d 519 (9th Cir. 1940).

181. *E.g.*, Hertzman v. Lynch, 54 F.2d 38 (1st Cir. 1931) (decided when present section 70e was found in section 67e of the Bankruptcy Act); Wilson v. Robinson, 83 F.2d 397 (2d Cir. 1936) (trustee successfully invoked New York fraudulent conveyance statute).

182. *E.g.*, Karkus v. Siefert, 169 F. Supp. 662 (D.N.J. 1958) (trustee used New Jersey Uniform Fraudulent Conveyance Act, as well as section 67d of the Bankruptcy Act); *In re* Messenger, 32 F. Supp. 490 (E.D. Pa. 1940) (trustee used state fraudulent conveyance act, as well as section 67d of the Bankruptcy Act).

183. Davis v. Wolf, 147 F.2d 629 (4th Cir. 1945).

A garden variety type of transaction arising under section 70e of the Act is that of fraudulent retention of possession and ostensible ownership. Section 67d of the Bankruptcy Act, based upon the Uniform Fraudulent Conveyance Act, may not cover fraudulent retention of possession.[184] In this area, therefore, the trustee may be remitted to the local law on the subject. The leading decision in this area is *Twyne's Case*,[185] decided in 1601. This case involved a pretended preference of a creditor who permitted the debtor to retain possession of and enjoy the income from property and brand it (sheep) as his own, although the property supposedly had been transferred to the creditor to pay his claim against the debtor. Holding this to be fraudulent under the statute of 13 Elizabeth, the Court stressed, among other things, that the debtor continued in possession of the goods and used them as his own and that by reason thereof he traded with others and deceived them. Retention of possession, of course, can cause injury both to present and subsequent creditors. The present creditor uses the vendor's retention of possession as evidence of a fraudulent intent on the debtor's part—a purpose not to make a genuine sale, but rather a device to defraud the creditor. However, there is another element as well; seeing no change in the debtor's position, the creditor may, to his prejudice, forbear to press his claim. The case of the subsequent creditor is that he extended credit on the faith of the vendor's apparent ownership. As to each class of creditors, then, a misrepresentation works injury.[186]

Cases involving fraudulent retention of possession and ostensible ownership are extremely important. Statistically there are many of them. However, the doctrine of retention of possession and ostensible ownership as a species of fraudulent conveyance has so many ramifications and local variations that no effort will be made here to give an exhaustive treatment. It is generally agreed that, under applicable local law, retention of possession by a seller is a badge of fraud, but there is no uniformity as to whether it is conclusive evidence of fraud, prima facie evidence of fraud, or merely admissible evidence of fraud on creditors.[187]

2. *Transfers Requiring Recordation or Notice.*—Perhaps the most prolific instances of fraudulent and voidable transfers that are subject to challenge by the trustee under section 70e of the Bankruptcy Act are found in those situations where registration, recordation, or prescribed notice are mandatory under state law in order to save a given

184. See MacLachlan 255-56, 270.
185. 3 Co. Rep. 806, 76 Eng. Rep. 809 (K.B. 1601).
186. 1 Glenn § 347.
187. 1 Glenn §§ 354, 355; MacLachlan § 225.

transfer from being struck down as fraudulent and void. This really is a codified species of fraudulent retention and ostensible ownership law.

In order to build up a sound credit system and to strike down secret conveyances and liens, the several states have enacted their own ideas of how to accomplish this avowed purpose; generally this has taken the form of constructive notice to the world by means of recording and/or registry statutes. But once more it must be emphasized that the applicable state law is determinative as to the characteristics, nature, effect, and validity of such transfers, so that rigid formulation of applicable rules is not possible. In the category of transfers voidable under section 70e of the Act, we have such devices as the chattel mortgage, the conditional sale, assignment of accounts receivable, bulk sales, mortgages, deeds of trust, pledges, equitable pledges, and trust receipts. Here, of course, the emphasis shifts to specific state legislation regarding requirements for recordation and giving notice. Because of the local variations, no comprehensive treatment can here be given. The cases of this sort open up such problems as the definition of "creditors" as to whom such transactions are voidable when the state recording statutes have not been complied with. That is to say, is the unrecorded transfer void as to a simple contract creditor,[188] or is the unrecorded instrument void only as to lien creditors?[189] In order for the unrecorded instrument to be void, must the creditor be one who becomes a creditor while the transfer is unrecorded,[190] or is the unrecorded transfer also void as against prior creditors?[191] Again, was the recording sufficiently timely to satisfy the requirements of the state recording statute?[192] The answers to all these questions are, of course, completely dependent upon the meaning of the applicable state recording statute. Under section 70e the applicable state law is decisive as to whether the transfer can withstand an assault by the trustee.

In the twenty-eight states which have adopted the Uniform Commercial Code, it will not be necessary to differentiate between the various types of financing devices, such as chattel mortgage, trust receipt, etc. Under Article 9 of the Code, secured financing of chattels is accomplished by use of a "security interest," created by a "security agreement," with the same rules applying to all security agreements.[193] Article 9 of the Code provides comprehensively for

188. Deane v. Fidelity Corp., 82 F. Supp. 710 (W.D. Mich. 1949).

189. *In re* Consorto Constr. Co., 212 F.2d 676 (3d Cir. 1954).

190. *Ibid.*

191. Karst v. Gane, 136 N.Y. 316, 32 N.E. 1073 (1892) (non-bankruptcy case).

192. *Ibid.* For a good discussion of the various state views of the effect of a tardy recordation of a chattel mortgage, see *In re* Consorto Constr. Co., *supra* note 189.

193. UNIFORM COMMERCIAL CODE §§ 9-102, -105.

the pledge, chattel mortgage, conditional sale, trust receipt, factor's lien, assignment of accounts receivable, and other security devices. Everything is covered except security agreements regarding real estate. This means that the requirements for perfecting security interests, so as to withstand an attack by a creditor, will be uniform in the states adopting the Uniform Commercial Code.

3. *Floating Liens on Shifting Property and Assignment of Accounts Receivable.*—A virtual Pandora's box of troubles for the trustee in bankruptcy has been the assignment of accounts receivable and mortgages on shifting goods, such as stock in trade. This has been a fertile field for the trustee to invoke state law, through the use of section 70e, to try to uproot the security device. To obtain a loan, a debtor may assign his accounts receivable, as well as giving a chattel mortgage on his stock of goods with a clause covering "after-acquired" property. If the debtor is required to collect the accounts as the agent of the lender and to turn over the proceeds to the lender, then there is not much difficulty; the assignment and mortgage has been upheld under the law of most states.[194] But trouble occurs when the agreement does not require the debtor to collect the accounts from sale of the shifting stock of goods and turn over the collections to the lender. In short, the debtor may be permitted to sell goods and reinvest the proceeds, sell again and reinvest. Under the doctrine of *Benedict v. Ratner*,[195] a decision of the Supreme Court of the United States applying New York law, if the debtor can collect the accounts and not pay them over to the lender, the assignment is void as to the trustee in bankruptcy of the debtor for failure to transfer dominion adequately. If the agreement between the debtor and the lender permits such practice, it is void as against creditors under the law of many states; and even if the agreement requires a strict segregation of the proceeds and prompt payment to the lender, the transaction may be void under applicable state law if the actual practice by the parties under the arrangement does not require a prompt accounting to the lender.[196] Also, an assignment of accounts otherwise valid may be vulnerable to attack by the trustee by invoking state law through the use of section 70e, if no control is maintained of goods returned for credit upon accounts receivable.[197] Such decisions indicate that the parties must treat the assignment as a real transfer of dominion and not a pretended one. Recordation of the mortgage and assignment generally will not protect the lender if there is an express or tacit

194. See 2 GLENN §§ 582-84.
195. 268 U.S. 353 (1925) (applying New York law).
196. See Bloch v. Mill Factors Corp., 134 F.2d 562, 563 (2d Cir. 1943).
197. Lee v. State Bank & Trust Co., 38 F.2d 45 (2d Cir. 1930), *decision on remand aff'd*, 54 F.2d 518 (2d Cir. 1931).

agreement creating the power in the transferor (debtor) to exercise dominion over the property.[198]

If an assignment of accounts receivable or a chattel mortgage were sustained where the debtor is given a free hand with respect to whether he will reinvest the proceeds from the sale of the shifting stock of goods covered by the security device in question, it would seem to afford a ready-made shield by which the debtor could fend off the rest of his creditors. The debtor could use this loose type of security device to insulate himself from the rest of his creditors, and yet, ostensibly, he could carry on business as usual with the consent of the friendly secured creditor. If bankruptcy hovered, the secured creditor apparently could then step in and take priority with respect to the accounts and remaining goods in the shifting stock.

However, the Uniform Commercial Code, presently adopted in twenty-eight states, seems to validate this type of security arrangement. The doctrine of *Benedict v. Ratner* appears to be either severely limited or abolished by the Code.[199] The official comments on the text of the Uniform Commercial Code declare that the Code expressly validates the floating charge or lien on a shifting stock, pointing out that the Code provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral; and that the Code repeals the rule of *Benedict v. Ratner*.[200] Expensive policing of the security by the creditor, thought to be required by the *Benedict v. Ratner* doctrine, apparently was an important policy consideration that caused the drafters of the Code to validate such security devices.

4. *Extent of Recovery by the Trustee in Bankruptcy Under Section 70e of the Bankruptcy Act.*—A very knotty section 70e problem comes up when there is a security transaction that is void as to one creditor but is not void as to other creditors. What are the rights of the trustee in that situation? To illustrate, suppose a debtor executes a mortgage in the sum of fifty thousand dollars, but before the mortgage is recorded a creditor comes into the picture in the amount of one hundred dollars. Assume that as to this intervening creditor, the mortgage is void under the applicable state recording statute. In the

198. See 4 COLLIER ¶ 70.77. For a scholarly treatment of why such a loose security device has been regarded by many courts as fraudulent, see 2 GLENN §§ 583a, 584, 590, 591. See also Pabst Brewing Co. v. Butchart, 67 Minn. 191, 69 N.W. 809 (1897).

199. UNIFORM COMMERCIAL CODE § 9-205.

200. See UNIFORM COMMERCIAL CODE § 9-205, comment. For a vigorous endorsement of the *Uniform Commercial Code* rule validating recorded floating liens and abolishing the Benedict v. Ratner rule, see Birnbaum, *Article 9—A Restatement and Revision of Chattel Security*, 1952 WIS. L. REV. 348, 353, 365-66, 391.

absence of bankruptcy, the intervening creditor would have only a first claim in the amount of one hundred dollars as against the mortgagee who was late in recording his mortgage. However, in bankruptcy, the situation is a horse of an entirely different color. There, the trustee in bankruptcy steps into the shoes of the hundred dollar creditor and uproots the fifty thousand dollar mortgage *in toto.* The mortgaged property then becomes an asset available for all creditors, and the mortgagee has only the status of an unsecured creditor. This is the teaching of *Moore v. Bay*,[201] decided by the Supreme Court of the United States in 1931.

Moore v. Bay and its consequences have been subject to vigorous attack by writers in the field.[202] However, ever since that decision it has been considered proper to invalidate the mortgage completely, even though the only creditor entitled to invalidate it has an insignificant claim.[203]

IV. The Fraudulent Conveyance as a Ground for Denying the Bankrupt a Discharge

The fraudulent conveyance is of significant importance in three facets of bankruptcy. As we have seen, it constitutes an act of bankruptcy and it can be avoided by the trustee in bankruptcy. There is a third role which the fraudulent conveyance plays in bankruptcy. It can be used to deprive the bankrupt of his discharge. Section 14c of the Act provides that a fraudulent conveyance of concealment not more than twelve months prior to the filing of the bankruptcy petition is a ground for denying a discharge.[204] However, a concealment by the bankrupt of his exempt property will not prevent the discharge.[205]

Perhaps the main question that arises at this point is whether actual fraud is required. We have seen that under section 67d there are several types of transactions that are regarded as fraudulent convey-

201. 284 U.S. 4 (1931).

202. MacLachlan 330-35; Scott, *The Meaning of the Provisions for Recordation of a Transfer as Applicable to Preference Under the Bankruptcy Act*, 18 Va. L. Rev. 249, 265-69 (1932).

203. City of New York v. Rassner, 127 F.2d 703 (2d Cir. 1942); Friedman v. Sterling Refrigerator Co., 104 F.2d 837 (4th Cir. 1939) ($14.23 invalidated $534.25).

204. "The court shall grant the discharge unless satisfied that the bankrupt has . . . at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition 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." Bankruptcy Act § 14c(4), as amended, 71 Stat. 599 (1957), 11 U.S.C. § 32(c)(4) (1958). Earlier we had a look at the meaning of the "transfer," "concealment," and "removal" of property. See notes 40-61 *supra* and accompanying text.

205. *In re* Chase, 141 F.2d 299 (7th Cir. 1944).

ances although they do not require an actual intent by the debtor to defraud his creditors. Consequently, there is an important question as to whether the debtor must have a conscious desire to hinder, delay, or defraud creditors before he will be denied a discharge on the ground that he committed a fraudulent conveyance. The question is not completely free from doubt. However, there is much authority supporting the view that only actual fraud will prevent a discharge, since the purpose of the Act is to protect against discharge only by a dishonest debtor.[206] Moreover, it should be noted that the Bankruptcy Act precludes a discharge only where the bankrupt has 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.[207] This terminology is the same as that found in section 3a(1) setting forth the definition of a fraudulent conveyance for an act of bankruptcy prior to the 1952 amendment of the Act. We recall that prior to that amendment an actual intent to defraud was an essential ingredient of a fraudulent conveyance which would constitute an act of bankruptcy.[208]

While the courts declare that the intent to defraud must be actual, as distinguished from constructive,[209] nevertheless a "conveyance while insolvent, without anything approaching a fair consideration to creditors . . . is presumptively fraudulent within the discharge provisions of the Act."[210]

Section 14c prescribes that a fraudulent conveyance that will constitute a ground for denying a discharge must have occurred not more than twelve months before the filing of the bankruptcy petition; but this section does not specify how the twelve-month period shall be measured.[211] We learned that for the purposes of deciding whether a fraudulent conveyance constitutes an act of bankruptcy[212] and whether the trustee is precluded by reason of the twelve-month time limitation from setting aside a fraudulent conveyance[213] the transfer does not take place within the purview of the Act until the transfer has become so far perfected that no bona fide purchaser from the debtor could thereafter have acquired rights in the property so trans-

206. That there must be actual fraudulent intent, as distinguished from constructive inteut, to bar a discharge, see *In re* Pioch, 235 F.2d 903 (3d Cir. 1956); *In re* Simon, 197 F. Supp. 301 (E.D.N.Y. 1961); 1 COLLIER ¶ 14.47.

207. Bankruptcy Act § 14c(4), as amended, 71 Stat. 599 (1957), 11 U.S.C. § 32(c)(4) (1958).

208. See notes 62-74 *supra* and accompanying text, where this point is discussed.

209. *In re* Nemerov, 134 F. Supp. 678 (S.D.N.Y. 1955).

210. Rothschild v. Lincoln Rochester Trust Co., 212 F.2d 584, 585 (2d Cir. 1954).

211. Bankruptcy Act § 14c(4), as amended, 71 Stat. 599 (1957), 11 U.S.C. § 32(c)(4) (1958).

212. See text dealing with time when transfer occurs, pp. 388-89 *supra*.

213. See notes 96-99 *supra* and accompanying text.

ferred superior to the rights of the transferee therein. The provision of the Act relating to the fraudulent conveyance and concealment as a ground for denying a discharge is silent with respect to the time when the transfer is deemed to have taken place. The decided cases do not resolve the matter, but a prominent work on the subject takes the position that the transfer should not be considered complete until the transfer is so far perfected that no bona fide purchaser from the debtor-transferor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein.[214] This interpretation would be in accord with the measurement of time set forth with regard to the fraudulent conveyance as an act of bankruptcy, as well as the time limitation on the power of the trustee to set aside such a transfer.

214. See 1 COLLIER ¶ 14.46.