1968

Creditors Rights

Dudley Warner Woodbridge
William & Mary Law School

CREDITORS RIGHTS 190 S.E.302--Omitted because of change in law.

CREDITORS RIGHTS Laborer's priority lien 169 Va.206 or 192 S.E.789.

Z did a mining business under the trade name of the Virginia Anthracite Coal Co. Z became insolvent. The laborers claimed a prior lien under Code 6438 which gave laborers liens on every company chartered by this state or any other state or country in case of railroads, mining, and manufacturing businesses. Are they entitled to the lien?

No. Company chartered, by necessity refers to corporations. At common law a laborer stands upon the same plane as any other creditor and unless he can point to a statute giving him a lien or preference he has none.

Note: In 1938 the statute was amended by what is now V#43-24 so that at the present time the statute is also applicable to individuals trading under a real or fictitious name and partnerships or unincorporated bodies of persons engaged in mining manufacturing, or transportion.

CREDITORS RIGHTS Homestead Exemption - Waiver 170 Va.275, or 196 S.E.625.

Facts: Grantor of deed of trust gave deed of trust creditor a note which waived homestead: Grantor later sold to X, the deed simply providing that X assumed the deed of trust debt. When the deed of trust debt matured the premises were sold and there was a deficiency. The deed of trust creditor sued X for the amount of the deficiency, and obtained judgment whereupon X claimed a homestead exemption. Is X entitled to this exemption?

Held: Yes. He never waived homestead. If the grantor of the deed of trust had sued X, X could have claimed his homestead. And if the deed of trust creditor sues standing in his grantor's shoes, he takes subject to X' right to claim homestead.

Code 34-22 reads in part, "If a debt which is superior to the homestead, or as to which the homestead is waived, be paid off a by a surety thereon, the principal shall not be allowed to claim the homestead as against such surety. "Here, however, the failure of X to waive the exemption did not make his debt superior to homestead. Therefore, if the debt of X as principal had been paid by his grantor surety he will not have paid off a debt of X as to which he has waived his homestead, and Code 34-22 has no application. Note: In this case an action at law was brought instead of bill in equity.

CREDITORS RIGHTS: Judicial Sale - Caveat Emptor 170 Va.240 or 196 S.E.627.

A foreclosure decree providing that sale was to be at risk of purchaser from time bid off by purchaser, and postponing delivery of possession of premises to purchaser for six months, was improper as discouraging the bidding and preventing the court from obtaining the highest bid.

It is a well established principle that the court does not guarantee the title to the property it sells. Caveat emptor applies to the purchaser at a judicial sale. If there are defects in the title, the successful bidder should except to confirmation of the sale. Uaually, in this way his rights may be safeguarded.

Creditor's Rights Fraudulent Conveyance — Statute of Limitations 198 S.E. 479.

A wife permitted her husband to borrow $6,000 on the security of her property and to use it in his business not expecting a return of the money. Later husband's business fell off, and he while sick conveyed property to his wife worth some $30,000 while he owed some $32,000 "in consideration of $10,000" no part of which was paid. He only retained about $2,000 in assets and a losing business. Seven years after the recordation of the above transaction, his creditors seek to set the conveyance aside. Discuss.

If this is a voluntary conveyance the action of the creditors is barred under Code 5820 after 5 years from the recordation thereof. If a fraudulent conveyance, there is no statute of limitations, but only equitable doctrine of laches.

Held to be a fraudulent conveyance because(1)fictitious consideration alleged(2) the earlier $6,000 transaction was evidently a gift by the wife to the husband.(3) the natural result of the conveyance was to hinder, delay, or defraud creditors.

Creditor's Rights Voluntary or Fraudulent Conveyance — 198 S.E.496. No case for mother

X owned 55 shares of stock and was heavily indebted. He gave his sister a note for $5,000 secured by a pledge of the stock to reimburse his sister for taking care of their mother who was in destitute circumstances. Can the creditors have the conveyance set aside as fraudulent or voluntary?

Since 1927 a child over 16 who has sufficient means is under a legal statutory duty to take care of his indigent mother or of his father if the father is unable to work and is in indigent circumstances. The amount depends upon the station of life, the parties, and if the $5,000 is not excessive, and the mother really was destitute, the conveyance is not a voluntary or fraudulent one.

Creditor's Rights Setoff — Mutuality of 198 S.E.501.

X borrowed $1,000 from the bank. X's wife was surety on the note that X gave the bank. X's wife has $1,000 deposited in the bank. The bank failed. Can X's wife set off the $1,000 liability as indorser against the $1,000 the bank owes her?

Held: No. If she could, and X were solvent, she would be paid in full. Here the setoffs are not mutual as she does not owe the bank. Note, however, if she were the real debtor(as where X was an accommodation maker)and the bank knew that fact, then the debts might be mutual and the setoff might be allowed.

Creditor's Rights Priority of Taxes 193 S.E.531.

A trustee under a deed of trust securing A sold pool tables. There were 6 years' personal property taxes and 3 years license taxes(State and City) unpaid.

Held: Trustee is under a duty to use net proceeds of sale first to pay off the taxes which amounted to about $1,600.

Creditor's Rights Bill in equity - What Ct should do when highest bidder refuses to perform? 198 S.E.877.

Q.1. In the absence of statute or some other ground of equity jurisdiction, can a general creditor file a bill in equity to subject the lands of a living person to the payment of a debt?

A. No. He must first obtain a specific lien, by judgment or otherwise on the property sought to be subjected.

Q.2. At a judicial sale X bid $15,000 and deposited $100. Y was next highest bidder at $14,500. X later refused to make the payments. What should the court do?

A.(1)It could take proceedings against X to compel him to pay the $14,900 after confirming the sale as to X.

(2) It could order a resale at public auction at X's risk to the extent of any deficiency.

Note(1) If it forfeits X's $100 deposit and refuses to confirm the sale to him (as it did in the instant case)there are no further rights against X.

(2) It was held error in the instant case to accept privately Y's bid of $14,500. The court should have ordered a sale at public auction.

Creditor's Rights Estoppel — limitations on lien 200 S.E.603

Facts: Charles and Andrew Easley were brothers. Charles wishes to purchase some stock. He needed to borrow $11,000 from the Defendant Bank in order to raise the necessary money. He applied to Andrew to lend him enough collateral to swing the deal. Andrew did so with the knowledge of the bank that the collateral was lent for this purpose. After Andrew endorsed the collateral he left. The Defendant Bank had Charles sign a note, and a provision in this note authorized the Defendant Bank to use this collateral to secure all debts as well as the specific one. Both Charles and Andrew knew the form used by Defendant Bank.

Later Charles became heavily indebted to the Defendant Bank, say to the extent of $22,000. Charles and Andrew were closely intimate, and for 12 years Andrew made no inquiry of the bank as to whether or not it was using his collateral as security for Charles' increased indebtedness.

Question: Was the bank within its rights in using the shares of stock of Andrew as security for Charles' new indebtedness?

Answer:(a) The general rule is that where bank knows that stocks are property of borrower's brother, and are being loaned to borrower to secure loan from bank, the bank acquired lien on the stock subject to such limitations, as the owner placed on borrower's use, that is in this case, to secure an $11,000 indebtedness, but--

(b) Where the brother knows the form of the collateral note authorizes pledgee to use proceeds of collateral to pay off other indebtednesses, and apparently acquiesces for some 12 years with apparently full knowledge of the facts, he is estopped to deny bank's right to hold stock as security for brother's total indebtedness.

Note: Two judges dissented on the ground that not all the elements of an estoppel were present to wit: a.) that he had done nothing to mislead the bank since bank already knew that stock belonged to Andrew and was pledged to secure a specific debt, and (b) the bank is not a third party bona fide holder of the collaterla ignorant of the true facts.

Creditor's Rights Burden of Proof — Wife V. Husband's Crs 200 S.E.629,634.

Q. In a contest between the wife and her husband's creditors, who has the burden of proof to show satisfactorily the bona fides of the transaction whereby the husband has conveyed property to the wife?

A. The wife. The presumptions are against her and in favor of the creditors. But it is a rebuttable presumption. If the wife has actually lent the husband her own money(rather than given it to him) it is as much the duty of a husband to be just to his wife as to other persons.

Important questions:

1. What was the source of the wife's money?
2. Is she corroborated by vouchers, cancelled checks, or memoranda?
3. Was there a contemporaneous debt, or was there a gift, the debt being an after-thought?
4. Has the husband been paying interest? If not is this satisfactorily explained?

Creditor's Rights Va. Law — "Chancery" or "Old English Rule" upon death of debtor Problem Suggested by 2 S.E.2d 323.

Impt.

A debtor is insolvent. He owes X $100,000 and X has a mortgage on assets worth $50,000. The debtor also owes unsecured creditors $100,000. His total assets including mortgaged property are $150,000, i.e. $100,000 free from mortgage and $50,000 mortgaged. If the debtor dies his property would be settled under the Virginia law and the "Chancery" or "Old English" rule would apply.

How much would X get and how much would the other creditors get(leaving out expenses of administration)?

If the debtor is thrown into bankruptcy before death, what then? Under "Chancery" or "Old English" rule, X proves his entire claim(whether or not he has realized $50,000 on mortgaged property) against the free assets. X thus claims $100,000 and unsecured creditors claim $100,000 against $100,000 free assets. X gets $50,000 from this claim plus $50,000 security. Unsecured creditors get $50,000.

Bankruptcy Rule

Bankruptcy rule(Statutory)

X can only prove for $50,000)
Unsecured creditors prive for $100,000) Against $100,000 free asset
Thus X gets $33,333-1/3 plus $50,000 security
Unsecured creditors get 66,666-2/3
$100,000

Creditor's Rights Application of "Old English Rule" re: interest 2 S.E. 2d 323

The A Bank closed its doors because insolvent. It owed the R Bank $125,000 plus (let us say) $4,000 interest accuring after its insolvency. This debt was secured by pledges of certain securities which when sold brought(let us say) $120,000.

Under the "Chancery" or "Old English" rule the R Bank may prove the entire debt of $125,000 as the personal liability of the A Bank. Suppose that Bank is able to pay a 7% dividend, or $8,750. Can this dividend be used to pay interest accrued after receivership took place?

Note these distinctions:(a) If all creditors are unsecured, or(b) all of equal rank then interest ceases on the date of declaration of insolvency as a matter of convenience. (c) But the secured creditor is not confined to a mere right to share in the receivership assets. He has outside security for the whole indebtedness and as long as this outside security is greater than the interest accruing after declaration of insolvency the secured creditor is entitled to collect both if he can. Hence, in our case, the R Bank is entitled to the whole $8750 which gives it $128,750 or its debt to time of the insolvency plus most of its interest after insolvency.

Creditor's Rights VERY IMPORTANT "Old English Rule" 2 S.E. 2d 323.

The A Bank closed its doors because insolvent. It owed the R Bank $125,000. It had pledged certain assets to the R Bank as security therefor. The R Bank sold these securities for $118,000. The receiver of the A Bank is now able to pay a 7% dividend to its creditors.

How much should be paid the R Bank, 7% of $125,000 so long as total amount paid does not exceed total indebtedness, or 7% of $7,000 balance due?

Answer 7% of $125,000.

Hold: While there is great conflict of authority and some four different rules Virginia along with the English courts, the Federal courts(except in bankruptcy where this matter is regulated by statute) and most state courts adopt the "chancery" or "Old English" rule which entitles a secured creditor to prove for the ENTIRE amount of his claim as long as he recovers no more than the total amount due. It is immaterial whether the security has been realized upon or not. The secured creditor relied upon the personal liability of the debtor as fully as any other creditor and in addition to his security, and hence has all the rights of an unsecured creditor plus his security to the extent that he has not been paid in full. Note: The rule in bankruptcy is statutory and limits proof of claims to the difference between the debt and the security.

Creditor's Rights Laborer's Lien 3 S.E. 2d 381.

Q.1. What lien if any is given to a laborer: 2. What effect, if any, does bankruptcy have on this lien? 3. If a laborer fails to perfect the lien does he lose all preference if bankruptcy follows?

A.1. W. 43-24 gives to laborers of a company engaged in railroading manufacturing or, mining in this State "A prior lien on----all the real and personal property of said company which is used in operating the same, to the extent of the monies due for such wages, provided the lien is perfected in the manner prescribed by Code 48-25.

A.2. When a lien has been thus perfected it is enforceable under 67d of the Bankruptcy Act(11 US.C.A.107(d))which provides for the preservation and enforcement of liens given in good faith and not repugnant to the bankruptcy act."

A.3. But failure to perfect the liens under the State Statutes(while destroying the liens) does not mean that the wage claims were not entitled to priority under

the Bankruptcy Act. By 64B(11U.S.C.A. 104b) wages due workmen--which have been earned within 3 months before the date of the commencement of the proceeding, not to exceed $600 to each claimant have priority to claims of general creditors.

Creditor's Rights — Suggested by 3 S.E. 2d 381.
What are the two commonest ways to liquidate business corporations of an ordinary kind?
1st. Bankruptcy proceedings. 2nd. An assignment to a trustee for the benefit of creditors. (note that in Va. such a trustee is a purchaser for value).

Creditor's Rights — Set-off by Surety — 4 S.E.2d 351.
C, the president of the X Bank, indorsed a certificate of deposit for the bank in order to dissuade the owner from withdrawing his money. C owed the bank on his own note payable to the bank which is now insolvent. The receiver sued C. Can C set-off his liability as surety for the bank against the bank's claim against him?
Held: Yes. The duty of the bank to re-imburse the surety arose before its insolvency and takes effect in equity from the date of the contract of surety-ship rather than from the date of actual payment by the surety.
While there is great conflict of authority on this point the weight of authority is that the set-off under these circumstances should be allowed.
Note that set-offs acquired before insolvency are allowable, but that set-offs acquired after insolvency are not as the latter would result in unjust preferences.

Creditor's Rights — Law v Equity — Set-offs — 4 S.E. 2d 351.
S in surety on X's bond. X is insolvent and the debt not yet due. X sues S on a separate obligation. Can S set-off the unmatured debt which is still contingent?
Held: Yes, in equity, but not at law, and this in spite of the general principle that one cannot acquire set-offs as against an insolvent person after his insolvency This is because the payments when made by the surety, will in equity be deemed to relate back to the date of the suretyship contract, at which time the surety became bound for the principal's debt and the principal in turn impliedly agreed to reimburse the surety for what he might thereafter be called upon to pay on his behalf. At that time the principal debtor was not insolvent.

Creditor's Rights — Set-off of Bank Deposit — 4 S.E. 2d 351 at p.355.
A owes an insolvent bank $400 and has a deposit therein of the same amount. Can he set-off the deposit against his indebtedness to the bank or would this not be permitted because it would give A a preference?
"The effect of this is to allow A to use the full amount of his deposit in order to pay his indebtedness to the bank. Thus A, in a sense, is paid his debt in full amount by the insolvent bank while the other depositors who do not owe the bank anything must receive only their pro rata share.
"And yet it has long since been settled that the allowance of a set-off in the situation just mentioned does not result in an objectionable preference, because the receiver merely stands in the shoes of the insolvent bank and holds its assets subject to the same rights and equities to which the bank would have been subject. Citing 146 U.S.499.

Creditor's Rights — Fraudulent Conveyance? Proof necessary — 4 S.E. 2d 369.
An aunt by will left $10,000 to her niece to help her save her home on conditions that the niece convey the property to a trustee free from all incumbrances, and the trustee then to hold the property in trust for the niece for life, remainder per stirpes to her descendants in fee.
The niece satisfied the above conditions. Her general creditors attack the conveyance. The $10,000 was used to pay off a mortgage on the property. Held: No fraud. The mere fact that an insolvent debtor makes a conveyance of his reality is not conclusive evidence that he has perpetrated a fraud on his creditors, but is only one material circumstance.

Fraud must be proved by clear, cogent, and convincing evidence.
The Aunt could dispose of her property as she saw fit and if the trustee paid a reasonable sum for the property there was no fraud here.

Creditor's Rights(Pl & Pr.) Liability of non-resident Stockholder 2d 39[illegible] of insolvent corp.
D was a member of a workmen's compensation mutual insurance company. The contract of membership provided that in case of insolvency each member should be liable for not to exceed one year's assessment in addition to the regular assessments which were a certain percentage of D's pay roll. D was a member in 1930 when the company, a Texas corporation, became insolvent. In 1933, an action was brought in Texas to wind up the affairs of the corporation, and D's liability was fixed at $600. This action was commenced in 1936. Two defenses urged were(1) 5 year statute of limitations and (2) D was not made a party defendant in suit to wind up corporation and fix his liability as a member.
Held: Statute of limitations did not start to run until D's liability was definitely determined and he was asked to pay some definite amount because prior to that time no action lay.
Liability of a non-resident stockholder is determined by the laws of the State where the corporation is incorporated.
A decree assessing stockholders of an insolvent corporation is conclusive against non-resident stockholders although not served with process within the state in which it was rendered or made party to the proceedings in so far as the necessity for such decree and the amount of the assessment are concerned where court has jurisdiction to determine these matters.(But it is not conclusive as to such personal defenses as payment, statute of limitations, or extent and duration of stockholders)

Creditor's Rights Priority of claims - Daughter v. (10 S.E. 2d 481.
F and D were father and daughter. P had a judgment against F. F and D formed a partnership for the practice of law. D was admitted to the bar in 1938. One S had a deed of trust on F's law books and office equipment to secure a debt of some $500 which had priority over P's judgment.
It appears that F received some $500 in fees prior to D's passing the bar examination, and that he turned this money over to D who paid off the deed of trust and took an assignment of the note so secured. Has P or D priority? F failed to testify.
Held:(1) Since the money came from F it is just the same as if he had paid off the deed of trust. "It is a well settled principle that payment by one who is primarily liable is an extinguishment of the debt. However, transferred or assigned, it is ever afterwards a mere nullity".(2) While it is true that the burden of proving fraud is on him who alleges it, where the transaction assailed is between father and daughter or other near relations only slight evidence is required to shift the burden of showing bona fides.(3) There are two "badges of fraud" here.
(a) F who knew the facts failed to testify. His silence speaks louder than the voice from the housetops.
(b) Neither were the firm's books offered in evidence to show when the fees were earned, when they were divided between the partners, and, if so, in what proportion.

Creditor's Right(IMPORTANT) Assignment for benefit of all 4 S.E. 2d 742.
The F Bank had a first lien on X's land. X made an assignment for the benefit of all his creditors. It was desired to sell the land free from all liens. The F Bank offered to co-operate provided its indebtedness would be paid in full before any other creditors should receive a cent. Could the court accept any such offer?
Held: No, for two reasons.(1) [illegible] prohibits a preference in deeds of assignment for the benefit of creditors.(2) Such an agreement would inequitably interfere with the rights of general creditors who have an equal right to share in the proceeds from the sale of other property.

Creditor's Rights Judicial Sale - Inadequacy of 5 S.E. 2d 521.
C died intestate and insolvent seized of several tracts of land. P bought one of these tracts at a judicial sale for the sum of $3,950. The tract had been appraised at $[illegible],100.

J later filed an upset bid of $3,932.50 and claimed that P's bid was grossly inadequate. The sale was properly advertised and well attended. The trial court refused confirmation of P's bid because of the upset bid.

Held: Error. If $3,5550 was grossly inadequate then $3,932.50 was certainly not adequate. J was present at the time of the bidding. The burden of proof was on J to prove gross inadequacy. Other tracts brought only 42% of appraised value but land values vary greatly in trucking areas. Public policy requires that judicial sales be taken seriously.

Creditor's Rights — Upset Bids — Principles — 5 S.E. 2d 523.

Statement of principles.

1. Where judicial sale is duly advertised and fairly conducted, an upset bid will not be received on the sole ground of inadequacy of prices unless it is clearly established by the evidence that the price offered at the sale is grossly inadequate.

2. Generally, one who was a bidder at judicial sale by himself or by an agent, or was present and had an opportunity to bid will not be permitted to put in an upset bid before confirmation.

Creditor's Rights — Special Deposit — Bank's receipt of deposit w knowledge of its insolvency — 7 S.E.(2d) 885.

F, as commissioner in chancery, sold a parcel of land for $1375 and placed the money in the D Bank to his credit as special commissioner. Eight days later the Bank closed and is able to pay only ten cents on the dollar. Those entitled to the $1375 claim priority. Discuss principles involved.

When the officers of an insolvent bank, with knowledge of the insolvency, receive from one of its customers a deposit, they are guilty of fraud and the bank becomes a constructive trustee of the deposit. The depositor may recover the deposit, if it can be identified, or if it cannot be identified, he may recover its equivalent. The mere fact that the bank closed eight days later hopelessly insolvent does not prove actual knowledge of insolvency. (It seems that in cases of this kind actual knowledge or scienter is necessary and that negligently not knowing when there is a duty to know is not enough).

It was next contended that this was a special deposit. In the absence of a clear agreement to the contrary expressed or implied, a deposit is presumed to be a general deposit. This is true even though the depositor styles himself a fiduciary and the funds are credited to a separate fiduciary account. It is true even though the funds are known by the bank to be trust funds, and is likewise true even if the funds are to be used for a particular purpose, so long as the depositor assents to their being commingled with the general funds of the bank.

In order to overcome this presumption, evidence must be adduced that the depositor and the bank were agreed that the bank was to have no right to use the funds but should hold them for specific repayment to the depositor.

Creditor's Rights—Equity — Trustee's duties in sale of Deed of Trust Property — 10 S.E. 2d 558

(1) Give the gist of V. 25-5[illegible] with reference to the terms at which the trustee in a deed of trust may sell the property which secures the debt.

(A) "Upon such terms and conditions as the trustee may deem best." Hence he has a large measure of discretion, which is however, subject to review. It is not per se an abuse of discretion to sell for cash.

(2) When will a trustee's sale be set aside for the reason that he sold at too low a price?

(A) If Debts are due and there is no fraud or collusion "it has long been the settled rule in this court that mere inadequacy of price is not sufficient to avoid a deed, unless so gross as to shock the conscience of the chancellor and raise a presumption of fraud".

Held: That even if 11 witnesses testified that land was worth $6,000 a sale for $3,250 that was fairly conducted will not be set aside.

Creditor's Rights — Mechanics' Liens — Mechanics' Liens — 13 S.E. 2d 801. — Filing requirements

X owned land, and contracted with a for the erection of a house. While work was going on X sold the land to Y. When work was finished A filed a mechanic's claim

a mechanics' lien. He gave the name of the owner as X with whom he had contracted instead of Y who was the owner at the time he filed his memorandum.

Held: The lien is invalid. The mechanics' lien law must be read in connection with the registry laws. The object of filing the memorandum is to give notice to subsequent parties, who might deal with the land. Such parties would look up to Y's transactions with the land after Y was owner, and indexing in X's name would be outside the chain of title, and notice to no one. "Owner" means owner at the time of filing the memorandum. If one purchases property he must find out who the owner is, and the same is true if one accepts a deed of trust. "The fact that the mechanics lien is to be indexed in the general index of deeds is a plain indication that he is to be placed in the same category as a purchaser or deed of trust creditor."

Creditor's Rights V#64-173 One purchases land at his peril from decedent's heirs 13 S.E. 2d 312

X owed a bank $600, the debt being unsecured. X died survived by 12 children. Within a year from his death there was a partition suit known to the bank, but the bank was not a party. The land was sold to Z who bought in ignorance of X's debt to the bank.

The bank sought to subject the land in Z's possession to its debt. Result?

Held: For the bank: By 64-173 one who purchases land from the heirs of a decedent within one year of his death does so at his peril with respect to debts owed by decedent even if unsecured. A partition sale is no exception to this statutory rule. The statute gives constructive notice.

Creditor's Rights Assignment of Insurance 177 Va. 341.

H was short a large sum as treasurer of Scott County. Plaintiff had to make this shortage good. H had a policy of life insurance payable to his estate which has a surrender value. He made his wife the beneficiary in return for her assignment to him of an account in an insolvent bank. He also notified the insurance company, and paid further premiums to the extent of $400 while insolvent. No formal assignment to the wife was made.

Held: An assignment requires no particular form. Provisions requiring written notice to the insurance company are for its benefit only. H's wife has purchased the policy. Consequently she is entitled to the full proceeds, and not just to the amount advanced for it, as would be the case if the transaction had been a loan with the policy as security.

Note, however, that the $400 premium paid while H was insolvent was a voluntary payment and void as to his creditors, so that H's wife must deduct $400 and pay same to plaintiff.

Creditor's Rights Judgment Lien — No rights to rents & profits 177 Va. 658

X secured a judgment against Y which was duly docketed. Y owned timber-land. He sold the timber to D who removed same and paid Y. X now claims that the sale of the timber to D by Y is void as to him, and that D owes X the amount he paid Y.

Held for D. A judgment lien gives no right to the possession of the property, but only a right to file a bill in equity for its enforcement. Until the judgment creditor does this he has no rights to the rents and profits of the land, nor can he maintain an action of waste against the judgment debtor.

Creditor's Rights B/P in Fraudulent Conveyance Suggested by 7 S.E. 2d 888.

Burden of Proof in case of fraudulent conveyance to prove fraud:

Case 1. Insolvent husband to wife. Here there is a presumption of fraud and wife must show by clear evidence that she furnished the money herself and acted in good faith. (5 Digest 176)

Case 2. Between brother and brother or other close relative: Presumed fair, but only slight evidence is required to shift the burden of showing good faith.

But note that if debtor is not insolvent at time conveyance is made, creditor alleging fraud must show same by evidence that is clear and convincing. General rule is that fraud is not presumed.

Creditor's Rights Partition + Creditor's Suit Va. 178 Va. 513, 519.

X had a judgment against A, and filed a bill in equity to enforce such judgment against land owned jointly by A and K. The commissioner in charge of the sale determined that K's interest was worth $160. A's interest was worth a great deal more since A had erected valuable improvements. The building burned, and the insurance company gave $6,000 insurance money to the commissioner who paid off all the lien debts. There was $900 left. Who is entitled to the $900 as between A, the owner, and B, the bidder whose purchase had been confirmed?

Held for A: A court of equity does not have power to substitute a creditor's suit for a partition suit. Hence it had no power to sell A's interest and the sale was void. Proper procedure would have been to have first partitioned the property, and then to have sold A's part. By statute(Va.-Code) a lien creditor may compel a partition of the jointly owned land, and then subject the interest of the debtor to the satisfaction of the debt.

Creditor's Rights 178 Va. 542.

Compare these cases. Substituted + Extended Mortgages

Case 1. A deed of trust on Blackacre to X to secure a debt of $2,000. Later a sale of mortgage of Blackacre to Y and still later a new deed of trust to X as a substitute for the first one. What are priorities? Since the second deed of trust to X was given in place of the first it destroys the first and Y now has priority.

Case 2. The same as Case 1 except that there is a statutory marginal extension of the first deed of trust for another 20 years instead of a substitute deed of trust. In this case the original deed of trust is not discharged but extended, and Y's rights are still subject to X's prior rights.

Case 3. The case involved here: W owned land in two counties, A county and B county. He mortgaged both tracts of land to X to secure a debt on Oct.9,1912 the debt being due one year from date. The mortgage was promptly recorded in both counties. In April 1920 W gave X a substitute mortgage on both tracts of land which was recorded in A county in 1920 and in B county on Oct.11,1933. In Oct.1920 W sold the tract of land in B county to Y by a warranty deed. On Oct.6,1933 W and X executed a statutory marginal extension of the Oct.9,1912 mortgage. Discuss priorities assuming that Y knew nothing actually of any mortgage, and paid value.

Y had constructive notice of the Oct.9,1912 mortgage and hence bought subject to it. This mortgage was destroyed by the substitute mortgage of 1920 whether Y knew about it or not. But since Y did not actually know about the substitute mortgage he is not bound by it. He does not have constructive knowledge of a mortgage recorded only in another county. The statutory marginal extension of a dead mortgage cannot deprive Y of his intervening rights.

Creditor's Rights Bankruptcy Preferring one Cr over another 179 Va. 288, 297

F owed S, his son, $10,000. He also owed C, a judgment creditor $10,000. F inherited real property worth $10,000 from another son, and at once deeded it to S in discharge of his debt to S. F had no other assets. C filed a bill in equity to cancel the conveyance from F to S. What decree?

If the debt from F to S was a genuine one and C has not docketed his judgment in the county or city in which the land is located S wins. "Except so far as prohibited by the Federal Bankruptcy Act, the Law of Virginia does not prevent a debtor from preferring one of his creditors to another, provided there is not design between the debtor and creditor to secure some fraudulent advantage to the debtor.

The fact that the transaction is between close relatives other than husband or wife is not per se a badge of fraud, but if good business practices are not followed as where no accounts are kept, no interest paid, no attempts to collect the debts are made, then the burden of proving fraud has been met, and defendant has the burden of going on with the evidence. Note: The essentials of a voidable preference in bankruptcy are given by Black as follows:(1)there must have been an act of the debtor in procuring or suffering the entry of a judgment against him or in making a transfer of his property;(2)the debtor must have been insolvent at the time of the transfer or of its recording or of the entry of the judgment;(3)these things must have

occurred within four months before the filing of the petition in bankruptcy, or after the filing and before the adjudication;(4)it must result from the transaction, if allowed to stand, that it would enable the creditor to obtain a greater percentage of his debt than other creditors of the same class; and(5)the person receiving it or to be benefited by it must have had reasonable cause to believe that enforcement of the judgment or transfer would effect a preference.

Creditor's Rights Caveat Emptor applies to purchaser at public sale. 179 Va.172,175. Sale

X borrowed $200 from Y and gave a deed of trust on land to T to secure the obligation. After default T duly sold the land at a public sale to D for $430 which D later refused to pay on the ground that the boundaries of the land were uncertain. T then hired a surveyor whose survey described land different from the land conveyed to T. T sued D for $430. Result?

Held for T. T sold the very land that was deeded to him in the deed of trust. T had no authority to order a survey, and the survey is not binding on anyone. Now note well this language, "A purchaser of land at a public sale made by a trustee must look to the title of the grantor of the land, and is entitled only to a deed of special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of caveat emptor applies."

Creditor's Rights Conflict of Laws Md. Receiver has no standing in Va. 179 Va.343 Ch. Ct.

By statute in Maryland holders of stock in Trust Companies are subject to double liability, that is, for each $100 share of stock, par value, they may be called upon to pay as much as $100 in addition in case of insolvency and the receiver of the trust company is authorized to institute proceedings to collect same. D, a stockholder of a Maryland Trust Company lives in Virginia. He ignored an assessment by the Receiver, and the Receiver sued him in Virginia. Result?

Case dismissed. A foreign receiver has no standing in a Virginia Court. The receiver is an officer of the Maryland court in Maryland alone. The proper procedure is to petition the Va. court for an ancillary receiver and have him bring the action.

Creditor's Rights Traders Act V#55-152 "lien Creditors" 180 Va.159

Code #55-152 reads in part, "If any person transact such business(as a trader)in his own name, without any such addition(as and Co.);all the property,stock, and choses in action acquired or used in such business shall, as to the creditors of any such person, be liable for the debts of such person." A, a manufacturer of automobiles, sold the cars in question to B, a retail dealer in cars, on the conditional sales plan. B was to have no rights in the cars other than the power to sell them,all receipts from such sales to go in a trust fund until the cars were paid for. B defaulted and A's assignee took the cars and sold them. A week later B was thrown into Bankruptcy. B's trustee in Bankruptcy sought to hold A's assignee.

Held: That "creditors" in the Traders Act means lien creditors. When A's assignee retook the cars B had no lien creditors. A's assignee was merely taking his own cars. If, however, he had waited to take them until after bankruptcy then the trustee would have had a lien and would have had a prior right to the cars. Note: the Traders Act does not apply to goods left with the trader merely for safekeeping,nor to registered cars where a certificate of title has been issued,nor to any transaction where the filing requirements of article 9 of the U.C.C. are applicable and have been complied with.

Creditor's Rights Transfers to Wife 181 Va.52.

Q. A husband, while insolvent, built a $5,000 house on his wife's land. Do his creditors have a lien on his wife's land? A. Yes. This is merely a gift to his wife, and void as to his creditors. Husband should be just before he is generaous.

Q. A husband had a life insurance policy payable to himself which had a surrender value of $4,000. He gratuitously assigned it to his wife while he was insolvent. Is the transaction void as to his creditors? A. Yes, for the same reason as above.

But, if the wife pays full value from her own funds, and does not know that husband intends to hinder, delay, or defraud his creditors then the wife is protected, but she has the burden of proving such facts since they can be shown by her, if they exist, easier than by anyone else.

CREDITOR'S RIGHTS Equity Enforcement of Taxes 181 Va.181.

X owned land which he mortgaged for $60,000. A year later in 1931 he deeded the land to Y who purchased same subject to the mortgage. During the next seven years no one paid any taxes on the property. In 1939 the land was worth $18,000; taxes and penalties were $7,500; and the mortgage was outstanding. Y died leaving plenty of personal property to pay all his debts. The City of Richmond filed a bill in equity to subject the land to the lien of its taxes. The mortgagee contends,(1)that the City should collect the taxes from Y's estate where it has an adequate remedy at law, (2)that under the doctrine of marshalling assets the City should look to Y's estate, and(3) Equity having taken jurisdiction should give complete relief and even if the City is entitled to enforce its tax lien it should also settle the dispute between Y's estate and the mortgagee.

Held:(1) Under tax Code 403(now V#58-1014) taxes may be enforced by warrant, motion for judgment at law [illegible], bill in chancery or by attachment just as between individuals, and by V#58-1023 the City is given a lien prior to any other encumbrance. The City has an election which is the City's election and not that of the mortgagee.

(2) It is well settled that, in the absence of independent equities, the doctrine of marshalling assets does not apply unless the litigants are creditors of the same debtor. Here Y's estate does not owe the mortgagee.(Note that if Y had assumed the mortgage this situation would have been different.)

(3) That while the Court of Equity could have settled all matters between the parties before it, this was not mandatory but discretionary. The mortgagee can still assert a claim against Y's estate if he so wishes, but that is collateral to the City's right to promptly collect the taxes.

CREDITOR'S RIGHTS Equity Pleading Allegations for "lien" or "debt" 181 Va.847.

X died intestate seized of three tracts of land. C, a judgment lien creditor,filed a creditor's bill in equity.(Note that he did not file a bill to enforce the lien.) He made X's administrator a party defendant. The bill did not allege that X's personal property was insufficient to pay his debts. No proof was offered that the rents and profits of the land would not pay off the debt in five years. The court ordered a sale. The debt was $1500. Tract 1 brought $900; Tract 2 $700; and Tract 3 $1200. Should the court confirm the sale?

No, it should not. The bill is defective on its face since the primary fund to pay debts is personal property. A lien debt is a debt.(If this had been a bill to foreclose a lien then no allegation that the administrator could not pay the debts out of the personal property would have been necessary).

Also, if Tract 1 and Tract 2 brought more than the debt there was no authority to sell Tract 3.

It was unnecessary to prove that the rents and profits would not pay the debt in five years as that is a requisite of foreclosure of a lien. V#8-391 governs foreclosure of judgment liens. V#64-171 et seq. govern general creditors' bills against decedents' estates.

CREDITOR'S RIGHTS Lien of Landlord Priority of Claims 182 Va.351.

Impt.

X owned a restaurant. He became insolvent and made a voluntary assignment for the benefit of his creditors. With the consent of all the creditors the property was sold for $1680. X owed the City of Danville $222; his landlord, L, $1500 rent, 3½ months in arrears and 2½ months not in arrears; the U.S. $1559; the Virginia Unemployment Compensation Commission $66. What are the priorities?

A.(1) Danville $222 taxes. These by statute have priority over L's claim.

(2) L for not more than six months' rent past due or to become due. Under the Virginia statute L has a specific perfected lien regarded as accruing from the date of the lease. Neither distress for past due rent nor attachment for rent yet to

become due are necessary to perfect the lien. These are merely methods of enforcing the lien. V. 55-268, Debts due to the U.S. (31 U.S.C.A. Sec.191) have first preference on all property so assigned over and above valid prior specific perfected liens. Hence only the interest of the assignee after these liens have been satisfied can be reached. (4) V. 30-77 , which makes payroll taxes a lien against employer's assets expressly preserves the priority of any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued. But see 65 Sup. Ct. 304 reversing this case with respect to both the City of Danville and the Landlord (Mr. Justice Jackson dissenting). The landlord's lien is not perfected until the distress and attachment actually take place. The City of Danville had no perfected lien until it distrained for taxes which it did not do until after the assignment for the benefit of creditors. Hence the U.S. has the first claim.

Sup. Ct. Reversed

Creditor's Rights-Upset bids 182 Va.842.

Property was sold at a partition sale for $17,900. It had been appraised at $14,000. The owners were two infants and a soldier. The property was really worth as much as $30,000 due to peculiar war conditions the Commissioners know nothing about. One S of New York City put in an upset bid of $23,000. S did not know of the proposed sale until after it was consumated. The commissioners did not send advertisements to those peculiarly affected because they were ignorant of such matters.

Held: (2 judges dissenting) that in spite of all the above and price obtained was not grossly inadequate, and that the stability of judicial sales requires its confirmation.

Creditor's Rights Mortgages Tee 185 Va.977.

X borrowed $21,000 from his brother, B, and gave his notes secured by a deed of trust on Blackacre in which deed of trust T was named trustee. B died and T qualified as B's personal representative. May T who has not been paid foreclose the deed of trust as an ordinary deed of trust is foreclosed in Virginia?

No, he cannot because he is not both trustee and beneficiary. As long as he as trustee stands indifferent he can sell the property at the request of any beneficiary after default without resorting to foreclosure proceedings in equity. But when he himself becomes the obligee he must foreclose just as if the deed of trust were a mortgage.

CREDITORS RIGHTS MORTGAGES TAXATION 186 Va.217.

X mortgaged Blackacre to P to secure a $50,000 debt. The mortgage provided that X would pay the taxes, and if he did not P could pay them and add them to the mortgage debt. X sold the mortgaged property to D subject to the mortgage the deed expressly providing that D was not to be liable for the mortgage in any way. No one paid the taxes which after a number of years amounted to $9,000. The premises were sold at a tax sale for $11,000 and $2,000 was given P who now contends that since D was the owner and since in effect P has paid the taxes that D should have paid he is subrogated to the rights of the taxing authorities against D personally. Is this correct?

Held: No. The taxes in this case were an accretion to the mortgage and as such purely an in rem right against the land and an in personam right against X. If P had paid the taxes he could only have added them to the mortgage. He ought not to be in any better position where he fails to pay. "The amount paid for taxes is a demand dependent upon the mortgage and is not an independent right enforcable in a second action." D has not assumed the debt himself nor has he asked anyone to pay the taxes for him.

CREDITORS RIGHTS Lien on Shifting Stock & Fixtures 188 Va.214

Note: The general rule in Virginia used to be that a deed of trust on a shifting stock of merchandise, where the merchant is left in possession with power of sale, was prima facie fraudulent and void. This was not true, however, of equipment and fixtures pertaining to a merchandise business which were not intended to be sold in the usual course of trade. "It would be a severe restriction upon the owner of a hotel or restaurant to prohibit him from giving a lien on the main asset of his business, which consists of his permanent equipment and fixtures, if he finds it necessary or expedient to finance its expansion."

CREDITORS RIGHTS Required Notice of Foreclosure Sale 188Va.680

H lent C $100 and took his bond for same in 1936 and gave a deed of trust on Blackacre to secure same. Later C went to Baltimore to live. He paid two $25 payments under pressure and then neglected and refused to pay anything more. Six years after the bond was due H finally asked the trustee to foreclose. The deed of trust did not specify any form of advertisement. V#5167(6)(as the law was when the deed of trust was executed) did not require publication in a paper, but notice was to be given "in such reasonable manner as the trustee may elect." The statute now(1949)directs publication in a newspaper once a week for four weeks in such a case. The trustee did not publish notice of the sale in any paper. He did not notify the debtor-grantor. He sent out some handbills and posted one personally on the bulletin board at the court house. One handbill was posted three miles from the premises and none nearer. Only two bidders showed up--H and the ultimate purchaser who bought the property at 41% of its minimum fair market value. Can C have the sale set aside?

Held: No.(two judges dissenting). The law at the time of the giving of the deed of trust governs. The sending out of handbills was a customary method of advertising before the law was later changed. The statute expressly states that no notice need be given the debtor-grantor. Property at a forced sale seldom brings anything like its real value. The price is not so grossly inadequate as to shock the conscience of the court, and the whole thing is H's fault anyway for neglecting to pay his long overdue trifling debt.

CREDITORS RIGHTS Note taken in discharge of Judgment 72 S.E.2d 105, 189 Va.236.

P secured a judgment against D for $177, and execution was issued and returned in 1928. In 1929 a note in the exact amount of the judgment plus interest was given and a notation was made on the records as follows, "Taken up by D's note,No.2004".After the statute of limitations had run on this new note but before 1949 the question arose as to whether or not P has any interest in D's land.

Held: No. Whether the new note was taken in absolute payment of the judgment thereby discharging it,or whether it was taken in conditional payment is a matter of intent. The presumption is that the note was not meant to discharge the judgment until it was paid in which case the judgment would still be a valid lien,but in this case that presumption has been rebutted by the notation on the record as above set forth.

1113. Land held by H+W was tenants by entireties cannot be reached by Creditors 192 Va. 735.

CREDITORS RIGHTS Property Domestic Relations

X conveyed land to H and W, husband and wife as tenants by the entireties with survivorship as at common law. C obtained a judgment against H for $2800 whereupon H and W deeded the land to W without any consideration. C charged that this conveyance was made to defraud him, and filed a bill in equity to enforce the lien of his judgment. H and W demurred. What ruling?

Held: For H and W. In Virginia only the joint creditors of H and W can reach land held by H and W as tenants by the entireties with survivorship. Such an estate cannot be sold by H or W separately, nor can it be partitioned, nor can the separate creditors of H or of W reach the land or any part thereof by attachment. Since H, prior to the conveyance to W, had no interest C could reach, no fraud is perpetrated on C when H conveys what C cannot reach to W. If the law should be changed please tell the legislature.

Sale — Duties of Tee & Purchaser to give Debtor adequate Notice

CREDITORS RIGHTS Deeds of Trust 193 Va. 744.

X sold a car to A for $1540 taking A's note and a deed of trust on the car. The deed of trust specified what notice was to be given A in case of sale and constituted T a trustee. When default occurred T asked his lawyer, K, to foreclose. K failed to give A the required notice and sold the car to X for $300 when the evidence indicated it was worth about $980 which was the balance of the debt due on the note at time of default.

Held: The sale was void for two reasons: (1) A trustee must act in accordance with th terms of the deed of trust and a sale without the notice required therein is void. It is the purchaser's duty to see that the trustee is acting within the terms of the deed of trust. (2) The trustee's duty is a personal one. A delegation of it to his attorney or to anyone else is void. In the instant case the trustee was not even present when the sale was made. T and X are guilty of conversion of the car. A is at least entitled to a credit to the amount of the value of the car.

Note: We would reach the same result under U.C.C.#9-504 which requires that notice be given the debtor, and U.C.C.#9-507 which makes a secured party liable for damages to the debtor caused by the secured party's failure to comply with the U.C.C. requirements when he disposes of collateral after default.

UCC

CREDITORS RIGHTS Transactions between H & W 194 Va. 191.

P secured a judgment of $2,000 against H. W, who was H's wife had invested $800 of her own money in a sawmill and made some profits on the venture. Still later H worked for W gratuitously as the manager of her sawmill. Business was good and some land was bought and sold by W. P now claims that he is entitled to reach the proceeds of this sale as fraudulent as to him. Is this contention sound?

Held: No. While the general rule is that in transactions between husband and wife the burden is on the wife so show that she did not buy property with funds furnished by the husband she has met that burden by showing that she purchased the land with her own money. None of H's money was traced to W and then into the consideration paid for the land. "Here the evidence establishes that the insolvent husband donated his services to his wife by managing and conducting her business while his creditor remained unpaid. That is a practice not lending itself to commendation. Yet the gift by the husband is not unlawful, and of itself it is insufficient to convict the wife of fraud."

CREDITORS RIGHTS Partnership → Corp. 111h. Partners as secured cro. 195 Va.513.

A and B while partners borrowed $5,000 from Bank and executed a deed of trust on certain land to secure the debt. Later A and B sold the partnership assets to the C Corporation which assumed the indebtedness. A and B owned one half the stock in the corporation. The transfer was made in good faith for a valuable consideration and with the knowledge of Bank. Later the C Corporation failed and A and B paid off the indebtedness. They now claim to be subrogated to the rights of Bank as creditors of the C Corporation secured by the deed of trust. Other creditors of the C Corporation contend that the deed of trust was extinguished when the debt it secured was paid by the original obligors.

Held: A and B are secured creditors. When the C Corporation assumed the debt it became primarily liable and A and B became sureties. When the surety pays the creditor he is subrogated to the security which the creditor holds. Creditors of the C Corporation had constructive notice that its interest in the land was subject to this indebtedness so there is no fraud on them, and hence it is immaterial that A and B are large stockholders in the C Corporation.

CREDITORS RIGHTS Insurance Garnishment Garnishment 196 Va.516.

Good Case

A, after reserving a life estate to herself conveyed Blackacre to her son, X, and X's wife, W, for and during their natural lives, and the life of the survivor thereof with the remainder in fee to their children, and expressly provided that the same shall not be subject to their debts and obligations. X and W took possession at once paying A a small rental, and agreeing to keep up the $4,000 fire insurance policy which was payable to A and X as their interests may appear. It was also agreed between A and X that any insurance collected would be used to replace the house which was insured for its full value. J is a judgment creditor of X. The house burned and J garnished the Insurance Co. What four plausible defenses has X, and which of these, if any, are good?

(1) Garnishment proceedings are purely statutory. The judgment creditor can have no greater rights against the garnishee than the judgment debtor. In this case any sum collected is impressed with a trust for the benefit of A and X's wife and children to be used for replacing the building, and does not belong beneficially to X alone.

(2) Under our statutes V#8-441 et seq. the claim against the garnishee by the judgment debtor must be certain and absolute, because the statutes do not authorize a court of law, in a mere side issue growing out of a garnishment proceeding, to exercise the intricate and complicated duties of a chancellor(in this case to figure out the value of X's interest in the $4,000).

(3) The insurance money in this case takes the place of the house which was held by H and W as tenants by the entireties for the life of H and W with survivorship for the life of the survivor, and the separate creditor of H cannot reach such an interest. (4) The insurance money takes the place of the house which was in the nature of a spendthrift trust since conveyed to X and W free from the claims of their creditors.(Held: Defenses(1)and(2) are valid. Hence there is no need of considering (3)and(4).

Notes:(a) In general the insurance money does not take the place of the building with the following exceptions,(1)Insured insures and dies; a loss takes place after his death while the policy is still in force,(2) Insured contracts to sell. Before the title passes the premises are destroyed by fire.(b) In 137 Va.427 a tenant pur autre vie insured the premises. They were destroyed by fire after the death of the cestui que vie, and the insurance company elected to pay anyway. It was held that the remainderman had no interest in the proceeds as the tenant pur autre vie had merely insured his interest. The fact that the insurance company paid when under no duty to do so is no skin off the remainderman's nose, and gives him no rights. In the principal case the court indicated that if X had merely been a life tenant, and had insured for himself alone, garnishment proceedings could have been successfully instituted against the insurer.

CREDITORS RIGHTS Contracts 1115. Assignments 196 Va.686.

O was owner, C was general contractor, and S was a sub-contractor. C agreed with O that he,C, would pay all laborers and materialmen. S agreed with C that he,S, would pay his own laborers and materialmen. S borrowed $8,000 from the P Bank, and assigned to it all its rights under the contract as security for the loan. S failed to pay his materialmen. If C were to pay them he would more than exhaust the amount he owed S for the work. P Bank sued C who interpleaded S's materialmen. What judgment?

Held: For the materialmen. S had nothing coming to him. An assignee stands in the shoes of his assignor. The claims of S's materialmen arise out of the same transaction between C and S and are in the nature of recoupment rather than set off which arises from independent transactions and for which suit could be maintained. This result is not changed by V#11-5 which was intended merely to change the effect in bankruptcy of an assignment of accounts receivable if Virginia had the "English Rule" --a matter which was then almost in complete doubt. It was not intended to change the general law with regard to the right of a debtor to assert against an assignee all just discounts or to deny recoupment to a debtor when he sought to cut down the claim of the assignor because he had violated some duty in the performance of his contract with the debtor.

Auto Cert.f

CREDITORS RIGHTS Sales Lien on Shifting Stock of Merchandise 196 Va.711.

V#46-71 reads in part, "Such certificate of title, when issued by the Division(of Motor Vehicles) shall be deemed adequate notice to the Commonwealth, creditors and purchasers that a lien against the motor vehicle exists * * *". D, a dealer, bought a certain Packard Car, borrowed $2800 from P, and applied for a certificate of title showing a $2800 lien on the car in favor of P. The certificate was delivered to P who consented to D's offering the car for sale. B bought the car for cash, received a receipt, and was told he would get his certificate of title within a few days. D did not pay off the lien or otherwise account to P. As between P and B who has the better right to the car?

Held: Buyer has the better right(3 judges dissenting). It has always been the law in this state that a lien on a shifting stock of merchandise is void as to purchasers in the ordinary course of business. When P permitted D to keep the car in his show room for purposes of sale he is estopped to assert a title as against the buyer. The statute set forth above was not meant to change this long established rule but only to provide a uniform method of recording the lien. But the recordation of a lien on a shifting stock of merchandise no matter how made is still void as against a purchaser in the ordinary course of business. Basis of dissent: Statute is plain. It is evidence of a special policy with reference to motor vehicles namely that all should buy in reliance on the certificate of title.

CREDITORS RIGHTS Insurance Non policy holder – N.Y. 196 Va.790 Va. business

The Preferred Accident Insurance Company of New York became insolvent. It has been duly licensed to carry on business in Virginia. X of Maryland was the assignee of a Virginia creditor. What can X do to collect his claim?

Held: He can put in his claim with the New York liquidator, or, standing in the shoes of the Virginia creditor, he has a lien on the securities that are required by statute to be placed in the hands of the Treasurer of Virginia in the amount of $45,000 to secure the payment in full of first the Virginia policy holders and second other Virginia creditors. An ancillary receiver will be appointed in Virginia and X should file his claim with him.

Floating Lien 1116. Revised June 1965. 199Va.312.

CREDITORS RIGHTS--Trust Receipts--Chattel Mortgage on a Shifting Stock of Merchandise

This case is omitted because of radical changes in the law.

The U.C.C. permits an inventory to be used as collateral and allows a floating lien thereon so that after acquired inventory would be subject thereto provided that the proper steps are taken for perfecting the security interest. This interest, however, is subordinate to that of a purchaser in the ordinary course of the seller's business. The U.C.C. does away with the distinctions between the various types of personal property security interests. You should now read the summary of U.C.C.--Article 9 as it appears on pp. 18-26 of these Bar Notes following P. 18 of 1964 Legislative Changes.

Statements to Small loan Co.

CREDITORS RIGHTS--Constitutional Law 200 Va.607.

D wished to borrow $600 from the P Small Loan Co. When asked about his debts he orally represented that he owed A and B. Before the loan was made he represented in writing that he owed A and B and no one else. As a matter of fact he also owed X and Y. Shortly after receiving the loan he took out bankruptcy and received an unopposed discharge. V#6-314, which applies to small loan companies, reads, "No written financial statement given by any applicant for a loan, or by any borrower, to a licensee under this chapter, shall be received in evidence, or otherwise used, against such applicant, or borrower, in any proceeding to recover the indebtedness incurred in connection with which the statement was given; nor shall any such statement be used in opposition to the granting of a discharge in bankruptcy." It is admitted that the last clause is invalid because contrary to the bankruptcy act itself. P sued D for damages arising from the false statements.

Held:(1) The first part of V#6-314 is severable from the invalid last portion.(2) While the statute does not apply to fraudulent oral statements, D did not say orally that A and B were the only ones he owed. The statement was true as far as it went. (Note: The court made no mention of the fact that half the truth is often a great lie Hence the oral statement was not a fraudulent one.(3) The written fraudulent statement is inadmissible under the first part of the statute.(4) While the statute applie only to small loan companies it is not unconstitutional for that reason. Small loan companies may be reasonably placed in a classification all their own under the police powers of the State because of their chances to take advantage of those in desperate financial circumstances.

CREDITORS RIGHTS Buyer in Ord. course 1117. Revised June 1965. 200 Va.776.
X was dealer in second hand cars. He owned and used one of these cars for his own personal and business needs. He borrowed $1200 from Bank and gave a chattel mortgage on the car as security. The chattel mortgage was noted on the certificate of title which Bank kept. X kept the car with other cars on the used car lot while he was at his place of business. However Bank did not have actual knowledge of this fact. P bought the car from X who promised to send him the certificate of title in a few days. X failed to pay Bank. As between P and Bank who has the better title?
Held: For Bank. This case is distinguishable from 196 Va.711(supra these notes) in that, in this case, Bank had no knowledge that X kept this car with the other cars. Bank could reasonably suppose that the mortgaged car was X's personal car and that when he drove it to his place of business he did not place it among the cars for sale The Gump Case(142 Va.190) which practically made the financer a guarantor of the integrity of a financed retailer in the case of sales to bona fide purchasers for value by the retailer was expressly overruled; but the instant case is in turn overturned and the rule in the Gump Case re-established by U.C.C.#9-307(1) which reads in so far as applicable to our case, "A buyer in ordinary course of business takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."

CREDITORS RIGHTS--Fraud--Foreclosure Sales--Rule 2.22 201 Va.11
At a deed of trust foreclosure sale by Trustees the property was knocked down to B, the buyer, for $3200. Before B bid in the property, he looked it over and it was obvious that it consisted of an uninhabitable vacant brick building in need of considerable repair. B failed to examine a seriously defective back wall because of difficulty of access through a locked gate on a third party's premises. The occupant had been ordered by the city building inspector to get out until repairs were made. These facts were not disclosed to B, but there was no misrepresentation made, nor were defects concealed. When B discovered these facts he declined to pay the amount due. The building inspector served notice on B that unless repairs were made by a certain time the building would be condemned and removed. B then filed a bill in equity for rescission for fraud. Trustees filed an answer but no cross-bill. Rescission was denied. Shortly thereafter Trustees filed a bill against B for specific performance and won. Six weeks later B sought a rehearing arguing that the rescission decree determined all the issues and since Trustees did not then ask for specific performance the matter was res judicata and no further relief could be had, and(the building having been torn down by the authorities because of failure to repair)that he had the defense of fraud and hardship.
Held:(1) There was no legal fraud. The parties were dealing at arms length. There was no active misrepresentation. The defects were obvious and no artifice had been used to hide them. Caveat emptor applies. (2) B's bill for rescission for fraud was different from Trustee's bill for specific performance and hence there was not the identity of issues necessary to support the defense of res adjudicata. (3) Since the decree for specific performance was a final decree and more than 21 days had elapsed since its rendition the decree had become final and no rehearing could have been held by the chancellor. (4) The Trustees could not have legally made the repairs. After they sold the land they had no right of possession as against the buyer. The note holder could not make them, for "he was a mere lienor who owned no estate in the property." B was the only one who could have made them and it is his own folly or at least his own decision if he did not.

CREDITORS RIGHTS--Mechanics' Liens 60 days "termination of work" 201 Va. 121 and 417.

A did the plumbing work in a house on lot 80 in a new subdivision owned by X. B did the electrical work in the same house and also in houses on lots 82,84,85,86 and 88. A's bill was for $1,265 and B's bill was for $960 figured at the rate of $160 per house. After A and B had done their work, X sold to D and the deed was duly recorded. More than 60 days after this sale, but before the houses had been completed A and B filed proper memoranda, and within six months after the debt was due they attempted to foreclose their liens. The trial court held that the sale of the houses after A and B had done their work was a termination of the work within the meaning of V#43-4 which requires that the memorandum be filed at any time after the work is done and before the expiration of sixty days from the time the building is completed or the work thereon is otherwise terminated, and hence found for the defendant.

Held: As to A the decree should be reversed. A mere sale of the property does not terminate the work, and to hold that it did would be contrary to the spirit of the statute. D had actual notice when he bought the property that construction work was going on. He should have known that there was a chance that everyone engaged therein might not be paid.

As to B, appeal dismissed. The Supreme Court of Appeals does not have jurisdiction unless $300 is involved. Here there are six $160 separate actions in rem against six separate houses and lots. One house and lot cannot be security for liens on other houses and lots. Hence no one case involves $300 and the erroneous decision below stands.(query:--unless there is still time to file a bill of review?)

CREDITORS RIGHTS--Federal Income Tax Lien Va State Statutory Lien 201 Va.686.

L leased premises to T who after a time failed to pay the rent when it was due. A distress warrant was issue on January 7,1957 for past due rent in the amount of $600 for the period from October 1, 1956 through Jan.31,1957. On Feb.6,1957, L caused the personal property on the premises to be attached to satisfy his claim in the amount of $750 for five months' future rent due under the terms of the lease. On March 15, 1957, in execution of the distress warrant and writ of attachment, the constable took possession and sold the property for $1900 net. On August 15,1956 the District Director of Internal Revenue made an assessment in the amount of $14,000 for past due income taxes. Notice of the tax lien was docketed in the proper state clerk's office on October 26,1956, and notice of this lien was served on the constable prior to the sale, and notice of levy was served on him immediately after the sale. Has L or the United States priority?

Held: The United States has priority under sections 6321 et seq. of the Internal Revenue Code since the tax lien was docketed prior to the distraint, despite the fact that for all state purposes, the landlord has a fixed and specific lien which related back to the beginning of the tenancy. Under federal decisions a state statutory lien cannot, regardless of its priority in time, prevail over a federal tax lien unless the debt secured by the state statutory lien had been first reduced to final judgment.

CREDITORS RIGHTS--Foreclosure of deed of trust 111 9 201 Va.814

A deed of trust did not provide for the time, place, and terms of sale. After default, and at the implied request of the beneficiary the trustee advertised the premises for sale for cash, but actually sold to R on credit with the consent of the beneficiary. Is the sale valid?

Held: Yes under subsection(6)of V#55-59 which reads in part as follows: "In the event of default * * * or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts * * * secured by the deed of trust at once due and payable * * * and proceed to sell the same at auction at the premises or at such other place as the trustee may select upon such terms as the trustee may deem best, after first advertising the time, place and terms of sale in such manner as the deed may provide, or, if none be provided, after first advertising the time, place and terms of sale once a week for four successive weeks * * *. No notice to the grantor or his successor in interest shall be required unless required by the deed of trust." By advertising the sale for cash instead of on terms the beneficiary was in a position to decide whether the successful bidder was a good risk for the extension of credit and hence to avoid for the most part the chance that a second foreclosure might become necessary.

CREDITORS RIGHTS--Mechanics' Liens 202 Va.243.

Held in this case,(1)the fact that the pleadings in suits by sub-contractors to enforce mechanics' liens do not state in sufficient detail the items of work and materials for which the liens are claimed is not jurisdictional. If owner wishes a more detailed statement he should request a court order to that effect.(2)The fact that final payment is not due the general contractor until he furnishes proof that all work and materials have been paid for has to do only with the time the final payment is due, and not with the amount thereof. Hence, if the amount due the general contractor is more than the total of the sub-contractor's liens the latter are entitled to payment from the owner if the statute has otherwise been complied with. The owner then may deduct these sums from the amount still owed the general contractor.

CREDITORS RIGHTS Mechanics' Liens 203 Va.73

P sold building materials to B, a contractor, who used these materials to build a house on a lot owned by B. Later B contracted to sell this lot to L, but the contract was not recorded. P was not paid so he filed a memorandum of mechanics lien on October 9, 1959 naming L or B or some unknown person as owner. The petition or bill to enforce the lien was instituted on April 7, 1960. It was objected that no mechanics' lien could attach to L's equitable interest, that L was not an owner within the meaning of the statute, and that the bill was not filed within the period required by statute.

Held: All contentions are invalid. An owner of an equity in real property is an owner, and the fact that it is possible that someone else is an owner and that fact is so stated in the memorandum does not invalidate the memorandum. Under V#43-17 as amended in 1956 the suit to enforce the lien must be filed within six months from the filing of the memorandum of lien, or after sixty days from the time the building is completed or work thereon terminated, whichever time shall last occur. Hence the instant suit to enforce the lien has been brought in time.

CREDITORS RIGHTS--Fraudulent Conveyances--Corporations 1120 204 Va.108

The R Corporation was found to be insolvent on June 11,1960. It then had two creditors, X, who owned half the stock, in the sum of $22,500, and Y who was owed $20,000 for materials. Its assets consisted of accounts receivable in the amount of $5,495 due from A, and $12,235 due from other parties, and materials with a book value of $18,000. X was in charge of the liquidation of the R Corp. He agreed that Y was to be allowed to take back its materials which were found to be worth only $5,000, and he collected A's account and turned the money so received over to Y. Later on July 29,1960 he had the R Corporation assign the rest of the accounts receivable to him. As of the date of this assignment R Corporation owed X $22,500, and Y a balance of $9,505. Y claims: (1)that the assignment of the accounts receivable to X is void as to him as it was made to hinder or delay him in the collection of his debt,and (2) that the fact that he received prior to the assignment more than 50% of his claim, when the R Corp. could only pay 50 cents on the dollar, does not prevent his sharing in the liquidating dividends of the accounts receivable along with X in proportion to their respective claims against the R Corporation as of the date of the assignment.

Held for Y on each contention. A stockholder in control of a corporation cannot legally prefer himself over other creditors. Any assignment having such a result comes within the provision of V#55-80 since it necessarily results in hindering or delaying other creditors.(Note that the mere fact that X was a stockholder was not enough to bring about this result--it was the fact that he was in complete control of R's corporate affairs). As to Y's second contention the Supreme Court of Appeals states, "Having set the assignment aside, the court used its 'undisputed power' to place the two parties in the same position they occupied on that date---. Thus the operative point in time with which the lower court was dealing was the date of the assignment of the accounts receivable which the court set aside. Having placed the corporate affairs in statu quo as of the time of the assignment, the court put the parties on an equal footing as of that date. This was equitable and proper."

Note: The above case is not covered by the U.C.C.

CREDITORS RIGHTS--Tenants by the Entireties in Personal Property 204 Va.123.

H and W owned realty as tenants by the entireties with survivorship. They sold it to X who paid over the entire proceeds to W. Shortly thereafter H became a voluntary bankrupt. T, his trustee in bankruptcy, claimed one half the proceeds of the sale of the realty on the theory that H and W were tenants in common thereof, and that H's act in turning over his half of the proceeds to W was a fraud on H's creditors.

Held: Since H and W were tenants by the entireties of the realty, they continued to be tenants by the entireties of the proceeds thereof in the absence of an agreement to the contrary. The proceeds could not be reached by H's sole creditors. It is not a fraud on H's creditors to give W that which the creditors were not entitled to. The Supreme Court expressly held that H and W can hold personalty as well as realty as tenants by the entireties.

CREDITORS RIGHTS Assignment for the benefit of creditors 205 Va.73

Under V#55-156 no preference is permitted among creditors in the case of an assignment for the benefit of creditors. Suppose X conveys 3/4ths of his property to T, a trustee, to secure A, B, C and D who constitute four of seven creditors. Is this a valid assignment for the benefit of creditors? The Supreme Court of Appeals went out of its way purposely to state:

This is not an assignment for the benefit of creditors within the meaning of the Virginia statute 55-156. The general assignment contemplated by the statute is a transfer of all the debtor's assets upon a trust for immediate liquidation and the payment of all his debts so far as the proceeds may go. Hence, as far as Virginia law is concerned A, B, C and D are secured creditors and come ahead of other creditors as per terms of the deed of trust to T. (I am assuming that all these debts are bona fide) ~~and that there has been no conveyance of a shifting stock of merchandise over which X retains control).~~

CREDITORS RIGHTS Attorneys' liens 205 Va.128

H and W had been living apart for some thirty years. During this time H unsuccessfully sought a divorce on two different occasions. In 1930 S, a nurse, came to live in H's house to take care of H's elderly kinsfolks. After their deaths she stayed on to take care of H until his death. A few years before H's death H conveyed Blackacre to S, placed money in the bank in the joint names of H and S as joint tenants with survivorship, and made a will leaving all his property to S. After H's death W renounced the will and engaged L to get what he could for her. L to receive one third of whatever he might get. L procured a liberal compromise offer and urged W to accept the same. W refused to consider the compromise stating that she wasn't interested in the money but she wanted to go before a jury to show the world what kind of a person S really was. L told her it was unethical to take a person to court for the sole purpose of annoying her, and withdrew from the case. Does L have a lien for his services on that portion of H's estate that W may be entitled to?

Held: No. While W owes L one third of the compromise offer she refused, he has no lien. He has no statutory lien by virtue of V#54-70 which gives a lawyer a lien in contract and tort cases since this is not such a case. Nor does L have a common law possessory lien because he does not have possession of any of W's property.

CREDITORS RIGHTS Equitable Liens 205 Va. 232.

A, a real estate agent for X, was to receive $50,000 in commissions "upon the closing of the transaction." The transaction in question was closed, but later X and the buyer mutually agreed to rescind. X is now insolvent. A claims that he has an equitable lien upon the property he sold. Is this contention correct?

Held: No. The principles of law underlying equitable liens are stated as follows (from Pomeroy as per P.236 of the opinion): "The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real, or personal, or fund, therein described or identified, a security for a debt or other obligation *** creates an equitable lien on the property so indicated which is enforcable against the property."

In the instant case there is no evidence of any such intent. A is just a general creditor.

CREDITORS RIGHTS Mechanics' Liens on Realty + Necessary Parties 205 Va. 927. Lien Cr.

X owned 506 acres of land which was subject, (1) to two deeds of trust, (2) to $242,000 mechanics' liens on the improvements and as much land as was necessary to the reasonable enjoyment thereof, and (3) to P's judgment against X. The mechanics' lien creditors sought to enforce their liens. They did not make P a party to this suit. They contended that while subsequent lien creditors were proper parties, they were not necessary parties, and that a decree by the chancellor which extinguished P's rights in the land was valid even though P had not been made a party to their suit.

Held: While P was not a necessary party, a failure to make him a party did not extinguish his rights as a judgment lien holder. P is entitled to his day in court and cannot be deprived of his rights without proper notice and an opportunity to present his claim. If he is not made a party, the decree is void as to him, and he is entitled to have the whole matter re-opened for a determination of liens and incumbrances and their amounts and priorities before the property is sold so that the parties interested may know how to act to protect their respective interests.

CREDITORS RIGHTS Removal of Collateral 205 Va.856

G bought a forklift truck (not a motor vehicle) on the conditional sales plan in July of 1961 for use in his business in South Norfolk. The conditional sales contract was properly recorded there. Because of a fire G rebuilt his plant in Norfolk and the truck has been in Norfolk since September of 1961. After more than a year had elapsed G made an assignment for the benefit of his creditors to certain trustees none of whom had actual notice of the conditional sale. Under the provisions of V#55-98 a failure to record in the county or city to which the security is removed within one year renders the security void as to bona fide purchasers for value. Who has priority--the conditional vendor or the trustees?

Held: In Virginia the trustees are purchasers for value since a pre-existing debt is value. Hence they have priority. (There would be a different result under the U.C.C. See Note below)

Note: V#55-98 has been repealed effective as of January 1, 1966 by U.C.C.9-401. Under the U.C.C. the security agreement in this type of case should be filed with the State Corporation Commission and locally in the county or city in which the debtor has his place of business. The U.C.C. 9-401(3) reads, "A filing which has been made in a proper place in this State continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed."

U.C.C.

CREDITORS RIGHTS No J becomes a lien until docketed 1143 207 Va. 1013. Lis Pendens

P filed a bill in equity to enforce the lien of a judgment which she had recovered against D. She sought to enforce it against certain real property conveyed by D to X Corporation of which D was a stockholder and director. The facts show that P's judgment was docketed on February 7. D by deed recorded on Jan. 30, conveyed the property to X Corporation for a valuable consideration, namely $17,000. P claims X Corporation would not be a B.F.P. because it had notice of her pending action through a lis pendens filed by P against D, and agent and director of X. D demurred, and the demurrer was overruled.

Held: Reversed. Our statutes hold that no judgment becomes a lien against real property as against a purchaser thereof for value except from the time it is duly docketed in the proper clerk's office. The fact that a lis pendens was filed by P has no effect, as a a lis pendens only has application where title or interest in real property is involved, and not in an action to recover a personal money judgment against a defendant. Furthermore, the mere fact that a grantee for value knows of a pending law suit against his grantor will not deprive him of the status of a bona fide purchaser.

CREDITORS' RIGHTS FINAL EXAMINATION May 29, 1967 Mr. Stason

Notes: 1. This examination consists of five essay questions, some with several parts; each question should be answered as shortly as is consistent with complete and clear explanation of the issues and relevant law involved.
2. The Bankruptcy Act, together with any indexing and reasonable personal annotation thereto, may be used in answering these questions.
3. Assume, in your answers, only such further facts--if any--as are really required.
4. Plan your time carefully: The papers will be collected promptly at noon.
5. Total credit: 100 points.

***

I. (20 points) 36 min

Explain the following four things about the principal creditors' (and debtors') remedies involved in our course: attachment, garnishment, sec. assignment, Mortgage creditors committee, Composition

A. The nature of each basic type (state and federal) of remedy.
B. The general purpose of each.
C. The mode of operation of each.
D. The principal types of person and other legal entity involved in each.

II. (24 points) ~~43~~ 43 min.

John Smith is a private businessman of many interests. He operates Lunar, Inc., which manufactures moon rockets -- in partnership with G. O. Wythe; and is president of Gibraltar Guardian, Inc., a life insurance business, and of Building and Loan Association, Inc., involved in the business indicated by its name. He is entitled to enter all legal transactions for each, having been validly so authorized. These businesses being in bad financial condition, he has validly executed for each a written statement that it cannot pay its debts and is willing to be adjudged bankrupt. He consults you today in respect of several matters related to this situation, as follows:

A. Lunar, Inc. is successor (having bought its productive properties at trustee's sale) in the moon rocket business to Zip, Inc., a corporation that was formed earlier by Smith and was adjudged and discharged as a bankrupt on a voluntary petition in bankruptcy filed on June 1, 1961. Smith, as president of Lunar, wishes to file a petition on its behalf under the Bankruptcy Act seeking reorganization under Chapter X of that Act. Alternatively, he wishes to file a petition on behalf of Lunar in bankruptcy. If neither of these alternatives is advisable or possible, he seeks to have you institute some other form of creditors' proceeding for Lunar and its creditors. In the course of your discussion with Smith, you learn that Lunar's assets are considerably exceeded by its liabilities, but that it has a competent staff, and good prospects to succeed its present line of business because of the rising market for moon rockets.

What legal and other issues must be dealt with in properly advising Smith Are either of his suggested remedies either advisable or available? What remedy or remedies will you advise, assuming the businesses in question have a choice?

B. Gibraltar Guardian, Inc., a Virginia corporation, is also insolvent "in the bankruptcy sense." It has thirteen creditors with noncontingent provable claims totalling $1,800,000 and assets (including insurance in force) of about $1,750,000. Twelve of these creditors are persuaded that Gibraltar should be permitted to continue in business, hence will not file petitions in bankruptcy against it. Gibraltar, itself, believes in its ability to continue and prosper. Scrooge, however, (he is the thirteenth creditor), wishes to have it declared bankrupt, and Smith anxiously asks your advice as to whether Scrooge alone can successfully file a bankruptcy petition against it.

A. What will you tell him, and why?
B. How would your advice differ, if at all, were above facts changed only by having Gibraltar be a manufacturer of false teeth?
C. Building and Loan Association, Inc., is also finding life hard; while its assets exceed its liabilities by a modest margin, it is unable to pay its debts as they fall due. Smith, as its president, seeks your advice as to whether he can file a petition in its behalf under Chapter X of the Act. You realize from the above facts that such a petition is barred for at least two reasons. What are they?

III. (16 points) 28 min

During the bankruptcy administration of Blow, Inc., the trustee in bankruptcy, Riley, petitioned the bankruptcy court for a summary order requiring Mrs. Horn, otherwise a stranger to the bankruptcy proceeding, to deliver to him as trustee certain shares of stock then in her possession which, he alleged, were the bankrupt's property which she had obtained fraudulently and without color or claim of title. Mrs. Horn demurred for want of summary jurisdiction of the court. Her demurrer being overruled, she answered, asserting that the stock was her individual property, having been acquired by her in good faith; and renewed her jurisdictional objection. The bankruptcy court nevertheless entered a decree holding that the stock was an asset of the estate, held by the respondent without color of title and in fraud of the trustee's rights, and ordering Mrs. Horn to deliver it to him forthwith. This holding was based solely upon the bankruptcy referee's independent finding that Mrs. Horn's claim was fraudulent, hence colorable only. On appeal, the Court of Appeals reversed, holding that the bankruptcy court lacked summary jurisdiction in this matter because the respondent's claim to the stock was substantially adverse to that of the trustee, not merely colorably so.

Which of these holdings--that of the bankruptcy court or of the Court of Appeals--is correct, and why? (Or, is either of them correct?)

IV. (20 points) 36 min

Zero Corporation, stock broking company, was duly adjudged bankrupt on a petition filed June 1, 1965. It was discharged, and the first meeting of its creditors was scheduled for July 1, 1965. Several matters must be settled before its estate can finally be distributed, as follows:

A. On Feb ruary 2, 1965, Zero mortgaged a certain tract of its land to B Bank (which knew Zero's affairs well) to secure a business loan (security margin: 10%); the mortgage was never recorded, although relevant state statute required recording;

Mortg not recorded w/i 4 mos

B. On the same day, Zero, debtor of C on an open account, paid that debt. When it did so, C asked Zero's president: "Can you afford to pay now? We will grant an extension, if you need it," to which the latter replied: "That's all right. We are completely solvent."

C had dealt contentedly with Zero for many years prior to that time, on open account and was a manufacturing corporation entirely located in Marseilles, France.

Good faith
Not on ground due to Sutton
See 70(d)

C. Zero, charged by Bank X with having obtained a certain loan from it by fraud, and fearing prosecution therefor, paid off the loan on May 31, 1965, with funds derived from selling some of its property for cash at current fair market value. At that time, Zero was insolvent in the bankruptcy sense and X knew it.

Dean v. Davis
67 d(3)

D. Ten days prior to filing of the petition against it, Zero had received cash from four of its customers to finance the purchase of General Motors common shares for their respective accounts. Two of these were margin customers, supplying only enough cash to meet margin requirements; the other two provided the full cash price. Purchases were made by Zero for the former by the date of filing; but the latters' purchases, ot have been made on June 2, were never completed. Their funds, received for the express purpose of making these purchases, had been simply credited to their respective accounts, and the specie commingled with Zero's other funds.

E. Zero rented its business premises from Landlord L; Zero being in default on rent on May 1, 1965, L timely perfected its landlords' lien under applicable state statute. L had no contractual or deposit security for rent.

F. The rest of Zero's creditors had claims provable under the Act. Two of them were wage claims, entitled to priority in bankruptcy. Part of these, including the wage claims, were filed on December 1, 1965; the rest were filed on January 2, 1966.

(continued next page)

IV. (continued)

As can be seen, the questions are:

A. Which, if any, of the transfers (items A, B, and C, supra) are avoidable by the trustee in bankruptcy, and why?

B. Can any of Zero's customers (item D) get their shares or cash, respectively; or must they all take their places in line as Zero's unsecured creditors? Why?

C. Can L assert its landlord's lien in bankruptcy (item E); if so, to what extent? Why? and

D. What will happen to the claims of Zero's unsecured creditors (item F)? Why?

Read the entire question before answering any part of it.

V. (20 points) 36 min.

Cozy Homes, Inc., was adjudicated bankrupt under a petition filed on May 1, 1967. On March 15, 1967, it had mortgaged a parcel of its land, valued at $100,000, for a loan of $40,000. Loan and mortgage were executed simultaneously (why do I mention that?) but the mortgage was not recorded as required by applicable State law until April 1--that law also providing for retroactive validity of recording if done within a "reasonable time" of the mortgage execution, but that interim unsecured claims take precedent over mortgaged not filed within such time. The trustee in bankruptcy asks you whether he can set the mortgage aside on behalf of the bankrupt estate, and, if so, which section(s) of the Bankruptcy Act he shall rely on in doing so. What will you advise him? and why?

The trustee, an inquiring man, leans back after you give him the very simple answer to his immediate question, and asks two hypothetical questions of you--possibly for future use: First, under what slight alteration of the above facts could he have used another Act section for the same purpose, and, second, under what other slight fact change would he have been barred from setting aside the mortgage altogether? What will you tell him, and why?