

## Chapter 95

### Fraudulent Conveyances

#### Chapter 95

LAW REVIEW CITATIONS: 36 OLR 313, 344.

#### 95.010

##### NOTES OF DECISIONS

In a deed the use of the word "convey" is equivalent to "grant" at common law. *Lambert v. Smith*, (1881) 9 Or 185, 194.

The term "conveyance" imports a transfer of an interest in real property. *Coston v. Portland Trust Co.*, (1929) 131 Or 71, 278 P 586, 282 P 442.

LAW REVIEW CITATIONS: 9 OLR 380; 24 OLR 289.

#### 95.020

##### NOTES OF DECISIONS

The burden of proof is on the party claiming fraud to allege and prove it. *McLeod v. Lloyd*, (1903) 43 Or 260, 71 P 795, 74 P 491.

A subsequent purchaser will prevail even though he has notice of the prior transfer, if he pays value and proves that both parties to the prior transfer intended to defraud purchasers. *Id.* But see *Weber v. Rothchild*, (1887) 15 Or 385, 15 P 650, 3 Am St Rep 162.

FURTHER CITATIONS: *Philbrick v. O'Connor*, (1887) 15 Or 15, 13 P 612, 3 Am St Rep 137.

#### 95.060

##### NOTES OF DECISIONS

Extrinsic evidence may be used to prove that a mortgagor retains the use and benefit of the mortgaged goods and is in effect the beneficiary of a trust. *Fisher v. Kelly*, (1896) 30 Or 1, 46 P 146; *Sabin v. Wilkins*, (1897) 31 Or 450, 48 P 425, 37 LRA 465; *Greig v. Mueller*, (1913) 66 Or 27, 133 P 94.

A mortgage is a transfer in trust for the grantor and falls within the purview of this section if the mortgagor has unlimited power to sell the mortgaged property for his own purposes. *Harris v. Schnitzer*, (1934) 146 Or 391, 27 P2d 1010; *Catlin v. Currier*, (1870) 1 Sawy 7, Fed Cas No. 2,518; *Scandinavian-Am. Bank v. Sabin*, 227 Fed 579.

This statute relates to realty as well as to personality. *Coston v. Portland Trust Co.*, (1929) 131 Or 71, 278 P 586, 282 P 442.

FURTHER CITATIONS: *Leasure v. Forquer*, (1895) 27 Or 335, 41 P 665; *First Nat. Bank v. Frazier*, (1933) 143 Or 662, 19 P2d 1091, 22 P2d 325.

LAW REVIEW CITATIONS: 9 OLR 380.

#### 95.070

##### NOTES OF DECISIONS

1. In general
2. Scope and effect
3. Proof required
4. Rights of creditors and transferees
5. Chattel mortgages

##### 1. In general

This section is essentially the same as the statute of 13 Elizabeth, ch. 5. *Crawford v. Neal*, (1892) 144 US 585, 12 S Ct 759, 36 L Ed 552; *Dick v. Hamilton*, (1867) Deady 322, Fed Cas No. 3,890.

##### 2. Scope and effect

Prior and subsequent creditors who can prove that a transfer of property was made with an intent to defraud them come within this section. *Crawford v. Beard*, (1885) 12 Or 447, 8 P 537; *Morton v. Denham*, (1901) 39 Or 227, 64 P 384; *Seed v. Jennings*, (1905) 47 Or 464, 83 P 872; *United States Nat. Bank v. Thebaud*, (1913) 65 Or 317, 320, 132 P 1168; *Hillsboro Nat. Bank v. Garabino*, (1916) 82 Or 405, 161 P 703; *Sitton v. Pegree*, (1926) 117 Or 107, 241 P 62, 242 P 1112.

This section does not prevent a debtor from preferring one creditor as against another. *Sabin v. Columbia Fuel Co.*, (1893) 25 Or 15, 34 P 692, 35 P 854, 42 Am St Rep 856; *Currie v. Bowman*, (1894) 25 Or 364, 382, 35 P 848; *Jolly v. Kyle*, (1895) 27 Or 95, 39 P 999; *Feldman v. Nicolai*, (1895) 28 Or 34, 40 P 1010; *O'Connell v. Hansen*, (1896) 29 Or 173, 44 P 387; *Inman, Poulson & Co. v. Sprague*, (1897) 30 Or 321, 47 P 826; *Sabin v. Wilkins*, (1897) 31 Or 450, 48 P 425, 37 LRA 465; *Flynn v. Baisley*, (1899) 35 Or 268, 57 P 908, 76 Am St Rep 495, 45 LRA 645; *Mendenhall v. Elwert*, (1900) 36 Or 375, 52 P 22, 59 P 805; *Fleischner v. First Nat. Bank*, (1900) 36 Or 553, 570, 54 P 884, 60 P 603, 61 P 345; *Ball v. Danton*, (1913) 64 Or 184, 194, 129 P 1032; *Grant County Bank v. Hayes*, (1915) 76 Or 407, 149 P 473; *People's Bank v. Rostad*, (1917) 86 Or 695, 169 P 347.

A transfer or assignment of an interest in property, which is subject to attack under this section, is enforceable as between the parties to the conveyance and passes title to the grantee. *Bradtfeldt v. Cooke*, (1895) 27 Or 194, 40 P 1, 50 Am St Rep 701; *King v. Miller*, (1909) 53 Or 53, 97 P 542; *People's Bank v. Rostad*, (1917) 86 Or 695, 169 P 347; *Barhan v. Bogard*, (1929) 128 Or 218, 270 P 762; *In re Estes*, (1880) 6 Sawy 459, 3 Fed 134, 5 Fed 60; *Hahn v. Salmon*, (1884) 20 Fed 801, 807.

##### 3. Proof required

If a transfer is executed by a debtor under suspicious circumstances, a presumption is raised that the transaction is a fraud on creditors, and the transferee is required to furnish proof sustaining the bona fides of the transfer. **Transferor and transferee are near relatives**, *Elfelt v. Hinch*, (1874) 5 Or 255; *Marks & Co. v. Crow*, (1887) 14 Or 382, 13 P 55; *Davis v. Davis*, (1890) 20 Or 78, 25 P 140; *Mendenhall*

v. Elwert, (1900) 36 Or 375, 384, 52 P 22, 59 P 805; Wright v. Craig, (1901) 40 Or 191, 66 P 807; Garnier v. Wheeler, (1901) 40 Or 198, 66 P 812; Walker v. Harold, (1903) 44 Or 205, 74 P 705; Vogt v. Marshall-Wells Hdw. Co., (1918) 88 Or 458, 172 P 123; Gowan-Lenning-Brown Co. v. Kingman, (1926) 116 Or 650, 242 P 351; Jones v. Beers, (1926) 118 Or 317, 246 P 711; Lipman Oil Co. v. Schwind, (1930) 132 Or 381, 285 P 1025; American Sur. Co. v. Hattrem, (1932) 138 Or 358, 3 P2d 1109, 6 P2d 1087; Orr v. Bauer, (1937) 156 Or 409, 67 P2d 770; Maidment v. Russell, (1938) 159 Or 653, 81 P2d 136, 82 P2d 692; Branchfield v. McCulley, (1951) 192 Or 270, 231 P2d 771; 235 P2d 334; **lack of valuable consideration**, Scoggin v. Schloath, (1887) 15 Or 380, 15 P 635; Weber v. Rothchild, (1887) 15 Or 385, 15 P 650, 3 Am St Rep 162; Taylor v. Miles, (1890) 19 Or 550, 25 P 143; Flynn v. Baisley, (1899) 35 Or 268, 57 P 908, 76 Am St Rep 495, 45 LRA 645; Willamette Grocery Co. v. Skiff, (1926) 118 Or 685, 248 P 143; Marion Automobile Co. v. Brown, (1928) 127 Or 551, 562, 272 P 914; Dick v. Hamilton, (1867) Deady 322, Fed Cas. No. 3,890; Evans v. Trude, (1952) 193 Or 648, 240 P2d 940; **reservation of benefit by transferor**, Lyons v. Leahy, (1887) 15 Or 8, 13 P 643, 3 Am St Rep 133; Hesse v. Barrett, (1902) 41 Or 202, 68 P 751; **transfer to corporation controlled by transferor**, Bennett v. Minott, (1896) 28 Or 339, 39 P 997, 44 P 288; Goodale v. Wheeler, (1902) 41 Or 190, 68 P 753; **transfer of all property**, Marion Automobile Co. v. Brown, (1928) 127 Or 551, 562, 272 P 914; Crocker v. Russell, (1930) 133 Or 213, 287 P 224.

Circumstantial evidence is normally used to establish the presence of a fraudulent intent, since direct proof is not available. Weaver v. Owens, (1888) 16 Or 301, 18 P 579; Bays v. Brown, (1939) 160 Or 594, 86 P2d 951.

Even though the transfer was made under suspicious circumstances, the grantee will prevail as against attacking creditors if he can prove that a valuable consideration was paid to the grantor without notice of the latter's intent to defraud. Garnier v. Wheeler, (1902) 40 Or 198, 166 P 812; Ball v. Danton, (1913) 64 Or 184, 195, 129 P 1032; Willamette Grocery Co. v. Skiff, (1926) 118 Or 685, 248 P 143; Orsen v. Siegle, (1942) 170 Or 153, 132 P2d 409.

A debtor's voluntary conveyance may be set aside at the suit of creditors without proof that the debtor believed himself insolvent at the date of the conveyance, if his solvency at the time was contingent on the stability of the market in the business in which he was engaged. Brown v. Case, (1902) 41 Or 221, 69 P 43.

The ultimate burden of proving that a transfer is fraudulent is on the person attacking it, but the proponent may be called upon to furnish proof sustaining its validity during the course of the trial. Vogt v. Marshall-Wells Hdw. Co., (1918) 88 Or 458, 172 P 123.

When numerous badges of fraud exist, the burden of explaining the transaction will shift to the transferee. Evans v. Trude, (1952) 193 Or 648, 240 P2d 940.

Where a conveyance antedates the judgment, the burden is upon plaintiff to plead and prove an actual indebtedness older than the conveyance attacked where the reliance is upon a purely voluntary transfer of the title. American Bonding Co. v. Stilwell, (1954) 202 Or 526, 276 P2d 415.

#### 4. Rights of creditors and transferees

In order to set aside a fraudulent conveyance a person must have an unsatisfied judgment as against the transferor or a lien on his property created by an attachment. Dawson v. Coffey, (1885) 12 Or 513, 8 P 838; Dawson v. Sims, (1887) 14 Or 161, 13 P 506; Bennett v. Minnott, (1896) 28 Or 339, 39 P 997, 44 P 288; Fleischner v. First Nat. Bank, (1900) 36 Or 553, 54 P 884, 60 P 603, 61 P 345; Seed v. Jennings, (1905) 47 Or 464, 83 P 872.

Before the transfer is voidable as against a transferee for value, the transferee must have had notice of its fraudulent character at the time of the transfer. Lyons v. Leahy, (1887)

15 Or 8, 13 P 643, 3 Am St Rep 133; Sabin v. Columbia Fuel Co., (1893) 25 Or 15, 34 P 692, 35 P 854, 42 Am St Rep 756; Currie v. Bowman, (1894) 25 Or 364, 378, 35 P 848; Jolly v. Kyle, (1895) 27 Or 95, 39 P 999; Garnier v. Wheeler, (1901) 40 Or 198, 66 P 812; Stubling v. Wilson, (1907) 50 Or 282, 90 P 1011, 92 P 810; Farmers' Nat. Bank v. Renefro, (1919) 94 Or 260, 184 P 564.

Until actual fraud is proved or disproved, a voluntary conveyance is valid as to subsequent creditors but constructively void as against existing creditors. Leasure v. Forquer, (1895) 27 Or 334, 41 P 665; Seed v. Jennings, (1905) 47 Or 464, 83 P 872.

The transfer of property by the grantee of a fraudulent conveyance to a bona fide purchaser cuts off the rights of a defrauded creditor. Bond v. Ellison, (1916) 80 Or 634, 157 P 1103; In re Estes, (1880) 5 Fed 60.

The mere expectation that the transferor will regain beneficial use of the property does not render the transfer fraudulent so long as the transferee is bona fide. Hesse v. Barrett, (1902) 41 Or 202, 68 P 751.

Failure of the transferor to testify in a suit to set the transfer aside is a badge of fraud. American Sur. Co. v. Hattrem, (1932) 138 Or 358, 3 P2d 1109, 6 P2d 1087.

An excessive effort on the part of grantee to give the appearance of fairness to conveyance is a badge of fraud. Evans v. Trude, (1952) 193 Or 648, 240 P2d 940.

The badges of fraud are clearly apparent where: (1) The deed carried no revenue stamps as would be necessary if it were delivered in payment of a debt in the amount claimed; (2) the transfer was in anticipation of a pending suit; (3) the transferor-debtor was insolvent; (4) there was a failure to record the instrument within a reasonable length of time after execution without explanation for the delay; (5) the conveyance was of all or substantially all of the debtor's property; (6) the retention of possession of the premises by the grantor after the execution of deed was unexplained; (7) the agency activities of the grantor in connection with subsequent mortgaging and selling of the property previously conveyed to grantee were unexplained; (8) the transfer so completely depleted the assets of the debtor that his creditor was hindered and delayed in recovering any part of his judgment; (9) the parties were related and there are other circumstances which incite distrust and suspicion. *Id.*

#### 5. Chattel mortgages

A chattel mortgage is voidable at the instance of purchasers and attacking creditors if the mortgagor has authority to dispose of the property for his own benefit. Orton v. Orton, (1879) 7 Or 478, 33 Am Rep 717; Jacobs v. Ervin, (1880) 9 Or 52; Bremer v. Fleckenstein, (1881) 9 Or 266; Aiken v. Pascall, (1890) 19 Or 493, 24 P 1039; Fisher v. Kelly, (1896) 30 Or 1, 13, 46 P 146; Sabin v. Wilkins, (1897) 31 Or 450, 48 P 425, 37 LRA 465.

A chattel mortgage on stocks of goods is valid if it entitles the mortgagee for value to have profits from sales applied to the debt, and the mortgagee requires the mortgagor to observe the terms of the mortgage. Currie v. Bowman, (1894) 25 Or 364, 383, 35 P 848; Sabin v. Wilkins, (1897) 31 Or 450, 48 P 425, 37 LRA 465; Greig v. Mueller, (1913) 66 Or 27, 133 P 94, 46 LRA(NS) 722; Scandinavian-Am. Bank v. Sabin, (1915) 142 CCA 211, 227 Fed 579.

Extrinsic evidence is admissible to prove that the mortgagor retained the use and benefit of the mortgaged goods. Fisher v. Kelly, (1896) 30 Or 1, 46 P 146; Greig v. Mueller, (1913) 66 Or 27, 133 P 94.

A chattel mortgage upon a fluctuating stock of goods is perfected when the mortgagee takes possession of the merchandise, even though the mortgagor originally retained possession of the goods without being required to apply the proceeds from sales to the debt. Kenney v. Hurlburt, (1918) 88 Or 688, 172 P 490, 173 P 158, LRA 1918E 652, Ann

Cas 1918E 737; *Turner v. Dobson*, (1942) 169 Or 362, 127 P2d 746.

If there has been no change of possession or management of the property, the transfer is constructively fraudulent. *Coston v. Portland Trust Co.*, (1929) 131 Or 71, 278 P 586, 282 P 442.

FURTHER CITATIONS: *Barrett v. Barrett*, (1875) 5 Or 411; *Wood v. Fisk*, (1904) 45 Or 276, 77 P 128, 738; *Stearns v. Wollenberg*, (1908) 51 Or 88, 92 P 1079, 14 LRA(NS) 1095; *Coffey v. Scott*, (1913) 66 Or 465, 135 P 88; *Sabin v. Kyniston*, (1916) 81 Or 358, 159 P 69; *Clarke v. Philomath College*, (1921) 99 Or 366, 193 P 470, 195 P 822; *Hill v. Harritt*, (1932) 140 Or 86, 12 P2d 1021.

#### 95.090

##### NOTES OF DECISIONS

The fact of fraudulent intent may be established by direct proof or inferred from the facts and circumstances surrounding the transaction. *Coolidge v. Heneky*, (1884) 11 Or 327, 8 P 281; *Lyons v. Leahy*, (1887) 15 Or 8, 13 P 643, 3 Am St Rep 133; *Philbrick v. O'Connor*, (1887) 15 Or 15, 13 P 612, 3 Am St Rep 139; *Weaver v. Owens*, (1888) 16 Or 301, 18 P 579; *Garnier v. Wheeler*, (1901) 40 Or 198, 66 P 812; *United States v. Griswold*, (1881) 7 Sawy 296, 311, 8 Fed 496, 569.

FURTHER CITATIONS: *Crawford v. Neal*, (1891) 144 US 585, 12 S Ct 759, 36 L Ed 552; *United States Nat. Bank v. Thebaud*, (1913) 65 Or 317, 132 P 1168; *Crocker v. Howland*, (1933) 144 Or 223, 24 P2d 327.

#### 95.100

##### NOTES OF DECISIONS

A purchaser has "previous notice" within the meaning of this section if he has actual knowledge of facts sufficient to put a reasonably prudent man on inquiry, even though he does not have actual knowledge of the grantor's intent to defraud. *Lyons v. Leahy*, (1887) 15 Or 8, 13 P 643, 3 Am St Rep 133; *Philbrick v. O'Connor*, (1887) 15 Or 15, 13 P

612, 3 Am St. Rep 139; *Coffey v. Scott*, (1913) 66 Or 465, 135 P 85; *Enes v. Pomeroy*, (1922) 104 Or 169, 206 P 860; *The Halladay Case*, (1886) 27 Fed 830, 849. But see *Coolidge v. Heneky*, (1884) 11 Or 327, 8 P 281.

To prevail as against attacking creditors, a purchaser must have paid a valuable consideration for the property before he had notice of the fraudulent designs of the transferor. *Garnier v. Wheeler*, (1901) 40 Or 198, 66 P 812; *Farmers' Nat. Bank v. Renfro*, (1919) 94 Or 260, 184 P 564.

To invalidate a conveyance to a purchaser for value it must appear that he had notice of the fraudulent intent of the grantor at the time of the transfer. *Jennings v. Frazier*, (1905) 46 Or 470, 80 P 1011; *Ball v. Danton*, (1913) 64 Or 184, 194, 129 P 1032; *Lane v. Myers*, (1914) 70 Or 376, 141 P 1022; *Bond v. Ellison*, (1916) 80 Or 634, 157 P 1103; *Sabin v. Kyniston*, (1916) 81 Or 358, 159 P 69; *Farmers' Nat. Bank v. Renfro*, (1919) 94 Or 260, 184 P 564; *Gowan-Lanning-Brown Co. v. Kingman*, (1926) 116 Or 650, 242 P 351.

When the circumstances surrounding the transfer indicate that the grantor had an intent to defraud his creditors, the grantee must offer proof of valuable consideration paid in good faith in order to prevail as against attacking creditors. *Willamette Grocery Co. v. Skiff*, (1926) 118 Or 685, 248 P 143; *Marion Automobile Co. v. Brown*, (1928) 127 Or 551, 272 P 914.

An assignee for the benefit of creditors is not a purchaser for value and without notice within the meaning of this section. *O'Connell v. Hansen*, (1896) 29 Or 173, 184, 44 P 387.

An allegation that the purchaser was holding the title with intent to defraud the creditors of a previous grantor is insufficient. *Allen v. Dodge*, (1921) 102 Or 466, 202 P 717.

This section does not protect a pledgee as against attacking creditors. *Lipman Oil Co. v. Schwind*, (1930) 132 Or 381, 285 P 1025.

FURTHER CITATIONS: *Sauers v. Beechler*, (1900) 38 Or 228, 63 P 195; *Grant County Bank v. Hayes*, (1915) 76 Or 407, 149 P 473; *Maidment v. Russell*, (1938) 159 Or 653, 81 P2d 136, 82 P2d 692; *Crawford v. Neal*, (1891) 144 U.S. 585, 12 S Ct 759, 36 L Ed 552; *Evans v. Trude*, (1952) 193 Or 648, 240 P2d 940.