CHAPTER 23

Parol, Fraudulent, and Other Void Gifts or Conveyances

**SECTION 27‑23‑10.** Conveyances to defraud creditors; transfers of income and property to avoid paying child support.

(A) Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

(B) A showing of two or more of the following creates a rebuttable presumption that a child support debtor intended to transfer income or property to avoid payment to a child support creditor:

(1) a close relationship between the transferor and transferee;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was not disclosed or was concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was substantially all of the debtor’s assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or after a substantial debt was incurred; and

(11) there was a departure from the usual method of business.”

HISTORY: 1962 Code Section 57‑301; 1952 Code Section 57‑301; 1942 Code Section 8696; 1932 Code Section 8696; Civ. C. ‘22 Section 5218; Civ. C. ‘12 Section 3455; Civ. C. ‘02 Section 2369; G. S. 1786; R. S. 1888; 1712 (2) 697; 1997 Act No. 71, Section 40.

CROSS REFERENCES

Separate property holdings of married women, see SC Const, Art 17, Section 9 and Section 20‑5‑30.

Statutes of frauds, see Sections 32‑3‑10 and 32‑3‑20.

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Fraudulent Conveyances 2.

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C.J.S. Fraudulent Conveyances Sections 3, 5.

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100 ALR 6th 281 , Judicial Remedies for Proceeds and Funds from Ponzi Schemes.

43 ALR 6th 611 , Construction and Application of Limited Liability Company Acts‑Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto.

15 ALR 6th 241 , Assumption of Mortgage on Real Property as Consideration for Conveyance that is Attacked as Fraudulent.

100 ALR 2nd 1094 , When Statute of Limitations or Laches Commences to Run Against Action to Set Aside Fraudulent Conveyance or Transfer in Fraud of Creditors.

9 ALR 1447 , Right of Creditors as Against Directors or Officers to Whom Property of a Corporation Has Been Transferred for a Consideration Other Than Payment of Debts Due Them.

48 ALR 1269 , Remedy of One Whose Money is Fraudulently Used in Purchase or Improvement of Real Property.

117 ALR 1263 , Rights of Creditors or Their Representatives to Complain of a Voluntary Transfer or Pledge of Corporate Assets by a Corporation Which Subsequently Becomes Insolvent.

158 ALR 1274 , Right of Creditor to Set Aside Fraudulent Transfer as Affected by Bankruptcy of Debtor.

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25 Am. Jur. Proof of Facts 3d 591, Avoidance and Recovery of Fraudulent Transfers.

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S.C. Jur. Assignments Section 47, Conveyance to Defraud Creditors.

S.C. Jur. Equity Section 29, Standard of Review on Appeal.

S.C. Jur. Equity Section 23.5, Setting Aside a Conveyance Under the Statute of Elizabeth.

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Forms

Am. Jur. Pl. & Pr. Forms Fraudulent Conveyances Section 1 , Introductory Comments.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 211, Trusts for Unlawful Purposes.

39 Causes of Action 2d 1, Cause of Action in Bankruptcy Case for Avoidance of Prepetition Fraudulent Transfer or Obligation Under 11 U.S.C.A. S548(A)(1)(B).

Fletcher Cyclopedia Law of Private Corporations Section 7401, History and Sources of Fraudulent Conveyance or Transfer Laws.

Restatement (2d) of Property, Don. Trans. Section 34.3, Creditors of Donor.

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1981 Survey: Property; fraudulent conveyances. 34 S.C. L. Rev. 195, August, 1982.

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1. In general

Cited in Temple v Montgomery (1930) 157 SC 85, 153 SE 640. Marion v Weston (1923) 126 SC 65, 119 SE 582. Miller v Wroton (1908) 82 SC 97, 63 SE 62, reh den 82 SC 109, 63 SE 449. Lawton v Perry (1893) 40 SC 255, 18 SE 861. Walker, Evans & Cogswell v Bollmann Bros. (1885) 22 SC 512. Du Rant v Du Rant (1892) 36 SC 49, 14 SE 929. Durham Fertilizer Co. v Hemphill (1896) 45 SC 621, 24 SE 85. Drake v Steadman (1896) 46 SC 474, 24 SE 458. Lynch v Lynch (1942), 201 SC 130, 21 SE2d 569.

Applied in Rice v Columbia (1928) 143 SC 516, 141 SE 705. Ex parte Lowrance (1925) 133 SC 103, 130 SE 343. Forbes v Bowman (1911) 87 SC 495 70 SE 165. Johnstone v Babb (1917, CA4 SC) 240 F 668. Mechanics Building & Loan Ass’n v Fowler (1900) 57 SC 110, 35 SE 433. Perkins v Douglass (1898) 52 SC 129, 29 SE 400. Bomar v Means (1898) 53 SC 232, 31 SE 234. Dennis v McKnight (1931) 161 SC 209, 159 SE 555. Austin v Goddard (1931) 164 SC 20, 161 SE 767.

Judgments, see Watlington v Howley (1787) 1 SC Eq 167. State v Fife (1831) 18 SCL 337. Posey v Underwood (1833) 19 SCL 262. Hipp v Sawyer (1830) 9 SC Eq 410. Bowie v Free (1851) 24 SC Eq 403. Dickison v Coward (1846) 37 SCL 49. Cureton v Doby (1858) 31 SC Eq 411. McCorkle v Montgomery (1859) 32 SC Eq 114. Weaver v Wright (1860) 47 SCL 9.

The words “goods and chattels” are inserted after word “hereditaments” in this section [Code 1962 Section 57‑301] to conform to the original Statute of Elizabeth, II Cooper’s Statutes at Large, 498. They were omitted by mistake in the Revised Statutes of 1872, 1882 and 1893. These statutes are in affirmance of the common law. Hudnal v Wilder (1827) 15 SCL 294. Footman v Pendergrass (1850) 24 SC Eq 33.

Fraudulent conveyances generally, see Blakeney v Kirkley (1820) 11 SCL 544. Henderson v Dodd (1830) 8 SC Eq 138. Lowry v Pinson (1831) 18 SCL 324. Union Bank v Toomer (1834) 11 SC Eq 27. Jacot v Corbett (1840) 15 SC Eq 71. Gruber v Bowles (1803) 3 SCL 266.

Quoted in Fidelity‑Bankers’ Trust Co. v. Little, 1938, 99 F.2d 950.

Under South Carolina’s Statute of Elizabeth, existing creditors may avoid transfers under an actual fraudulent transfer theory or under a constructive fraud theory. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Fraudulent Conveyances 1

Under South Carolina’s Statute of Elizabeth, conveyances may be set aside by creditors existing at the time of fraudulent transfer and by subsequent creditors. In re Pigg (Bkrtcy.D.S.C. 2014) 515 B.R. 274, affirmed 2014 WL 4536642. Fraudulent Conveyances 206(1); Fraudulent Conveyances 208

Under South Carolina’s Statute of Elizabeth, conveyances may be set aside by creditors existing at the time of the transfer and by subsequent creditors. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 206(1); Fraudulent Conveyances 208

Under Sought Carolina law, to set aside a voluntary conveyance, the plaintiff must show that: (1) the grantor was indebted to him at the time of the transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full, not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 14; Fraudulent Conveyances 273

For existing creditors, conveyances may be set aside pursuant to South Carolina’s Statute of Elizabeth under two scenarios: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration, and, second, where a transfer is made without actual intent to defraud the grantor’s creditors, but without consideration. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 64(1); Fraudulent Conveyances 74(1)

Bankruptcy Code’s strong‑arm provision allowed Chapter 7 trustee to “step into the shoes” of creditors entitled, under South Carolina’s Statute of Elizabeth, to avoid fraudulent transfer of property by debtor, provided there was a creditor with a valid unsecured claim in the bankruptcy case who could assert such a claim. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Bankruptcy 2704

Under South Carolina law, elements of fraudulent transfer avoidance action depend on status of creditor pursuing cause of action, as creditor in existence at time of challenged transfer or only subsequent thereto, and also, as to existing creditors, upon whether transfer was made for valuable consideration. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Fraudulent Conveyances 74(1); Fraudulent Conveyances 206(2)

Assignee of Chapter 7 trustee, which filed fraudulent conveyance complaint under, inter alia, South Carolina law, against brokers whose accounts were used by debtor to carry out its “stock‑loan” scheme, adequately stated a claim under the Bankruptcy Code’s strong‑arm provision by alleging that debtor operated a Ponzi scheme and had the intent to defraud its creditors, that debtor was indebted at the time of the alleged transfers, and that brokers had knowledge of debtor’s fraudulent scheme, such that debtor’s intent could be imputed to brokers. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2008) 396 B.R. 184. Bankruptcy 2724

For existing creditors, conveyances can be set aside as fraudulent transfers under South Carolina’s Statute of Elizabeth in two instances: when challenged transfer was made for valuable consideration, it will be set aside if plaintiff establishes that (1) transfer was made by grantor with actual intent of defrauding creditors, (2) grantor was indebted at time of transfer, and (3) grantor’s intent is imputable to grantee; when transfer was not made on valuable consideration, no actual intent to hinder or delay creditors must be proven, and, instead, as a matter of equity, transfer will be set aside if plaintiff shows that (1) grantor was indebted to him at time of transfer, (2) conveyance was voluntary, and (3) grantor failed to retain sufficient property to pay indebtedness to plaintiff in full, not merely at time of transfer, but in the final analysis when creditor seeks to collect his debt. In re Ducate (Bkrtcy.D.S.C. 2007) 369 B.R. 251. Fraudulent Conveyances 8

South Carolina’s Statute of Elizabeth allows a creditor to avoid a fraudulent transfer of property by a debtor. In re Ducate (Bkrtcy.D.S.C. 2007) 369 B.R. 251. Fraudulent Conveyances 240

Under South Carolina law, subsequent creditors may have conveyance set aside as fraudulent as to creditors where: (1) conveyance was “voluntary,” in sense that it was without consideration; and (2) it was made with view to future indebtedness or with actual fraudulent intent on part of grantor to defraud creditors. In re Ducate (Bkrtcy.D.S.C. 2006) 355 B.R. 536. Fraudulent Conveyances 8

“Actual moral fraud” involves a conscious intent to defeat, delay, or hinder one’s creditors in the collection of their debts through a conveyance of property; with a voluntary inter‑family transfer, the burden shifts to the transferee to establish the transfer was valid. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 64(1); Fraudulent Conveyances 273

The Statute of Elizabeth, which deems void conveyances made for the purpose of defrauding creditors or to avoid paying child support, does not limit its application to judgment creditors; its protection also extends to other types of parties defrauded in connection with the conveyance of property. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 205

Under the Statute of Elizabeth, conveyances of real property shall be set aside under two conditions: first, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud, and, second, where a transfer is made without actual intent to defraud but without valuable consideration. Oskin v. Johnson (S.C. 2012) 400 S.C. 390, 735 S.E.2d 459. Fraudulent Conveyances 64(1); Fraudulent Conveyances 73.1

Under the Statute of Elizabeth conveyances may be set aside as fraudulent under two conditions: (1) where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration, and (2) where a transfer is made without actual intent to defraud the grantor’s creditors, but without valuable consideration. Albertson v. Robinson (S.C.App. 2006) 371 S.C. 311, 638 S.E.2d 81, rehearing denied. Fraudulent Conveyances 8

An action to set aside a transfer as fraudulent is an action in equity. Albertson v. Robinson (S.C.App. 2006) 371 S.C. 311, 638 S.E.2d 81, rehearing denied. Fraudulent Conveyances 237(2)

Nulla bona return is not condition precedent for judgment creditor to maintain suit to set aside transfers under Statute of Elizabeth where creditor has alleged and proven that his deceased debtor is insolvent. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

Section 27‑23‑10 does not limit its application to judgment creditors, rather, its protection extends to other types of parties defrauded in connection with conveyance of property. Lebovitz v. Mudd (S.C. 1987) 293 S.C. 49, 358 S.E.2d 698. Fraudulent Conveyances 213

Complaint states cause of action for fraudulent conveyance where it alleges that conveyances rendered debtor insolvent, were made with knowledge of creditor’s tort claims, and with actual intention to defraud creditors; statute does not limit its application to judgment creditors, rather extending its protection to other types of parties defrauded in connection with conveyance of property. Lebovitz v. Mudd (S.C. 1987) 293 S.C. 49, 358 S.E.2d 698.

Constructive trust is distinguished from express trust in that former arises entirely by operation of law without reference to any actual or supposed intention of creating trust; it is resorted to by equity to vindicate right and justice or frustrate fraud; fraud is essential element, but it need not be actual fraud; constructive trust is permitted to be proved by parol evidence despite statute of frauds. Whitmire v. Adams (S.C. 1979) 273 S.C. 453, 257 S.E.2d 160. Trusts 91

If one of two innocent persons must suffer by the fraud of another, the one whose negligence makes the fraud possible must bear the loss. Ex parte Dort (S.C. 1961) 238 S.C. 506, 121 S.E.2d 1. Estoppel 72

Protection afforded by this section is not limited to judgment creditors. Matthews v. Montgomery (S.C. 1940) 193 S.C. 118, 7 S.E.2d 841.

The right to object to an equitable mortgage as being violative of the statute of frauds is personal to the party who agrees that the land shall be encumbered, and such right may be waived. Miller v. Wroton (S.C. 1908) 82 S.C. 97, 63 S.E. 62, rehearing denied 82 S.C. 97, 63 S.E. 449. Frauds, Statute Of 143(2)

Remedy of creditors, see Armour Packing Co. v. London (S.C. 1898) 53 S.C. 539, 31 S.E. 500.

Application of section to personal property. Avery v. Wilson (S.C. 1896) 47 S.C. 78, 25 S.E. 286.

2. Intent to defraud, or to hinder, delay or defeat creditors

The general rule under this section is that fraudulent intent on the part of the grantor is necessary to bring a conveyance within its terms, but such an intent will be inferred when a conveyance is made under such circumstances that it will necessarily hinder and delay creditors. Rogers v. Marchant, 1937, 91 F.2d 660, certiorari denied 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571. Fraudulent Conveyances 9

Under South Carolina law, no actual intent to hinder or delay creditors need be shown in order for creditor in existence at time of transfer to avoid transfer that was not made for valuable consideration; rather, plaintiff must prove: (1) that grantor was indebted to him at time of transfer; (2) that conveyance was voluntary; and (3) that grantor failed to retain sufficient property to pay indebtedness to plaintiff in full. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Fraudulent Conveyances 9; Fraudulent Conveyances 54(1); Fraudulent Conveyances 58; Fraudulent Conveyances 64(1); Fraudulent Conveyances 74(3)

Where transfer was made without valuable consideration being exchanged, no actual intent to hinder or defraud creditors has to be proven in order to avoid transfer on constructive fraud theory under South Carolina law; in such situations, transfer will be set aside if creditor establishes the following: (1) that grantor was indebted to creditor at time of transfer; (2) that conveyance was voluntary; and (3) that grantor failed to retain sufficient property to pay his indebtedness to creditor in full, not merely at time of transfer, but in the final analysis when creditor seeks to collect debt. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Fraudulent Conveyances 8

Under South Carolina law, conveyance may be set aside as fraudulent as to existing creditor under two conditions: (1) where transfer is made without consideration, where grantor was indebted to plaintiff‑creditor at time of transfer, and where, as result of transfer, grantor does not have sufficient assets to pay his/her indebtedness to plaintiff; or (2) where transfer was made by grantor with actual intent of defrauding creditor, and that intent is imputable to grantee, even though valuable consideration was paid. In re Haddock (Bkrtcy.D.S.C. 2000) 246 B.R. 810. Fraudulent Conveyances 8

Landowner transferred property to limited liability company, of which he was one of two members, for purposes of avoiding creditor’s claims, as required to establish fraudulent conveyance in violation of Statute of Elizabeth; landowner was heavily indebted to creditor at time of transfer, behind on his payments, and in the process of negotiating a loan extension, landowner was well aware that his failure to satisfy obligations would result in inevitable litigation, landowner failed to update his financial statement that he had filed with creditor, and landowner’s testimony that he transferred the property for liability reasons did not rebut presumption caused by these badges of fraud. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Fraudulent Conveyances 276

A badge of fraud creates a rebuttable presumption of an intent to defraud in transferring an asset outside the reach of a creditor, under Statute of Elizabeth. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Fraudulent Conveyances 24(2); Fraudulent Conveyances 271.4

When there is a concurrence of several badges of fraud in a voluntary intra‑family transfer, an inference of fraud may be warranted. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 16

The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land. Oskin v. Johnson (S.C. 2012) 400 S.C. 390, 735 S.E.2d 459. Fraudulent Conveyances 9; Fraudulent Conveyances 64(1)

Even where it is shown that the grantor has fraudulent intent, to annul for fraud a deed based upon value consideration under the Statute of Elizabeth, it must not only be shown that the grantor intended to hinder, delay or defraud creditors, but it must also appear that the grantee participated in such fraudulent act. Oskin v. Johnson (S.C. 2012) 400 S.C. 390, 735 S.E.2d 459. Fraudulent Conveyances 64(1); Fraudulent Conveyances 162.1

First mortgagee did not assign note and mortgage to assignee limited liability company (LLC) formed by mortgagor’s spouse with intent to defraud co‑mortgagor’s judgment creditor, as grounds for vacating transfer under Statute of Elizabeth; grantor who transferred equitable interest in real property to LLC was mortgagee, not co‑mortgagor, and there were no allegations that mortgagee intended to defraud creditor. (Per Toal, C.J., with one justice concurring in part and one justice concurring in result). Oskin v. Johnson (S.C. 2012) 400 S.C. 390, 735 S.E.2d 459. Fraudulent Conveyances 24(1)

The Statute of Elizabeth may be employed by any creditor, including a judgment creditor, to void any transfer of property made with intent or purpose to delay, hinder, or defraud creditors and others. Carr v. Guerard (S.C. 2005) 365 S.C. 151, 616 S.E.2d 429. Fraudulent Conveyances 213; Fraudulent Conveyances 221

The “Statute of Elizabeth” renders void any transfer of property made with intent or purpose to delay, hinder, or defraud creditors and others. Carr v. Guerard (S.C. 2005) 365 S.C. 151, 616 S.E.2d 429. Fraudulent Conveyances 9

A transfer made without valuable consideration may be set aside even without an actual intent to defraud. Royal Z Lanes, Inc. v. Collins Holding Corp. (S.C. 1999) 337 S.C. 592, 524 S.E.2d 621. Fraudulent Conveyances 9; Fraudulent Conveyances 73.1

One who is in debt cannot make a conveyance without consideration that will prevail against existing debts. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Fraudulent Conveyances 74(2)

A debtor’s transfer of his personal residence to his wife was not fraudulent under Section 27‑23‑10 with respect to an equipment lessor since the debtor’s wife had guaranteed the leasing agreement, and retained the property; property remained in reach of the lessor by virtue of the wife’s guaranty. Leasing Enterprises, Inc. v. Goodwin (S.C.App. 1993) 312 S.C. 122, 439 S.E.2d 294. Fraudulent Conveyances 11; Fraudulent Conveyances 104(.5)

Transfer in trust to pay monthly alimony obligation to former wife had been made with intent to delay and hinder creditors, where circuit court had found trust documents “untrustworthy” and burden of proving consideration and bona fides of transaction had not been carried; where transfers to family members are attacked upon ground of actual fraud or because of their voluntary character, law imposes burden upon transferee to establish both valuable consideration and bona fides of transaction by clear and convincing testimony; question of bona fides of transaction was lacking where evidence showed that during lifetime of decedent, trust never really operated separate and apart from decedent’s other business interests. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

Loans made primarily for operation of hotel while decedent was very ill were upheld because bank had failed to prove lack of consideration for note and mortgage, and testimony was credible that this transaction was not entered into to hinder, delay, or defraud creditors; in order to annul mortgage which is supported by valuable consideration, it must be shown not only that decedent intended to hinder, delay, or defraud his creditors, but also that mortgage creditor participated in fraud. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

If there is evidence that titled spouse conveyed marital assets in contemplation of divorce, an action may be brought under Section 27‑23‑10 to set aside the conveyance as fraudulent. Hursey v. Hursey (S.C.App. 1985) 284 S.C. 323, 326 S.E.2d 178. Marriage And Cohabitation 611

Conveyances are set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor’s creditors but without consideration. Gardner v. Kirven (S.C. 1937) 184 S.C. 37, 191 S.E. 814. Fraudulent Conveyances 8

Under the Statute of Elizabeth, a debtor may secure a bona fide creditor by confession of judgment, provided he does not thereby delay or defraud his other creditors, or does not secure to himself some direct advantage at their expense. Sloan v. Hunter (S.C. 1900) 56 S.C. 385, 34 S.E. 658, 76 Am.St.Rep. 551, rehearing denied 56 S.C. 385, 34 S.E. 879.

This section does not declare a transaction void where it is to the interest of the parties entering into it to avoid it, but the declaration is that a transaction entered into with an intent to hinder, delay, or defeat creditors shall be void. Leake v. Anderson (S.C. 1895) 43 S.C. 448, 21 S.E. 439.

Fraud is a mixed question of law and fact. Means v. Feaster (S.C. 1873) 4 S.C. 249. Fraud 64(1)

3. Subsequent creditors

South Carolina’s Statute of Elizabeth authorizes avoidance of fraudulent transfers by both existing and subsequent creditors. In re Ducate (Bkrtcy.D.S.C. 2007) 369 B.R. 251. Fraudulent Conveyances 206(1); Fraudulent Conveyances 208

Under South Carolina fraudulent transfer law, analysis is slightly different where it is subsequent, as opposed to existing, creditors who seek to avoid alleged fraudulent transfer; subsequent creditors may have conveyance set aside (1) when conveyance was “voluntary,” i.e., without consideration, and (2) when it was made with view to future indebtedness or with actual fraudulent intent on part of grantor to defraud creditors. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Fraudulent Conveyances 8

Under South Carolina law, fraudulent conveyance may be set aside for both existing and subsequent creditors; however, standards which courts apply to set aside transfer differ slightly based upon whether creditor seeking to set aside transfer was existing creditor at time of conveyance. In re Haddock (Bkrtcy.D.S.C. 2000) 246 B.R. 810. Fraudulent Conveyances 206(1); Fraudulent Conveyances 208

A subsequent creditor may successfully set aside a voluntary transfer if it was made with a view toward future indebtedness or actual fraudulent intent on the part of the grantor to evade creditors. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 69(1); Fraudulent Conveyances 208

Subsequent creditors may have conveyances set aside under the Statute of Elizabeth, which deems void conveyances made for the purpose of defrauding creditors or to avoid paying child support, when (1) the conveyance was voluntary, that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors; subsequent creditors must show actual moral fraud, rather than legal fraud. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 69(1); Fraudulent Conveyances 75

4. Waiver of protection against fraudulent conveyances

Protection of South Carolina Code Section 27‑23‑10, which prohibits fraudulent conveyances to avoid debt, was not waived by placing in guarantee agreement prohibition against transfer of stock by guarantors, as there is no evidence in record to imply that lender waived its rights to prohibit guarantors from giving away all their tangible assets so as to be unable to satisfy their obligations under guarantee, and it did not follow that since guarantee prohibited only transfer of stock, it necessarily allowed guarantors to transfer any other property which they own without concern for their obligations to lender. NCNB Nat. Bank of North Carolina v. Tiller (C.A.4 (S.C.) 1987) 814 F.2d 931.

5. Bad faith on part of judgment creditors

Judgments cannot properly be set aside under this section where there is no showing that the judgment creditors participated in the mala fides of the debtor, to whatever extent bad faith does appear. Marquette Corp. v. Priester, 1964, 234 F.Supp. 799.

Genuine issues of material fact, as to whether Chapter 7 debtor’s transfer of family home and furnishings to his spouse some years prior to petition date was effected with actual fraudulent intent or with view to future indebtedness, precluded entry of summary judgment for trustee on strong‑arm avoidance claim asserted pursuant to South Carolina’s Statute of Elizabeth. In re Ducate (Bkrtcy.D.S.C. 2006) 355 B.R. 536. Bankruptcy 2164.1

For subsequent creditor to avoid transfer under South Carolina law, as actually fraudulent as to creditors, debtor does not need to have intent to defraud specific creditor; it is enough that transfer was made with intent to defraud creditors in general. In re Ducate (Bkrtcy.D.S.C. 2006) 355 B.R. 536. Fraudulent Conveyances 9

Badges of fraud, which South Carolina courts consider in deciding whether challenged transfer was made with actual intent to defraud creditors, include the following: insolvency or indebtedness of transferor; lack of consideration for conveyance; relationship between transferor and transferee; pendency or threat of litigation; secrecy or concealment; departure from usual method of business; transfer of debtor’s entire estate; reservation of benefit to transferor; and retention by debtor of possession of property. In re Haddock (Bkrtcy.D.S.C. 2000) 246 B.R. 810. Fraudulent Conveyances 14

The transaction is subject to attack if at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker. Coleman v. Daniel (S.C. 1973) 261 S.C. 198, 199 S.E.2d 74.

Actual knowledge of, or participation in, the debtor’s fraudulent intention on the part of the transferee need not be established in order to justify a conclusion that the transaction was illegal. Coleman v. Daniel (S.C. 1973) 261 S.C. 198, 199 S.E.2d 74.

Knowledge on the part of a purchaser that the seller is indebted or insolvent has frequently been held sufficient to place a purchaser on notice and to require him to investigate. Coleman v. Daniel (S.C. 1973) 261 S.C. 198, 199 S.E.2d 74. Fraudulent Conveyances 159(2)

To set aside a deed based on valuable consideration under this section, it must be shown not only that grantor intended thereby to hinder, delay or defraud creditors, but also that grantee participated in such fraudulent purpose. Beaufort Veneer & Package Co. v. Hiers (S.C. 1927) 142 S.C. 78, 140 S.E. 238.

In order to sustain an allegation that a conveyance is void for actual fraud, it is necessary to show that the donee of the conveyance joined in the transaction and was particeps criminis in the perpetration of the fraud. McIntyre v. Legon (S.C. 1893) 38 S.C. 457, 17 S.E. 253. Fraudulent Conveyances 162.1

5.5. Voluntary conveyance

Under South Carolina’s Statute of Elizabeth, a transfer made without valuable consideration is “voluntary conveyance” or “gratuitous conveyance,” which may be avoided without proving actual intent to defraud creditors. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Fraudulent Conveyances 64(1); Fraudulent Conveyances 74(3)

Corporate Chapter 7 debtor’s chief financial officer (CFO) was not overpaid, and did not receive “voluntary transfer” recoverable by trustee in exercise of his strong‑arm powers under South Carolina’s Statute of Elizabeth, merely because he received interest upon which his ex‑wife insisted as prerequisite for advancing CFO the funds necessary to make loans to financially distressed corporate debtor, in amount twice the amount of principal borrowed; e‑mails between parties and their performance in accordance with terms of e‑mails was sufficient to establish existence of agreement for payment of interest in twice the amount of principal borrowed. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Interest 33; Usury 42

Under South Carolina law, a voluntary conveyance may be avoided without proving actual intent to defraud creditors. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 64(1); Fraudulent Conveyances 74(1)

Under South Carolina law, a “voluntary conveyance” means a gratuitous transfer made without valuable consideration. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 73.1

Under South Carolina law, where transfers to members of the family are attacked on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 8

6. Consideration

To avoid a deed under this section, it must be shown either that it is without consideration, or else that it was made in bad faith by both parties. McElwee v Kennedy (1899) 56 SC 154, 34 SE 86. Lenhardt v Ponder (1902) 64 SC 354, 42 SE 169.

Under South Carolina law, “valuable consideration,” the absence of which renders a conveyance voluntary, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 73.1

Under South Carolina law, grossly inadequate consideration does not render a conveyance “voluntary”; rather, the inadequacy of the consideration is treated as a “badge of fraud,” and actual intent to defraud must be proven. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 77

Under South Carolina law, “voluntary conveyance,” for fraudulent transfer avoidance purposes, includes a conveyance made upon mere nominal consideration or without consideration. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Fraudulent Conveyances 74(3)

Prepetition transfer that Chapter 7 debtor made for no consideration, at time when he was indebted to two creditors that currently held allowed unsecured claims against estate, was avoidable by trustee in exercise of strong‑arm powers as creditor holding an allowed unsecured claim, where transfer left debtor with insufficient property to pay his creditors; transfer was avoidable at unsecured creditor’s behest under South Carolina’s Statute of Elizabeth. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Bankruptcy 2704; Fraudulent Conveyances 58

Under South Carolina law, transfer made for valuable consideration may be avoided as fraudulent transfer by creditor whose claim was in existence at time of transfer if creditor establishes: (1) that transfer was made by grantor with actual intent of defrauding creditors; (2) that grantor was indebted at time of transfer; and (3) that grantor’s intent is imputable to grantee. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Fraudulent Conveyances 9; Fraudulent Conveyances 54(1); Fraudulent Conveyances 64(1); Fraudulent Conveyances 155

Under South Carolina law, insolvency at time of transfer is not required for avoidance of transfer made without valuable consideration under the Statute of Elizabeth. In re Amelung (Bkrtcy.D.S.C. 2010) 436 B.R. 806. Fraudulent Conveyances 61

Where there is valuable consideration, a transfer may be set aside as a fraudulent conveyance only if there is an actual intent to defraud creditors imputable to the grantee. Royal Z Lanes, Inc. v. Collins Holding Corp. (S.C. 1999) 337 S.C. 592, 524 S.E.2d 621. Fraudulent Conveyances 155

Grossly inadequate consideration is insufficient ground to set aside a conveyance as fraudulent in the absence of intent to defraud; overruling Dufresne, 295 S.C. 1, 366 S.E.2d 256. Royal Z Lanes, Inc. v. Collins Holding Corp. (S.C. 1999) 337 S.C. 592, 524 S.E.2d 621. Fraudulent Conveyances 9; Fraudulent Conveyances 73.1

Grossly inadequate consideration for a conveyance is a badge of fraud and creates a rebuttable presumption of intent to defraud. Royal Z Lanes, Inc. v. Collins Holding Corp. (S.C. 1999) 337 S.C. 592, 524 S.E.2d 621. Fraudulent Conveyances 14; Fraudulent Conveyances 16

Value given to person other than debtor in exchange for debtor’s assets does not constitute consideration sufficient to avoid application of fraudulent conveyance statute. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Fraudulent Conveyances 76(1)

Debtor’s guarantee of its holding company’s credit line debt was unsupported by valuable consideration, for purposes of claim that guarantee was fraudulent conveyance, absent evidence that brief loan extension agreed to by bank in exchange for guarantee benefitted debtor. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Corporations And Business Organizations 2857

Transfer made without valuable consideration will be set aside as fraudulent conveyance if grantor was indebted to plaintiff at time of transfer and grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at time of transfer, but at time plaintiff seeks to collect; if there is valuable consideration, transfer will be set aside only where grantor was indebted at time of transfer and had actual intent to defraud creditors imputable to grantee. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Fraudulent Conveyances 8

Debtor’s guarantee of debt that its director incurred to purchase debtor was without valuable consideration, for purposes of claim that guarantee was fraudulent conveyance; benefit obtained by director in having his note extended was not consideration to the debtor. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Corporations And Business Organizations 2857

The evidence sustained a finding that property was conveyed without consideration and with intent to defraud creditors, despite the transferee’s testimony that the property was worth between $125,000 and $130,000 and that he wrote checks totalling $95,000 for an interest in the partnership which acquired the property, since (1) the checks did not reflect actual payment for the property, (2) the deed to the property was not executed and recorded until 6 years after the transfer, and (3) fraud and secrecy were implied by the close relationship between the transferor and the transferee, as well as threatened and pending litigation and judgments against the transferor at the time of transfer. Martin v. Town of Pine Ridge (S.C.App. 1993) 313 S.C. 432, 438 S.E.2d 259.

Loans made primarily for operation of hotel while decedent was very ill were upheld because bank had failed to prove lack of consideration for note and mortgage, and testimony was credible that this transaction was not entered into to hinder, delay, or defraud creditors; in order to annul mortgage which is supported by valuable consideration, it must be shown not only that decedent intended to hinder, delay, or defraud his creditors, but also that mortgage creditor participated in fraud. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

Where a conveyance is made without an actual intent to defraud but without consideration, the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors; but this means a sufficient amount of property not merely at the time of the transfer, but an amount from which in the final analysis the creditors will be able to collect their indebtedness in full. Gardner v. Kirven (S.C. 1937) 184 S.C. 37, 191 S.E. 814.

No matter how adequate the consideration, it lacks one of the main incidents to validity if it is not bona fide. Means v. Feaster (S.C. 1873) 4 S.C. 249.

Challenged transfers of inventory, operating funds, business, and salary by debtor‑corporation to its president and other alleged insiders were supported by valuable consideration and, thus, could not be set aside under South Carolina’s Statute of Elizabeth. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Corporations And Business Organizations 2845

7. Accrual and limitations of actions

Corporation was not entitled to defense of laches on company’s fraudulent conveyance claim under South Carolina’s Statute of Elizabeth, where company filed its claim within applicable limitations period, did not fail to perform a legal duty, and did not commit a negligent act that would cause prejudice to corporation. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Corporations and Business Organizations 2881

Under discovery rule, company’s fraudulent conveyance claim against corporation under South Carolina’s Statute of Elizabeth did not accrue, and applicable three year statute of limitations did not begin to run, until corporation produced documents during discovery put company on notice that corporation may have made distributions to shareholders with the knowledge that it was potentially liable for remediation of environmental contamination. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Limitation of Actions 100(12)

Under South Carolina law, statute of limitations on fraudulent transfer avoidance action under the Statute of Elizabeth begins to run after two events occur: (1) cause or right of action to institute and maintain such an action has accrued; and (2) aggrieved party has either discovered the fraud or is charged with knowledge, after exercise of due diligence, sufficient to put him on notice of fraud. In re Ducate (Bkrtcy.D.S.C. 2006) 355 B.R. 536. Limitation Of Actions 99(2); Limitation Of Actions 100(3)

Under South Carolina law, recording of conveyance of debtor’s property to related corporate entity, for stated consideration of three dollars and other entity’s assumption of mortgage debt, did not serve as constructive notice to existing trade creditor with small claim in amount of $266.72 that property had been fraudulently transferred, of kind sufficient to start three‑year statute of limitations on creditor’s fraudulent conveyance claims under the Statute of Elizabeth. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Limitation Of Actions 100(13)

Under South Carolina law, limitations period for causes of action in fraud, including fraudulent transfer claims under the Statute of Elizabeth, is governed by “discovery rule,” which provides that statute of limitations does not begin to run until discovery either of fraud itself, or of such facts as would have led to knowledge of fraud if pursued with reasonable diligence. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Limitation Of Actions 100(3)

Plaintiff lost status as judgment creditor when judgment became more than ten years old and, therefore, lacked standing to bring an action under the Statute of Elizabeth to void transfer of property. Carr v. Guerard (S.C. 2005) 365 S.C. 151, 616 S.E.2d 429. Fraudulent Conveyances 221

In an action to set aside a conveyance of lands made contrary to this section the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Walter J. Klein Co. v. Kneece (S.C. 1962) 239 S.C. 478, 123 S.E.2d 870. Limitation Of Actions 37(4); Limitation Of Actions 100(10)

A proceeding to set aside a deed upon the ground of fraud, where the party seeking so to do is in a position to institute an action for that purpose, must be commenced within six years from the time when the facts constituting the fraud are discovered by the aggrieved party. Walter J. Klein Co. v. Kneece (S.C. 1962) 239 S.C. 478, 123 S.E.2d 870.

8. Evidence and burden of proof

Where parol evidence relative to a trust is offered, not to establish it, but to show that the conveyance made in executing it was based upon adequate consideration, was for a proper purpose and was not to defeat the claims of creditors, parol evidence is competent for such purpose and is not precluded by the statute of frauds. U.S. Fidelity & Guar. Co. v. Mills, 1944, 146 F.2d 694.

In Finley v Moore (1899) 55 SC 195, 33 SE 362, it was held that for the purpose of negativing an intent to give a creditor preference, it could be shown that the conveyance was made pursuant to the provisions of a parol trust. U.S. Fidelity & Guar. Co. v. Mills, 1944, 146 F.2d 694.

In company’s action against privately‑held corporation for fraudulent conveyances to shareholders under South Carolina’s Statute of Elizabeth, burden was on shareholders to establish that conveyances were supported by valuable consideration, as well as establish the bona fides of the transactions, where all of the shareholders were family members of those on the corporate board, notwithstanding observance of corporate formalities. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Corporations and Business Organizations 2885

To avoid transfer under South Carolina’s Statute of Elizabeth as constructively fraudulent to creditors, plaintiff must establish the following: (1) that grantor was indebted to him at time of the transfer; (2) that conveyance was voluntary; and (3) that grantor failed to retain sufficient property to pay the indebtedness to plaintiff in full, not merely a time of transfer, but in the final analysis when plaintiff seeks to collect his debt. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Fraudulent Conveyances 8

Chapter 7 trustee satisfied burden of showing that there were creditors holding allowable unsecured claims whose claims were in existence at time of challenged transfers, in form, inter alia, of the IRS, into whose shoes trustee could step to assert fraudulent transfer avoidance claims under South Carolina’s Statute of Elizabeth. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Bankruptcy 2641

Under South Carolina’s Statute of Elizabeth, a fraudulent transfer will be set aside if the plaintiff can establish that: (1) the transfer was made by the grantor with the actual intent of defrauding his creditors, (2) the grantor was indebted at the time of the transfer, and (3) the grantor’s intent is imputable to the grantee. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2008) 396 B.R. 184. Fraudulent Conveyances 9; Fraudulent Conveyances 54(1); Fraudulent Conveyances 155

Given that they alleged fraud, Chapter 7 trustee’s actual and constructive fraudulent transfer claims under South Carolina Statute of Elizabeth had to be pleaded with particularity. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 429. Bankruptcy 2724

Under a constructive fraud theory, an existing creditor may avoid a transfer under South Carolina Statute of Elizabeth if it can establish that (1) the grantor was indebted to him at the time of the transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay the indebtedness to creditor in full, not merely at the time of the transfer, but in the final analysis when creditor seeks to collect his debt. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 429. Fraudulent Conveyances 8; Fraudulent Conveyances 58

Under a fraudulent transfer theory, an existing creditor may avoid a transfer under South Carolina Statute of Elizabeth if it can establish three things: (1) the transfer was made by the grantor with the actual intent of defrauding its creditors, (2) the grantor was indebted at the time of the transfer, and (3) the grantor’s intent is imputable to the grantee. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 429. Fraudulent Conveyances 8; Fraudulent Conveyances 9

Chapter 7 trustee’s claims against purported corporate recipient of debtor’s assets alleging actual and constructive fraudulent transfers under South Carolina Statute of Elizabeth did not satisfy rule requiring that averments of fraud be pleaded with particularity, given trustee’s failure to allege approximate dates of transfers and particular individuals or entities involved, and to specify those creditors with allowed claims giving him standing to assert such claims pursuant to Bankruptcy Code. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 429. Bankruptcy 2724

Chapter 7 trustee did not satisfy rule requiring that averments of fraud be pleaded with particularity in asserting claims against members of debtor‑limited liability company (LLC) and related corporation for fraudulent conveyance and constructive fraudulent conveyance under Bankruptcy Code and South Carolina Statute of Elizabeth, given trustee’s failure to allege approximate dates of challenged transfers and particular individuals or entities involved, and to specify those creditors with allowed claims providing him with standing to assert such claims. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 407. Bankruptcy 2724

In asserting claims alleging fraudulent conveyance and constructive fraudulent conveyance under Bankruptcy Code and South Carolina Statute of Elizabeth, Chapter 7 trustee had to plead fraud with particularity, such that complaint had to specify details of alleged fraud, including time, place, particular individuals involved, and specific conduct asserted. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 407. Bankruptcy 2724

Under a constructive fraud theory, an existing creditor may avoid a transfer under South Carolina Statute of Elizabeth if it can establish that (1) the grantor was indebted to him at the time of the transfer, (2) the conveyance was voluntary, and (3) the grantor failed to retain sufficient property to pay the indebtedness to creditor in full, not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 407. Fraudulent Conveyances 8; Fraudulent Conveyances 58

Under a fraudulent transfer theory, an existing creditor may avoid a transfer under South Carolina Statute of Elizabeth if it can establish three things: (1) the transfer was made by the grantor with the actual intent of defrauding its creditors, (2) the grantor was indebted at the time of the transfer, and (3) the grantor’s intent is imputable to the grantee. In re Derivium Capital, LLC (Bkrtcy.D.S.C. 2006) 380 B.R. 407. Fraudulent Conveyances 8; Fraudulent Conveyances 9

Under South Carolina fraudulent transfer law, burden of proving fraud is normally on plaintiff; however, where transfers to members of family are attacked either as being actually fraudulent or on account of their voluntary character, the law imposes burden on transferee to establish both valuable consideration and bona fides of transaction by clear and convincing testimony. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Fraudulent Conveyances 271.3; Fraudulent Conveyances 278(1)

Under South Carolina law, on challenge to alleged fraudulent transfers to family members under either an actual or constructive fraud theory, burden of proof shifts to transferee to prove, by clear and convincing and not just by preponderance of the evidence, both that valuable consideration was exchanged between parties and bona fides of transaction. In re Haddock (Bkrtcy.D.S.C. 2000) 246 B.R. 810. Fraudulent Conveyances 300(1)

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Fraudulent Conveyances 295

Evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 295

Evidence was sufficient to support a finding that fourth brother intended to confound or hinder his existing and known potential creditors, including his three brothers, as required for the three brothers to assert the Statute of Elizabeth, under which recent conveyances made for the purpose of defrauding creditors would be deemed void; the recent transfers were voluntarily made to a family member just months prior to trial on tort claims against fourth brother, and fourth brother continued to use the property as his own following the transfers. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 64(2); Fraudulent Conveyances 69(1); Fraudulent Conveyances 73.1; Fraudulent Conveyances 131.1

Evidence was sufficient to support a finding that fourth brother intended to confound or hinder his existing and known potential creditors, including his three brothers, as required for the three brothers to assert the Statute of Elizabeth, under which remote conveyances made for the purpose of defrauding creditors would be deemed void; fourth brother’s remote conveyances were voluntary, he recognized that by putting his property in his children’s names he could insulate himself from existing and known potential creditors, and even after transfer of his property, fourth brother continued to enjoy the benefits of ownership by continuing to farm it, receive income from it, and borrow money against it. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 24(1); Fraudulent Conveyances 146(3)

Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony. Gardner v. Kirven (S.C. 1937) 184 S.C. 37, 191 S.E. 814. Fraudulent Conveyances 278(1)

In an action under this section to set aside a mortgage for actual fraud upon creditors, proof of a nulla bona return upon the execution in favor of the plaintiff creditors is not necessary to establish the insolvency of the defendant grantor, which fact may be shown by any other competent testimony. Gray v. Anderson Hardware Co. (S.C. 1913) 94 S.C. 80, 77 S.E. 742. Fraudulent Conveyances 297

In determining whether payments made by Chapter 7 debtor‑corporation to its president’s sister violated South Carolina’s Statute of Elizabeth, bankruptcy court should have required transferee‑sister to prove, by clear and convincing evidence, both that she gave valuable consideration in exchange for her salary and the bonafides of the transaction, rather than having trustee, as party challenging the transaction, prove his case. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Bankruptcy 2726.1(3); Bankruptcy 2727(3)

9. Qualification as creditor

Creditors alone can attack instrument on ground of fraud. Mitchell v Cleveland (1907) 76 SC 432, 57 SE 33 (superseded on other grounds by statute as stated in Liberty Loan Corp. v Mumford (App) 283 SC 134, 322 SE2d 17, cert gr 284 SC 367, 326 SE2d 657 and cert dismd 287 SC 254, 335 SE2d 805).

Fraudulent conveyance cannot be avoided by executor or administrator. Chappell v Brown (1830) 17 SCL 528; King v Clarke (1837) 11 SC Eq 611.

Bankruptcy Code’s strong‑arm statute allowed Chapter 7 trustee to step into the shoes of creditors entitled, under South Carolina’s Statute of Elizabeth, to avoid fraudulent transfer of property by debtor; thus, for trustee to maintain action under Statute of Elizabeth, there had to be creditor with valid unsecured claim in bankruptcy case that could assert a claim to avoid challenged transfer. In re Ducate (Bkrtcy.D.S.C. 2007) 369 B.R. 251. Bankruptcy 2704

Asbestos complainants that had filed suits in which debtor was named as defendant, prior to alleged fraudulent transfer of real estate from debtor to related corporate entity, were not actual creditors whose claims against debtor would give Chapter 7 trustee standing to pursue strong‑arm avoidance claims under South Carolina fraudulent conveyance law; as of date of hearing on defendants’ motion for summary judgment on strong‑arm claims, none of these asbestos complainants had filed proof of claim in bankruptcy case. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Bankruptcy 2704

Plaintiff was not a creditor of debtor by virtue of his status as preferred shareholder of debtor’s holding company, precluding his recovery of transfers made by debtor without valuable consideration. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Corporations And Business Organizations 2873

Plaintiff, by virtue of its loan to debtor corporation, was creditor entitled to set aside fraudulent conveyance. Future Group, II v. Nationsbank (S.C. 1996) 324 S.C. 89, 478 S.E.2d 45, rehearing denied. Corporations And Business Organizations 2873

10. Requirement that debt be reduced to judgment

Creditor need not obtain nulla bona return prior to bringing suit to nullify voluntary transfer of property of his deceased debtor. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

The law requires in an action by a creditor solely to set aside his debtor’s voluntary deed, for legal fraud, allegation and proof that the debt was reduced to judgment execution issued to enforce collection of the judgment, and a nulla bona return on the execution by the sheriff. Walter J. Klein Co. v. Kneece (S.C. 1962) 239 S.C. 478, 123 S.E.2d 870. Fraudulent Conveyances 269

The rule carries with it no requirement that a creditor must have been armed with a judgment and nulla bona return at the time the deed or transfer under attack was made in order to render the creditor susceptible of being injured in the loss or impairment of his debt by such transfer within the meaning of the statute. It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. It may be reduced to judgment at a later date. To determine whether a person is such an existing creditor as can invoke the protection of the statute, the inception of the debt or obligation is the time which controls and not the date of the subsequent entry of judgment. Matthews v. Montgomery (S.C. 1940) 193 S.C. 118, 7 S.E.2d 841.

11. Conveyance to family member

Under South Carolina’s Statute of Elizabeth, shareholders of privately‑held corporation failed to establish bona fides of monetary distributions to shareholders by corporate directors who were their family members, and thus transfers were fraudulent and void, where corporate officers were aware of impending liability for environmental remediation, and made one such distribution the day after corporation was brought into litigation related to environmental contamination. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Corporations and Business Organizations 2845

Under South Carolina’s Statute of Elizabeth, privately‑held corporation’s transfers of company assets to shareholders who were family members of corporate directors were not supported by valuable consideration, and thus were fraudulent and void, where corporation’s creditors, including company, were entitled to its assets after it became insolvent, and distributions were not made in exchange for redemption of shares. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Corporations and Business Organizations 2845

Chapter 7 debtor did not receive consideration for his prepetition transfer of his 50‑percent membership interest in a limited liability company (LLC) to his father, and so the voluntary conveyance could be avoided pursuant to the Bankruptcy Code’s strong‑arm provision and South Carolina’s Statute of Elizabeth without proving actual intent to defraud creditors; although dissociation agreement signed by debtor and his father stated that $10 was the full and complete consideration that debtor received for the conveyance of his ownership and other interests in the company, the bankruptcy court found that debtor in fact received nothing for his interest in the LLC, there was no evidence that the conveyance relieved debtor of any personal obligation to repay his parents for his portion of any agreed capital call, and debtor’s continuing employment with the company was not consideration for the transfer. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Fraudulent Conveyances 298(2); Fraudulent Conveyances 300(1)

Where, under South Carolina law, Chapter 7 debtor was found to have fraudulently conveyed his 50‑percent membership interest in a limited liability company (LLC) to his father prepetition, the appropriate remedy was the recovery of the property transferred, given the recoverability of debtor’s interest, the difficulty in valuing his interest, and the lack of evidence of any depreciation in the value of the interest since the transfer. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Bankruptcy 2704; Fraudulent Conveyances 96(2)

Chapter 7 debtor’s prepetition conveyance of his 50‑percent membership interest in a limited liability company (LLC) to his father constituted a transfer of property under South Carolina law; absent evidence of any ongoing obligation among LLC’s members to make capital contributions, debtor’s interest in the LLC pursuant to its operating agreement was not an executory contract, debtor’s interest, instead, consisted of both his management rights and distributional interest in the LLC, and, while debtor lost his management rights by dissociating himself, he maintained his distributional interest, which constituted personal property, until he transferred that interest to his father in the subject conveyance. In re Hanckel (Bkrtcy.D.S.C. 2014) 512 B.R. 539, affirmed, appeal dismissed 2015 WL 7251714, motion to dismiss appeal denied 2015 WL 7251723. Bankruptcy 2534

Debtor’s transfer to her daughter, for nominal sum of $5.00 and love and affection between parties, of a remainderman’s interest in real property in which she retained life estate, and continued to use as before, could be avoided as constructively fraudulent by creditor with existing claim against debtor at time of transfer, where debtor’s assets were significantly diminished as result of transfer, to extent that debtor did not have sufficient money to repay her debt to creditor. In re Haddock (Bkrtcy.D.S.C. 2000) 246 B.R. 810. Fraudulent Conveyances 62

Mortgage granted by judgment debtor to nephew three months after judgment creditor filed original action against debtor was the result of moral fraud, and therefore, constituted a fraudulent conveyance; there was no note, and the mortgage was not supported by either contemporaneous or past valuable consideration. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 27

Nephew’s purported loans to judgment debtor in years prior to entry of judgment against debtor were for the purpose of returning to debtor part of an earlier fraudulent conveyance, and involved actual moral fraud, constituting fraudulent conveyances; shortly after purchase of property as part of earlier fraudulent conveyance, nephew obtained open‑end, equity line mortgage for which debtor paid interest, and nephew transferred funds to debtor allegedly as a loan but debtor did not acknowledge the debt in writing or make payments to nephew on it. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 24(1)

In determining whether a family‑member transferee has met his burden to show the bona fides of a supposed fraudulent conveyance, court will look to whether there are indicia of badges of fraud, including insolvency or indebtedness of the transferor, lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, reservation of benefit to the transferor, and the retention by the transferor of possession of the property allegedly conveyed. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 16

Multiple badges of fraud justified setting aside, as a fraudulent conveyance, judgment debtor’s transfer of funds to his nephew, made nine years prior to the entry of judgment and purportedly in consideration for life estate in property purchased by nephew; public records showed that consideration for transaction was only $5, and despite nephew’s assertion that debtor was debt‑free at time of transfer, federal tax liens were filed against debtor in subsequent years. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Fraudulent Conveyances 15

A conveyance of a debtor’s residence to his mother, prior to his default on a note, was void under Section 27‑23‑10 where the mother paid nothing for the property, the debtor continued to reside on the property and to pay the mortgage and taxes on it, the debtor paid no rent to his mother, the mother continued to reside at her own home, and the mother knew nothing about the conveyance until it was completed. First Citizens Bank and Trust Co. of South Carolina v. Scofield (S.C.App. 1985) 286 S.C. 520, 335 S.E.2d 248. Fraudulent Conveyances 96(1); Fraudulent Conveyances 146(3)

12. Conveyance of corporate or partnership assets

Court’s prior erroneous determination in action by creditor against insolvent corporation’s directors under South Carolina’s Statute of Elizabeth governing fraudulent conveyances, that South Carolina law did not recognize derivative suits by creditors, was law of the case on corporate directors’ motion for judgment as a matter of law; determination would not work a manifest injustice, since creditor would recover on fraudulent conveyance claim. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Courts 99(6)

Under South Carolina fraudulent transfer law, transfer of real property from one corporation to related corporate entity, as part of plan to permit new chief executive officer of first corporation to acquire equity interest therein without also acquiring interest in this property, was not subject to avoidance as transfer that was made with actual intent to defraud creditors, notwithstanding that, at time of transfer, debtor was facing potential liability on asbestos claims; debtor provided convincing explanation for conveyance, transferred only this real property and no other assets, and was solvent for more than one year following conveyance. In re J.R. Deans Co., Inc. (Bkrtcy.D.S.C. 2000) 249 B.R. 121. Corporations And Business Organizations 2845

The creditor of a corporation was entitled to have the grantor/corporation’s transfer of corporate assets set aside as violative of Section 27‑23‑10 where the corporation was indebted to the creditor when it sold the assets, the consideration was worth $10,000 to $16,000 less than the value of the assets transferred and the corporation did not have sufficient assets after transfer to pay its debts to the creditor. Dufresne v. Regency Realty, Inc. of Hilton Head Island (S.C.App. 1987) 295 S.C. 1, 366 S.E.2d 256. Corporations And Business Organizations 2870

Allegations that partnership transferred all of its real property first to individual partners and then to partners’ newly created out of state partnership, rendering former partnership insolvent, and that such transfers were made with knowledge of pending tort claims action and with actual intent to defraud plaintiffs, state causes of action for fraudulent conveyances. Lebovitz v. Mudd (S.C. 1987) 293 S.C. 49, 358 S.E.2d 698.

The intent and purpose of the entry of judgments between various corporate defendants, owned or controlled by one individual defendant, was solely to delay, hinder and defraud plaintiff of its just and lawful actions and claims and therefore, said judgments were void as to plaintiff under this section. Crown Cent. Crown Central Petroleum Corp. v. Elmwood Properties (S.C. 1964) 244 S.C. 588, 138 S.E.2d 38.

Had it not been for the activities of the plaintiff and its diligence in pursuing the matter, successfully setting aside the deed from one corporate defendant to a second corporate defendant, and bringing into the court the property in question, despite the efforts of the individual defendant in opposition, there would be no assets in the hands of the first corporation with which to pay any of its creditors, and therefore all claims of plaintiff were entitled to priority over the claims of a third corporation. Crown Central Petroleum Corp. v. Elmwood Properties (S.C. 1964) 244 S.C. 588, 138 S.E.2d 38. Corporations And Business Organizations 2969

Chapter 7 debtor‑clothing manufacturer’s transfer of inventory to foreign corporation that it created, for assembly into salable finished goods, as well as its transfer of equipment and cash to cover the local costs of that assembly, in an attempt to move its sewing operation off‑shore to reduce its costs, were not fraudulent transfers under the Bankruptcy Code or South Carolina law but, rather, constituted simple and straightforward production outsourcing. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Bankruptcy 2645.1; Corporations And Business Organizations 2846

Finding that Chapter 7 debtor‑clothing manufacturer’s sales of inventory to its president and to related company were not fraudulent transfers under the Bankruptcy Code or South Carolina law but, rather, constituted stopgap effort to generate cash to keep debtor afloat, was supported by evidence that transfer of inventory was an attempt to pay down loan and to aid debtor during its financial downturn, that related company ultimately purchased the inventory and sold it to third parties at no profit, and that related company also lost considerable amounts of money during its short existence. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Bankruptcy 2727(3)

Yearly salary and bonus of Chapter 7 debtor‑corporation’s president, totaling less than $250,000.00 for the head of a $13 million company which had historically been very profitable, represented good faith compensation and bonus for president’s service, and not an improper transfer under the Bankruptcy Code or South Carolina law. In re Southern Textile Knitters (C.A.4 (S.C.) 2003) 65 Fed.Appx. 426, 2003 WL 124771, Unreported. Bankruptcy 2646; Corporations And Business Organizations 2845

13. Conveyance of stock

Where bank stockholder made a voluntary conveyance of all her property while the bank was in liquidation and she was subject to assessment on her stock, such conveyance could be set aside. Rogers v. Marchant, 1937, 91 F.2d 660, certiorari denied 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571.

14. Assignment or conveyance to spouse

Even if Chapter 7 trustee could rely upon constructive fraud to avoid debtor’s prepetition transfer of home and its contents to wife under South Carolina’s Statute of Elizabeth, based upon claim of subsequent creditor and trustee’s strong‑arm powers, wife adequately explained circumstances surrounding transfer to rebut any inference of fraud, in that debtor did not act with intent to defraud creditors, but, instead, had continued to contribute to family business and depleted his resources through series of bad business deals. In re Ducate (Bkrtcy.D.S.C. 2007) 369 B.R. 251. Bankruptcy 2726(4)

Judgment debtor’s transfer of marital residence to wife was fraudulent conveyance, even though judgment creditors’ claim of breach of contract had not been reduced to judgment at the time of the transfer; creditors’ breach of contract claim accrued prior to transfer, and debtor lacked other funds sufficient to satisfy the debt. Albertson v. Robinson (S.C.App. 2006) 371 S.C. 311, 638 S.E.2d 81, rehearing denied. Fraudulent Conveyances 57(1); Fraudulent Conveyances 241(2)

Transfer of marital residence from judgment debtor to his wife for $5.00 and love and affection was not sufficient consideration to defeat claim by judgment creditors that transfer was fraudulent conveyance; wife testified that she had no recollection of receiving the $5.00, couple did not have clear understanding of what constituted the consideration, and debtor stated that he was afraid his family would lose everything if he did not convey the property. Albertson v. Robinson (S.C.App. 2006) 371 S.C. 311, 638 S.E.2d 81, rehearing denied. Fraudulent Conveyances 95(2)

Transfer of property from corporation wholly owned by husband to wife violated Statute of Elizabeth, in absence of clear and convincing evidence that transfer was for consideration and was bona fide. Windsor Properties, Inc. v. Dolphin Head Const. Co., Inc. (S.C. 1998) 331 S.C. 466, 498 S.E.2d 858. Corporations And Business Organizations 2865

Judgment against wife of decedent was improper where bank did not pray for money judgment against wife; additionally, where there was no evidence that prior to conveyance from husband to wife husband was insolvent, transfer to wife of one‑half interest in property, and subsequent conveyance from wife to husband of life estate in property, did not violate Statute of Elizabeth. South Carolina Nat. Bank v. Halter (S.C.App. 1987) 293 S.C. 121, 359 S.E.2d 74.

Assignment made from husband to wife, in consideration of wife supporting disabled husband and family, was voluntary and without consideration as to a judgment creditor existing when the assignment was made. Matthews v. Matthews (S.C. 1945) 207 S.C. 170, 35 S.E.2d 157. Fraudulent Conveyances 300(1)

For case which set aside a voluntary conveyance by a husband to his wife and daughter as being violative of this section [Code 1962 Section 57‑301], see Gardner v. Kirven (S.C. 1937) 184 S.C. 37, 191 S.E. 814.

In suit to set aside deed to wife on ground of fraud, evidence showing a valid transaction and an adequate consideration supported judgment for defendant. E. Sternberger Co. v. Summerford (S.C. 1929) 150 S.C. 60, 147 S.E. 627. Fraudulent Conveyances 300(1)

A deed from judgment debtor to his wife, made to prevent a creditor bank from collecting its expected deficiency judgment, will be set aside in a proceeding by the bank after it has secured such a judgment and a return of nulla bona has been made. Farmers’ Bank v. Bradham (S.C. 1924) 129 S.C. 270, 123 S.E. 835. Fraudulent Conveyances 104(2)

14.5. Tenants in common

Fact that landowner and co‑owner transferred property by single deed did not preclude setting aside landowner’s transfer as a fraudulent conveyance in violation of Statute of Elizabeth, despite the presumptive validity of co‑owner’s transfer; landowner and co‑owner owned property as tenants in common, and thus each transfer was distinct, and the invalidity of one transfer did not necessarily invalidate the other. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Fraudulent Conveyances 23

15. Attorney fees

Special referee’s award of attorney fees based primarily on the underlying fraudulent conduct of fourth brother in making conveyances of his property for the purpose of defrauding known or potential creditors constituted an abuse of discretion, where the Statute of Elizabeth, which deemed void conveyances made for the purpose of defrauding creditors or to avoid paying child support, did not provide for an award of attorney fees. Judy v. Judy (S.C.App. 2013) 403 S.C. 203, 742 S.E.2d 672, certiorari denied. Fraudulent Conveyances 319

16. Bankruptcy

Strong‑arm provision allowed Chapter 7 trustee to step into shoes of creditor holding an allowable unsecured claim and to assert creditor’s rights under the South Carolina Statute of Elizabeth, provided that there was creditor with a valid unsecured claim in the bankruptcy case who could assert a claim to avoid the transfer. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Bankruptcy 2641; Bankruptcy 2704

Written memorandum of understanding was not final word on whether corporate officer and employee were entitled to interest on prepetition loans they made to Chapter 7 debtor‑corporation, and parties’ subsequent conduct and communications, including officer’s and employee’s forbearance in not attempting to collect on loans once they became due and corporation’s payment of 7.5% rate of interest without protest when loans were eventually repaid, established that they had reached agreement on payment of interest in exchange for this forbearance; accordingly, officer and employee did not receive any voluntary payment of interest to which they were not entitled, and interest payments were not recoverable by trustee in exercise of strong‑arm powers under South Carolina’s Statute of Elizabeth. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Bankruptcy 2646; Bankruptcy 2704

Excess interest payments that corporate Chapter 7 debtor’s officer received as result of corporation’s math errors in calculating the interest owing on prepetition loans from officer were made for no consideration, and not just inadequate consideration, and were recoverable by trustee in exercise of strong‑arm powers as constructively fraudulent “voluntary transfers” under South Carolina’s Statute of Elizabeth. In re Genesis Press, Inc. (Bkrtcy.D.S.C. 2016) 559 B.R. 445. Bankruptcy 2650(1); Bankruptcy 2704

Trustee’s strong‑arm rights as creditor holding an allowable unsecured claim permit him to “step into the shoes” of creditors and assert their rights under the South Carolina Statute of Elizabeth, provided there is creditor with a valid unsecured claim in bankruptcy case who could assert a claim to avoid transfer. In re Pigg (Bkrtcy.D.S.C. 2014) 515 B.R. 274, affirmed 2014 WL 4536642. Bankruptcy 2704

Bankruptcy court would recommend that district court set aside, as both actually and constructively fraudulent to creditors under South Carolina’s Statute of Elizabeth, an insolvent or near‑insolvent debtor’s undisclosed prepetition transfer to woman with whom he had close personal relationship of real property that he purchased for in excess of $100,000 for sum of $5.00, as well as debtor’s undisclosed gratuitous prepetition transfers to this same woman of other personal property, where debtor’s ex‑wife, who had filed proofs of claim for which she asserted priority status as domestic support obligation, was existing creditor at time of challenged transfers, and several other creditors who had also filed proofs of claim were also owed money at time of transfers, thereby permitting Chapter 7 trustee to assert strong‑arm rights of creditor holding an allowable unsecured claim. In re Pigg (Bkrtcy.D.S.C. 2014) 515 B.R. 274, affirmed 2014 WL 4536642. Bankruptcy 2104; Bankruptcy 2704; Fraudulent Conveyances 54(1); Fraudulent Conveyances 74(3); Fraudulent Conveyances 77; Fraudulent Conveyances 108

17. Trusts

Following determination that privately held corporation made fraudulent conveyances of corporate assets to shareholders prior to dissolution in order to evade liability for environmental remediation in violation of South Carolina’s Statute of Elizabeth, court would exercise equitable powers to impose remedy of trust for corporation’s creditors, and would order shareholders to fund trust with amounts equal to distributions they received. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Trusts 94.5

Under South Carolina law, court would not impose constructive trust on fraudulent conveyances made by privately‑held corporation to its shareholders in violation of Statute of Elizabeth; there was no indication that transferee shareholders acted with wrongful intent, distributions at issue were not identified with specificity, and there was more than one creditor seeking funds from corporation. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 127 F.Supp.3d 568. Trusts 94.5; Trusts 95

Under South Carolina law, creditor had no adequate remedy at law against directors of corporation who made fraudulent conveyances to themselves by distributing corporate assets, and thus creditor would be permitted to proceed against directors in equity under Statute of Elizabeth to recover the void distributions. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Corporations and Business Organizations 2873

Under South Carolina principles of equity, express trust funded by the shareholders and corporate directors in the amount of distributions made by directors to shareholders after corporation became insolvent was an adequate remedy that vindicated creditor’s right to void fraudulent conveyances under Statute of Elizabeth. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Corporations and Business Organizations 2873

Constructive trust was not appropriate remedy for creditor’s claim seeking to void fraudulent conveyance by corporate board of directors to shareholders who were family members under South Carolina’s Statute of Elizabeth; shareholders had not engaged in wrongdoing, creditor did not identify money to be transferred into trust, return of funds to corporation for benefit of creditor was not possible since corporation was dissolved, and express trust already created by court was an adequate remedy. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Corporations and Business Organizations 2873

18. Sanctions

Corporate directors’ motion for judgment as a matter of law on creditor’s claim under South Carolina’s Statute of Elizabeth was not frivolous, and thus did not merit sanctions; directors were successful, in part, in obtaining relief sought. PCS Nitrogen, Inc. v. Ross Development Corp., 2015, 126 F.Supp.3d 611. Federal Civil Procedure 2774(1)

18.5. Record on appeal

Landowner and limited liability company’s subsequent objections to evidence of later transfer by company, to which landowner had fraudulently conveyed property, did not cure their failure to contemporaneously object when the evidence was first introduced, and thus, the propriety of admission of such evidence was not preserved for appeal. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Appeal and Error 230

19. Standard of review

An action to set aside a conveyance of land as fraudulent under the Statute of Elizabeth is an equitable action, and an appellate court applies a de novo standard of review. First Citizens Bank and Trust Company, Inc. v. Park at Durbin Creek, LLC (S.C.App. 2017) 419 S.C. 333, 797 S.E.2d 409, rehearing denied. Appeal and Error 893(2); Fraudulent Conveyances 237(2)

Broad de novo scope of review applied in actions to set aside supposed fraudulent conveyances does not relieve appellant of his burden to show that the trial court erred in its findings, and an appellate court is not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Appeal and Error 893(2); Appeal and Error 895(2)

An action to set aside a supposedly fraudulent conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies. Gordon v. Lancaster (S.C.App. 2016) 419 S.C. 48, 795 S.E.2d 857, rehearing denied. Appeal and Error 893(2); Fraudulent Conveyances 237(1)

**SECTION 27‑23‑20.** Conveyances to deceive purchasers.

Every conveyance, grant, charge, lease, estate, encumbrance and limitation of use or uses of, in or out of any lands, tenements or other hereditaments whatsoever which may be had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall purchase in fee simple, fee tail, for life, lives or years such lands, tenements and hereditaments, or any part and parcel thereof, or to defraud and deceive such as have or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken (only as against such person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which shall have so purchased, for money or other good consideration such lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of them) to be utterly void, frustrate and of no effect, any pretense, color, feigned consideration or expressing of any use or uses to the contrary notwithstanding.

HISTORY: 1962 Code Section 57‑302; 1952 Code Section 57‑302; 1942 Code Section 8697; 1932 Code Section 8697; Civ. C. ‘22 Section 5219; Civ. C. ‘12 Section 3456; Civ. C. ‘02 Section 2370; G. S. 1787; R. S. 1889; 1712 (2) 499.

Library References

Fraudulent Conveyances 1, 23, 71.

Westlaw Topic No. 186.

C.J.S. Fraudulent Conveyances Sections 2 to 3, 5 to 8, 24, 198.

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S.C. Jur. Assignments Section 48, Conveyance to Defraud Purchasers.

NOTES OF DECISIONS

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1. In general

The Statute 27 Elizabeth is only an affirmance of the common law. Footman v Pendergrass (1850) 24 SC Eq 33; Hudnal v Wilder (1827) 15 SCL 294.

This section does not extend to goods and chattels. Teasdale v Atkinson (1806) 4 SCL 48. Footman v Pendergrass (1850) 24 SC Eq 33.

Notice of purchaser at second sale, see Hudnal v Wilder (1827) 15 SCL 294. Howard v Williams (1830) 17 SCL 575.

Merger clause and disclaimer provisions in purchase contract for home did not protect vendors from purchasers’ counterclaims for fraud and negligent misrepresentation based on alleged statements made by vendors’ real estate agent indicating that there were no easements on the property. Slack v. James (S.C.App. 2003) 356 S.C. 479, 589 S.E.2d 772, rehearing denied, certiorari granted, affirmed 364 S.C. 609, 614 S.E.2d 636, on remand 2006 WL 6810107. Fraud 36

Prospective purchasers of home, who subsequently refused to purchase home after discovering a sewer line easement which materially affected the use of the property, were entitled to bring an action against vendors for fraudulent misrepresentation based on alleged statements made by vendors’ real estate agent prior to entering into contract which indicated that no easements existed, even though the purchasers could have ascertained the existence of the easement through investigation of public records; the question of whether the purchasers could reasonably rely on the statement at issue in view of the information entered upon the public record was for the jury to decide. Slack v. James (S.C.App. 2003) 356 S.C. 479, 589 S.E.2d 772, rehearing denied, certiorari granted, affirmed 364 S.C. 609, 614 S.E.2d 636, on remand 2006 WL 6810107. Fraud 64(5)

**SECTION 27‑23‑30.** Punishment of parties to fraudulent conveyances.

All parties to such feigned, covinous and fraudulent gifts, grants, leases, charges or conveyances, or being privy to and knowing of them, or any of them, who shall wittingly or willingly put in use, avow, maintain, justify or defend them, or any of them, as true, simple and done, had or made bona fide or upon good consideration, of or to the disturbance or hindrance of the purchaser or purchasers, lessees or grantees, their heirs, successors, executors, administrators or assigns or such as have or shall lawfully claim anything by, from or under them, or any of them, shall incur the penalty and forfeiture of one year’s value of such lands, tenements and hereditaments so purchased or charged, the one moiety whereof shall be for the use of the State and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, encumbrance or limitation of use, to be recovered by action in any court of competent jurisdiction; and also, being thereof lawfully convicted, shall suffer imprisonment for one‑half year.

HISTORY: 1962 Code Section 57‑303; 1952 Code Section 57‑303; 1942 Code Section 8698; 1932 Code Section 8698; Civ. C. ‘22 Section 5220; Civ. C. ‘12 Section 3457; Civ. C. ‘02 Section 2371; G. S. 1788; R. S. 1890; 27 Eliz., c. 4; 1712 (2) 500; 13 Eliz., c. 5; 1712 (2) 497.

Library References

Fraudulent Conveyances 330, 331.

Westlaw Topic No. 186.

**SECTION 27‑23‑40.** Conveyances upon good consideration.

Nothing contained in Sections 27‑23‑10 to 27‑23‑30 shall extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use or uses of, in, to or out of any lands, tenements or hereditaments at any time had or made upon or for good consideration and bona fide to any person or body politic or corporate, anything mentioned to the contrary notwithstanding.

HISTORY: 1962 Code Section 57‑304; 1952 Code Section 57‑304; 1942 Code Section 8699; 1932 Code Section 8699; Civ. C. ‘22 Section 5221; Civ. C. ‘12 Section 3458; Civ. C. ‘02 Section 2372; G. S. 1789; R. S. 1891; 1712 (2) 500; 1712 (2) 498.

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1. In general

Quoted in Fidelity‑Bankers’ Trust Co. v. Little, 1938, 99 F.2d 950.

Cited in Miller v. Wroton (S.C. 1908) 82 S.C. 97, 63 S.E. 62, rehearing denied 82 S.C. 97, 63 S.E. 449.

**SECTION 27‑23‑50.** Leases, estates, or interests assigned, granted or surrendered by parol.

No leases, estates or interests, either of freehold, term of years or uncertain interests, of, in, to or out of any lands, tenements or hereditaments shall at any time be assigned, granted or surrendered, unless it be by deed or note, in writing signed by the party so assigning, granting or surrendering them, or his agent thereunto lawfully authorized by writing or by act and operation of law.

HISTORY: 1962 Code Section 57‑305; 1952 Code Section 57‑305; 1942 Code Section 7043; 1932 Code Section 7043; Civ. C. ‘22 Section 5515; Civ. C. ‘12 Section 3736; Civ. C. ‘02 Section 2651; G. S. 2018; R. S. 2150; 1712 (2) 545.

CROSS REFERENCES

Parol contracts relating to real property, see Section 32‑3‑10.

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S.C. Jur. Assignments Section 4, Land.

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S.C. Jur. Gifts Section 5, Gifts of Real Property.

S.C. Jur. Landlord and Tenant Section 7, Written and Oral Leases Not Governed by the Rlta.

Forms

South Carolina Legal and Business Forms Section 7:1 , Legal Principles.

South Carolina Legal and Business Forms Section 8:1 , Legal Principles.

South Carolina Legal and Business Forms Section 8:4 , Checklist‑Drafting Deed.

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South Carolina Legal and Business Forms Section 14:1 , Legal Principles.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 31.4, Gift of Donor’s Interest in Land.

Restatement (3d) of Property (Servitudes) Section 2.7, Formal Requirements (Statute of Frauds).

Restatement (3d) Property (Wills & Don. Trans.) Section 6.3, Gifts of Land.

Restatement (3d) Property (Wills & Don. Trans.) Section 6.3 TD 3, Gifts of Land.

LAW REVIEW AND JOURNAL COMMENTARIES

Robertson, Electronic commerce on the internet and the statute of frauds, 49 S.C. L. Rev. 787, Summer 1998.

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Parol agreements 2

1. In general

Additional related cases, see National Bank v People’s Grocery Co. (1929) 153 SC 118, 150 SE 478. Workman v Copeland (1921) 117 SC 214, 110 SE 526; Charles v Byrd (1888) 29 SC 544, 8 SE 1. Davis v Pollock (1892) 36 SC 544, 15 SE 718. Sampson v Camperdown Cotton Mills (1894, CC SC) 64 F 939.

Cited in Croft v. Faust (S.C. 1947) 209 S.C. 477, 40 S.E.2d 801.

Section 30‑7‑10, requiring deeds of conveyances to be recorded, must be construed in connection with this section requiring enforceable agreements to be in writing, since the former section could relate to enforceable agreements only. Epps v. McCallum Realty Co. (S.C. 1927) 139 S.C. 481, 138 S.E. 297. Fraudulent Conveyances 154(1); Vendor And Purchaser 231(14.1)

Statute of frauds must be pleaded to give right to object to evidence obnoxious to the statute. Coward v. Boyd (S.C. 1908) 79 S.C. 134, 60 S.E. 311. Frauds, Statute Of 152(1)

Part performance, see Baker v. Hussey (S.C. 1902) 63 S.C. 551, 41 S.E. 758.

Applied in Hillhouse v. Jennings (S.C. 1901) 60 S.C. 392, 38 S.E. 596.

2. Parol agreements

A parol partition is binding upon the parties if there is sufficient proof of part performance to take it out of the statute of frauds. Actual possession is the most satisfactory evidence of part performance. Kennemore v Kennemore (1887) 26 SC 251, 1 SE 881. Bolt v Sullivan (1934) 173 SC 24, 174 SE 491.

Demurrer to the complaint, on the ground that the alleged contract upon which the action was based was an oral contract for the subleasing, use or occupancy of real estate in violation of this section and what are now Sections 32‑3‑10 and 27‑35‑20, was properly overruled, where the questions whether the alleged contract violated the statute of frauds or was removed from the operation of the statute as a contract of guaranty or by virtue of part performance could properly be determined only after the facts were developed on a trial of the merits. Leventis v. Acciardo (S.C. 1971) 256 S.C. 437, 182 S.E.2d 726. Frauds, Statute Of 150(1)

**SECTION 27‑23‑60.** Force and effect of parol leases.

All estates, interests of freehold or terms of years, and any uncertain interests of, in, to or out of any lands, tenements or hereditaments, made or created by livery or seizin only or by parol and not put in writing and signed by the parties so making or creating them, or their agents thereunto lawfully authorized by writing, shall have the force and effect of estates at will only and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol lease or estate or any former law or usage to the contrary notwithstanding, except leases not exceeding the term of one year from the time of entry whereupon the rent reserved to the landlord during such term shall amount unto two‑thirds parts, at least, of the full improved value of the thing demised.

HISTORY: 1962 Code Section 57‑306; 1952 Code Section 57‑306; 1942 Code Section 7042; 1932 Code Section 7042; Civ. C. ‘22 Section 5514; Civ. C. ‘12 Section 3735; Civ. C. ‘02 Section 2650; G. S. 2017; R. S. 2149; 29 C. 2, c. 3; 1712 (2) 545.

CROSS REFERENCES

Duration of tenancy which may be created by parol, see Section 27‑35‑10.

Library References

Frauds, Statute Of 58, 59.

Westlaw Topic No. 185.

C.J.S. Frauds, Statute Of Section 87.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Landlord and Tenant Section 7, Written and Oral Leases Not Governed by the Rlta.

NOTES OF DECISIONS

In general 1

1. In general

Additional related cases, as to holding over by tenant, see Matthews v Hipp (1903) 66 SC 162, 44 SE 577. Hillhouse v Jennings (1901) 60 SC 392, 38 SE 596. Hellams v Patton (1895) 44 SC 454, 22 SE 608. Davis v Pollock (1892) 36 SC 544, 15 SE 718. Workman v Copeland (1921) 117 SC 214, 110 SE 526. Morris v Palmer (1895) 44 SC 462, 22 SE 726.

An alleged oral agreement to extend the term of written lease for an additional two years would have been invalid in the absence of such partial performance as would remove the bar of the statute of frauds, and no such relief from the statute was possible where the original term had not expired. Farr v. Williams (S.C. 1957) 232 S.C. 208, 101 S.E.2d 483.

This section does not preclude such building restrictions as may be included in a general scheme of improvements intended to enhance the value of each lot in an entire tract. McDonald v. Welborn (S.C. 1951) 220 S.C. 10, 66 S.E.2d 327. Frauds, Statute Of 56(5)

Parol lease for a period not exceeding one year commencing at a future date is not within the statute of frauds. National Bank of South Carolina v. People’s Grocery Co. (S.C. 1929) 153 S.C. 118, 150 S.E. 478. Frauds, Statute Of 53

Payment of rent and retention of possession under an oral agreement relating to tenancy after the expiration of a lease for a term of years would constitute part performance taking the agreement out of the statute. National Bank of South Carolina v. People’s Grocery Co. (S.C. 1929) 153 S.C. 118, 150 S.E. 478. Frauds, Statute Of 129(8)

**SECTION 27‑23‑70.** Validity of parol gifts.

No parol gift of any chattel shall be valid against subsequent creditors, purchasers or mortgagees, except when the donee shall live separate and apart from the donor and actual possession shall, at the time of the gift, be delivered to and remain and continue in the donee, his executors, administrators or assigns.

HISTORY: 1962 Code Section 57‑307; 1952 Code Section 57‑307; 1942 Code Section 7046; 1932 Code Section 7046; Civ. C. ‘22 Section 5518; Civ. C. ‘12 Section 3739; Civ. C. ‘02 Section 2654; G. S. 2021; R. S. 2153; 1833 (6) 483.

Library References

Fraudulent Conveyances 24(1).

Gifts 4.

Westlaw Topic Nos. 186, 191.

C.J.S. Fraudulent Conveyances Sections 24 to 27.

C.J.S. Gifts Sections 11 to 12.

RESEARCH REFERENCES

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 34.3, Creditors of Donor.

**SECTION 27‑23‑90.** Land conveyed with condition or the like and afterwards sold, first conveyance void.

If any person shall make any conveyance, gift, grant, demise, charge, limitation of use or uses or assurance of, in or out of any lands, tenements or hereditaments with any clause, provision, article or condition of revocation, determination or alteration at his will or pleasure of such conveyance, assurance, grant, limitation of uses or estates of, in or out of such lands, tenements, or hereditaments or of, in or out of any part or parcel of them, contained or mentioned in writing, deed or indenture of such assurance, conveyance, grant or gift, and, after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall bargain, sell, demise, grant, convey or charge such lands, tenements or hereditaments, or any part or parcel thereof, to any person or body politic and corporate, for money or other good consideration paid or given (such first conveyance, assurance, gift, grant, demise, charge or limitation not by him revoked, made void or altered according to the power and authority reserved or expressed unto him in or by such secret conveyance, assurance, gift or grant), then the former conveyance, assurance, gift, demise or grant, as touching such lands, tenements and hereditaments so after bargained, sold, conveyed, demised or charged, against such bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against every person who shall lawfully claim anything by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate and of no effect; provided, that no lawful mortgage made bona fide and without fraud or covin, upon good consideration, shall be impeached or impaired by force of anything in this chapter contained.

HISTORY: 1962 Code Section 57‑309; 1952 Code Section 57‑309; 1942 Code Section 8700; 1932 Code Section 8700; Civ. C. ‘22 Section 5222; Civ. C. ‘12 Section 3459; Civ. C. ‘02 Section 2373; G. S. 1790; R. S. 1892; 1712 (2) 500.

Library References

Fraudulent Conveyances 24(1), 35.

Westlaw Topic No. 186.

C.J.S. Fraudulent Conveyances Sections 24 to 27.