Statue of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations

Samuel M. Hesson

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Samuel M. Hesson, Statue of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L. Rev. 222 (1946)
Available at: http://scholarship.law.cornell.edu/clr/vol32/iss2/5

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
THE STATUTE OF LIMITATIONS IN ACTIONS TO
SET ASIDE FRAUDULENT CONVEYANCES AND
IN ACTIONS AGAINST DIRECTORS BY
CREDITORS OF CORPORATIONS

SAMUEL M. HESSON

Introduction

The New York State Legislature has recently concerned itself with stat-
utes of limitation in actions brought by, or in behalf of corporations against
directors and officers. It was thought that existing statutes prolonged the
possibility of suit to such an extent that directors and officers were preju-
diced by lapse of time in making their defense. A new Subdivision 8 was
added in 1942 to Civil Practice Act § 48 which prescribes a six-year statute
of limitations, as follows:

"8. An action, legal or equitable, by or on behalf of a corporation against
a director, officer or stockholder, or a former director, officer or stock-
holder, if such action is for an accounting, or to procure judgment on
the ground of fraud, or to recover a penalty or forfeiture imposed or to
enforce a liability created by common law or by statute unless such action
is one to recover damages for waste or for an injury to property or for
an accounting in connection therewith in which case such action shall
be subject to the provisions of subdivision seven of section forty-nine."

This enactment effects a shortening of the statute of limitations in actions
brought against directors and officers by a corporation itself or by stock-
holders in the corporation's right. The ten-year statute of limitations is in-
applicable to such actions, and, while the statute does not expressly say that
the fraud action is barred six years from the date of the fraud, the sponsors
of the bill intended to abolish, as to corporate actions against directors and
officers, the rule that the time is measured from the date of discovery of the
fraud. Justification for such exceptional treatment was found in the fact
that modern regulation of corporations gives stockholders better oppor-
tunity to familiarize themselves with their corporation's affairs.

1N. Y. Civil Practice Act §§ 48(8), 49(7).
2The time allowed was ten years, the normal equity statute of limitations, if the
action was properly brought in equity for an accounting. If the action was based upon
an injury to the corporation caused by negligence or other wrongful act, six years was
allowed. Where the action was based on fraud, the time was computed from the
This legislative action did not affect the existing rules which apply to actions by creditors of corporations against directors and officers. There are several New York statutes which give creditors a non-derivative right of action, based upon negligence or other misconduct of corporate management.\textsuperscript{3} When the creditor's right is sought to be enforced we must look elsewhere than to Civil Practice Act, section 48, to discover the applicable limitation of time.\textsuperscript{4}

The injury for which the creditor seeks redress under the statutes mentioned above frequently involves a transfer of the corporation's assets. If the transfer is fraudulent as to creditors the creditor has a remedy under the Uniform Fraudulent Conveyance Act.\textsuperscript{5} The statute of limitations as to such a remedy is ten years measured from the date of the transfer.\textsuperscript{6} The rule is the same whether the transferor is a natural person or a corporation. Corporation laws, however, give the creditor of a corporation an additional statutory remedy to which a different statute of limitations applies.

The determination of the number of years to be allowed for the commencement of a particular action is of subordinate importance to the determination of the date from which the appointed time is to be measured. We are here mainly concerned with the ascertainment of the date from which the statutory period shall be computed. If limitations run from the date of the transaction, the creditor's cause of action may be barred before he has any reason to know of its existence. If, on the other hand, the date of discovery of the fraud, or the date of judgment upon the primary obligation, or the date of return of an execution, be taken as the starting point, transactions of a date long past can be brought into the light of litigation. Directors and officers of a corporation may then be subject to suit by creditors although action by the corporation or by its stockholders has long since been barred. There is some reason in this. Creditors should not be held bound to exercise that degree of vigilance which is the duty of stockholders in discovering the misconduct of directors in the management of a corporation. The directors have little cause for complaint when they are compelled, at any time, to restore, for the benefit of creditors of the corporation, assets which they have fraudulently acquired for themselves. When, however, the

\textsuperscript{3}\textit{N. Y. Stock Corp. Law} §§ 15, 58, 59, 61, 114; \textit{N. Y. General Corp. Law} §§ 60, 61.

\textsuperscript{4} See Shepard Co. v. Taylor Publishing Co., 234 N. Y. 465, 135 N. E. 852 (1923), holding the creditor's action under \textit{N. Y. Stock Corp. Law} § 15 to be upon a liability created by statute, to which a six year limitation, computed from date of return of execution against the corporation, applies.

\textsuperscript{5}\textit{N. Y. Debtor and Creditor Law} art. 10.

directors have not themselves acquired any benefit, when the sole consequence of their misconduct is loss to the corporation, a shorter period of time for the commencement of a creditor's action may well be justified.

This article embraces an inquiry into the statute of limitations applicable to actions to set aside fraudulent conveyances under the Debtor and Creditor Law and that applicable to actions by creditors, to reach assets of a corporation transferred in violation of corporation laws. It extends also to a consideration of the statute of limitations in the creditor's action based upon the misconduct of directors and officers of a corporation.

**FRAUDULENT CONVEYANCES**

**A. The New York Rule**

Neither Article 2 of the Civil Practice Act nor the Debtor and Creditor Law expressly prescribes the period of time within which an action may be brought to set aside a fraudulent conveyance. Prior to the adoption of the Civil Practice Act, the action was held to be within the fifth subdivision of section 382 of the Code of Civil Procedure which prescribed a six-year statute of limitations for:

"An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which on the thirty first day of December, eighteen hundred and forty-six, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

The statute of limitations did not start to run upon the discovery of the fraud, however, unless judgment had been procured and execution returned unsatisfied. In *Gates v. Andrews* the fraudulent transfer had been discovered more than six years before the commencement of the action but the statute was held to be no bar for the reason that the cause of action was not perfect until the creditor had a right to sue. The question arose again in *Weaver v. Haviland* and a like decision was rendered, the court saying:

"The right of Fish to bring an action to set aside the transfer did not accrue until he had recovered a judgment in this state against Phebe Haviland and the return of an execution unsatisfied. Until his claim against Phebe Haviland had ripened into a judgment he stood as a general creditor merely and was not in a situation to assail the transfer to defendant. The authorities upon this point are numerous and decisive [citations omitted]. The time when the fraud was committed is not the period from which the limitation is to be computed, but the time..."

737 N. Y. 657 (1868).
when the plaintiff had acquired a standing to assail it. The present action was commenced within six years after Fish had recovered his judgment here. . . . The clause in sub. 5, sec. 382, following the clause above quoted, 'the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under which he claims of the facts constituting the fraud' does not help the defendant. This clause was added to enlarge the time for bringing the action beyond the six years in the case specified. It was not intended to make the date of the discovery of the fraud the time of the accruing of the right of action in cases where the fraud was known, but the plaintiff had not established his claim by judgment. The clause was inserted to provide for a class of cases where the right of action was perfect but the fraud had not been discovered until a subsequent period. 78

And the statute did not commence to run upon the return of the execution unless the fraud was then discovered. It was so held in Decker v. Decker wherein it was urged upon the court that the action was in substance one for the enforcement of a trust to which the ten-year statute applied. The court said:

"The transfer to Jackson could therefore be assailed only on the ground of fraud, and a creditor's bill to reach and follow the proceeds of the fraud in the hands of fraudulent beneficiaries was a proper and suitable remedy, and, I think, might have been chosen even if a trust had resulted. There would have been a choice of remedies. The action, therefore, was founded on fraud and came within section 382 of the Code of Civil Procedure. It was only barred by the lapse of six years from the discovery of the fraud. . . ." 9

A cause of action to recover damages for fraud was not within section 382, subdivision 5, of the Code of Civil Procedure, above referred to. 10 The section applied only to actions equitable in nature. Upon the adoption of the Civil Practice Act, however, the words "other than for a sum of money" were omitted from the section and actions in deceit were thereby brought within its operation. 11

It is important to note that the section prescribing a statute of limitations for an action to procure a judgment on the ground of fraud was limited to actions based on actual fraud, deliberate and intentional. 12 It did not apply to actions based upon constructive fraud. 13 If the transaction was consid-

8142 N. Y. 534, 537, 37 N. E. 641, 642 (1894).
11Laws of New York 1921, c. 199, § 1.
cred unlawful and invalid because of the abuse of a relation, or by reason
of a statute, even if there was no actual intention to cheat or defraud, the
ten-year statute of limitations governing equity actions applied and the ac-
crual of the cause of action was not deemed to be postponed until the facts
were discovered.\textsuperscript{14} This is the rule which is now applied to actions brought
to set aside fraudulent conveyances.\textsuperscript{16}

The departure from the rule of \textit{Gates \textit{v. Andrews}} and \textit{Weaver \textit{v. Haviland}}
was the result of the adoption of the Uniform Fraudulent Conveyance Act.\textsuperscript{16}
Prior thereto a creditor could not assail a fraudulent transfer until he had
reduced his claim to judgment, and, except in extraordinary circumstances,
until execution upon the judgment had been returned unsatisfied.\textsuperscript{17} The
procurement of a judgment is no longer a condition precedent, however,
and a general creditor, even if his claim has not matured, may have a fraudu-
 lent conveyance set aside.\textsuperscript{18} \textit{Gates \textit{v. Andrews}} and \textit{Weaver \textit{v. Haviland}} ap-
pplied the rule that limitations do not start to run until complainant has the
right to sue. The application of that same rule requires that the statute of
limitations shall begin to run at the date of the conveyance since the creditor
now has the right to commence his action at that time. Exception to the
rule is possible only if the action is held to be within the fraud statute of
limitations.

The Debtor and Creditor Law, section 276, declares that a conveyance
made with actual intent, as distinguished from intent implied in law, to
hinder, delay or defraud either present or future creditors is fraudulent
as to both present and future creditors. It is seldom necessary, however,
for the creditor to assume the burden of proving actual fraud. Section 273
of the statute provides that a conveyance by a person who is or will be
thereby rendered insolvent is fraudulent as to creditors without regard to
the transferor's intent if made without a fair consideration. The actual
intent of the transferor is immaterial also as to certain conveyances made
without fair consideration by persons engaged or intending to engage in
business.\textsuperscript{19} In the ordinary case the creditor will secure redress upon proof
of facts giving rise to a legal presumption of fraud. Since his claim then
rests upon constructive, as distinguished from actual fraud, the ten-year

\textsuperscript{14}ibid.

\textsuperscript{15}Hearn 45 St. Corp. v. Jano, 283 N. Y. 139, 27 N. E. (2d) 814 (1940).

\textsuperscript{16}It was adopted in New York by Laws of New York 1925, c. 254, § 5.

\textsuperscript{17}Weaver v. Haviland, 142 N. Y. 534, 37 N. E. (2d) 641 (1894).

\textsuperscript{18}N. Y. DEBTOR AND CREDITOR LAW §§ 278, 279.

\textsuperscript{19}N. Y. DEBTOR AND CREDITOR LAW § 274.
statute of limitations applies, and the cause of action accrues at the date of
the conveyance. The cause of action in *Buttles v. Smith* was based upon section
274 of the Debtor and Creditor Law, and the actual intent of the parties
was, therefore, of no moment. The court said:

"As to the causes of action set up under article 10 of the Debtor and
Creditor Law, different rules apply. Under that statute it is not essen-
tial that the creditor first procure judgment and the return of an un-
satisfied execution before he may maintain the action (*American Surety
Co. v. Conner*, 251 N. Y. 1). The statute is remedial and he might sue
individually before or after the maturity of his claim to set aside the
transfer. . . . His time to sue should not be extended by the proceed-
ings to obtain judgment thereon and subsequent sequestration of assets.
The complaint sets up constructive fraud, not actual fraud, and under
such conditions the ten-year Statute of Limitations applies and com-
ences to run from the date when the act or omission constituting it
occurred and not from the time when the facts constituting the fraud
were discovered. . . ."\(^\text{20}\)

The opinion does not intimate that the creditor would have been denied the
benefits of the discovery rule if his complaint had been based upon actual
fraud. As a matter of pleading the creditor will generally assert that the
conveyance was tainted by a dishonest purpose, even though his main re-
liance is upon constructive fraud. A complaint of that character was before
the court in *Hearn 45 St. Corp. v. Jano*. It was construed as stating a cause
of action for constructive fraud, the court saying:

"The complaint in the case at bar states a cause of action to set aside
a transfer which, regardless of the intent of the debtor, is forbidden by
the statute to the extent that there are claims by creditors. In this case
the complaint does not rest upon the facts that the transfers were with-
out consideration and rendered the debtor insolvent, but also alleges an
actual intent on the part of the debtor to evade the creditor. The com-
plaint would have been sufficient without such additional allegation.
But the gravamen of the complaint is not thereby transformed into an
action to recover judgment on the ground of actual fraud. Surely the
action is not one for actual fraud where a complete cause of action
may be stated by a showing of the bare facts of a voluntary convey-
ance resulting in insolvency. Such a conveyance is but one of the two
kinds which are deemed fraudulent by the operation of the statute.
Both kinds are simply acts which are voidable at the behest of the
creditor as a result of the statutory declaration. . . . The plaintiff's
right is complete without reference to the quality or character of the
acts of the individual defendants. The gravamen of the action is the

\(^{20}\text{281 N. Y. 226, 236, 22 N. E. (2d) 350, 353 (1939).}\)
right of the creditor to be paid out of assets to which he is actually entitled and to set aside the indicia of ownership which apparently contradict that right.”

This construction of the pleading saved the complaint as against defendant’s defense based upon section 48, subdivision 5 of the Civil Practice Act, since the fraud had been discovered more than six years before the action was commenced. In Werbelovsky v. Rosen, the pleading was similarly construed and, ten years having elapsed from the date of the transfers, the defense of the statute of limitations was sustained. The decision is in accord with the New York rule that neither ignorance, on the part of the plaintiff, of the existence of the cause of action, nor concealment of its existence by the defendant, will prevent the running of the statute of limitations.

Even if the remedies afforded the creditor by the Debtor and Creditor Law are barred by lapse of time, a remedy remains if the transfer involved actual fraud. The creditor, within six years after his discovery of the facts, may sue for damages sustained by reason of the transfer made with intent to cheat. In Nasaba Corp. v. Harfred Realty Corp., the plaintiff had procured judgments against two corporations, and executions had been returned unsatisfied in 1931. The assets of the corporations had been transferred, by certain manipulations in 1929, to the controlling director and stockholder and to his wife. The creditor did not discover the facts until 1940, more than ten years after the date of the transfers. He then promptly sued, his complaint alleging that the transactions were “for unfair insufficient and inadequate considerations with intent to and as part of a concerted plan and conspiracy to hinder delay and defraud plaintiff creditor of its claims.” The only relief demanded was for the damages sustained. A motion to dismiss the complaint on the ground that the cause of action was barred by limitations was denied. The reason, in the court’s words, was:

“The allegations contained in the complaint . . . quite clearly show that the action is not to set aside or to declare the conveyances of the debtor’s properties fraudulent nor to procure application of the real properties conveyed to the payment of the judgments, nor is equitable relief of any kind sought. Plaintiff does not seek to follow the funds and property of the debtor corporation into the hands of any of the defendants. Thus if an analysis of the complaint establishes that causes of action for actual fraud are alleged, it was error to dismiss the complaint.”

---

21283 N.Y. 139, 142, 27 N.E. (2d) 814, 816 (1940).
22260 App. Div. 222, 21 N.Y.S. (2d) 88 (2d Dep’t 1940).
The opinion in *Nasaba Corp. v. Harfred Realty Corp.* would seem to indicate that the relief demanded, rather than the presence in the complaint of allegations of fraud, is the determining factor on the question of the applicability of the fraud statute of limitations to transactions involving fraudulent transfers. If the complaint had been for equitable relief, the court would probably have followed *Hearn 45 St. Corp. v. Jano* and treated the allegations of fraud as surplusage. The language of the court in *Buttles v. Smith* will bear a contrary meaning. It was there said:

"The complaint sets up constructive fraud, not actual fraud, and under such conditions the ten year Statute of Limitations applies. . . . Above it appears that the right to recover was fundamentally and necessarily cognizable in equity and not at law. Section 53 of the Civil Practice Act applies to all actions in equity for fraud not covered by subdivision 5 of section 48."26

Nevertheless, in the *Nasaba* case, citing *Buttles v. Smith* and *Hearn 45 St. Corp. v. Jano*, this language was used:

"If it appears from the face of the complaint that the causes of action alleged owe their existence exclusively to statutory provisions (Debtor & Creditor Law, Art. 10) . . . or to constructive fraud as distinguished from actual fraud, applicable statutes of limitation . . . bar prosecution."27

There was no attempt to make distinction between actions to set aside fraudulent transfers under Debtor and Creditor Law, section 273, and like actions prosecuted under section 276 wherein the burden rests on the creditor to show actual fraud. Nor does there seem to be any sound reason why the creditor should have a longer time to sue in the one case than in the other. The result to him in either case is the same. The recovery he seeks is "to levy in satisfaction of his debt upon property which he is entitled to treat as belonging to the debtor, albeit the title is ostensibly lodged elsewhere."28

B. Fraudulent Conveyances—Comparative Rules

There is but little support in judicial opinion elsewhere for the New York rule that the date of the transfer is the starting point in computing the statute of limitations in actions to set aside fraudulent transfers. In a few states, however, there are statutes which demand as much diligence of the creditor.

---


27287 N. Y. 290, 293, 39 N. E. (2d) 243, 244 (1942).

In Tennessee it is provided\(^{29}\) that limitations shall not commence to run in favor of a fraudulent or voluntary possessor until the creditor has a right of action to test the validity of the conveyance, and in that state any creditor without having a judgment may sue to set aside a fraudulent conveyance.\(^{30}\)

It was held in Ramsey v. Quillen\(^{31}\) that, since the creditor could sue without a judgment, his attack upon a fraudulent conveyance was barred by seven years adverse possession by a wife occupying with her husband under a recorded deed from him. This view is exceptional, however, and even in those states which have adopted the Uniform Fraudulent Conveyance Act,\(^{32}\) the courts have adhered to previously established rules as to the date of accrual of the action. Usually the opinions do not mention the effect, on the limitations question, of the adoption of the Act, but in Lind v. O. N. Johnson Co.,\(^{33}\) the question was fully considered, and the court overruled the contention that the statute had effected a change in the rule that limitations commence to run when the creditor's judgment is procured.

In Kentucky the action to set aside the fraudulent conveyance is considered to be within the general fraud statute of limitations,\(^{34}\) accruing upon discovery of the fraud, but the practical effect of the New York rule is, nevertheless, achieved. The statute\(^{35}\) prescribes a five-year limitation for

\(^{29}\)TENN. CODE ANN. (Williams, 1934) § 10363 provides: "In no case shall the limitation of actions be held to commence running in favor of a fraudulent or voluntary possession until the creditor to be affected by the fraudulent or voluntary conveyance has a right of action to test the validity of such conveyance."

\(^{30}\)TENN. CODE ANN. (Williams, 1934) § 10358.

\(^{31}\)Lea 184 (Tenn. 1880).


\(^{33}\)204 Minn. 30, 282 N. W. 661, 119 A. L. R. 940, 949 (1938).

\(^{34}\)Gillardi v. Henry, 272 Ky. 188, 113 S. W. (2d) 1158 (1938); Moore v. Sheperd, 189 Ky. 593, 225 S. W. 484 (1920); Grand Lodge v. First Nat. Bank, 251 Ky. 189, 64 S. W. (2d) 474 (1933); Pope v. Cawood, 293 Ky. 660, 170 S. W. (2d) 55 (1943); Sword v. Scott, 293 Ky. 630, 169 S. W. (2d) 825 (1943); Hollifield v. Blackburn, 294 Ky. 74, 170 S. W. (2d) 910 (1943) (the recording of the fraudulent deed starts statute of limitations running).

\(^{35}\)KY. REV. STAT. (Cullen, 1944) §§ 413.120, 413.130. The third subdivision of § 413.130 provides: "In an action for relief or damages for fraud . . . the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten years after the time of making the contract or the perpetration of the fraud."
actions brought for relief on the ground of fraud, and provides that the action is deemed to have accrued upon the discovery of the fraud. It provides further that the action must be commenced within ten years after the perpetration of the fraud. No distinction is made between actual and constructive fraud. In either case the action is barred by the lapse of ten years from the date of the transfer, and may be earlier barred by the expiration of five years after the discovery of the fraud. The Missouri fraud statute of limitations is in somewhat similar terms, but it is held inapplicable to actions to set aside fraudulent conveyances.

By statute in Virginia and West Virginia distinction is made between cases involving constructive and those involving actual fraud. The statutes refer to voluntary transfers only, and prescribe a five-year limitation for actions brought to set them aside. In Virginia the action must be brought within five years after recordation of the deed, or within five years after the transfer was or should have been discovered if the instrument was not recorded. In West Virginia suit must be commenced within five years after the transfer was made. The statutes are held to have no application to cases of actual fraud. In Atkinson v. Solenberger a conveyance from husband to wife had been recorded almost nine years before the creditor's suit was

---

38 Grand Lodge v. First Nat. Bank, 251 Ky. 189, 64 S. W. (2d) 474 (1933).
37 Dorsey v. Phillips, 84 Ky. 420, 1 S. W. 667 (1886); Phillips v. Shipp, 81 Ky. 435, 5 Ky. L. Rep. 460 (1885), and cases cited supra note 34.
36 Rogers v. Brown, 61 Mo. 187 (1875); Miller v. Allen, 192 S. W. 967 (Mo. 1917); Bobb v. Woodward, 50 Mo. 95 (1872). The statute, Mo. Rev. Stat. Ann. (1942) § 1014, prescribes a five-year limitation for "an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."
35 Va. Code Ann. (1942) § 5820. "Limitation of suits to avoid voluntary deeds, etc., --No gift, conveyance, assignment, transfer, or charge, which is not on consideration deemed valuable in law, or which is upon consideration of marriage, shall be avoided in whole or in part for that cause only, unless within five years from its recordation, if recorded under a law providing for its recordation, and if not so recorded within five years from the time the same was or should have been discovered, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied on by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer, or charge, is declared to be void by section fifty-one hundred and eighty-five."
34 W. Va. Code Ann. (1943) § 3988. "Limitation of Suits to Avoid Voluntary Transfers or Charges.--No transfer or charge which is not on consideration deemed valuable in law shall be avoided, either in whole or in part, for that cause only, unless, within five years after it is made, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied on by or at the suit of a creditor as to whom such transfer or charge is declared to be voided by the next preceding section. . . ."
33 Bumgardner v. Harris, 92 Va. 188, 23 S. E. 229 (1895); Welsh v. Solenberger, 85 Va. 441, 8 S. E. 91 (1888); Hunter v. Hunter, 10 W. Va. 321 (1877); Himan v. Thorne, 32 W. Va. 507, 9 S. E. 930 (1889); McCue v. McCue, 41 W. Va. 151, 23 S. E. 689 (1895); Solins v. White, — W. Va. —, 36 S. E. (2d) 132 (1945).
begun. The complaint alleged that not only was the deed voluntary, but also that it was made for the purpose of hindering, delaying and defrauding creditors and that the grantee had notice of the fraudulent intent. Holding the statute as to voluntary transfers inapplicable, the court said:

"This is not a case where money or property is received from an insolvent donor by one who has no reason to suspect such insolvency and without any purpose to defraud the creditors of the donor. In such a case the transfer being merely voluntary, it is as to the donee constructively fraudulent and must be attacked within five years, but where the donee has knowledge of the fact that the donor is insolvent and the natural and necessary effect of the transactions is to hinder, delay, or defraud the donor's creditors, it is actually fraudulent, not only as to the donor but also as to the donee."42

The five-year statute does apply, however, if the fraudulent design of the grantor is unknown to the grantee.43 In cases of actual fraud, held not to be within the statute, there is no statute of limitations, and the defendant must rely upon the doctrine of laches to defeat the creditor's suit.44

A Maryland statute45 requires exceptional vigilance on the part of creditors when the fraudulent transfer is between husband and wife. Such a transfer is invalid if made in prejudice of the rights of subsisting creditors, but the creditors must assert their claims within three years after the acquisition of the property or be forever barred. For the purpose of asserting the creditors' claims unmatured claims are considered as due and matured. The courts construe the statute as requiring action by the creditor within three years after date of recording the deed, or after the creditor had notice of it, or some knowledge which put him on inquiry.46

42112 Va. 667, 671, 72 S. E. 727, 728 (1911).
43Hawkins v. Blake, 69 W. Va. 190, 71 S. E. 191 (1911); Sleeth v. Taylor, 82 W. Va. 139, 95 S. E. 597 (1918).
45Md. Ann. Code (Flack, 1939) art. 45, § 1. "The property, real and personal, belonging to a woman at the time of her marriage, and all the property which she may acquire or receive after her marriage, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor or personal exertions, or in any other manner, shall be protected from the debts of the husband, and not in any way be liable for the payment thereof; provided, that no acquisition of property passing from one spouse to the other, shall be valid if the same has been made or granted in prejudice of the rights of subsisting creditors, who, however, must assert their claims within three years after the acquisition of the property, or be absolutely barred, and, for the purpose of asserting their rights under this section, claims of creditors not yet due and matured shall be considered as due and matured."
46Davis v. Harris, 170 Md. 610, 185 Atl. 469 (1936); Stieff Co. v. Ullrich, 110 Md.
Statutes in Kansas and Indiana provide a short statute of limitations as to claims to lands fraudulently conveyed where the grantor has died. In Kansas the limitation is two, in Indiana five years measured from the date of the grantor’s death.

In addition to the jurisdictions which have by statute accorded the transferees of property the benefit of a statute of limitations measured, in certain circumstances, from the date of the transaction, there are a few states in which the courts sometimes reach a similar result by decision. While adhering to the rule that the cause of action does not accrue until the facts constituting the fraud are discovered, they hold the creditor to have discovered the fraud as of the date of recordation of the conveyance. The recorded conveyance is deemed to be constructive notice not only of the deed and its contents but also of the fraud. The cases depend upon their own facts, and the recorded deed is sometimes held to be constructive notice of the fraud by courts which are bound by the rule that the effect of recording is to give notice of the deed and its contents. In Causemaker v. De Roo, it appeared that interest on a note due in 1926 had been paid to

629, 73 Atl. 874 (1909); U. S. Fid. & Guar. Co. v. Shoul, 161 Md. 425, 157 Atl. 717 (1931); Dixon v. Dixon, 128 Md. 1, 96 Atl. 1027 (1916); Wear v. Skinner, 46 Md. 257 (1876). (Where deed recorded, the statute is conclusive for ordinary diligence would induce creditor to look at the records).

47KAN. GEN. STAT. (Corrick, 1935) § 59-141. “Real estate subject to sale includes fraudulent transfers; innocent purchasers; limitation. ... and no claim to the lands so fraudulently conveyed shall be made, unless within two years next after the decease of the grantor.” Prior to L. 1939, Ch. 180, § 280 the limitation was three years.

48IND. STAT. ANN. (Burns, 1933) § 6-1109; Todd v. Eberwine, 216 Ind. 47, 22 N. E. (2d) 977 (1939) (the time to sue is not extended by the statute if limitations had run prior to grantor’s death).

49E. B. Piekenbrock & Sons v. Knoer, 136 Iowa 534, 114 N. W. 200 (1907) (Deed recorded immediately and husband and wife went into possession—creditor lived in same community); Bristow v. Lange, 221 Iowa 904, 266 N. W. 808 (1936) (failure to get lien on land within five years after deed recorded is, in absence of special circumstances, a bar). To same effect: Somers v. Spaulding, 229 Iowa 432, 294 N. W. 610, 133 A. L. R. 1300, 1311 (1940); Kittel v. Smith, 136 Kan. 522, 16 P. (2d) 538 (1932); Black v. Black, 64 Kan. 689, 68 Pac. 662 (1902); Fleming v. Grafton, 54 Miss. 79 (1876). (Cf. Gordon v. Anderson, 90 Miss. 677, 44 So. 67 (1907) holding the fact of record merely a circumstance in connection with change of possession; Hughes v. Littrell, 75 Mo. 573 (1882); F. S. Royster Guano Co. v. Wilson, 193 N. C. 836, 137 S. E. 135 (1927) (Action more than three years after registration of the deed held barred. The opinion says, however, that the creditor knew of the deed more than three years before action commenced). Cf. Ewbank v. Lyman, 170 N. C. 505, 87 S. E. 348 (1915) (saying the record is not usually notice of the fraud); Vodrie v. Tynan, 57 S. W. 680 (Tex. Civ. App. 1900). Cf. Watkins Co. v. Gibbs, 66 S. W. (2d) 355 (Tex. Civ. App. 1933) (holding recordation constructive notice at least where plaintiff did not try to prove that he did not know of the recorded conveyance).

50See note 49 supra.

51153 Kan. 648, 113 P. (2d) 85 (1941).
1936. Judgment on the note was obtained in 1939. A month later the creditor commenced action to set aside a deed from the debtors to their son of certain land situate in a state other than that in which the creditor and the debtors lived. The deed, reciting a consideration of one dollar had been recorded in 1936. The statute of limitations of Kansas was two years from the discovery of the fraud, the cause, however, not accruing until entry of judgment and return of execution. The cause of action was held barred. The court said that ordinarily the fact of recordation was notice only of the deed and its contents and not of the fraudulent purpose. If, however, the circumstances are such as to put a person of ordinary prudence upon inquiry, the record is notice of the fraudulent intent. A like decision was rendered in Smith v. Edwards, wherein the deed recited a consideration of "one dollar and other valuable considerations," the court saying that if the deed indicates a fair consideration all persons may rely upon it. To the same effect is Bristow v. Lange in which a deed from father to son was assailed eight years after it was recorded. The plaintiff was held barred by laches for having delayed in suing upon a note which had matured eight years before.

The cases holding that a recorded deed is constructive notice of the underlying fraudulent purpose are opposed to the great weight of authority. The view is generally taken that recordation gives constructive notice only of the deed and its contents, or that the fact of recordation is merely one circumstance to be considered with all others on the question as to whether the creditor should have discovered the fraud at any particular point in time.

The circumstances, in this case sufficient, were as follows: the creditor could have demanded payment of the note at any time; the deed showed it was to grantor's son and recited only a nominal consideration; the grantors were practically insolvent; and plaintiff claims that he lent the money only because the borrowers owned the property involved in the litigation.

52 Smith v. Edwards, 5381 Utah 244, 17 P. (2d) 264 (1932).
53 Bristow v. Lange, 54221 Iowa 904, 266 N. W. 808 (1936).
54 Baldwin & Co. v. Williams, 74 Ark. 316, 86 S. W. 423 (1905); First Presbyterian Church v. Rabbitt, 118 F. (2d) 732 (C. C. A. 9th, 1940); Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342 (1899); compare Underwood v. Fosha, 96 Kan. 549, 152 Pac. 638 (1915) with Kansas cases cited supra note 49; Chinn v. Curtis, 24 Ky. L. Rep. 1563, 71 S. W. 923 (1903); Lant v. Manley, 75 Fed. 627 (C. C. A. 6th, 1896); Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838 (1897); Oldham v. Wright, 337 Mo. 170, 85 S. W. (2d) 483 (1935); compare Forsyth v. Easterday, 63 Neb. 887, 89 N. W. 407 (1902) with State Bank v. Frey, 91 N. W. 239 (Neb. 1902), where grantee went into possession; Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903); Goldbold v. Lambert, 8 Rich. Eq. 155, 70 Am. Dec. 192 (S. C. 1856); Bank of Marlinton v. McLaughlin, 121 W. Va. 41, 1 S. E. (2d) 251 (1939); Schoedel v. State Bank, 245 Wis. 74, 13 N. W. (2d) 534 (1944) (as far as limitations are concerned there is no such thing as constructive discovery of fraud).
The rule of *Weaver v. Haviland*,[66] which prevailed in New York prior to the adoption of the Uniform Fraudulent Conveyance Act, is the rule which prevails generally throughout the United States today. A cause of action

---

[66]See note 8 *supra*.

[57]*Ariz.* Molina v. Bennett, 37 Ariz. 70, 289 Pac. 512 (1930) (3 years after discovery of the fraud).

*Cal.* Adams v. Bell, 5 Cal. (2d) 697, 56 P. (2d) 208 (1936); Brown v. Campbell, 100 Cal. 635, 35 Pac. 433 (1893); First Presbyterian Church v. Rabbitt, 118 F. (2d) 732 (C. A. 9th, 1940). It is uncertain what effect the adoption in California of the Uniform Fraudulent Conveyance Act will have. Brunvold v. Johnson & Co., 59 Cal. App. (2d) 75, 138 P. (2d) 32 (1943). Cf. The creditor's remedy where he purchases the property at execution sale and sues to remove the fraudulent deed as a cloud on title. In *Scholle v. Finnell*, 166 Cal. 546, 137 Pac. 241 (1913), it was held that the creditor may wait until the last day to sue on his debt, and, after obtaining judgment, wait for expiration of the period for issuing execution, and, upon buying the property at the execution sale, wait almost five years before suing to set aside the conveyance. To the same effect: *Puccetti v. Girola*, 63 Cal. App. (2d) 240, 146 P. (2d) 714 (1944), holding that the cause of action did not accrue prior to the execution sale and that the fact that the cloud on title had its inception in fraud did not render applicable the three year statute relating to actions for relief on the ground of fraud.

*Colo.* Bowman v. May, 102 Colo. 417, 80 P. (2d) 327 (1938); Arnett v. Coffey, 5 Colo. App. 560, 39 Pac. 894 (1895); (within three years after discovery of fraud). But the creditor cannot sue and cause does not accrue until judgment obtained. *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342 (1899). If the creditor unduly delays getting judgment he will be barred by *laches*. *Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850 (1900) (10 years delay in getting judgment and this action delayed until debtor died—defense of *laches* sustained).

*Fla.* Lamper v. Osius, 38 F. Supp. 373 (S. D. Fla. 1941) *Cf.* Isaacs v. Mulray, 112 Fl. 197, 199, 150 So. 232, 233 (1933), holding that the cause does not accrue "until suit has been filed at law to enforce the payment of the debt or until judgment is recovered and even then if it be alleged ... that the property ... is held in trust for the judgment debtor, it may be that the suit ... might be considered as process in aid of the enforcement of judgment which can be invoked at any time pending the life of the judgment." The action may be barred by *laches*: *Thresher v. Ocala Mfg. Co.*., 153 Fla. 488, 15 So. (2d) 32 (1943). (Deed recorded 1922—judgment in 1929—no attack on transfer until 1942 three years after grantor's death). *Cf.* Sample v. Natalby, 120 Fla. 161, 162 So. 493 (1935), holding defense of *laches* insufficient although six years elapsed from date of transfer, where no prejudice shown.

*Ind.* State v. Osborn, 143 Ind. 571, 42 N. E. 921 (1895); *Duncan v. Cravens*, 55 Ind. 525 (1877); *DeArmond v. Ballou*, 122 Ind. 398, 23 N. E. 766 (1899); *Todd v. Eberwine*, 216 Ind. 47, 22 N. E. (2d) 977 (1939). The statute is not suspended until discovery, however, unless defendant is guilty of active concealment. *Ibid.*

*Ky.* See cases cited *supra* note 34. The action, however, is not maintainable after the expiration of ten years from the perpetration of the fraud. *Ibid.*

*Miss.* Gordon v. Anderson, 90 Miss. 677, 44 So. 67 (1907). *But see* Abbey v. Commercial Bank, 31 Miss. 434, 437 (1856), holding that a court of equity "could never sanction the defense of Statute of Limitations at the instance of the defendant, and his wife and child, the parties to the alleged fraud." In this case there was no adverse possession, since the debtor remained in possession with his family.

*Mont.* Finch v. Kent, 24 Mont. 268, 61 Pac. 653 (1900) (within two years after fraud discovered, but cause does not accrue until judgment obtained).

* Neb.* Ainsworth v. Roubal, 74 Neb. 723, 105 N. W. 248 (1905) (within four years after fraud discovered providing judgment obtained, overruling Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302 (1893), which held the cause accrued upon discovery of
to set aside a fraudulent conveyance is, by the weight of authority, within
the general fraud statute of limitations. The statutes ordinarily provide that
a cause of action to procure relief on the ground of fraud is deemed to have
accrued upon the discovery of the fraud, or upon the discovery of the facts
constituting the fraud. There are exceptions, as in Indiana, where the
statute of limitations is not suspended in the absence of active concealment
by the defendant of the existence of the cause of action. The creditor

the fraud whether claim reduced to judgment or not); Buckner v. McHugh, 123 Neb.
396, 243 N. W. 112 (1932). The cause may be defeated by laches. Blum v. Voss,
139 Neb. 233, 297 N. W. 84 (1941) (the grantee had discharged a mortgage).

N. J. Levy v. D'Alesandro, 14 N. J. Misc. 449, 185 A. 543 (Ch. 1936). (In equity
the period of limitations begins to run only from the discovery of the fraud by
the injured party, or from the time when he was in a situation where, by the exercise
of reasonable diligence, he would have discovered the fraud). Cf. Silverman v. Christian,
123 N. J. Eq. 506, 198 Atl. 832 (Ch. 1938) (Here the debt fell due from the principal
defendant on Jan. 23, 1931, more than six years before the commencement of this
suit. Thereupon, and when the fraudulent conveyance was made, the six year period
began to run).

N. C. Evbank v. Lyman, 170 N. C. 505, 87 S. E. 348 (1915); Graeber v. Sides,
151 N. C. 596, 66 S. E. 600 (1909)

Ohio. Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903) (within four years
of discovery of the fraud). In Combs v. Watson, 32 Ohio St. 228 (1877) it was held
that the cause accrued upon discovery whether judgment then obtained or not, since
procurement of judgment was not a prerequisite to suit.

Okla. Ziska v. Ziska, 20 Okla. 634, 95 Pac. 254 (1908); White v. Exchange Nat.
Bank, 172 Okla. 331, 44 P. (2d) (1935) (may sue without judgment if debtor insolvent,
non-resident, or absconded. Deed to daughter 1923. Plaintiff discovered fraud 1927.
Okla. 378, 77 P. (2d) 1112 (1938), holding that in absence of laches in obtaining
judgment and execution, the statute begins to run on return of execution.

New, 33 S. C. 28, 11 S. E. 386 (1889) to same effect, but holding the action involved
for the recovery of possession of property purchased at execution sale, the
fraudulent deed being merely a link in defendant's chain of title. If the action is
based on constructive fraud, it accrues upon return of execution. Suber v. Chandler,

Wilke, 138 Tex. 263, 158 S. W. (2d) 288 (1942); Eckert v. Wendel, 120 Tex. 618
40 S. W. (2d) 796 (1931). (The action is within the fraud section, four years from
discovery, but if the creditor procures attachment or judgment lien the action to en-
force it will not be barred except by adverse possession for three or five years as the
particular statute requires.)

Utah. Smith v. Edwards, 81 Utah 244, 17 P. (2d) 264 (1932).

Wash. Fidelity Nat. Bank v. Adams, 38 Wash. 75, 80 Pac. 284 (1905); Davison v.
Hewitt, 6 Wash. (2d) 131, 106 P. (2d) 733 (1940). But the action is not maintainable
after the expiration of six years from rendition of judgment, since by statute the lien
of the judgment cannot be extended for a longer period. Johnson v. Great Northern
Lumber Co., 85 Wash. 16, 147 Pac. 641 (1915).

1881) (within six years after fraud discovered); Foote v. Harrison, 137 Wis. 588, 119
N. W. 291 (1909).

58 IND. STAT. ANN. (Burns, 1933) § 2-601.
there is held barred by the expiration of six years after the recording of the conveyance.\textsuperscript{59} A like construction was given the \textit{Alabama} statute in \textit{Van Ingen v. Duffin}.\textsuperscript{60} The statement in the opinion in that case to the effect that the cause of action accrues upon the date of the conveyance has, however, since been explained in \textit{Van Antwerp v. Van Antwerp}.\textsuperscript{61}

The discovery of the fraud does not start the statute of limitations running even in those jurisdictions which hold the fraud statute applicable to an action to set aside a fraudulent conveyance.\textsuperscript{62} Time cannot commence to run until the creditor has the right to sue, and in the absence of statute, that right accrues upon the procurement of judgment or upon the return of execution. The application of the discovery of the fraud rule gives the creditor extended time if he has failed to commence his action within the appointed time after judgment, or judgment and return of execution. This accepted theory might have given way under the Uniform Fraudulent Conveyance Act, but there is no evidence, except in New York, that the rule has been changed. The question is still open in \textit{California} where the uniform act was not adopted until 1939. \textit{Brunvold v. Johnson \& Co.}\textsuperscript{63} was decided in 1943, but the action had been commenced within three years of the effective date of the statute. The court said: "Any new right conferred by \textsection{3439.09} could only accrue on the date that that section became effective" and held that the action was not barred. Whether the courts in \textit{California}, in view of the new rights conferred upon the general creditor, will hold that the cause of action accrues, prior to judgment, upon the discovery of the fraud remains to be determined.

A substantial body of authority supports the view that the cause of action to set aside a fraudulent conveyance accrues when judgment is procured upon the creditor's claim. In \textit{Arkansas} the creditor may sue within ten years after obtaining judgment, the statutory time for enforcement of a judgment against the debtor's property. If he sues within that time he will not be barred unless the grantee has had adverse possession for the statutory period of seven years.\textsuperscript{64} \textit{A. Baldwin \& Co. v. Williams}\textsuperscript{65} illustrates the \textit{Arkansas} rule in both of its aspects. The grantor's tenant, grantee in one of the conveyances, had been in possession over seven years since the con-

\textsuperscript{59}Todd v. Eberwine, 216 Ind. 47, 22 N. E. (2d) 977 (1939).
\textsuperscript{60}158 Ala. 318, 48 So. 507 (1909).
\textsuperscript{61}242 Ala. 92, 5 So. (2d) 73 (1941).
\textsuperscript{62}See note 57 \textit{supra}.
\textsuperscript{63}59 Cal. App. (2d) 75, 138 P. (2d) 32 (1943).
\textsuperscript{64}James v. Mallory, 76 Ark. 509, 89 S. W. 472 (1905) ; A. Baldwin \& Co. v. Williams, 74 Ark. 316, 86 S. W. 423 (1905).
\textsuperscript{65}See note 64 \textit{supra}.
veyance was made. As to him the complaint was dismissed. It was sustained, however, as to the transferee of another tract who was not in possession adversely. The rule is the same in Missouri except that in that state the prescriptive period is ten years. In Louisiana, by statute, a one-year statute of limitation is prescribed for the revocatory action, the time to be counted from the time that judgment is obtained if the action is brought by an individual creditor. If brought by syndics or other representatives of the creditors collectively, it is measured from the time of their appointment. In Minnesota and South Dakota the cause accrues when judgment is obtained. In Lind v. O. N. Johnson Co., distinction is drawn between the creditor's suit to reach the debtor's equitable interest in property and that to set aside the fraudulent transfer. As to the former, the return of execution is a condition precedent to the creditor's right to sue; as to the latter, judgment alone is necessary. And limitations start to run at the time the right to commence an action first comes into being. Iowa, Kansas, and Oklahoma are in accord with the view that the cause of action accrues upon procurement of judgment, but conditionally. The creditor must not be guilty of undue delay in reducing his claim to judgment. In Somers v. Spaulding, a note was given in 1932, due two years later. The day the note was given the makers made and recorded a deed to their daughters. The creditor obtained judgment on the note in 1938 and promptly sued to set aside the conveyance. A defense of laches based upon the four years delay in obtaining judgment was sustained.

In some states the cause of action is not deemed to have accrued until the return of execution. It has been held by courts in Kansas that the return of execution is a prerequisite unless the debtor is insolvent. The

1. See note 67 supra.
4. Ibid.
creditor has in Michigan one year after levy of his execution to begin his action.\textsuperscript{73} In Oregon the cause of action accrues upon return of execution.\textsuperscript{74} The same is true in South Carolina if the action is based on constructive fraud.\textsuperscript{75}

A suit to set aside a fraudulent conveyance is analogized in a few jurisdictions to an action to recover property, real or personal as the case may be. In Alabama such a suit is a suit for the recovery of real property, if the transfer was of lands, and the ten-year statute of limitations applies.\textsuperscript{78} It was said in Van Ingen v. Duffin\textsuperscript{77} that the cause accrues on the date of the conveyance, but in Van Antwerp v. Van Antwerp\textsuperscript{78} it was decided that the statute does not necessarily start to run when the transfer is made. Adverse possession was held to be an essential feature of the statute of limitations as a defense to an action for the recovery of property real or personal and the cause of action accrues when the grantee asserts his claim of ownership by a hostile possession. In Georgia the rule seems to be the same at least insofar as a transfer of realty is concerned.\textsuperscript{79} A change of possession under a fraudulent conveyance has been held in Missouri to commence an adverse possession which, if continued for ten years, will bar the creditor's action.\textsuperscript{80} And seven years adverse possession after the right of the creditor to enforce his debt accrued, was held, in Ramsey v. Quillen,\textsuperscript{81} to be a bar. In Texas, if the creditor has procured a judgment lien, his action to enforce his lien against lands fraudulently conveyed is not barred until the grantee acquires full title under some statute of limitations which would bar an action for the recovery of real estate.\textsuperscript{82}

In a few jurisdictions the statute of limitations is held inapplicable, except by analogy, to actions in equity to avoid fraudulent conveyances, and unless a defense of laches is sustained, the action will not be barred. There are


\textsuperscript{74}Williams v. Comm. Nat. Bk., 49 Ore. 492, 90 Pac. 1012 (1907).

\textsuperscript{75}Suber v. Chandler, 18 S. C. 526 (1882).

\textsuperscript{76}Drummond v. Drummond, 232 Ala. 401, 168 So. 428 (1936); Van Ingen v. Duffin, 158 Ala. 318, 48 So. 507 (1909).

\textsuperscript{77}Ibid.

\textsuperscript{78}242 Ala. 92, 5 So. (2d) 73 (1941). To same effect: Rowe v. Bonneau-Jeter Hardware Co., 245 Ala. 326, 16 So. (2d) 689, 158 A. L. R. 1266 (1943).

\textsuperscript{79}Beasley v. Smith, 144 Ga. 377, 87 S. E. 293 (1915).

\textsuperscript{80}Bobb v. Woodward, 50 Mo. 95 (1872); Rogers v. Brown, 61 Mo. 187 (1875). And see Steele v. Reid, 284 Mo. 269, 223 S. W. 881 (1920). The action may be barred by laches. Wall v. Beedy, 161 Mo. 625, 61 S. W. 864 (1901) (nine years delay while property enhanced in value.—Barred by laches).

\textsuperscript{81}5 Lea (73 Tenn.) 184 (1880).

\textsuperscript{82}Eckert v. Wendel, 120 Tex. 618, 40 S. W. (2d) 796 (1931).
decisions to this effect in Georgia,\textsuperscript{83} Illinois,\textsuperscript{84} and Mississippi,\textsuperscript{85} and in Virginia and West Virginia, as has been noted above,\textsuperscript{86} the statute of limitations does not apply to actions to set aside conveyances tainted with actual fraud.

C. Actions Against Directors and Officers by Creditors of Corporations

I. The New York Statutes

When a judgment creditor of a corporation discovers that the corporation’s assets are insufficient to satisfy his debt, he may have recourse, in a proper case, pursuant to statutes enacted for his protection, against transferees of the corporation’s property or against the directors and officers of the debtor corporation. The New York statutes which provide these remedies are General Corporation Law, sections 60, 61, and Stock Corporation Law, sections 15, 58, 59, 61, and 114. The purpose of section 114 of the Stock Corporation Law is to impose upon directors, officers, and stockholders of foreign corporations transacting business in this state, the liabilities imposed upon directors, officers, and stockholders of domestic corporations by the other statutes mentioned above.\textsuperscript{87} A statement of the nature of the remedies provided is necessary to a consideration of the applicable statute of limitations.

Section 15 of the Stock Corporation Law prohibits the transfer of any property of a corporation to a director, officer, or stockholder for any consideration other than full value in cash, if the corporation has refused to pay any of its obligations when due. It invalidates also every conveyance or transfer of any of the property of a corporation made with intent to prefer any creditor at a time when the corporation is insolvent or its insolvency is imminent, if the transferee knows that a preference is intended. The person who receives any property of a corporation by an act prohibited by the section is bound to account to the corporation’s creditors, stockholders, or trustees. The directors and officers of the corporation concerned in any prohibited act are made personally liable to the creditors and stockholders to the extent of any loss they may sustain.

Section 60 of the General Corporation Law provides for certain actions

\textsuperscript{83}Remington-Rand Inc. v. Emory U., 185 Ga. 571, 196 S. E. 58 (1938); Gormley v. Wilson, 176 Ga. 711, 168 S. E. 568 (1933).

\textsuperscript{84}Greenman v. Greenman, 107 Ill. 404 (1883). See also Motel v. Andracki, 299 Ill. App. 166, 19 N. E. (2d) 832 (1939) (delay not prejudicial—laches not a bar); Messick v. Mohr, 292 Ill. App. 69, 10 N. E. (2d) 870 (1937) (parties who combine to defraud creditors are precluded from relying on laches).

\textsuperscript{85}Abbey v. Commercial Bk. of New Orleans, 31 Miss. 434 (1856).

\textsuperscript{86}See notes 41-44 \textit{supra}.

\textsuperscript{87}StGerman American Coffee Co. v. Diehl, 216 N. Y. 57, 109 N. E. 875 (1915).
against directors and officers of a corporation. By that section, and section 61, a creditor may maintain an action against directors and officers for the following relief: (1) to compel them to account for their conduct including any neglect of or failure to perform their duties; (2) to compel them to pay to the corporation, or to its creditors, any money and the value of any property, which they have acquired to themselves, or transferred to others, or lost or wasted through any neglect of or other violation of their duties; (3) to set aside a transfer of property made by them contrary to a provision of law where the transferee knew the purpose of the transfer; or (4) to enjoin such a transfer.

Section 58 of the Stock Corporation Law prohibits the declaration of dividends out of capital. Directors in office when a prohibited payment of dividends is made, except those relieved by the terms of the statute, are made jointly and severally liable to the corporation and its creditors to the amount of any loss sustained by reason of the dividend. Loans to stockholders are prohibited by section 59 of the Stock Corporation Law, and the officers and directors making, or assenting to, such loan are made jointly and severally liable, to the extent of the loan and interest, for debts of the corporation contracted before the repayment of the loan. Section 61 of the Stock Corporation Law provides creditors a remedy against directors and officers for having made false reports upon which the creditors relied.

The statutes reflect the view that the assets of a corporation constitute a trust fund for the payment of its debts. Collusive and preferential transfers may be set aside and personal liability may be decreed against directors and officers concerned in making them to the extent of the creditors' loss. Most of the cases deal with misconduct of that nature. The creditor may sue, however, where negligence or other violation of the director's duties causes loss. There is some overlapping in the remedies afforded. Transfers invalidated by corporation laws may be fraudulent as to creditors, and remediable under the provisions of the Debtor and Creditor Law. The several sections of the corporation laws above mentioned reach into each other to some extent. It is not unusual to have complaints setting forth several causes of action although the creditor's sole purpose is to undo a single corporate transaction. Whalen v. Strong presented a complaint simpler in form. According to its averments, pleaded as a single cause of action, the

---

89N. Y. GENERAL CORP. LAW §§ 60, 61.
directors of a corporation had transferred a tract of land to the corporation's principal stockholders just prior to the entry of plaintiff's judgment against the corporation. The complaint charged that the transfer was for an inadequate, or for no consideration, with intent to give the stockholder a preference, to make the corporation insolvent and to prevent the property becoming subject to the lien of the judgment. The relief sought was an accounting, a reconveyance to the corporation, cancellation of the deed, a receivership, an injunction, and that plaintiff's judgment be paid by the defendant directors. The special term held that three causes of action were pleaded and ordered that they be separately stated. The appellate division reversed and held that the complaint stated but a single cause, and that in aid of execution. "These statutes [Stock Corporation Law, section 15, and General Corporation Law, sections 60, 61] are remedial. They furnish additional remedies. They are in extension, not in exclusion, of existing remedies, statutory, equitable or at common law." 91

The creditor may sue in his own right. The question was presented in Caesar v. Bernard, an action based upon the predecessor of Stock Corporation Law, section 15, and the court held:

"The liability created by this statute against directors and officers is for the loss sustained by creditors through wrongful acts of directors and officers by which the funds of the corporation have been depleted, and instead of requiring that the action shall be brought by, or in the right of the corporation to restore its funds, the legislature gave a cause of action to the creditors and stockholders in their own right to recover the damages sustained." 92

Buckley v. Stansfield 93 was an action by a creditor against directors of a corporation under the predecessors of General Corporation Law, sections 60, 61. At a time when the liabilities of the corporation exceeded its assets, the directors transferred all its property to another corporation. Defendants contended that plaintiff could recover only in a representative capacity in behalf of the corporation or all creditors. The court held that, at least where there is no showing that there are other creditors similarly situated, recovery could be had by plaintiff as an individual creditor. That other creditors will be protected is indicated by the fact that the judgment in Whalen v. Strong 94 was modified to provide that if there were other creditors

91Id. at 621, 246 N. Y. Supp. at 45.
94See supra note 90.
similarly situated, the plaintiff creditor could recover only his pro rata share.95

II. The Computation of the Statute of Limitations in New York

Of the New York corporation laws herein considered the only one which provides its own statute of limitations is section 61 of the Stock Corporation Law. The action therein authorized, based upon the making of false reports, cannot be maintained after the expiration of two years from the time that the report was made.96 Nor does the Civil Practice Act prescribe expressly a statute of limitations for creditors' actions against directors and officers of corporations other than moneyed corporations. A three-year statute of limitations is provided as to actions against a director or stockholder of a moneyed corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute.97 The cause of action is not deemed to have accrued until discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created.98

The statute of limitations begins to run against creditors' actions which owe their existence to Stock Corporation Law sections 15, 58, or General Corporation Law sections 60, subd. 5, and 61 when execution upon the judgment is returned unsatisfied.99 Until that time the creditor has no cause of action, and limitations do not commence to run until the right capable of present enforcement first comes into being.100 Buttles v. Smith101 was an action in behalf of a creditor of an insolvent corporation against three brokerage firms, the transferees of the corporation's funds. The creditor had obtained judgment against the corporation in 1933 upon an obligation due in 1926 and execution was returned unsatisfied. The action against the brokers was commenced in 1938. The funds paid to the brokers were in payment of debts owing from the corporation's two stockholders and directors. It was held that the causes of action based upon the Debtor and Creditor Law accrued when the transfers were made; those based upon

---

95Whalen v. Strong, 248 App. Div. 672, 289 N. Y. Supp. 19 (4th Dep't 1936). Upon reargument the judgment was again modified to allow the creditor the whole of his judgment, there being no showing that there were other creditors. Whalen v. Strong, 249 App. Div. 792, 292 N. Y. Supp. 385 (4th Dep't 1936).
96N. Y. Stock Corp. Law § 61.
98Ibid.
the corporation laws accrued upon the return of the execution. A like decision was rendered in Rosenkranz v. Doran\textsuperscript{102} in which the action was based upon Stock Corporation Law section 58 and General Corporation Law section 60. A corporation had conveyed land in 1926, covenanting against incumbrances. Neither vendor nor vendee knew, until 1938, that a prior deed contained a restriction against apartment houses. An action begun in 1938 for rescission resulted in 1940 in a judgment against the corporation. The corporation was then insolvent, the assets having been distributed to the officers in the form of salaries from 1926 to 1939. Considering the unknown indebtedness to the vendee, the withdrawals were being made while capital was impaired. The action against the officers was not barred by limitations.

Buttles v. Smith\textsuperscript{103} has recently been distinguished in Hastings v. Byllesby & Co.\textsuperscript{104} In the former case it was held that an action, brought under subdivision 5 of section 60 of the General Corporation Law, accrued upon the return unsatisfied of the creditor's execution. The action was brought by a receiver, appointed in an action in aid of the execution, to set aside transfer of a corporation's assets to creditors of the corporation's directors and officers. In the latter case, a trustee in bankruptcy of the corporation sued under subdivisions 1 and 2 of section 60 of the General Corporation Law, to recover moneys and property of the corporation which defendants allegedly had "wasted, disposed of, or took unlawfully and fraudulently, and to recover profits which . . . the defendants wrongfully appropriated." It was held that the action was derivative and that since an action by the corporation itself was barred at the time of the appointment of the trustee, an action by the trustee was likewise barred. In Buttles v. Smith, the receiver sought a remedy, it was said, for "a wrong to the creditor . . . independent and distinct from any wrong to the corporate debtor," while in Hastings v. Byllesby & Co., the cause of action asserted by the trustee was "based upon a wrong done to the corporate debtor." The result, in this most recent case, would have been the same, it would seem, if the action had been brought by an individual creditor, for the court significantly says:

"We assume arguendo that the action . . . is brought in behalf of creditors for the relief specified in subdivisions 1 and 2 of section 60, though there may be little in the complaint to support that assumption. Even so the fact remains that the cause of action is based upon a wrong to the debtor. The cause of action accrued to the debtor when the wrong occurred and though the statute permits a creditor or stockhold-

\textsuperscript{102}264 App. Div. 335, 35 N. Y. S. (2d) 413 (2d Dep't 1942).
\textsuperscript{103}281 N. Y. 226, 22 N. E. (2d) 350 (1939).
\textsuperscript{104}293 N. Y. 404, 57 N. E. (2d) 733 (1944).
er to bring an action for the wrong done to the corporation, the damage or injury to a creditor, like the damage or injury to a stockholder, arises only indirectly from the damage or injury to the corporation and is repaired when the damage or injury to the corporation is repaired."\(^{105}\)

An action by a creditor pursuant to the first two subdivisions of the General Corporation Law must, therefore, be commenced within the time limited for an action by the corporation to recover for the wrong done. The relief obtainable in an action against directors or officers, as provided in those subdivisions, is as follows:

1. To compel the defendants to account for their official conduct including any neglect of or failure to perform their duties, in the management and disposition of funds and property, committed to their charge.

2. To compel them to pay to the corporation, or to its creditors any money and the value of any property which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties.

The complaint in *Hastings v. Byllesby & Co.* charged Haystone Securities Corporation with having conspired with the directors of the debtor corporation to waste the assets of the latter. The syndicate of which Haystone Securities Corporation was a member was alleged to have realized a large cash profit as a result of a transfer of certain shares of stock to the debtor corporation. In the Appellate Division, which reversed the Special Term, it was pointed out that the action, unlike that in *Bustles v. Smith*, was not one to set aside a fraudulent conveyance. The Court there said:

"Plaintiff was not trying to get from Haystone its share of the proceeds of any property acquired by the Ladenburg syndicate; it was charging it with liability for all the wrongful acts of the corporate fiduciaries, and those acting in concert with it."\(^{106}\)

It was pointed out, further, that there was no claim that the debtor corporation had any creditors, nor that the rights of creditors had in any way been impaired, nor even that the solvency of the corporation had been affected. And the court concluded that "although plaintiff [the trustee in bankruptcy] has the rights of a creditor, as well as those of Standard [the debtor corporation], he is presently asserting the rights of Standard derivatively."\(^{107}\) It was unnecessary for the Appellate Division to decide what the result would have been if it had been alleged that creditors existed.

\(^{105}\)Id. at 410, 57 N. E. (2d) at 736.

\(^{106}\)265 App. Div. 643, 649, 40 N. Y. S. (2d) 299, 304 (1st Dep't 1943).

\(^{107}\)265 App. Div. 642, 650, 40 N. Y. S. (2d) 299, 304 (1st Dep't (1943).
The Court of Appeals nevertheless assumed that the action was brought in behalf of creditors, and even upon that assumption, affirmed the judgment of dismissal. The distinction which is drawn is between creditors' suits based upon the first two subdivisions of section 60 of the General Corporation Law and those based upon the fifth subdivision of that section. As to the former, the cause of action accrues when the wrong is done; as to the latter, the cause accrues upon the return unsatisfied of the creditor's execution. In neither instance, however, does the creditor have the right to sue unless he is a judgment creditor.108

III. Computation of the Statute of Limitations—Comparative Law

In several states there are statutes expressly providing a statute of limitations for actions against directors and officers of corporations. Two of these suggest strongly a legislative intention to encourage individuals to accept directorships. The Michigan statute provides for actions against directors and officers for the violation of or failure to perform their duties whereby the corporation's property is lost or wasted or transferred to one or more of them, and for actions to enjoin or set aside unlawful transfers. No director can be held for a delinquency under the section, however, after the expiration of six years from the date of the delinquency, or after two years from the time the delinquency is discovered, whichever shall sooner occur. In Pennsylvania an action cannot be maintained against a director

———


109 Mich. Stat. Ann. § 21.47, "... action may be brought by the corporation, through or by a director, officer or shareholder, or a creditor, or receiver, or trustee in bankruptcy, or by the attorney general of the state on behalf of the corporation against one or more of the delinquent directors, officers or agents, for the violation of, or failure to perform, the duties above prescribed or any duties prescribed by this act, whereby the corporation has been or will be injured or damaged or its property lost, or wasted, or transferred to one or more of them, or to enjoin a proposed, or set aside an unlawful transfer of the corporate property to one knowing the purpose thereof. The foregoing shall in no way preclude or affect any action any individual shareholder or creditor or other person may have against any director, officer or agent for any violation of any duty owed by them or any of them to such shareholder, creditor, or other persons. No director or directors shall be held liable for any delinquency under this section after six years from the date of such delinquency, or after two years from the time when such delinquency is discovered by one complaining thereof, whichever shall sooner occur."

to charge him with any neglect of duty as a director after the expiration of six years after the commission of the act of neglect.

Six states\(^\text{111}\) have prescribed statutes of limitation for actions against directors and officers of all corporations, but of a limited application. They are in substantially the same form. The action against a director to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within a specified time after discovery of the facts by the aggrieved party. The Georgia statute,\(^\text{112}\) however, provides a twenty year statute of limitations, computed from the date of accrual for "suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law." A Virginia statute\(^\text{113}\) prescribes a two year limitation for suits against directors for any liability imposed by the laws of the state. The action must be commenced within two years "after such right of action shall accrue."

Four states,\(^\text{114}\) including New York, expressly limit the time for suit against directors of money corporations to recover a penalty or forfeiture, or to enforce a liability created by law. Again the action is deemed to have accrued upon discovery of the facts.

In fourteen states,\(^\text{115}\) the statutes imposing liability upon directors forholders and directors. It is hereby declared to be the true intent and meaning of the statutes of limitation, that no suit, at law or in equity, shall be brought or maintained against any stockholder or director in any corporation or association, to charge him with any claim for materials or moneys for which said corporation or association could be sued, or with any neglect of duty as such stockholder or director, except within six years after the delivery of the materials or merchandise, or the lending to or deposit of money with said corporation or association, or the commission of such act of negligence by such stockholder or director."

\(^\text{111}\) CAL. CODE CIV. PROC. (1941) § 359. "... This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." IDAHO CODE ANN. (1932) § 5-237; MONT. REV. CODES ANN. (Anderson and McFarland, 1935) § 9061; NEV. COMP. LAWS (Hillyer 1929) § 8541; UTAH CODE ANN. (1943) § 104-2-35.

\(^\text{112}\) GA. CODE ANN. § 3-704.

\(^\text{113}\) VA. CODE ANN. (1942) § 3816.

\(^\text{114}\) N. Y. CIV. PRAC. ACT § 49(4); GEN. STAT. N. CAR. (1943) § 1-33 (three years after discovery); N. D. COMP. LAWS ANN. (1913) § 73.93 (six years after discovery); S. C. CODE (1942) § 367 (six years after discovery); WIS. STAT. (1943) § 330-51 (six years after discovery).

\(^\text{115}\) DEL. REV. CODE (1935) § 2067 (six years); FLA. COMP. GEN. LAWS ANN. § 612.57 (two years); IDAHO CODE ANN. (1932) § 29-130 (2 years—liability is to corporation only); LA. GEN. STAT. ANN. (Dart, 1939) § 1107 (two years); MICH. STAT. ANN. (1937) § 21.48 (3 years); MINN. STAT. (1945) § 301-23 (three years—liability to corporation); NEV. COMP. LAWS (Hillyer, 1929) § 1674 (three years); N. J. COMP. STAT. (1911) Tit. 4:8-19 (six years). The statute applies only to payment of dividends by a going concern, not to a distribution of all the assets to stockholders. Beatty v. Peter-
unlawfully paying dividends out of capital, or authorizing or permitting unlawful distribution of a corporation's assets, prescribe the time within which the action must be brought. The time generally runs from the date of the payment or distribution. Three states provide, however, that no statute of limitations shall be a bar to an action against a director to recover upon the liability created by the statute. Such a provision formerly existed in North Dakota but the statute was amended in 1919 to provide instead: "No action or proceeding to enforce or recover any penalty, forfeiture, or liability hereunder shall be commenced more than six months after the aggrieved party shall have had actual notice of the violation. . . ." The two year limitation in the Ohio statute does not apply to an action brought by a creditor, the statute providing that the creditor cannot maintain the action until after procurement of judgment against the corporation, or after the corporation's bankruptcy or dissolution.

In Ohio and Rhode Island the statutes imposing liability upon directors making false reports limit the time for maintaining the action to four and two years, respectively, after the act complained of.

In the majority of states the courts must determine, without the benefit of a precise statute, the statute of limitations applicable to the particular action against directors or officers, and the date of accrual of the cause of action as well. Their conclusions depend to a great extent upon the construction of the statute imposing liability. Is the statute penal or is it remedial? In either case, does the cause of action accrue upon the date of violation of the statute, or upon the incurring of the obligation to the creditor, or upon its maturity, or at the time the creditor discovers the underlying facts? Is the statute postponed until the creditor procures judgment and has execution against the property of the corporation returned unsatisfied? The cases do not fall into a single pattern. There is substantial uniformity in judicial construction of the modern statutes as being penal or remedial. Usually they are held to be remedial as far as the creditor's remedies are con-


See supra note 115.

Ochs v. Ozier Co., 140 Ohio St. 355, 44 N. E. (2d) 464 (1942).

Ohio Code Ann. (Baldwin, 1940) § 8623-123.

cerned, and not within the statutes providing limitations for actions to recover a penalty or forfeiture. A New York statute imposing liability upon directors "for all the debts of the company then existing, and for all that shall thereafter be contracted" for having failed to file an annual report, was held to be penal. The reason was that the liability had no relation to the actual loss or injury sustained by the creditor.\textsuperscript{121}

There is some authority for the view that directors are trustees of an express trust and that the statute does not commence to run until the trust is repudiated or the cestui que trust discovers the wrongdoing.\textsuperscript{122} Most courts, however, conceding that directors are trustees, hold that the trust is constructive and permit a plea of limitations.\textsuperscript{123}

Where the statute imposes liability upon the directors for the creditor's "debts" the cause of action is generally held to have accrued either upon the contracting of the obligation or upon its maturity.\textsuperscript{124} In \textit{California} the cause is held to have accrued upon the date it is contracted even though the claim will not mature until after the creditor's right to sue will be barred by limitations.\textsuperscript{125} The discovery provision of the \textit{California} statute is held to apply only to actions for a penalty or forfeiture. A like result is reached in \textit{Montana} the court there saying, however, that the cause of action accrues when the liability is created by law.\textsuperscript{126} In \textit{Arkansas} the cause of action accrues when the debt is contracted.\textsuperscript{127}

Most of the cases dealing with directors' liability to creditors involve unlawful payment of dividends or wrongful distribution of assets to stockholders. It is generally held that the cause of action accrues when the dividends are paid or the transfer is made.\textsuperscript{128} In \textit{Utah} it has been held that the

\textsuperscript{121}Merchants Bank v. Bliss, 35 N. Y. 412 (1866).
\textsuperscript{124}Morgan v. Hedstrom, 164 N. Y. 224, 58 N. E. 26 (1900) (failure to file report when debt matured).
\textsuperscript{125}Hunt v. Ward, 99 Cal. 612, 34 P. 335 (1893); Pourroy v. Gardner, 122 Cal. App. 521, 10 P. (2d) 815 (1932).
\textsuperscript{126}Williams v. Hilger, 77 Mont. 399, 251 P. 524 (1926).
\textsuperscript{128}Pourroy v. Gardner, 122 Cal. App. 521, 10 P. (2d) 815 (1932); McNair v. Burt, 68 F. (2d) 814 (C. C. A. 5th, 1934); Lexington & O. R. Co. v. Bridges, 7 B. Mon.
rule applicable to a transfer of the corporation's assets is the same as in the ordinary case of a fraudulent conveyance of property by a failing debtor, i.e., limitations begin to run when the fraud is or should be discovered.\textsuperscript{128} The liability imposed in \textit{Oregon} is for "debts" and the cause accrues upon maturity of the creditor's claim against the corporation.\textsuperscript{130} In \textit{Chatham v. Mecklenburg R. Co.},\textsuperscript{131} the creditor sued to recover assets distributed to stockholders and creditors, and the court held that the cause of action did not accrue until the return of the execution issued against the corporation.

Sometimes the liability is predicated upon the directors having made excessive loans, or contracted excessive debts, in violation of a statute. Generally the cause of action is held to have accrued when the excessive loans are made or the excessive indebtedness contracted,\textsuperscript{132} although the courts usually are careful to say that the case involves no fraud or concealment. It has been held in \textit{South Dakota}, however, that the action is to recover upon a liability created by statute accruing when the creditor discovers the facts as to the making of excessive loans.\textsuperscript{133} And in \textit{New Jersey}, the court applied the equity discovery rule to an action based upon a statute forbidding loans to stockholders, and making assenting directors liable for debts to the extent of the loans.\textsuperscript{134} In \textit{Vermont} a cause of action based upon excessive loans was held to accrue when the creditors' debt was contracted.\textsuperscript{135}

The cases are few which deal with the statute of limitations in creditors' actions against directors founded upon negligence. \textit{Purcell v. Baker}\textsuperscript{136} was an action founded upon negligent management of a bank. The five-year statute for actions on a liability created by statute was held applicable, and since the bank had closed its doors more than five years before the action was begun, the complaint was dismissed. It was said that the cause accrued, at the

\textsuperscript{128}556; 46 Am. Dec. 528 (Ky. 1847); McGill's Adm'x v. Phillips, 243 Ky. 768, 49 S. W. (2d) 1025 (1932); Detroit Trust Co. v. Goodrich, 175 Mich. 168, 141 N. W. 882 (1913) (so long as defendant was innocent); Thomas v. Richter, 88 Wash. 451, 153 P. 333 (1915); Peeples v. Hayes, 156 Cal. 286, 104 P. (2d) 305 (1941); Coombes v. Getz, 217 Cal. 320, 18 P. (2d) 939 (1933) (liability of directors for moneys embezzled by officers); Williams v. Davis, 182 Minn. 186, 234 N. W. 11 (1930) (conversion by directors).

\textsuperscript{130}American Theatre Co. v. Glasmann, 95 Utah 303, 80 P. (2d) 922 (1938).

\textsuperscript{131}Patterson v. Wade, 115 Fed. 771 (C. C. A. 9th, 1902).

\textsuperscript{132}180 N. C. 500, 105 S. E. 329 (1920).


\textsuperscript{134}Smith v. Lyle, 59 S. D. 534, 241 N. W. 512 (1932).

\textsuperscript{135}Cole v. Brandle, 127 N. J. Eq. 31, 11 A. (2d) 255 (1940).

\textsuperscript{136}Bassett v. St. Albans Hotel Co., 47 Vt. 313 (1875).

\textsuperscript{137}270 Ky. 772, 110 S. W. (2d) 1079 (1937).
latest, when the bank closed, and the fraud statute of limitations was held not to apply. In *Link v. McLeod*\(^3\) the directors had resolved to reimburse the president for his losses in stock transactions, which he induced the directors to believe were conducted on the corporation's account. It was held that the creditor's action accrued, not when the money was paid out, but on the date of the resolution. In *Tennessee* the action is barred when the time runs out against an action by the corporation itself.\(^3\) In *Winston v. Gordon*\(^3\) held, in a case involving careless disregard of duties and improvident loans, that the cause accrued when the wrong was committed.

**D. Conclusion**

The majority rule that the statute of limitations does not start to run against an action to set aside a fraudulent conveyance at least until the creditor has procured judgment is reasonably grounded in the view that a cause of action should not be barred before complainant has the right to sue. The reason disappears when the creditor is allowed to commence his action even before his claim matures. By the weight of authority, however, the statute does not commence to run when judgment is procured upon the primary obligation, nor even upon the return of execution, if the facts constituting the fraud have not then been discovered. The action is held to be within the general fraud statute of limitations and the creditor has the benefit of the discovery rule.

The New York rule that the cause accrues at the date of the fraudulent transfer may result in the barring of the action before the creditor knows that the transfer has been made. The rule, nevertheless, has its advantages. It eliminates from the case the question of fact as to when the fraud should have been discovered and facilitates the disposition of the action upon a motion. Furthermore the security of titles is better established and transferees may develop and improve their property without danger that a creditor of the grantor will claim many years later that he had just then discovered the fraud. The length of time during which the cause of action may be maintained gives reason for belief that not many creditors will suffer loss by expiration of the statutory period.

The New York rule is applied whether the fraudulent transferor is a natural person or a corporation. If the transferor is a corporation, however, the creditor may base his action on corporation laws and recover al-

---

\(^3\) Pa., 566, 45 Atl. 340 (1900).
\(^3\) Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448 (1891).
\(^3\) Va. 899, 80 S. E. 756 (1914).
though his action based on the Uniform Fraudulent Conveyance Act is barred. The statute of limitations does not begin to run until return of execution against the corporation, since the courts have consistently held that the term "creditor" in the corporation laws considered, means a judgment creditor with execution returned unsatisfied. Such a construction postpones the possibility of litigation for long periods. There may be justification in the fact that the transfers are very often from the corporation to the officers and directors themselves. In such event the transfer may in reality involve nothing more than a change in the form in which the owner elects to have the title held.

Corporation statutes give creditors a right of action against directors and officers whose negligence or mismanagement has caused loss to the corporation. Such wrongs are usually righted in actions brought by stockholders. The stockholder is limited to the time within which the corporation itself could sue. The creditor of the corporation is subject to the same limitation on the theory of Hastings v. Byllesby & Co.\(^{140}\) There is this difference, however: the stockholder may sue when the wrong is done; the creditor cannot sue until the return of his execution against the property of the corporation.

\(^{140}\) 293 N. Y. 404, 57 N. E. (2d) 733 (1944).