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## Creditor's Rights—Fraud Must Be Proven, Not Presumed

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and are free to proceed with a tax foreclosure against the debtors.<sup>8</sup> The present case was not commenced by Weaver Sons until four years after the Chapter X proceedings were terminated and Weaver Sons had been restored to its ordinary status, and nearly twelve years after the defendant Burgess had recorded his deed from the City. Conceding then that federal supremacy may require that the Statute of Limitations be tolled during this period of reorganization the two year period nevertheless expired because more than four years had elapsed from the termination of the reorganization.

FRAUD MUST BE PROVEN, NOT PRESUMED

The issue raised in *Chemical Corn Exchange Bank v. Wassung*<sup>9</sup> was whether a fraudulent intent by the defendant to conceal information concerning his financial condition had been proven.

In March, 1956, the plaintiff discounted three notes for the defendant which were subsequently paid. At that time, the plaintiff obtained from the defendant a financial statement of his net worth. Between October and December of the same year, the plaintiff discounted five more notes for the defendant. The plaintiff discounted the notes on the alleged oral assertion by the defendant that there was no material change in his financial condition since the first notes were discounted. These notes were not paid. The maker thereof was adjudged a bankrupt and discharged, as was the defendant. To escape the bankruptcy discharge, the plaintiff brought this action on the theory that the defendant had fraudulently induced the plaintiff to discount the notes and that they were ignorant of the alleged fraud when the discharge in bankruptcy was entered.<sup>10</sup>

At the trial, the defendant admitted that the real estate assets listed on the statement were over stated and that they had been sold for considerably less than appeared on the statement prior to the discounting of the five notes. Because of these admissions, the trial court found that the defendant intended to conceal information concerning his financial condition and the statement that there was no material change in his financial condition was fraudulent. The Appellate Division reversed, holding that, "There is neither proof of deliberate concealment of material facts with intent to defraud nor, . . . is there evidence of reckless disregard of truth."<sup>11</sup>

The Court of Appeals affirmed the Appellate Division holding, that the plaintiff did not sustain the burden of establishing fraudulent intent. The majority pointed out that assuming the listed real estate was over stated and that the defendant had said there was no material change in his financial condition, fraudulent intent was not proven. With no proof as to defendant's actual net worth plus the fact that the five notes were assets not listed on the statement,

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8. *Town of Agawam v. Commors*, 159 F.2d 360 (1st Cir. 1947).

9. 7 N.Y.2d 337, 197 N.Y.S.2d 169 (1960).

10. 11 U.S.C. § 35.

11. 8 A.D.2d 788, 187 N.Y.S.2d 548, 549 (1st Dep't 1959).

it does not follow that the defendant intended fraud or was unreasonable in saying there had been no material change in his financial condition.

The position taken by the dissent was that the evidence sustained the trial courts conclusion and that its judgement should be affirmed. First, because the trier of fact has the benefit of observing the witnesses and therefore a better opportunity to assess their credibility, and second, because the Appellate Division could reverse only if the trial court's conclusion was at variance with the conclusion that a prudent trier of fact would have reached.<sup>12</sup> The dissent argues that on the basis of the defendant's knowledge as to his real estate transactions, he could not reasonable have thought that there was no change in his financial condition.

The question of fraudulent intent largely depends on the facts in any given case. Here there was no proof as to the defendant's actual financial condition, therefore the accuracy of the oral statement is mere conjecture. The rule, "fraud must be proved and is not presumed" was clearly applicable here.<sup>13</sup>

## CRIMINAL LAW

### VOLUNTARINESS OF REPUDIATED CONFESSION

Once again the issue of the voluntariness of an inculpatory confession is broached for general consideration. *People v. Vargas*<sup>1</sup> presents the classic situation where defendant confessed to the police and later recanted his confession, claiming it had been made under coercion and duress. He also claimed, however, that there had been an unnecessary delay before his arraignment, in violation of Section 165, Code of Criminal Procedure,<sup>2</sup> and therefore the confession taken during the period of the illegal delay must as a matter of law be excluded. At approximately six o'clock on the evening of February 13, 1958, defendant was taken into custody for questioning along with several other persons in connection with the killing of one Lillian Mojica. He made a statement to the police at approximately nine P.M., and was questioned again at eleven o'clock for about an hour and a half. Defendant was again interrogated on the morning of Feb. 14th beginning at five o'clock A.M. and lasting until eight o'clock A.M., at which time he was brought some coffee and pastry. The investigation of the police continued through the morning. When confronted with the results of the police investigation at about eleven-thirty A.M., defen-

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12. *Prime v. City of Yonkers*, 131 App. Div. 110, 115 N.Y. Supp. 305 (2d Dep't 1909), aff'd 199 N.Y. 542, 93 N.E. 1129 (1910).

13. *Low v. State*, 281 App. Div. 309, 120 N.Y.S.2d 339 (3d Dep't 1953), affirmed 305 N.Y. 913, 114 N.E.2d 470 (1953).

1. 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960).

2. N.Y. Code Crim. Proc. § 165:

The defendant must in all cases be taken before a magistrate without unnecessary delay.