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Twyne's Case Retold: Still Good Law Four Hundred Years Later

Stephen P Harbeck[1]

Introduction

Four hundred years ago, the Sheriff of Southampton rode forth to help a creditor collect a judgment. The judgment creditor, "C", was owed two hundred pounds by the judgment debtor, Pierce. Pierce, it seems, also owed another debt of four hundred pounds to Twyne of Hampshire. We can infer from ensuing events that Pierce and Twyne were close friends; on the other hand, Pierce and "C" had an arms-length, business relationship.

Anticipating the judgment and the subsequent arrival of the Sheriff, Pierce made 'a general deed of gift' of all his goods and chattells to his friend Twyne. Even though Pierce had purportedly conveyed the assets to Twyne, Pierce retained possession of the assets, and treated them as his own. He sold some of the goods, and, as for the livestock, 'he shore the sheep, and marked them with his own mark.'

"C" obtained a writ of execution, and the Sheriff set out to satisfy the judgment debt by seizing goods and chattels from Pierce. The Sheriff was not exactly successful. In the words of the Star Chamber, 'divers persons, by the command of the said Twyne, did with force resist the said Sheriff.'

As one might expect, further litigation ensued. In short, the Star Chamber held that Pierce's 'gift' to Twyne had 'the signs and marks of

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1 General any Counsel, Securities Investor Protection Corporation. The Securities Investor Protection Corporation, as a matter of policy, disclaims responsibility for any private publication by of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of SIPC or of the author's colleagues upon the staff of SIPC.

fraud.' The supposed gift from Pierce to Twyne was set aside.[2]

The Star Chamber found that there were six indicia of fraud in Twyne's Case, which required the court to void the purported gift from Pierce to Twyne under the Statue of Fraudulent Conveyances, 13 Eliz C5, 1571.

First, the gift purported to transfer everything Pierce owned, including his clothes, and other necessities. Such a 'general' transfer is highly irregular.

Second, Pierce retained possession of the goods. He treated them as his own.

Third, the deed of gift from Pierce to Twyne was made in secret.

Fourth, the transfer was made with "C's" litigation looming ominously over Pierce.

Fifth, Twyne apparently held the goods in trust for Pierce, who had full use of them. The court held that 'fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.'

Sixth, the deed of gift itself was suspicious. It recited, for no apparent reason, that this was an honest, true, and bona fide gift, so he drafted a clause which aroused suspicion. In short, the clause proved the exact opposite of its terms.

The end result: The deed of gift was voided, and Twyne was convicted of fraud. Further, Twyne and the 'divers persons' under his command were convicted of rioting. Presumably, the Sheriff was more successful in his next attempt to obtain the goods and deliver them to "C".

While the various 'badges of fraud' set forth in Twyne's Case have been developed and refined over the last four centuries, the case has stood the test of time as a common law precedent which courts in the United States still find useful in the contemporary world.

Across the Atlantic and on to the present

Twyne's Case is still a valid common law precedent in the United States today. In *BFP* v *Resolution Trust Corp*,[3] the supreme Court has

2 Twyne's Case, Star Chamber, *1601, 3 Coke 80b, 76 Eng Rep 809.*

3 511 US 531; 114 S Ct 1757 (1994).

recently held that a transfer of title to an asset without transfer of possession, or a transfer for grossly inadequate consideration, would raise a rebuttable presumption of actual fraudulent intent. The Court cited the English common law 'badges of fraud' doctrine, as set forth in Twyne's Case, as authority for that proposition.[4]

A recent federal district court opinion notes that although the state of California has not expressly codified the 'badges of fraud' test for determining the indicia of actual fraud, that state's version of the Uniform Fraudulent Transfer Act can be traced 'back to Twyne's case, the seminal badges-of-fraud decision.'[5]

The federal law of bankruptcy in the United States provides that a trustee of a bankrupt person or corporation may 'avoid' – that is, reverse – fraudulent transfers.[6] Accordingly, the United States Bankruptcy Courts have relatively frequent occasion to rely on the 'badges of fraud' test, and Twyne's Case. Thus, in *in re Colandrea*,[7] the court first noted the Statute of Fraudulent Conveyance Act, and then stated that '[t]he indicia or badges of fraud first outlined in Twyne's case… continued to be recognised by the Maryland courts as part of the law of fraudulent conveyances' under that state statute.[8] Finally, the court in *Colandrea* stated that 'the badges of fraud set out by the Star Chamber in *Twyne's Case* remain applicable in Maryland for the purpose of shifting the burden of proof to the transferee as to his *bona fides* with regard to the conveyance.'[9] A separate bankruptcy court has also noted that Twyne's

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4 511 US 531114, 540-41; S Ct 1757, 1763.

5 *Mussetter* v *Lyke*, 10F Supp 2d 944, 959 (n D Ill 1998); see also *Wyzard* v *Goller*, 28 Cal Rptr 2nd 608, 612, 23 Cal App 4th 1183, 1191 (1994).

6 A trustee in Bankruptcy may avoid fraudulent transfers by using the federal law relating to fraudulent transfers, Bankruptcy Code s 548, 11 USC s 548, or by using the laws of several states, which also prohibit such transactions. State law is made applicable in bankruptcy by Bankruptcy Code section 544(b), 11 USC section 544(b). See *In re Miami General Hospital, Inc*, 124 BR 383, 391, n 4 (Bkrtcy SD Fla 1991). It is often the case that the state statutes allow a trustee to reach back further in time to avoid transfers which would not be affected by Bankruptcy Code section 548.

7 17 BR 568, (Bankr D Md, 1982).

8 17 BR 568, 579.

9 17 BR 568, 580.

Case forms part of the common law of the state of Illinois.[10]

The bankruptcy appellate panel in *In re Black & White Cattle Co*,[11] commented that '[t]he principle which deems the separation of ownership and possession to be presumptively fraudulent is deeply engrained in our jurisprudence. *See, eg, Twyne's Case...*'[12] The court noted that as a result of this presumption, the California state legislature enacted a statute to protect purchasers and creditors dealing with feed lot operators who are in possession of cattle belonging to another.[13] The California statute requires the owner of dairy cattle which are delivered into the possession of a feed lot operator to record, as a public record, the feeding agreement so that others will be on notice of the owner's claim to the cattle. Upon reflection, the California statutory scheme has an extraordinary relation to Twyne's Case: the statute is designed to require a public record to overcome the presumption that one in possession of livestock is not the owner (Consider the consequences of such a law on Twyne and his judgment debtor friend Pierce).

Bankruptcy Courts in the United Sates have recently relied on Twyne's Case to avoid prosaic transactions, such as the transfer of real estate between family members,[14] and to reverse sophisticated financing arrangements, such as a corporate leveraged buyout which had the effect of paying the corporation's shareholders while creditors remained unsatisified.[15]

A Bankruptcy Court has also cited Twyne's Case for the proposition that a debtor should be denied a discharge in bankruptcy, and the 'fresh start' given to honest debtors, where the 'badges of fraud' test was applied

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10 *Matter of Reda, Inc* 60 BR 178, 180 (Bkrtcy ND Ill 1986).

11 30 BR 508 (9th Cir Bankr App 1983).

12 30 BR 508, 512 A full reading of the case indicates that the court was probably not conscious of the irony of expounding the principle that the presumption of fraud was 'engrained' in American jurisprudence in a case involving a cattle feeding lot.

13 Cal Civ Code section 2980 5.

14 *In re Hegarty*, 208 BR 760 (Bkrtcy D Mass 1997).

15 *In re Bay Plastics, Inc.*, 187 BR 315 (Bkrtcy CD Cal 1995).

to demonstrate, by circumstantial evidence, that the debtor intended to evade his tax obligations.[16]

Summary

As was noted by the court in *In re Overmyer Telecasting Co, Inc*,[17] 'fraud and deceit have come a long way since 1601.' That court stated, in connection with complex layers of corporate fictions, that it had never encountered such a systematic distortion of truth and of the legal system. But, the court said, 'as clever as [the fraudulent actor's] system was, it still left numerous badges of fraud'. And for that reason, American courts will continue to honour the precedent established by Twyne's Case.

16 *In re Berzon*, 145 BR 247, 250 (Bkrtcy ND Ill 1992); *In re Bailey*, 145 BR 919 (Bkrtcy ND Ill 1992).

17 23 BR 823, 917 (Bkrtcy ND Ohio 1982).