No. 13457

Supreme Court of Illinois

Sackett, et al.

vs.

Mansfield, et al.

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

143

No. 147.

Sackett
vs
Marshall

1345

BRIEF AND ARGUMENT

ON THE

LAW OF

Voluntary Assignments,

WITH PREFERENCES FOR THE

Benefit of Creditors.

E. S. SMITH,

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Supreme Court of Illinois

William A. Sackett et al
Plffs in Error
— vs —
Augustus Mansfield et al
Defts in Error

Error to McHenry

BRIEF AND ARGUMENT

ON THE

LAW OF VOLUNTARY ASSIGNMENTS.

For Plff in Error

The Law applicable to Assignments with preferences, giving the Assignee discretion as to the time and manner of sale.

We propose to consider the validity of assignments containing the following provisions :

1. That the assignee "shall with all *convenient* diligence sell and dispose of the assigned property, at public or private sale, as he may deem most beneficial to the interests of the creditors (or of the parties concerned), and convert the same into money, and shall with all reasonable dispatch collect," &c.

This provision is in the asst in the case at bar

2. Authorizing the assignee to sell "upon such terms or conditions as in his judgment may appear best and most for the interest of the parties concerned."

3. Authorizing the assignee to sell "upon such terms and conditions," &c., "but for cash only."

4. When the assignee is directed to "first pay and disburse all the just and reasonable expenses, costs, charges and commissions attending the due execution of the assignment and the carrying into effect the trust thereby created, together with a reasonable compensation or commission for his own services."

We claim that an Assignment containing either of the foregoing provisions authorizes the Assignee to exercise his own discretion as to the time when and the manner in which the assigned property shall be sold or disposed of and the trusts imposed upon him by the Assignment discharged, and is therefore void as against creditors, being made with intent to hinder, delay and defraud them.

Since the questions we are considering may well be regarded as of great importance, we propose to discuss them both upon principle and authority, and endeavor to settle not only the questions immediately involved, but, so far as it is practicable, to extract from the authorities some general principle, upon the application of which, the validity of all voluntary assignments with preferences may be tested and determined.

THEIR HISTORY.

And it is first to be observed, in the language of the Court in *Dunham vs. Waterman*, 17 New York Reports 15, that "General assignments in trust for the payment of debts are

'for the most part an American device. In England, such an 'assignment by a trader — a term which is held to embrace 'nearly every man of business — is considered an act of bank-'ruptcy; and the commission issued supersedes the assign-'ment The history of these assignments in this State tends 'to show that they were originally an invention by debtors in 'failing circumstances, *designed not for the benefit of creditors, 'but to perpetuate their own control over the property in their 'hands.*"

"Voluntary assignments (says Senator TRACY, in *Grover vs. 'Wakeman*, 11 Wend. 216), which enable a debtor in failing 'circumstances to delay and defeat the diligence of particular 'creditors, by transferring his property to trustees of his own 'selection, is an invention comparatively of modern origin. I 'doubt if they have been known for more than forty or fifty 'years: at least I can find no case of their distinct recognition 'in the English Courts prior to 1805. It is true that a volun-'tary assignment, by means of what is called a deed of com-'position, is of much older date. But this is a very different 'affair, for the creditors are made parties to the deed, and the 'assent of all of them is required to give it validity. Volun-'tary assignments have, however, of late years, been sustained 'by courts of law, and sometimes, I confess, under circum-'stances which I can hardly reconcile with my own notions of 'legal justice. But it will be found that in the first cases 'where such assignments are sanctioned, *the courts were influ-'enced entirely by the consideration that they operated to secure an 'equal distribution of the insolvent's property among all his cred-'itors. They saw that the principle of such assignments trenched 'upon a fundamental maxim of the common law, and were appa-'rently repugnant to the very wording of the statute of frauds. 'But the rule of chancery, that equality is equity, prevailed over 'the common law principle*—VIGILANTIBUS NON DORMIENTIBUS LEGES

'SUBVENIUNT — *and courts permitted the debtor to arrest the dili-*
'gence of one creditor in order to provide for the interests of all."

THEIR ORIGIN.

The rule, recent as it is, allowing voluntary assignments, has its ORIGIN "not in the statute, but in the decisions of our 'courts, and springing from the difficulties arising from the ab-'sence of a general bankrupt law." (*Nicholson vs. Leavitt*, 6 'Selden 596, per EDMONDS, J.) And the TRUE REASON why this 'right of preference has been allowed to the debtor is, that 'whilst the property is in his hands, unshackled by legal liens 'and incumbrances, his power over it is absolute, and as he 'can dispose of it by sale to any person, so he may dispose of 'it by way of satisfaction to any creditor."

THEIR MISCHIEVOUS TENDENCIES.

The MISCHIEVOUS TENDENCIES of voluntary assignments with preferences, were discovered immediately after the courts had permitted them to be made, and upon this point Senator TRACY, in *Grove vs. Wakeman*, holds this emphatic language:

"Voluntary assignments, which were first allowed to pre-'vent inequality in the distribution of an insolvent's assets. 'are now resorted to as the most efficient means of securing 'this inequality. To prevent a rightful preference, the result 'of legal diligence, an act is tolerated which secures to the 'debtor a capricious preference vastly more unequal. Either 'principle, that of assignment or that of preference, standing 'by itself might very well be questioned; but brought together, 'they form an unnatural coalition, from which little that is sal-

'utary or honest can be anticipated. * * *The experience of* '*all commercial communities leads to the conclusion, that this* '*power of preferring creditors is a fruitful source of frauds, and* '*in every respect mischievous and unwholesome.*"

THE CURRENT OF AUTHORITY.

The CURRENT AND TENDENCY OF AUTHORITY — THE POLICY OF COURTS AND LEGISLATURES — since the right to make voluntary assignments with preferences was first recognized, has set steadily and unvaryingly against them. "For more than thirty 'years (says EDMONDS, J., in *Nicholson vs. Leavitt*, 6 Selden 592) 'our courts have been struggling to keep within due bounds 'voluntary assignments by failing debtors. No one can be 'engaged long in the administration of justice without becom- 'ing sensible how much fraud and mischief are perpetrated un- 'under color of such machinery. To punish a vigilant cred- 'itor, to extort terms from him, to keep the property within 'the debtor's control by means of a friendly assignee, or to 'make it as available to him as possible, are far more fre- 'quently the purposes of such assignments, than a fair and 'equal distribution of the property among those to whom it 'equitably belongs. And the result at which courts are bound 'to aim — such distribution namely, and that as soon as prac- 'ticable — is almost invariably thwarted by these assignments, 'and the delay and hindrance which they interpose, under the 'pretence of equality and a full dedication of the debtor's 'effects to the payment of his debts. Under the name of that 'equality which is equity, the means of the debtor are placed 'beyond the reach of his creditors, and frequently consumed 'in expenses and charges by the assignee, rather than in the 'liquidation of debts. Such is most generally the practical

'effect of tolerating these voluntary assignments, and no one 'can long occupy a seat on the bench without witnessing and 'lamenting it.

"*The only ground* on which they have ever been allowed at 'all is, that *they do only that which every principle of honesty 'demands, and surrender all of the debtor's property to the satis-'faction of all his debts.* Yet it is *most frequently true* that '*they operate to withdraw that property from its legitimate pur-'pose*, at least for a while if not permanently. and *often appro-'priate it for other purposes.*

"The courts have been compelled to witness these frauds, 'thus perpetrated in the name of the law, until they have 'been constrained by a sense of duty to aim at suppressing 'the evil, as far as in them lies, and at attaining that equality 'which is shunned under the pretence of seeking it.

"From the cases of *Murray vs. Riggs* (2 J. Ch. R. 565) and '*Hyslop vs. Clark*, (14 J. R. 458) both in 1817, until this day, 'our courts, both of law and equity, have struggled for the 'attainment of this object. and have been engaged in striking 'down the various forms devised by the ingenuity of debtors 'to pervert a rule — sounding fairly — to the purposes of evil."

So, again, in *Burdick vs. Post* (12 Barbour 176), BARCULO J., in delivering the opinion of the court, says:

"The rule authorizing preferences had hardly become estab-'lished, ere the courts—perceiving the dangerous power vested 'in failing debtors of rewarding friends and punishing exacting 'or importunate creditors — began to regret its admission and 'exercise their ingenuity in imposing limits and restrictions. 'Thus, in *Riggs vs. Murray* (2 John Ch. 565), Chancellor 'KENT held the folllowing language: 'The application of the

'rule is always to be watched with jealousy, and we are not 'required by any reasons of expediency or justice to enlarge 'the rule by giving it a new and dangerous facility. We ought 'to require of the insolvent.' "

And Judge BARCULO, at page 178, adds :

"Not only has the language of Judges been adverse to the 'extension of this power, but the tendency of the adjudica- 'tions on the subject for the last thirty years has been to con- 'fine the insolvent within the narrow limits we have defined."

In *Boardman vs. Holliday*, 10 Paige, 229–30, Chancellor WALWORTH declares, that he "cannot sanction the extension 'of the principle of giving preferences in these voluntary as- 'signments beyond what must be considered as the settled law 'of the land."

In *Grover vs. Wakeman*, (11 Wend. 219) Senator TRACY says :

"The law of our State, though it tolerates, does not favor 'this preference. The legislature has discountenanced it by 'denying the relief of our insolvent act to such debtors as have 'exercised it in contemplation of insolvency. *If, therefore, it 'was a question arising now for the first time, whether an assign- 'ment by an insolvent which contained a provision securing a pre- 'ference to favored creditors was or was not against the policy of 'the statute of frauds, I should hesitate very much before I decided 'that it was not.* But the question is not now open, having 'been repeatedly settled by our highest judicial tribunals, to 'whose decisions I yield a ready submission. *But whilst I do 'this, I am not disposed to go one line beyond the adjudged cases, 'to uphold and extend a principle the general influence of which 'I am persuaded is unjust and mischievous.*"

And again, in *Webb vs. Daggett* (2 Barbour 11), HARRIS, J., declares that "Voluntary conveyances have not ceased to be 'regarded with jealousy. They are rather tolerated than fa- 'vored. The principle of allowing an insolvent debtor to give 'arbitrarily such preferences, among creditors equally worthy, 'as may result in the payment of the entire debt of one, and 'the loss of the entire debt of another, has been condemned in 'the strongest terms by many of the wisest statesmen and the 'most enlightened jurists of our country."

And J. BRONSON remarks in *Goodrich vs. Downs* (6 Hill 429), that "The Courts have found great difficulty in upholding as- 'signments which give a preference among creditors; and *such* 'transfers have only been allowed to stand *where the debtor* 'makes an unconditional surrender of *his effects for the benefit of* 'those to whom they rightfully belong."

And MASON, J, in *Rathbone vs. Platner* (18 Barbour 275), with reference to assignments of this character, declares that "The law tolerates them when honestly made for the purpose 'of giving the preference and devoting the whole property of 'the debtor to the payment of the debts. Many of our most 'eminent judges have regretted that the principle of permitting 'an insolvent to make a voluntary assignment of his property, 'giving preferences in any way, should ever have been adopted 'or sanctioned by our courts; and the settled doctrine of the 'courts of this State at the present day is, not to sanction the 'extension of the principle beyond what must be considered 'the settled law of the land."

"Preferential assignments," says ROOSEVELT, J., in *Nichols vs. McEwen*, 17 New York 24, "*are not to be encouraged. The* 'law rather tolerates than approves them. They are inconsistent 'with an enlarged equity, and should therefore be held to the

'strictest conditions. The insolvent may in good faith select 'his own assignee and give effect to his own preferences. *Be-* '*yond that limit he cannot and should not be allowed to go.*"

The same tendency to a strict construction of voluntary assignments with preferences prevails throughout the Union. Thus, in *American Exchange Bank vs. Inloes* (7 Maryland 388) the Court say :

"Although it has been more than once decided in Maryland, 'that a debtor by the common law, and apart from our insol- 'vent system, may by assignment of his property, or by pay- 'ment, secure one creditor to the exclusion of others ; *yet such* '*a provision in a deed of trust is only permitted by a court of* '*equity ; but so far from commending the transaction to the court* '*as one of honesty and fair dealing, should rather throw a cloud* '*of distrust upon it.*

The Supreme Court of Pennsylvania, in *Livingston vs. Bell* (3 Watts 201), say :

"It would have been better had these conditional assign- 'ments been brought within the purview of the 13th of Eliza- 'beth, as they might have been originally, and as they have 'been in some of the States."

And the Supreme Court of New Jersey, in *Owen vs. Arvis* (2 Dutcher 44), declare that :

"While it is well settled that conveyances made fairly and 'in good faith, with the honest intention to pay one class of 'creditors to the preference of another, are not treated as void, 'but as the mere exercise of a right which the law admits and 'sanctions, *yet courts regard with great jealousy the introduc-* '*tion of any element into the transaction which indicates the ab-* '*sence of good faith.*"

The Supreme Court of Connecticut, in *Ingraham vs. Wheeler* (6 Conn. 282), per BRAINARD, J., say :

" To admit that an insolvent has a right to prefer his favor-
' ite creditors—his friendly endorser who assisted to support
' his buoyancy perhaps to the deception of the ignorant and
' incautious, and who had received assurances that in no event
' he should suffer— to the claims of his butcher and his baker,
' *I thought was going far enough.*"

The same rule of construction obtains in Massachusetts — *Johnson vs. Whitwell*, 7 Pick. 71 ; is still more rigidly enforced in Ohio —*Atkinson vs. Jordan*, 5 Ohio 293 ; in Illinois — *Nesbitt vs. Digby*, 13 Illinois 387 ; in Alabama —*Borland vs. Mayo*, 8 Ala. N. S. 105 ; in California —*Billings vs. Billings*, 2 Cal. 107 ; in Vermont — 17 Ver. R. 311 ; in Virginia — 8 Leigh 416 ; in Kentucky — 11 B. Monroe 296.

In Michigan, the Supreme Court, in *Pierson vs. Manning*, (2 Mich. 448), say :

" Great and well founded doubts have always been enter-
' tained by Courts generally in this country, in relation to sus-
' taining voluntary assignments by insolvent debtors, at all,
' which give a preference to the claim of one creditor over that
' of another ; and such transfers of property by debtors in fail-
' ing circumstances have only been sanctioned by courts, in
' most of the States, where the surrender and transfer is in
' fact entirely *unconditional.*"

In Maine, New Hampshire, Connecticut, Georgia, and New Jersey, preferences in voluntary assignments by insolvent debtors are *inhibited by statute.* And in Ohio and Pennsylvania, such preferences are by statute entirely disregarded ; and the property assigned inures by statute to the benefit of all the creditors of the assignor, in proportion to their respective debts.

The determination of the courts to restrict voluntary assignments with preferences within the narrowest possible limits, and the general rule of construction has been applied to, and assignments have been held fraudulent and void *per se*, in the following cases:

Where the assignment was to pay the trustees and such other creditors as the debtor in one year might direct, and reserved a power to appoint new trustees, and to revoke, alter, add to or vary the terms of the assignment at his pleasure.

Riggs vs. Murray, 2 John. Ch. 565.

Where the assignment contained a provision reserving to the assignor the power thereafter to designate the creditors who should receive the avails in case those first designated should refuse to execute a release on receiving their proportionate shares.

Hyslop vs. Clark, 14 John. 458.

Where the assignment contained a proviso that in case any of the creditors named should not, within the time limited in the deed which contained a release of the debtor from his debts, become parties to it, the share or proportions of such creditors so neglecting or refusing to execute the deed should be paid by the trustees to the assignor himself.

Austin vs. Bell, 2 John. 442.
Grover vs. Wakeman, 11 Wend. 219.

Where the assignment declared a trust to pay a certain sum annually for a limited time to the debtor.

Mackie vs. Cairns, 5 Cowen 547.

Where the assignor attempted to clothe the trustees with authority to apply a portion of the proceeds to the payment of such trustees as the creditors *should think proper*.

Boardman vs. Holliday, 10 Paige 223.

Where the assignment first provided for the payment of all costs and expenses necessarily incurred by the assignee in defending any suits that might be instituted against him by any creditor or other person for anything growing out of the assignment or in any way connected therewith.

Mead vs. Phillips et al., 1 Sand. Ch. 83.

Where, by the terms of the assignment, the property assigned was suffered to remain in the possession of the assignor.

Addington vs. Etheridge, 12 Grattan 436.
Storm et al. vs. Davenport, 1 Sand. Ch. 135.

Where the assignment substantially *reserves the right to give future preferences ;*

Averill vs. Loucks, 6 Barbour 470 ;

or *makes provision for only a part of the creditors*, and, without making any provision for the rest, directs the assignee to *reassign to the assignor the surplus.*

Strong vs. Skinner, 4 Barbour 559.
Goodrich vs. Downs, 6 Hill 439.
Sheldon vs. Dodge, 4 Denio 217.
Griffin vs. Barney, 2 Comstock 270.

Where the assignment is in trust for the separate use of the wife of the grantor.

Fiedler vs. Day, 2 Sandford 594.
Planck vs. Schermerhorn, 3 Barb. Ch. 644.

Where the trust is upon the express condition that the assignee shall not be accountable *but for gross neglect or wilful misfeasance.*

Olmstead vs. Herrick, 1 E. D. Smith 311.
Litchfield vs. White, 3 Selden 443.

Where the assignment contains a clause providing that the

real estate conveyed under it should not be sold by the trustees *until after all the personal property, goods, and other personal assets were exhausted, without his consent.*

Pierson vs. Manning, 2 Michigan 448.

Where the assignment is expressly made and designed to secure the payment of debts with the property assigned, *and avoid its sacrifice at the discretion of creditors.*

Ward vs. Trotter, 3 Monroe, 2.
Vernon vs. Morton, 8 Dana, 247.

Where there is no disposition made of surplus.

Malcolm vs. Hodges, 8 Maryland, 419.

Where power was given to the trustee, at his discretion, to sell the property conveyed in the deed, *gradually in the manner and on the terms in which, in course of their business, the grantors have sold and disposed of their merchandise.*

Jalver vs. Am. Ex. Bank, 11 Md. 173.
Am. Ex. Bank vs. Jalver, 7 Md. 391.
Greene & Traunnel, vs. Treber, 3 Md. 11.

Where the assignee is authorized to sell UPON A CREDIT.

2 Selden, 510; 6 Selden, 591.
Barney vs. Griffin, 2 Comstock, 365.
D'Ivernois vs. Leavitt, 23 Barb. 63.
Kellogg vs. Slawson, 1 Kern. 302.
Brigham vs. Tillinghast, 3 Kernan, 214.
Porter vs. Williams & Clark, 5 Sel. 142.
Hutchinson vs. Lord, 1 Wisconsin 286.
Keep vs. Sanderson, 2 Wisconsin, 42.
Dunham vs. Waterman, 17 N. Y. 9.
Bowen et al. vs. Parkhurst, MS. opinion Supreme Court of Illinois.
Burdick vs. Post, 12 Barb. 168; 2 Sel. 522.

Or upon such TERMS AND CONDITIONS *as to him shall seem most advisable, &c.*

Keep vs Sanderson, 2 Wis. 42.
Shufeldt vs. Abernethy, 2 Duer, 533;

Or, within CONVENIENT TIME, as to them should *seem meet, &c.*

Woodburn vs. Mosher, 9 Barbour, 255.
Murphey vs. Bell, 8 How. Pr. R. 468.
Kellogg vs. Slawson, 1 Kernan, 307.
Lyons vs. Platner. 11 N. Y. *Leg. Ob.* 87.

Or, where the assignee is allowed to *withhold the division and distribution of the assets for any length of time, which he, in his* DISCRETION, *may think proper.*

D'Iernois vs. Leavitt, 23 Barb. 63.

Or, where the trustee is authorized to convert the money into property or AVAILABLE MEANS.

Brigham vs. Tillinghast et al, 3 Ker. 215.

Or, where the assignee is empowered to *mortgage or lease* the assigned estate.

Planck vs. Schermerhorn, 3 Barb. Ch. 644.

Or, where the assignment contains a provision that the assignee, a lawyer, shall be allowed *a reasonable counsel fee* over and above expenses, and commissions for executing the trust.

Nichols vs. McEwen, 17 N. Y. R. 22.

The GENERAL PRINCIPLES governing voluntary assignments with preferences, as extracted from the authorities already cited, are these:

The assignment must be *absolute and unconditional ;* it must contain *no reservations or conditions for the benefit of the assignor*, nor extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration of a partial dividend ; it must not be made with intent to *hinder, delay or defraud* creditors. and must contain no provisions expressly vesting in the assignee any discretionary power as to the *time when* or the manner in which the assignor's property shall be disposed of.

In the APPLICATION of these general principles to the provisions under consideration, we insist that they, or either of them, would invalidate an assignment. The first provision which we have herein mentioned provides, that the assignee shall, with all *convenient* diligence, sell and dispose of the assigned property at public or private sale, *as he may deem most beneficial to the interests of the creditors* of the assignor, and convert the same into money, and shall also, with all *reasonable diligence*, collect, get in and recover all and singular *the said* debts, &c.

This provision expressly confers upon the assignee a discretionary power as to the *time and manner* of selling the assigned property — the *time* in which the assigned debts shall be collected, by a necessary implication, leaves entirely to the discretion of the assignee to determine when the avails of the property held in trust by him shall be devoted to the payment of the debts of the assignor, and is, therefore, obnoxious to the statutes of the State of Illinois, as being made with intent to hinder, delay and defraud creditors.

The construction to be placed upon any such provision, in an assignment, will be strict. We have already seen that these assignments are of comparatively recent date; that they

have their origin from the desires of debtors to save their property; that they are mischievous in their tendencies and result practically in great inequality and injustice; that they are merely tolerated from force of precedent, that the whole current of authority is against them, and the policy of courts is to restrict them within the very narrowest limits. Under such circumstances were the question presented in this case new and without direct authority to sustain it, there could be but little doubt but that, following the unmistakable tendencies of the authorities, the Court would declare the assignment fraudulent and void.

The ground upon which assignments have been declared fraudulent and void upon their face is that they are opposed to the statute of fraud.

That statute, so far as affecting the present question, is in the State of Illinois as follows:

"Every conveyance of goods and chattels had and made 'or contrived of malice, fraud, covin, collusion or guile, to the 'intent or purpose to delay, hinder or defraud creditors of their 'just and lawful suits, debts, accounts, damages, &c., shall be 'utterly void, &c." (~~R. S.~~ Scates Comp. 541, *sec.* 2.)

Hence, under this statute, every assignment had, made or contrived of malice, fraud, covin, collusion or guile, to the intent to *delay* creditors, or to *hinder* them, or to *defraud* them of their just and lawful suits, &c., is void. It is not, under this statute, made absolutely nor altogether a *question of intent;* but, where the assignment is made to the *purpose* to *delay* creditors, or to *hinder* them, or to defraud them, it is equally void as if made with that *intent.*

And in discussing this statute, we will consider:

FIRST—THE INTENT.

It is well and conclusively settled, that whenever an assignment contains provisions which are calculated *per se* to hinder, delay or defraud creditors, the courts will set it aside and declare it void, *upon the principle that a party must in all cases be held to have intended that which is the necessary consequence of his acts.*

This doctrine has been expressly held in the State of New York, under the statutes of that State concerning fraudulent conveyances, which provide that in all cases arising under that act, the question of fraudulent intent shall be deemed a question of fact and not of law.

Mr. Justice NELSON, in *Cunningham vs. Freeborn*, 11 Wend. 240, in construing that statute, concedes that fraud in all such cases is a question of fact and that an actual fraudulent intent must be found either by the jury or by the tribunal which acts in its place; but he contends *that a case may be presented* in which a fraudulent intent is so plainly to be inferred from the instrument itself, that no jury would be permitted to disregard the evidence, and where it would be the clear duty of the court to set aside a verdict found in opposition to such inference.

See also *Dunham vs. Waterman*, 17 New York, 21.

And hence, the question of *intent* may be determined solely upon reference to the assignment itself and and its provisions. If, therefore, any provision or clause in the assignment plainly

and distinctly tends to hinder or delay or defraud creditors, or impose obstacles to legal process with intent to hinder creditors in the collection of their demands, or to *delay* payment to some future period, or to *defraud* them by absolutely defeating all attempts to enforce their claims, then it is to be found as a matter of fact that the assignor *intended* it. The intent is found the same as the intent is found in hundreds of other cases, civil and criminal, where it is inferred that a man intends to do what his deliberate conduct plainly, distinctly and inevitably tends to accomplish. (*Burdick vs. Post*, 12 Barbour 183: *Van Nest vs. Yoe*, 1 Sand Ch. 4; *Dunham vs. Waterman*, 17 New York, 21.)

And this leads us to the consideration of the consequences flowing from the provisions in the assignment which we have already quoted and therefore we insist as proposition.

SECOND—THE PRESUMPTION.

That the consequences naturally resulting and flowing from that provision in the assignment authorizing the assignee to sell and dispose of the assigned property with CONVENIENT DILIGENCE *at public or private sale*, as they, or the survivors of them, MIGHT DEEM MOST BENEFICIAL to the interests of the creditors, and to *collect* all the debts, &c., with ALL REASONABLE DISPATCH, *were the delay and hindrance of creditors;* that the assignor is therefore presumed to have *intended* it, and the assignment consequently falls directly within the spirit and letter of the statute and is void.

"When a debtor (EDMONDS, J., *Nicholson vs. Leavitt*, 6 Seld. 595) becomes insolvent, *his property belongs in equity and*

'*justice to his creditors and not to him, and therefore the object* '*and aim of the law is to give it to his creditors.* He has an in- 'terest to see that it is not sacrificed or wasted, but is so 'managed as to pay as much of his debts as possible. This is 'the extent of his equitable interest, *but it is subordinate to the* '*rights of his creditors, which are to have the property applied to* '*the satisfaction of the debts without fraud, hindrance or delay.* 'That subordination is an inflexible principle of the law and is 'universal save only where it is interfered with by the rule 'which sustains these voluntary assignments. It is in obedi- 'ence to that principle that the creditor has a right to resort to 'the courts and to enforce the satisfaction of his claims, even 'at the expense of a forced sale and sacrifice of the debtor's 'property It is that which lies at the foundation of all bank- 'rupt laws and is interwoven into our insolvent laws. It is 'founded in justice, enacted into our statutes, and is necessary 'for the due protection of the immense mass of mercantile 'transactions which are accumulating around us."

And Senator TRACY, in *Grover vs. Wakeman, supra,* very forcibly remarks that "the law will not allow a person to ac- 'complish indirectly what he is prohibited from doing directly. '*Upon every moral principle the property of an insolvent belongs* '*to his creditors,* and although the law tolerates him in distri- 'buting it among them according to his notions of right, yet it 'will not tolerate him in locking it up in order that in its final 'distribution he may secure a future benefit to himself. In 'short, while the law permits a debtor to prefer one creditor 'to another, it will not permit him to prefer himself to any 'creditor."

In the cases which we have cited where courts have held assignments void, it will be found, upon a careful examination of those authorities, that they have universally proceeded upon

the reason that the objectionable features of the assignment conferred upon the assignee an authority so to execute and discharge his trust that the creditors might be *delayed, defrauded or hindered thereby.* The question is not — and this distinction it is important to note — whether the assignment might be so construed or read as to be harmless in its effect, *but whether, in the exercise of the discretion conferred, the result might be hindrance or delay.* The provision now under consideration authorizes the assignee to sell and dispose of the property assigned with *convenient* diligence. The question of *convenience* is one left purely in the *discretion of the assignee.* He is authorized to determine when it will be convenient to sell, and thus are the creditors compelled to wait upon him as to time. He has, therefore, by the express language of the assignment, the power to determine *the time when the property shall be sold.* It is out of the proceeds of the sales that the creditors are to realize their pay. The right to say when that sale shall be is taken from the creditors and vested, by the debtor, in the assignee, who has a right to postpone it to any period of time which may suit his *convenience.* He derives the right from the instrument creating his trust—he has the right to delay the sale.

Having the right, delay is one of the consequences naturally resulting from the assignment, and in expressly conferring such a power the *intent to accomplish the delay* which *is absolutely contemplated by the language of the instrument* becomes absolutely established.

This clause, standing alone, would be sufficient to vitiate the assignment. It is an express and unqualified authority to *delay* the creditors; it makes no difference whether they be actually delayed or not, it is enough that the debtor has conferred upon his assignee that power. But the language immediately

following is still clearer upon this point. The assignees are not only expressly clothed with discretionary power as to the *time* when the property shall be sold, but they are also authorized to sell at public or private sale, *as they may deem most beneficial* to the interests of the creditors. Here is discretion entirely unlimited — they may sell "*as they may deem most beneficial;*" that is, in the manner or at the time they may deem most beneficial. Should the assignors, therefore, in the exercise of their uncontrolled discretion, deem that the interests of the creditors required that the assigned property be held a year, and that a sale thereof be delayed that length of time, they have the express power to exercise such a discretion. And no matter how honestly and fairly this discretion might be exercised by the assignee, the result to the debtor is the same — he is *delayed and hindered.*

Not only this, but the entire right of determining the *manner* in which the property is to be sold being thus vested in the assignees, they may, should they deem it most beneficial, sell it upon a credit. They are expressly authorized to sell it *as* they may deem most beneficial, &c., and, should they determine that the difference in price between a sale upon credit and a sale for cash would make the former most beneficial, clearly they could not be said to have exceeded their authority in so selling. Now, what is the effect of such a trust upon the rights of creditors? In the first place, it puts the property beyond the reach of ordinary legal process In the second place, it leaves it there until the sssignee shall determine to sell, or shall find it *convenient to sell.* In the third place, the creditors after having thus awaited, the sale may be put off and kept at bay during an indefinite period until the expiration of the term of credit, which, in their unlimited discretion, the assignees may have seen fit to give on the sale.

There is still another clause in the assignment which renders it obnoxious to the objections we have already urged — it authorizes the assignees to collect, get in and recover the debts assigned with all *reasonable dispatch*. The time, then, when these debts shall be collected is discretionary with the assignee. It may be longer or shorter as he may deem reasonable, and thus the creditor, in that respect, may be indefinitely *delayed and hindered*.

"Are not such provisions calculated to hinder and delay creditors? Clearly so. For, by the common legal forms, a debt can be collected by execution in ninety days. The creditor can recover a judgment, seize and sell the effects of his debtor and obtain his money long before the assignee is reqnired by the tenor of this instrument to determine whether it is convenient for him to sell, and whether it is most benefical to sell at public or private sale, for cash or credit." (Per BARCULO, J.,—*Burdick vs. Post, supra.*)

But, it has been claimed that even under such an assignment, the long delay we have described would not be tolerated, but that a court of equity would remove the trustee.

But this position is met and overthrown in a number of recent cases. Thus, in *Nicholson vs. Leavitt*, 2 Selden, 520, Mr. Justice GARDNER, in delivering the opinion of the Court of Appeals in that case, commenting on the opinion of Chancellor WALWORTH, in *Rogers vs. De Forest*, 7 Paige, 278, says:

"The ground upon which this learned jurist upholds a trust 'to sell on credit, is that the securities taken for the property 'sold may, by order of the court, be at once converted into 'cash. This is also the opinion of the Superior Court, who

'seem to have adopted the doctrine and reasoning of the Chan-
'cellor. But if the *debtor can legally* direct the trustees to give
'credit on the sale, it is because the law clothes him with a
'discretion to determine whether a future payment will or will
'not be advantageous to his creditors. *The Court of Chancery*
'*cannot control that discretion*, or deprive the creditors of the
'benefits resulting from its exercise by compelling the trustees
'to sacrifice the securities taken from the purchasers in order
'to raise money for immediate distribution.

"This is true of an assignment like the present, where the
'assignees are clothed with a discretionary authority by the
'author of the trust. *It is in each case a question of power*
'*under the statutes. If the debtor can create such a trust, equity*
'*cannot interpolate a provision that the fund shall be disposed of*
'*and the money realized according to the discretion of a chancellor.*
* * * * Indeed, the reason assigned by the Chancellor
'for upholding the trust is in substance because the Court of
'Chancery can annul it at pleasure. I DENY THAT COURTS POSSESS
'ANY SUCH POWER. IF THE TRUST IS VALID THEY ARE BOUND TO EN-
'FORCE AND NOT DEFEAT IT; that a power of this kind vested in
'a debtor would be most dangerous, the Chancellor impliedly
'admits in claiming jurisdiction to modify and regulate its
'exercise. *Its liability to abuse is, to my mind, a sufficient reason*
'*against implying its existence. The same considerations which*
'*made the legislature require an immediate sale, requires an im-*
'*mediate payment also. A discretion may be* as judiciously
'exercised in postponing the time of sale of property as in
'postponing the time of payment."

Upon the same point, Justice BARCULO, in *Burdick vs. Post*, 12 Barb. 173, remarks—

"If the deed is valid, his (the assignee's) discretion must be

'uncontrollable so long as fraud or collusion cannot be truly 'charged against him; and in times of commercial distress, it 'would be no difficult matter to show that deferring the sale 'or time of payment for months, or even years, would be 'apparently beneficial to all parties, and that in the exercise of 'a sound discretion he could not sooner convert the property 'according to the true spirit of his authority. *Under such 'circumstances the courts could not interfere, but must leave the 'creditor at the mercy of this plausible discretion.*"

Upon the same point SELDEN, J., in *Dunham vs. Waterman*, 17 New York, 19 says:

"This distinction overlooks the distinction between a *duty 'imposed by law and a power conferred by an individual.* The 'first would be under the entire control of the courts. If an 'assignee should err in the exercise of that legal discretion, 'which is incident to his trust, the courts on application of the 'creditors, would correct the error. If the sale of the assigned 'property was unreasonably delayed the courts could hasten 'it *Not so, however, in respect to a discretionary power express- 'ly vested in him by the assignment; nothing short of fraud or a 'want of good faith in the exercise of such power would authorize 'the courts to interfere,* If an assignment, containing such a 'clause, is held valid, it must, of course, be held that the debtor 'has a right to confer the power; that is, has a right to vest 'this power in the assignee as a condition upon which he parts 'with his rights of property. *If the Courts uphold this con- 'dition, must they not execute it? can they substitute their discre- 'tion for that which the owner of the property has vested in his 'assignee?*"

See also *Nicholson vs. Leavitt*, 6 Selden, 597.
Hart vs. Crane, 7 Paige, 38.
Meacham vs. Sternes, 9 Paige, 405.

It is no sufficient answer to the objections urged against such a provision in an assignment that there is in all cases an implied discretion vested in the assignee, and that, therefore, the deed merely confers expressly what the law implies.

Thus in *Nicholson vs. Leavitt*, 6 Seld. 595, EDMUNDS, J., remarks—

"The great consideration that is urged in support of the 'clause, which is objected to in this assignment, is that the 'assignee must have some discretion as to the mode of selling 'the property, and that discretion may often warrant a sale on 'credit; that sales on credit are often expressly sanctioned by 'the statute, and that, therefore, it cannot be improper to con-'fer, in terms, upon the assignee the power which flows to him 'as a necessary incident of his position. * * * Now, it 'seems to me that this argument overlooks this important con-'sideration; *that sanctioning this clause, when given in terms, 'strips the creditor of his control over the property and confers 'that control on the debtor.*"

And BARCULO, J., in *Burdick vs. Post*, remarks—

"It is declared to be inconsistent to determine that an ex-'press authority to sell on credit destroys the deed, when an 'implied authority always exists; and while it is a rule of 'equity, as well as of the statute, to allow the sale of trust 'estates and of insolvents' estates, upon credit. To this we 'reply, in the first place, that the existence of the implied 'power is very questionable; and in the second place, if it 'exists at all, it is a different power from that contained in the 'assignment, as is manifest from the disposition evinced by 'debtors to insert the express authority as well as from the 'consideration that the implied authority, must always be under

'the direction and control of the court: that it is usual to in-
'sert, in a decree for the sale of trust property by a receiver,
'a right of selling on a reasonable credit, when circumstances
'seem to require it, is not disputed. But is there not a broad
'distinction between that and the present case? The receiver
'is the officer of the court, appointed by and amenable to the
'court; he is not selected by the debtor, but by the court on
'the nomination of the creditors or on its own motion Nor
'can any order, touching the disposition of the estate, be made
'without giving the creditors an opportunity of being heard.
'But the assignee is the chosen friend of the insolvent; too
'often his mere tool, and always more or less under his influence,
'independent of the creditors, and even bound to apply to the
'court for aid, direction or authority as to the mode of selling,
'or the length of credit.

"So, also, in regard to the statutory trustees of the estates
'of non-resident, absconding and insolvent debtors; they are
'appointed by the officers of the law; are not in any respect
'the agents or nominees of the debtor, and are, therefore, en-
'tirely removed from those improper influences which lead to
'the frequent abuse in the management and disposition of the
'effects of an insolvent under the ordinary voluntary assign-
'ments. The case mentioned, of executors or administrators
'selling under an order of the surrogate, stands also upon es-
'sentially different ground. But even in these cases of judicial
'sales, the statute does not give full discretion, but imposes
'limitations as to the terms of credit. In our judgment no
'ordinary assignee should ever sell on credit without obtaining
'leave from the court, on application, with notice to the *cestuis*
'*que* trust, or obtaining their consent."

There is still another important consideration in determining the character and validity of such an assignment — THAT

WHENEVER A DISCRETION IS EXPRESSLY CONFERRED UPON THE ASSIGNEE, EITHER AS TO THE TIME OR MANNER IN WHICH THE ASSIGNED PROPERTY SHALL BE SOLD, BY CONFERRING UPON HIM THE RIGHT TO SELL UPON CREDIT, OR OTHERWISE EXERCISE HIS DISCRETION, THE ASSIGNEES CANNOT BE HELD PERSONALLY RESPONSIBLE.

Thus in *Hopkins vs. Ray et al*, 1 Met. 79, the question arose upon the answers of Caffin and Gardner, who were summoned as trustees of Ray, the defendant. In delivering the opinion of the Court SHAW, C. J., says :

"The trustees, in their answer, disclose the assignment by 'which they were authorized to sell and dispose of the goods 'in such manner as they should think most advisable, within one 'year, and then close the sale at auction. Pursuant to this au- 'thority, they had sold the goods to various individuals on 'credit, and taken notes not due when the trustee process was 'served. The assignment, by force of the statute, was not void 'but voidable as against creditors. Before the intervention of 'any attachment, the trustees were authorized to sell the goods 'on credit, and having so sold them, and taken notes, they were 'not personally responsible, either for the goods or for the pro- 'ceeds, and therefore were not chargeable as trustees."

And again, in *Neally vs. Ambrose*, 2 Pick. 185, where the assignment empowered the trustee to sell the goods in such manner as he might consider expedient and most for the interest of all the parties, it was held that the trustee had authority to sell on a credit, and that, in the absence of all proof of fraud, they were not personally responsible for the same in money.

It is not difficult to see, in view of the freedom of the assignees from personal responsibility under such assignments, the hazards and perils to which the rights of creditors are exposed. The authority given to the assignee to sell as he may deem most advisable, confers as we have seen, the right to sell upon a credit.

To whom credit shall be given, and the period of credit, are matters resting solely in the discretion of the assignee; and thus it may happen, that he may in good faith sell the entire property upon credit to persons who may prove to be entirely irresponsible, and in this way the assigned property be absolutely lost, and the creditors have no remedy whatever. Should they attempt to hold the assignee responsible, his answer is complete in saying that he has simply done what he was authorized to do. He has merely exercised his *judgment* and he is not liable, because his judgment was at fault. But these evils result not singly from selling goods upon a credit. The assignee, under such general power, may deem it advisable to hold the goods for an indefinite length of time without selling them at all, in the hope of realizing better prices in the future. Should his judgment in such case be at fault, and the goods so depreciate in value, that but a small portion of their original value be realized, the creditors are again compelled to bear the loss, and are entirely without remedy In any event they are delayed and hindered. It is idle to suggest, that because the power to inflict these various evils upon the creditor is not expressly conferred, we are not to presume that the assignee will do so under his general power, and that we are never to presume that a party will be guilty of an illegal act, when any other construction can be adopted. But the complete answer to this is, that where these general powers of discretion are conferred, *the act complained of, so far as the assignee is concerned, is not illegal*, and there is wherein the difficulty arises.

If it were illegal, then the remedy could be had against him. But the moment that the right to interpolate any such provisions into an assignment is once conceded, then the power of the assignee under them becomes complete.

"Every provision," says Mr. Justice SANDFORD (in *Litchfield vs. White*, 3 Sand. 545,) "in an assignment which exempts 'the assignee from any liability that he would by law be sub-'ject to as assignee, is of itself a badge of fraud."

It is undisputed, that in the absence of the specific provisions in assignments, conferring upon the assignee the exercise of his discretion as to the time and manner of sales, that the assignee would be by law liable for any loss resulting from a sale of the property upon credit, or from any other delay. THESE PROVISIONS RELIEVE AND EXEMPT HIM FROM THAT LIABILITY, and therefore bring all these cases within the operation of the rule above stated, and must be considered as badges of fraud.

"It is a general principle," says the Court, (in 10 Wend. 250,) "applicable to all instruments or agreements, that what-'ever may be implied from the terms or language of an instru-'ment, is in judgment of law contained in it."

The power to sell *as* the assignee may deem most beneficial, or in the *manner* he may deem advisable, must certainly carry with it, by implication, the right to sell upon a credit. This implication arises not from the law, but the instrument itself. It is a protection to the assignee acting under it. *His power to sell upon credit, under such a provision, is, as we have seen, as complete as if it were expressly conferred.* He has the *right* to sell upon a credit in such case, and he derives his right from the instrument itself. And there is but one way in which the rights of the creditors can be protected, and that is by declaring all such assignments absolutely void.

It is important also to notice, that in all those cases where assignments have been held void upon their face, it has been for the reason that the provisions of the assignment in each particular case operated to *hinder or delay* the creditors; and that the *time or manner* of the sale of the assigned property has been submitted to the *discretion of the assignee;* and we insist that the principles established by the more recent cases, carried out to their logical and legitimate results, would invalidate every assignment wherein *any discretion whatever* is vested, by the terms of the instrument, as to the time when or the manner in which the assigned property shall be disposed of.

GARDINER, J., in *Nicholson vs. Leavitt*, 2 Selden 517, holds this language:

"It was argued that an intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment illegal; a positive intent to defraud them must exist.' The answer to this suggestion is, that a positive intent to defraud always does exist, where the inducement to the trust is to hinder and delay creditors, since the right of the creditor to receive his demand *when due* is as absolute as the right to receive it at all. It has always been understood that where an individual has incurred an obligation to pay money, the *time* of payment was an essential part of the contract; that when it arrived the law demanded an immediate appropriation by the debtor of his property in discharge of his liability, and, if he failed, would itself, by its own process, compel a performance of the duty. The debtor, by the creation of a trust, may direct the application of his property, and may devolve the duty of making the appropriation upon a trustee. This the law permits, and such delay as may be necessary for that purpose. *But the debtor cannot in this way avoid the obligation of immediate payment, or extend the period of credit*

'*without the assent of the creditor*. The attempt to do this, 'however plausible may be the pretense, is in conscience and 'in law a fraud and nothing else. It is the fraud which we 'are asked to sanction, by upholding the trust in question.

"These insolvent debtors have authorized their trustees, ac- 'cording to their discretion, to sell the assigned property *upon* '*credit*. *They* are to determine when the purchasers shall pay, 'and, of course, when the creditors shall receive their dividend. 'Their power amounts to this, as we shall see, if it amounts 'to anything. It is hardly necessary to say, that what 'the debtors could authorize they could direct to be done; and 'they could have prescribed the period for the credit in the 'trust deed. Their power in this respect, upon the principles 'assumed by the Court below, is unlimited if exercised in 'good faith. The whole argument, independent of authority, 'in favor of this extraordinary power, resolves itself into this: 'that without it, the property of the debtor may be sacrificed, 'and creditors thereby injured. To this it may be answered, 'if the trust property is not readily convertible into money, 'the debtor may dispose of it himself. He is under no obli- 'gation to assign. It was not the object of the legislature, as 'the late Chancellor remarked, 'to hold out inducements to a 'debtor in failing circumstances to place his property beyond 'the reach of creditors.' (7 Paige 274.) In the second place, 'if the property is more than sufficient to discharge all the 'debts of the assignor. he has no right to delay creditors by 'giving credit on the sale of his property, with a view to in- 'crease the surplus resulting to him; *this would be a trust for* '*his own benefit*, and consequently void by the first section of 'the act against fraudulent conveyances. (7 Paige 37.) If 'the property is insufficient to pay the demands of creditors, 'it is obvious that they are chiefly interested in the amount to 'be realized by the sale. As they must sustain the loss, if

'there is a deficiency, they should have the right to be con-
'sulted and to determine whether their interest will be better
'subserved by a smaller sum presently received, or a larger
'one at a future period. The rights of the debtor are suffi-
'ciently guarded by the privilege, which the law gives him,
'of intrusting the sale of his property to trustees of his own
'selection. That they will consult his interest, whoever else
'may suffer, is demonstrated by all past experience,"

The remarks of Judge EDMONDS, in the same case, reported in 6 Selden, page 596, also clearly indicate the ground upon which the Court proceeded in that case. He says :

"It is already too well settled for us now to shake, that it
'(the assignment) may also perform the office of preferring
'one creditor to another. Shall it go further? Shall it also
'give the debtor power to say to his creditor *You shall wait my*
'*pleasure for your pay; you shall abide my time and not select*
'*your own for the satisfaction of your just claim?* Because, if
'it may, it necessarily takes from the creditor the control of
'the *mode and manner* in which he shall coerce payment, and
'*confers it upon the debtor and the friendly assignee whom he may*
'*choose*. And can any one say that this is not hindering and
'delaying creditors? Practically it is so, reason and refine
'upon it as we may. Anything that interrupts the creditor
'in the lawful pursuit of his remedy through the courts, for
'the purpose of enforcing payment, hinders and delays him."

The objection to the assignment in *Nicholson vs. Leavitt* was, that it authorized the assignee to *sell upon credit*. It was held void, as we have seen, because such sale would *involve a delay;* that the creditor has the rightful control of the mode and manner of payment, of which such a provision deprived him, and conferred it upon the friendly assignee. Upon the principle thus established, it would seem undeniable that wherever the

assignment, by any provisions, divested the creditor of the right to determine the mode and manner of payment, and left it dependent upon the will and discretion of the assignee. it would be equally objectionable.

The case of *Nicholson vs. Leavitt* has been expressly approved, and the doctrine therein established unqualifiedly adopted in this State, in *Bowen et al. vs. Parkhurst et al.* (not yet reported.) The assignment in that case also contained a provision authorizing the assignee to sell upon credit. The Court say :

"The assignment withdraws all the debtor's property from 'the reach of legal process, and leaves it where the creditor 'cannot reach it in any other manner than by the exercise of '*the discretion* of the assignees. The assignee has it in his 'power to place the creditors at defiance until he shall have 'converted the property into the means of payment at private 'sale, on credit, on such terms as he in his judgment may 'deem best and most for the interest of the parties concerned. '*This power to sell at private sale on the most advantageous terms* 'INVOLVES THE RIGHT TO DELAY THE SALE AS LONG AS THE AS-'SIGNEE THINKS PROPER. The sale may be made on any terms 'of credit he thinks best, and in this way the creditors may 'be indefinitely hindered and delayed. An insolvent debtor 'ought not to have the power, under color of providing for his 'creditors, of placing his property beyond their reach in the 'hands of trustees of his own selection, and take away the 'right of the creditors to have the property converted into 'money for their benefit *without delay*. They alone should 'have the right to determine whether the property shall be 'sold on credit, and any conveyance which takes away this 'right ought not to be upheld, for it is a conveyance to hinder 'and delay creditors, and within the very teeth of the statute."

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The purport of this decision is clear and unmistakable. The Court expressly hold that the power to sell at private sale on the most advantageous terms involves the right to delay the sale as long as the assignee thinks proper. The deed is void, therefore, not simply because it gives the assignee the right to sell upon credit, but because it vests in him a discretionary power, in the exercise of which the sale may be delayed; and that in the exercise of this discretion the assignee has the power, under the assignment, to sell upon a credit, if in his opinion he should consider those terms to be the most advantageous.

The doctrine for which we contend is, we think, clearly enunciated in the opinion of Mr. Justice BARCULO (*Burdick vs. Post*, 12 Barb. 180) and affirmed in 2 Selden 522. He says:

"It is broadly stated, that the necessary effect of every 'assignment made by an insolvent, even when the debts are to 'be paid (*pari passu*) is to hinder and delay creditors. Now, 'that such delay may often be the effect, we shall not under-'take to controvert. but that it is the necessary effect, or that 'it is a consequence apparent upon the face of the conveyance, 'we most confidently deny. Take a simple assignment, in which 'the debtor conveys his property absolutely to the assignee with 'instructions to convert the same into money and apply it in 'payment of debts. Is there anything in such an instrument 'that imports or implies necessary delay? Certainly not. If 'the estate is reasonably small, there is nothing in the nature 'of the business itself that requires any delay. In fact an as-'signee can proceed even more expeditiously than a sheriff 'on execution, for the latter is required to give the statutory 'notices of sale, which the former may abridge or dispense 'with. And whether the estate is large or small, there is no 'reason why an assignee can not sell as well and as soon as an

'officer. No one, therefore, merely looking at the deed, can 'certainly say that it must operate to hinder or delay a cred- 'itor. That it often does so, is an undisputed and lamentable 'verity; but the fault is in most cases that of the particular 'trustee. The remedy for this the courts should apply, by 'quickening his motions with prompt and vigorous applications, 'or by removing the trustee and appointing a receiver in his 'place, as was done by the Chancellor in *Hart vs. Crane* (7 'Paige 37), saying 'It was the duty of the assignee to proceed 'and sell the property, either at public or private sale, without 'delay, and to pay over the proceeds thereof to the creditors.' 'And again, 'that it would be a fraud upon them, if, by the 'terms of the assignment, the assignee was directed to delay 'the sale, for the purpose of obtaining higher prices for the 'property, unless by consent of the creditors;' that 'it was a 'breach of trust on the part of the assignee to delay the sale 'of the property, for the purpose of retailing it out for higher 'prices'

"It is quite a different matter when the conveyance itself pro- 'vides for a delay; and this we apprehend to be the true distinc- 'tion between lawful and unlawful assignments, in this respect. 'The former, although they may, owing to the peculiar state 'or situation of the property, occasion some incidental delay, 'do not require or authorize it in terms. The latter contains 'provisions which call for delay, and which, if carried into 'effect, as we are bound to assume they will be, do necessarily 'by their own operation cause a hindrance or delay; and 'therefore all these are illegal. For this reason a simple as- 'signment is valid, while an assignment which directs the 'trustee to wait twelve months before proceeding to execute 'his trust, is plainly and manifestly invalid upon the same 'principle, and for the same reason, a clause authorizing a sale 'on credit must vitiate the instrument"

be discharged are in the discretion of the courts, and by their discretion he is bound to act In the other case his individual discretion is substituted instead, and the judgment of the assignee is substituted in place of the judgment of the courts, and over the exercise of that judgment the courts can have no control. And the Court in the case last cited go still further, and expressly declare that voluntary assignments should not be permitted to substitute the will of the debtor or his assignee, or even *their discretion*, to the judgment of the courts.

Again in *Griffin vs. Barney*, 2 Coms. 371, BRONSON, J., says:

"It is also an unanswerable objection to the deed that the 'assignees are authorized to sell the property on credit. An 'insolvent debtor cannot, under color of providing for creditors, 'place the property beyond their reach, in the hands of trustees 'of his own selection, and take away the right of the creditors 'to have the property converted into money for their benefit 'without delay; they have the right to determine for themselves whether the property shall be sold on credit, and a 'conveyance which takes away that right and places it in the 'hands of the debtor, or in trustees of his own selection, comes 'within the very words of the statute—it is a conveyance to 'hinder and delay creditors, and cannot stand."

The ground taken by Justice Bronson is that the debtor cannot take away the right of the creditors to have the property converted into money for their benefit without delay, and that. therefore, any provision in the assignment, which should confer upon the assignee power to say when the property should be sold, would be taking away that right from the creditor, and, therefore, would render the assignment as being a conveyance to hinder and delay him.

In *D'Ivernois vs. Leavitt*, 23 Barb. 80, the same principle is again enforced. In that case CLERKE, J., says:

"The assignment marked as 'schedules A, B, C, D, E, F, 'G, K, and L,' contain the clause allowing the assignee to sell 'on credit and are clearly within the principle established in 'Nicholson vs. Leavitt, 2 Seld. 510. The ground that 'schedule 'A' is distinguished from the rest, because another joint owner 'of the property, not liable to the plaintiffs, united with R. & 'J. W. Leavitt in the conveyance, is not tenable. The property assigned is not merely of the joint interest, but that of 'each of the assignors. The assignments marked as 'schedules 'H, I and J,' do not contain the clause authorizing a sale upon 'a credit. But in my opinion they each contain one equally 'obnoxious; *they allow the assignee to withhold the division and 'distribution of the assets for any length of time which he, in his 'discretion, may think proper.* This, if carried out, gives him 'a coercive power over the creditors, arming him with the 'means of constraining them to a commutation or release of 'their claims. *It is, in a measure, to prevent and ignore such a de-'sign that Courts of Justice have so generally of late evinced 'a disposition to avoid all instruments investing the assignee with 'any discretion beyond what is absolutely inseparable from the 'performance of his trust.* A power to sell on credit invests 'him with a discretion to protract indefinitely the satisfaction 'of the claims of creditors, and the final reckoning and settlement of the trust."

In *Brigham vs. Tillinghast*, 3 Kernan 220, an assignment which authorized the assignee to convert the property into *available means* was declared void, and the Court in that case say:

"The true rule to be observed is this: An insolvent debtor 'may make an assignment of all his estate to trustees to pay

'his debts, with or without preferences; but such assignees 'are bound to make an immediate application of the property. 'And any provision contained in the assignment which shows 'that the debtor, at the time of its execution, intended to pre-'vent such immediate application will avoid the instrument, 'because it shows that it was made with intent to hinder and 'delay creditors in the collection of their debts."

And again, in *Grover vs. Wakeman*, Senator TRACY declares that "If a debtor be allowed to proceed beyond the single 'purpose of paying his debts, it is not easy to see at what 'point he can be arrested. The only safe rule is to regard 'every assignment *which operates to delay creditors for any pur-'pose whatever*, not distinctly calculated to promote their in-'terest, as contrary to the policy of the statute of frauds."

The case of *Woodburn vs. Mosher*, 9 Barb. 257, is directly in point. The assignment in that case authorized the assignees to forthwith take possession and seizure of the premises, and within *convenient time, as to them shall seem meet*, by public or private sale, shall convert all and singular the premises into money, &c. The Court in that case say:

"The assignees are to convert the property in a convenient 'time, as to them shall seem meet. The term "meet" means 'fit, suitable—(Webster.) They shall attend to the business. 'then, when it shall suit their convenience. Perhaps it will 'not suit their convenience in six months, or a year, or even a 'longer time. In other words they shall attend to it when 'they please. But creditors are entitled to have the assigned 'property converted into money and applied to the payment 'of their debts without unnecessary delay. * * * If the 'clause in question, authorizing the assignees to discharge their 'duties whenever it shall suit their pleasure or convenience,

'may operate to hinder or delay creditors—as it seems plainly 'to me that it may—then it renders the assignment void. In '*Lyons vs. Platner* (11 N. Y. Leg Obs. 87), the assignment 'provided that the assignee should take possession of the as- 'signed property, and with all convenient diligence, and within 'four months from the date thereof, sell and dispose of the 'same, either at public or private sale, and to such persons 'and for such prices and upon such terms as he should deem 'best for the interest of the parties concerned, &c. It was 'held that this authorized the assignee to sell upon credit, and 'was therefore void."

Woodburn vs. Mosher has been cited and approved in *Brigham vs. Tillinghast*, 3 Kernan 219, and in *Kellogg vs. Slawson*, 1 Kernan 307. See also *Murphy vs. Bell*, 8 How. Pr. Rep. 468.

Again, in the still later case of *Jessup vs. Hulse*, 29 Barb. 539, the same principle was recognized and enforced. The assignment in that case contained a provision directing the assignee to "sell, dispose of and convey the said real estate and personal property at such time or times and in such manner and as shall be most conducive to the interests of the creditors, and convert the same into money as soon as may be consistent with the interests of said creditors." The assignment was declared void on the ground that it conferred the power to *delay* making sales of the assigned property and converting the same into money. In delivering the opinion of the Court, EMOTT, J., says:

"I do not think it necessary to determine whether the as- 'signment, now before us, imparts or confers an authority to 'sell on credit; if it do not, it must confer the power to delay 'making sales of the assigned property until such time as the 'assignee may think most conducive to the interests of credit-

'ors. That is the very language of the deed; and besides this 'the property is not to be converted into money forthwith, but '"as soon as may be consistent with the interests of the cred-'itors." *The objection to assignments, authorizing sale on credit,* '*is that they postpone the payment of the assignor's debts.* The 'credit given to the purchasers of his property, either with the 'object of realizing larger prices or for any other purpose, 'necessarily extends the time of payment of his debts, and this 'is beyond the power of the debtor. He cannot, by trans-'ferring his property to a friendly assignee, avoid the obliga-'tion of immediate payment.

"The same reason exists for the objection to an assignment which, as in *D'Ivernois vs. Leavitt*, authorizes a distribution at the pleasure or discretion of the assignees. Thus the courts condemn assignments which permit the assignees to delay the time of payment for property sold in order to its conversion into money, and also assignments which authorize the assignees to postpone, for any length of time, the distribution of the proceeds of sale. *Both these classes of deeds are condemned, because their effect is to sanction a delay of the ultimate payment of the creditors. An assignment which authorizes a delay in bringing the assigned property to sale, is open to the same objection, involves the same consequences and must meet with the same condemnation.* Indeed, it is here that the temptation to delay for the advantage of the debtor is often the strongest. If an insolvent debtor can secure his property from the grasp of the law and place it in friendly hands, authorized to hold it until times may change and the property can be sold to better advantage, he will often secure a great benefit to himself. But it will be at the expense of his creditors or at least in violation of their rights. They have a right to insist upon the appropriation of his property to the payment of his debts without any further delay than such as is necessary and inevitable. He has no more right to

delay the sale of his property than he has to postpone the collection of its proceeds or their distribution among his creditors."

And again, at page 546, he declares that "*we must adhere to the spirit of the later decisions and hold* THAT A DEBTOR CAN GO NO FARTHER THAN TO DIRECT THE APPROPRIATION OF HIS PROPERTY, AND SELECT THE PERSON WHO IS TO CONVERT AND APPLY IT."

It will be observed that in the case last cited the right to the exercise of discretion, as to the sale of the property assigned, was not expressly vested in the assignee, but he was only authorized to sell and dispose of the property at such time or times and in such manner as should be most conducive to the interests of the creditors. But the objection to such a provision was, that the power to determine what time and manner of sale would be most conducive to the interests of the creditors, would be effectually left to the determination of the assignee.

The provision under consideration is far more objectionable than that in *Jessup vs. Hules.* It in the first place provides that the assignee shall, with all *convenient* diligence, sell and dispose of the assigned property. By whom is this question of convenience to be determined? By the assignee alone. It is equivalent to an authority to sell when he pleases. Should he happen to be engaged in other business requiring his exclusive attention, he would be authorized, under such a clause, to delay making the sale any indefinite period of time, until his other business had been disposed of. Under such an assignment, should application be made to the courts to hasten a sale, the assignee might well answer, that by reason of his own private affairs engrossing his whole time, he had not found it convenient to sell, and it would not be convenient for him to do so for any length of time which he might name. The assignee is to judge of what suits his convenience, and not

the courts. And they would have no right, either at law or equity, in the absence of fraud, to control his discretion, and thus the creditors are indefinitely delayed. The manner of the sale is also left to the assignee's discretion; he is to determine what manner is most beneficial. The diligence in collecting the debts assigned is also left to his judgment. He is to collect them with *reasonable* diligence. In determining what diligence is reasonable, the creditors may be indefinitely and injuriously delayed. Such a provision entirely changes the duties of the trustee and exempts him from a liability which, without it, the law would impose upon him. It is the duty of trustees of choses in action to take every necessary step, by suit or action, or otherwise, for realizing the chose in action without delay. And if the funds be lost from their neglect of this duty, they will be held personally responsible for the loss, although they acted without any improper motive.

Caffrey vs. Darby, 6 Ves. 488.
Mucklow vs. Fuller, Jac. 198.
Powell vs. Evans, 5 Ves. 839.
Tebbs vs. Carpenter, 1 Mad. 290.

But if a discretion be left to the trustee, and in the bona fide exercise of that discretion he delay the realization of the property, the court will not fix him personally with the loss thus occasioned.

Buxton vs. Buxton, 1 M. & Cr. 80.
Hill on Trustees, 447.

It is manifest that such a provision falls directly within the spirit and policy of the statute of fraud. It often occurs that the entire property assigned consists in notes, accounts and other evidences of indebtedness. The time when the creditors, for whose benefit such an assignment is made, receive their pay, depends upon the time when those choses in action are

collected. The law would compel the utmost diligence, but such a provision leaves the whole matter to the judgment of the assignee; in the exercise of that judgment the collection of the demands assigned may be indefinitely postponed; thus are the creditors delayed; the parties against whom they are held may become insolvent: the loss falls upon the creditor. It is no answer to say that the courts can hasten the exercise of this discretion. This right has been sometimes assumed, but it does not exist; and hence, there is but one method by which these evils can be avoided, and that is by invalidating such an assignment altogether.

We insist, also, that such a provision in an assignment as authorizes the assignee to sell and dispose of the assigned property upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned, falls directly within the operation of the general principle for which we contend; confers expressly upon the assignee a discretionary power as to the time and manner of sale, and hinders and delays creditors. Upon this particular point there is some conflict of authority; and we think it can be clearly shown that authorities sustaining assignments of that character proceed upon an entirely erroneous basis. Such a provision has, however, been held to invalidate an assignment in several cases. The question was directly presented in *Keep vs. Sanderson*, 2 Wis. 59, and in delivering the opinion of the Court in that case, CRAWFORD, J., holds this language:

"The judgment of the assignee is here made the criterion 'by which his authority and discretion in regard to the sale 'and disposition of the assigned property is to be measured. 'It is competent for debtors in failing circumstances to make 'an assignment of their property for the payment of their 'debts, but in so doing they are not at liberty to restrict the

'liability of their assignee, or extend his powers beyond the 'limits which are prescribed by law, because the effect of a 'valid assignment is to place the property beyond the reach 'of the ordinary process of the courts resorted to by creditors 'to enforce their claims, and hence the liability of the assignee 'to those creditors ought not to be curtailed beyond that pro- 'vided by law, at the mere volition of the assignor and as- 'signee."

"*Suppose that in the judgment of the assignee it would be to 'the best interests of the parties concerned to dispose of any por- 'tion of the property on credit, could it be truly said that under 'this instrument he has not the power to do so? We think it could 'not, because the language used in the deed — 'upon such terms 'and conditions' — is sufficiently comprehensive to include the 'power to sell upon credit. A sale is either for cash or upon 'credit;* and the price agreed upon, as well as the time at 'which the payment shall be made, is necessarily included in 'the terms and conditions of the sale.

Vide *LeRoy vs. Beard*, 8 How. 451.

'At the last term of this Court, in the case of *Hutchinson 'et al. vs. Lord*, 1 Wis. R. 286, we held that an assignment for 'the benefit of creditors, which empowered the assignee to 'sell "upon such terms and for such prices," was equivalent 'to a power to sell upon credit, and we think the reasons as- 'signed by us for our conclusion in that case are equally ap- 'plicable in this. Whenever the assignee can, within his 'authority, postpone the payment of the price of assigned 'property sold by him, he thereby necessarily delays the cre- 'ditors interested in such assigned property, in the collection 'of their demands, and inasmuch as the assignor must be 'deemed to have intended the legal consequence flowing from 'every provision contained in his assignment, such as that of

'which we now treat, must be taken as evidence, apparent on 'the face of the instrument, of the intent with which it was 'executed."

In *Hutchinson vs. Lord*, 1 Wis 286, the same rule was held, and applied to an assignment authorizing the assignee to sell "upon such *terms*, prices," &c.

The same question was directly presented in *Schufeld vs. Abernethy*, 2 Duer, 536. The opinion of the Court, delivered by Mr. Justice DUER, states, as we claim, the correct principle. He says:

"The Court of Appeals, in revising the judgment of this 'Court, in *Nicholson vs. Leavitt*, has established the doctrine 'that an assignment made by an insolvent debtor for the ben- 'efit of his creditors, is, upon its face, fraudulent and void, 'when, by its terms, a discretionary power is given to the as- 'signee, by the exercise of which the immediate conversion 'of the property into money, or the immediate distribution of 'the proceeds of its sale among the creditors, may be pre- 'vented or delayed. Such a provision, it seems, is conclusive 'evidence of an intent to delay creditors, and an intent to 'delay creditors, it also seems, is equivalent to an intent to de- 'fraud them.

"The discretionary power given to the trustee in the assign- 'ment, which, on the sole ground that it contained the power, 'was set aside as fraudulent, in *Nicholson vs. Leavitt*, was that 'of selling the property assigned for 'cash or upon credit.' 'The authority of the trustee in the case now before us, is to sell 'the property 'upon such terms and conditions as in his judg- 'ment may appear best and most for the interest of the par- 'ties concerned.' The words are not the same; but, we ap- 'prehend, that in the meaning there is not the slightest dif-

'ference. 'Terms and conditions' can only mean terms and 'conditions of payment; and unless in connexion with the 'words that follow in the clause which we have quoted, they 'convey, by a necessary implication, a discretionary power to 'sell upon credit, they are absolutely without significance or 'purpose; they are not merely superfluous, but senseless.

'The objection is not met by saying that, as a sale upon 'credit is an illegal act, the Court will not presume that the 'discretion thus given will be exercised. The question is not 'whether the discretion will be exercised, but whether it was 'meant to be given by the words that are used; for, as we 'understand the decision of the Court of Appeals, it is the 'intent of the debtor to delay his creditors, as manifested by 'his grant of the discretionary power — not the probability or 'improbability of the future exercise of the power — that 'vitiates and nullifies the assignment.

'It may be true that when there are several modes of exer- 'cising a discretion, one of which is prohibited by law, the 'others not, in order to sustain the grant it will be presumed 'that lawful authority only was given. But the difficulty in 'this case is, that if you take away the power to sell upon 'credit, no discretion remains. since there can be no exercise 'of a discretion as to the terms and conditions of a sale, when 'it is for cash and cash alone that the sale can be made; there 'is no discretion where the duty is single and imperative.

'We repeat, then, that the question relates only to the intent 'of the debtor granting a discretionary power, as evidenced 'by the terms of the grant; and that, in this case, the debtor 'meant that the assignee should sell the property upon credit, 'if in his judgment that course would be most beneficial to 'the parties interested; and that this intent is manifest from

'the terms he has used, we think it is impossible to doubt. 'We can perceive no reason for giving to the words of this 'assignment a different construction from that which would be 'given to the same words in an ordinary power of attorney. 'When the power given to the attorney is to sell real or per- 'sonal property upon such terms and conditions as he may deem 'most for the interest of his principal, the validity of a sale 'made by him in good faith upon credit, we apprehend. has 'never been doubted. The sale, however, cannot be valid, 'unless the words embrace and convey the authority."

In *Kellogg vs. Slawson*, a different view was taken, and in delivering the opinion of the Court, PARKER J., says :

"It is certain, that the 'terms and conditions' on which the 'property is to be disposed of are left entirely to the discre- 'tion of the assignees. But that discretion is to be exercised 'within legal limits. The law implies a restriction not in- 'serted in express words. It will not defeat the instrument 'by inferring that the assignor contemplated an illegal act. 'There is no express authority given in the assignment to sell 'on credit or do any other illegal act; and there is ample room, 'within legal limits, for the exercise of the discretion con- 'ferred. * ** * The language of the assignment can be 'abundantly satisfied by a construction that shall support the 'instrument, and in such cases the rule is well settled that a 'construction shall not be given which shall defeat it. If the 'general authority given in the assignment is to be regarded 'as contemplating and authorizing a sale on credit, it authori- 'zes equally any and every other illegal act; such as disposing 'of it by lottery or at a raffle; making the sale a cover for 'usury; agreeing with the assignee himself to keep possession, 'and dispose of it for his own benefit, &c. All these illegal 'things might be done under the broad authority to sell and

'dispose of the property on such terms and conditions as in 'the judgment of the assignees might appear best, and a design 'to do them may, with as much propriety, be imputed to the 'parties to the assignment, as a design to sell on credit."

With reference to this opinion, it is first to be observed that it is conceded that the terms and conditions on which the property is to be disposed of are left entirely to the discretion of the assignees. Hence there can be no question raised but that the assignment, by its terms, confers upon the trustees a discretion as to the time and the manner of sale Now, it cannot be questioned that any discretion which the assignor might be allowed to vest in his assignee, it would be perfectly proper for the assignee to exercise. If it is legitimate for the debtor to authorize his trustee to sell upon such terms as he pleases, the assignee most clearly has a right to exercise his own judgment as to the terms upon which he shall sell. If it is legal to authorize a discretion, it is legal to exercise it; and the only ground upon which the exercise of such discretion could be declared to be illegal would be that it was illegal in the assignor to confer it. What, then, was the effect of the discretion authorized by the assignment? That is to be determined by the meaning of the words conferring it; and hence, if the word terms, as used in this connection, would authorize the assignee to sell upon a credit, most certainly the authority so to sell is conferred, as it is "a general principle, applicable to all instruments or agreements, that whatever may be fairly implied, from the terms or language of an instrument, is, in judgment of law, contained in it."

10 Wendell 250.

The word *terms* is certainly broad and comprehensive enough to authorize a sale upon credit. Thus, in *LeRoy vs. Beard*, 8 Howard's Rep. 451, Mr. Justice WOODBURY, in defining the

power granted by a letter of attorney, in which the agent or attorney was authorized to sell lands "on such *terms* in all respects as he deems advantageous," lays some stress on the word *terms*. He says: "Terms is an expression applicable to the conveyance and covenants to be given, as much as to the amount of and *time of paying the consideration*."

BOUVIER, in his law dictionary, has it thus: "*Terms*, in contracts: This word is used in the civil law to denote the *space of time granted* to the debtor for discharging his obligation; these are express terms resulting from the positive stipulations of the parties, as where one undertakes to pay a certain sum on a certain day." As applied to *estates*, he defines it thus: "The limitation of an estate, as a term for years, for life, or the like. The word term does not merely signify the *time*, but the estate also, and interest that passes by that lease," &c. Again he says: "TERM — *Practice*: The space of *time* during which a court holds a session."

WEBSTER defines it thus: "1. A limit; a bound or boundary; the extremity of anything; that which limits its extent. 2. The *time* for which anything lasts; *any limited time*. 14. In *contracts*, terms in the plural are conditions, propositions stated or propositions made, which, when assented to or accepted by another, settle the contract and bind the parties. A engages to build a house for B for a specific sum of money *in a given time*; these are his *terms*."

The word conditions has a meaning equally broad and comprehensive. WEBSTER defines it to be the "terms of a contract or covenant; terms given or provided as the ground of something else; that which is established, or to be done, or to happen, as requisite to another act." In contracts of sale it may relate to the time of payment of the thing sold; the price and

the time for its payment are essential conditions in all contracts of that character. Thus, in *Hagedorn vs. Laing*, 6. Taunt. 162, among the *conditions* of the sale was one providing that the price should be paid on or before delivery.

It is a universally recognized rule that where a power of attorney authorizes the agent to sell, upon such *terms* as he may deem best, he has the right to sell upon credit. What, indeed, are the terms of every contract of sale? Simply the price to be paid for the thing sold and the *time* when that price is to be paid. Under such a provision as we are now considering the assignee, upon the sale of the property, has express authority given him to fix and determine the terms and conditions of the sale; a contract made by him differs in no respect from a contract of sale made by any other person, and the *time when the price is to be paid* is as much a part of the terms of a contract as the price itself. This price must be paid either at once or a future day to be agreed upon between the parties. If it is to be paid *immediately* it is because the terms of the contract so require it; if at any *future day* it is because it is so stipulated in the agreement. The right to determine whether payment shall be at once made or in future is vested in the assignee, and follows of a very necessity from his right to prescribe the terms of the contract by which he sells The sale is for cash in either event. In one case the cash is to be paid immediately, in the other at a future time, fixed by agreement of the parties and embodied in the terms of the contract.

The effect and operation of such a provision in an agreement, then, is simply this: That the debtor by the deed vests in the assignee the title to his property in trust for certain purposes. The assignee is authorized to make contracts of sale of the property; he is not only authorized to make the contract, but

also to prescribe and fix its terms — there is no limit to his discretion; his right is as complete under such an authority to fix all the terms of the contract as any one of them.

In the absence of any such provision, it is true that the law would, to a certain extent, regulate the terms of the sale; but if the right vests in the assignor to confer that power upon the assignee, the courts have no control over him, and the making of the contract, the price to be paid and the time when, are left entirely to the discretion of the assignee. That this is so, is practically conceded by the opinion of Judge PARKER. In attempting to show how such a discretion might be legally exercised, he says:

"The assignees were at liberty to sell at public or private 'sale; in large or small quantities; or one article with the 'privilege of taking more of the same kind at the same price. '*They might require a certain per centage to be paid at the time* '*of the bid, and the balance on delivery, and might prescribe the* '*time and place of delivery* in gross or in parcels."

Now this is nothing more nor less than the right to fix the time of payment; in other words, to give credit. Supposing, in case of a sale of the goods at auction, the assignee should require, as one of the terms and conditions of the sale, the payment in cash, immediately, of fifty per cent. of the amount bid, and the payment of the balance in six months thence, at which time the goods should be delivered: Is not this giving credit for the balance? Is it not postponing the time of payment? The assignee would certainly be bound by the terms of such an assignment. He would be obliged to hold the goods for the person making the bid; he could dispose of them to no other person. Call such an authority by whatever name we may, the creditors rre thereby delayed. A distribution among them is postponed until the time fixed by the assignee has ar-

'cions in regard either to the probable intention of the parties 'contracting or to the probable changes which they would have 'made in their contract had they foreseen certain contingencies. 'Whenever the words are clear and definite, they must be un- 'derstood according to their grammatical construction and in 'their ordinary meaning. For such, it is natural to suppose, 'is the intention of the party using them."

The general principles governing the construction of contracts, are most clearly stated in *Powell on Contracts*, page 327. He says :

" The intent of the parties to a contract or agreement is to 'be gathered from external signs and actions ; for whatever 'difference there may be between a man's internal sentiments 'and external expression, he must in his ordinary transactions 'with mankind, be considered to use signs according to their 'common acceptation ; *there could be no such thing as an obli- 'gation if a man might affix what interpretation he pleased to his 'signs, and pretend that he meant to use them different from their 'received acceptation.* * * * The signs of the intentions 'of men are of two sorts, namely : words and actions. As to 'positive words : The rule seems to be, that unless there be 'most decisive reasons which lead us to conjecture the intent 'was otherwise, *they are to be understood in their proper and 'most known signification;* not the grammatical one which regards 'the etymology and original of them, but that which is vulgar 'and most in use ; for use is the judge, the law and the rule 'of speech."

And the cases in which the ordinary import of words may be *restrained* are thus stated by the same author, at p. 387 :

" First, where there is an original defect in the will of the 'speaker, so that it is not co-extensive with his words. And,

'secondly, where there is some collateral accident inconsistent 'with the speaker's design."

And again, at page 395, the rule is thus stated:

"If there be in the terms of a contract any obscurity or du- 'biousness which cannot be cleared up by the intention of the 'contracting parties or any other circumstance, and all other 'rules of exposition of words fail, then the construction ought 'to be against him who ought to have explained himself or 'made the other have delivered himself fully; and, therefore, 'he who is obliged ought to speak clearly, or otherwise in gen- 'eral the other party has a right to explain the cause for his 'own advantage."

And again: In *Lowber vs. LeRoy*, 2 Sand. 220, SANDFORD, J., in construing the meaning of the words "assets" and "machinery," says:

"The folly or the wisdom of the contract, as one or another 'construction might be placed upon its terms, would be a dan- 'gerous element to introduce into the interpretation of agree- 'ments. It suffices for this case that whatever were the views 'of the parties, they have expressed their agreement in terms 'too plain to be doubted or misunderstood."

In *Chitty on Contracts*, page 29, the rule is thus stated:

"The plain, ordinary and popular sense or meaning of the 'terms adopted by the parties shall prevail."

See also *McWilliams vs. Martin*, 12 Serg. & Rawle, 269.
Hawes et al. vs. Smith, 12 Maine 432.
White vs. Smith, 33 Penn. State 186.

It must be borne in mind that the simple question to be de-

termined in the construction of all such clauses in assignments is, whether it authorizes the assignee to exercise discretion as to the time and manner of the sale or distribution among the creditors. The point is not whether he will exercise it or not, but whether, under the power conferred upon him by the language of the instrument, he *might* do so. The validity of the assignment is determined by the *intent* of the party in making it. That intention when the agreement has been reduced to writing is evidenced by the agreement itself. If there is any ambiguity or uncertainty in the language used, then the assignment is to be strictly construed against the party making it and in favor of the creditors. If the words used are unambiguous they are, as we have seen, to be construed according to their *apparent* import, and if the popular understanding of these words would authorize the assignee to determine when the property should be sold, the conclusion is inevitable that the assignor intended to confer that authority, and the intention to vest in an assignee the right to exercise such a discretion, wherever it is apparent upon the face of the instrument, is construed by the courts as conclusive evidence of an intent to hinder, delay and defraud creditors, and that the assignment is made for that purpose and is therefore, as to those creditors, void.

The construction adopted by Judge PARKER. in *Kellogg vs. Slawson*, if carried out to its legitimate consequences and fully applied, would sanction the very assignments which were held invalid in the case of *Woodburn vs. Mosher*, which was cited and approved by him. The assignment in that case directed the assignees to sell within "convenient time, as to them should seem meet."

Now, if the rule, that it is not to be presumed that the assignee will do an illegal act, is to be adopted, without reference

to the language of the power under which he acts, it is certainly as legitimate to infer that the word *convenient* contemplated an immediate sale, and the word *meet* contemplated a purely legal exercise of his judgment, as to presume that the authority to sell on terms and conditions, to be fixed by the assignee, contemplated only legal terms and conditions. If the word "terms" can be so warped and distorted from its true meaning as to embrace simply the prices for which goods are to be sold and the quantities, we might quite as well say that the word "convenient" was intended to mean the *proper* time, and we should, therefore, *presume* that the assignee would determine that it was convenient to sell without delay.

And so in *Jessup vs. Hulse, supra*, the assignee was authorized to sell at such time and in such manner as should be most conducive to the interests of the creditors. Adopting Judge PARKER'S reasoning we would be bound to presume that the assignee would do so, on the principle that the language might allow of it.

The truth is, that the construction adopted in *Kellogg vs. Slawson* is forced and unnatural The principle thereby established is entirely inconsistent with the previous and subsequent rulings of the same court. Carried ought to its legitimate consequences it would allow any extent of discretion to be vested in the assignee, and entirely overlooks the important fact that courts will not conjecture whether the assignee *will exercise the discretion to the delay* of creditors, but will determine the validity of the contract upon the ground simply as to whether he *might* so exercise it under the language of the instrument creating his trust.

But again: Judge PARKER says, in referring to the discre-

tion conferred by the language of the assignment he was considering:

"But that discretion is to be exercised within legal limits. 'The law implies a restriction not inserted in express words. 'It will not defeat the instrument by inferring that the as- 'signee contemplated an illegal act."

The answer to this position is obvious, and we have in a great measure already given it, viz: That where the assignment confers discretion as to the time and manner of sale, its exercise to the full extent of the power conferred is *not* illegal, provided the clause itself is legal. So far as the assignee is concerned, he is protected from all responsibility for his acts by the instrument under which he acts. That the power to make a contract of sale, and prescribe the "terms and conditions" of the contract, confers an unlimited discretion as to those terms, cannot be doubted. It comes within every rule of full discretionary power as defined by the courts.

"The term discretionary power" (vide *Hill on Trustees*, p. 484) "carries with it its own meaning. Wherever an author- 'ity is given to trustees which it is either not compulsory 'upon them to exercise at all, or, if compulsory, the *time or* 'manner or extent of its execution is left to be determined by 'trustees, that is obviously a discretionary power, though the 'extent and nature of the discretion may vary in each case. ' * * * * * A discretionary power may be conferred on 'the trustees either by the express terms of the trust, or by 'implication from the nature of the duty imposed on them."

It is somewhat difficult to determine the meaning of Judge PARKER in saying that the discretion is to be exercised within legal limits. After the right to confer a discretion is once con-

ceded, the only legal limit to its exercise is found in the assignee or the language conferring it. In the absence of fraud, the act done under virtue of such discretionary power can only be rendered or made illegal upon the ground that the instrument conferring it was illegal. If he is to be understood as meaning that the courts could or would control such discretion, he is then clearly and unquestionably in error. And it is because courts cannot control the assignee in that respect, acting under an assignment authorizing it, that the courts have repeatedly declared that the assignor had no right to confer it.

"As a court of equity will not in general assume the exer-
'cise of a discretionary power vested in trustees, so it will not
'interfere to control the trustees acting bona fide in the exer-
'cise of their discretion."

Potter vs. Chapman, Ambl. 98.
Pink vs. DeThuisey, 2 Mad. 157, 162.
French vs. Davidson, 3 Mad. 396.
Clark vs. Parker, 19 Ves. 11.

The same doctrine is well established in this country. Thus, in *Hawley vs. James*, 5 Paige 485, the Court say :

"The amount of the commissions to be allowed to Augustus
'for collecting the rents and profits of the estate is, by the 22d
'clause of the will, submitted to the discretion of the other
'trustees. This discretion they may exercise from time to
'time in reference to the trouble and expense of the duty to
'be performed, and so long as the discretionary power of the
'trustees is exercised in good faith this court has no right to
'interfere to control its exercise."

Again in *Cochran vs. Paris*, 11 Gratt. 356, the Court say :

"A court of equity will not, in general, assume the exercise 'of a discretionary power vested in a trustee, nor interfere to 'control the trustees acting *bona fide* in the exercise of their 'discretion."

The same principle was also distinctly recognized in *Nicholson vs. Leavitt*, wherein Judge GARDNER expressly denies that courts have any such power, and argues the necessity of its exercise as good reason to prohibit the power which would give rise to it.

See also *Morton vs. Southgate*, 28 Maine 41.
Littlefield vs. Cole, 33 Maine 552.
Leavitt vs. Burne, 21 Conn. 1.
Bunner vs. Storm, 1 Sand. Ch. 357.
Arnold vs. Gilbert, 3 Sand. Ch. 556—
1 id. 623.
Gochenauer vs. Froelich, 8 Watts 19.
Cloud vs. Martin, 1 Dev. & Batt. 297.
Cowles vs. Brown, 4 Call 477.

The words "and convert the same into money," which follow such clauses in an assignment, cannot, we think, limit the discretion conferred." The duty of converting the property into money is expressed or implied in every assignment, since where the creditors are to be paid in money, such a conversion must of necessity precede the payment.

2 Duer 539.

We also claim that the decision in *Kellogg vs. Slawson* is directly opposed to the more recent authorities in the State of New York.

In *Dunham vs. Waterman*, 17 N. Y. Rep., already cited, it

is expressly held, by Mr. Justice SELDEN, that neither the will nor the *discretion* of the assignee can be substituted for that of the creditors or the courts. The same doctrine is recognized and enforced in *Jessup vs. Hull*, in *Burdick vs. Post*, *Nichols vs. McEwen*, and is indeed the general rule now established in that State for the construction of assignments.

In *Brigham vs. Tillinghast* — 3 Kernan 215 — *Kellogg vs. Slawson* was alluded to; but in that case the Court expressly say that they confine their decision to the mere question as to the right of the assignor to authorize the assignee to convert the property into "available means."

The opinion in *Kellogg vs. Slawson* was delivered by Judge PARKER. No other opinion was delivered in the case. He was a member of that court by transfer from the Supreme Court of that State, and was never a judge of the Court of Appeals. The same question has never since been directly presented to the Court of Appeals, and the manner in which it was then determined is manifestly in conflict with the spirit of the later decisions of the same tribunal. It cannot, at all events, be regarded as authority here; and since the reasoning of the Court in *Nicholson vs. Leavitt* has been adopted to its fullest extent and in its broadest meaning by the Supreme Court of this State, in *Bowen vs. Parkhurst*, *supra*, it may be regarded as having been virtually disapproved.

So far, also, as the mere question of construction is concerned, it is important to note the difference between the statutes of the State of New York and this State, with regard to fraudulent conveyances. In the former State, fraudulent intent is, by express statute, in all cases made a question of *fact*. In this State no such imperative rule prevails; and a

material distinction exists between fraud in fact and fraud in law. Upon this point the authorities are uniform.

Howell vs. Edgar, 3 Scammon 417.
Ramsdell vs. Sigerson, 2 Gilman 79.
Conkling vs. Carson, 11 Illinois 503.
Nesbitt vs. Digby, 13 Illinois 387.
Davis vs. Ransom, 18 Illinois 396.

In this State, an assignment made in malice, fraud, &c., to the *purpose* of delaying, hindering or defrauding creditors, is equally void as one made to that *intent*. *Purpose* is defined by Webster, *end*, *effect*, *consequence*. If, therefore, an assignment might, by its terms, have the *effect* or *consequence* to delay, or result in hindering or delaying or defrauding creditors, it is obnoxious to the statute, and, as to those creditors, void.

In the light of the authorities; in view of the manifest tendency of courts against voluntary assignments with preferences — the injustice perpetrated by them, and the source from which that injustice especially springs — we would state as a rule sustained by the authorities, and especially adapted to prevent the evils attendant upon instruments of this character, the following :

THAT ALL ASSIGNMENTS EMPOWERING THE ASSIGNEE TO EXERCISE HIS DISCRETION AS TO THE TIME WHEN OR THE MANNER IN WHICH THE ASSIGNED PROPERTY SHALL BE DISPOSED OF, OR AS TO THE TIME OR MANNER IN WHICH THE AVAILS OF THE ASSIGNED EFFECTS ARE TO BE DISTRIBUTED AMONG THE CREDITORS, IS, AS TO CREDITORS, VOID; AND THAT A DEBTOR CAN GO NO FARTHER THAN TO DIRECT THE APPROPRIATION OF HIS PROPERTY AND SELECT THE PERSON WHO IS TO CONVERT AND APPLY IT.

Upon every consideration of public justice and of individual right, the adoption and recognition of such a principle as that for which we contend would seem to be imperatively demanded. Experience has abundantly demonstrated the fact, that a very grave error was committed when they were at first sanctioned. Originating at a period of commercial and pecuniary embarrassment, the courts so far relaxed the rigor of the law, upon the assumption that equality was equity; and even those early cases never contemplated any thing further than an entire, complete and unqualified appropriation of the debtor's effects to the payment of all his creditors in equal proportions. No sooner, however, was the right, to give preferences, once conceded, than it was converted into an engine of fraud, and against which the courts have been ever since contending.

Confined to the simple purpose of appropriating the debtor's property to the payment of his debts in the order which he may appoint, and under the control of the courts, they are shorn of much of their power for mischief. The assignee is usually the friend of the debtor and selected by him with special reference to the control which the debtor can exercise over him, nursing the estate for his benefit, and exercising whatever discretion is conferred upon him to the sole benefit of the assignor. It is from the exercise of that discretion that in the great multitude of cases the creditors are defrauded; it is the fountain head from which, in a great measure, the evils of assignments have their origin — it is impossible to correct the evil in any other way than by striking at the root of the difficulty and denying the right to confer discretion altogether. It is impossible to take any middle ground that will meet the difficulty. The courts are powerless in the premises so long as the right is permitted to exist at all. Under the principle, for which we contend, no arbitrary rule will be imposed upon

the assignee, but he will proceed in the line of duty which the courts will mark out for him, and will exercise such a discretion as the courts, with a full understanding of all the facts and necessities of the case, and a regard to the rights and interests of all parties concerned, shall direct.

Such a principle is not introducing any new element in the administration of justice in this respect, but is simply carrying out, in its letter and spirit, a statute deriving its sanctions from an enlarged experience, approved by the wisdom of generations of the most enlightened jurists and statesmen, intimately interwoven into the texture of the common law, and everywhere recognized as essentially necessary for the protection of the public against losses resulting from fraudulent conveyances and transfers of property. The doctrine for which we insist, distinctly recognized and fully applied, brings us back to that point from which the courts of sister States regret that they have ever departed.

The very name of assignment, for the benefit of creditors, has become a byword and reproach to our jurisprudence; and our courts witness, daily, the fraudulent debtor placing his property practically beyond the reach of his creditors, and bidding them defiance, under its convenient shelter. It is the plain and manifest duty, as we doubt not it is the disposition, of our courts, to relieve the law from such a reproach, to the fullest possible extent The discharge of that duty in the State of Illinois is comparatively easy. We are not, as in the State of New York, bound to sustain voluntary assignments with preferences, by any long line of adjudicated cases. We are comparatively unshackled by precedent, and at liberty to consider the subject as a new and open one. "We have (say 'the Supreme Court, in *Bowen vs. Parkhurst*) no law in this

'State expressly authorizing voluntary assignments; but they 'have been generally upheld for the *benefit of creditors—never* '*to their disadvantage.*" And when it is considered that the commercial interests of our State are rapidly developing themselves into a power and acquiring a proportion which place them second to none other; that the commercial prosperity and advancement of any people is dependent in a great measure upon the security which the law guaranties them against all contrivances calculated or tending to embarrass the creditor in enforcing his demands against the debtor: and that wherever that feeling of security does not exist, trade and commerce invariably languish, and enterprise in those channels is checked and restrained, the line of duty and policy in the direction we have named would seem clear and open.

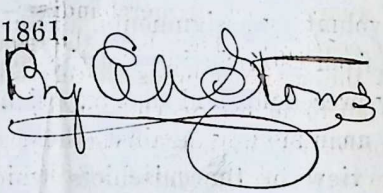
We have the benefit of the experience of those older States in which voluntary assignments, as an experiment upon and departure from the principles of the common law, have cecome settled by precedent, and that experience, as testified by their courts, is unanimously against them. The courts of those States, in view of the mischiefs which have resulted from them, and the frauds which are perpetrated under their cover, are unanimous in regretting that they were ever permitted at all, and, to avoid all those difficulties as far as possible, are subjecting them to the most rigid scrutiny and confining them within the narrowest possible limits.

The principle which we claim is recognized by authority and sanctioned by experience — would still give to the unfortunate but honest debtor all the privileges he would deserve; all, indeed, that an honest man would ask, and quite as much as a dishonest man should have It would still leave all the benefits to be derived from such instruments intact and rid them of

their evils. It would leave their capacities for any just or honest purpose unimpaired, and would deprive them of their powers for mischief; it would sufficiently protect the debtor and at the same time place the creditor in such a position that his rights should be properly insured and cared for. The courts would be, under such a rule, the mediator between debtor and creditor, and caring for and protecting the interests of both; and not, as under a different rule, placing the creditor at the mercy of a capricious and unlimited discretion, to be exercised by an individual who, from his very position, is necessarily controlled by influences adverse to them. It would save the community from a vast volume of losses, daily inflicted upon them. It is, finally, a policy dictated by every consideration of justice and reason, and must therefore be adopted.

E. S. SMITH.

CHICAGO, FEBRUARY, 1861.



In addition to the suggestions made in the argument herewith submitted, I have deemed it proper to add a few remarks with reference to the effect of the authority conferred upon the assignee to sell at public or private sale, *as he may deem most advisable.*

We have already seen, that wherever a discretion is vested by the terms of the instrument under which he acts, upon the assignee, that neither the creditors nor the Courts can control or regulate its exercise; and hence the fact that an assignee might be justified, even in case where no express authority is conferred, in selling at public auction or private sale, can have no weight in determining the question presented in this case, for the very apparent reason that, in the one case, the exercise of that discretion would be subject to the control of the creditors and the Courts, and in the other case would be left entirely to the judgment of the assignee.

The evils which might result from an express authority vested in an assignee to determine whether the property assigned to him should be sold at public or private sale, are manifest.

Let us suppose, by way of illustration, that the property assigned consisted of a large stock of merchandise,—the assignment is made for *the benefit of creditors.* They have the legal interest in the property assigned, and the assignee holds merely for their benefit. With them should it be left to determine when and how the property should be sold. In the absence of any authority expressly vesting the right to determine that question in the assignee, the creditors would unquestionably have the right to insist that the property so assigned should be sold publicly or at once, to the end that they might immediately realize the amount of their demands against the assignor. But if the discretion be vested in the assignee, he would have the right to determine that the assigned property should be sold at private sale and at retail, and thus indefinitely delay and hinder the creditors in the collection of their debts. The *time* when the creditors are to realize from the property depends essentially upon the *manner* in which it was sold. The *amount* to be realized may also depend in a very great degree upon it. Thus a private sale at retail would delay and postpone the time of distribution. In exercising the right to sell either at public or private sale, the assignee, by virtue of his discretionary power, might determine to sell at auction, and thus reduce the *amount* to be realized. The difficulty rests in the fact that the discretionary power vested in the assignee, is subject to no control from creditors or Courts, and is a power which may be wielded greatly to the injury of those for whose benefit the assignment is made.

This question was distinctly presented and passed upon in U. S. Circuit Court at Chicago, in the case of *Howe* et al. vs. *Doty*, and Judge Drummond, following and adopting in its length and breadth the reasoning of this Court in *Bowen* vs. *Parkhurst*, adopted the principle which we insist is clearly deducible from the whole current of modern authority, that the assignor had no right to vest in the assignee any discretionary power as to the time or manner in which the assigned property should be sold, and in applying that doctrine, held that the assignment was fraudulent and void as against creditors.

STATE OF ILLINOIS, SUPREME COURT, } ss. The People of the State of Illinois,

To the Sheriff of the County of Mc Henry Greeting:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Mc Henry County, before the Judge thereof, between William H. Sackett and Edward Lyons

plaintiffs, and Augustus G. Mansfield and Anson Sperry

defendants; it is said that manifest error hath intervened, to the injury of the said plaintiffs

as we are informed by their complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said Augustus G. Mansfield and Anson Sperry

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Augustus G. Mansfield and Anson Sperry

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 26th day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty one

L. Leland

Clerk of the Supreme Court.

by J. B. Rice Deputy

Executed the within by reading the same to the within named Aaron Sparry and Augustus L Mansfield this 19th day of April 1861

James D Haworth Sheriff
per B F Church Deputy

Sheriffs Costs
Serv 1 00
Mil. 1 50
Return 10
$2.60

William H Scachard

vs.

No.

Augustus L Mansfield
et al

SCIRE FACIAS.

Filed April 22 A. D. 1861

L Lelan

Clerk.

Printed by BEACH & BARNARD, 14 S. Clark St.

SUPREME COURT,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1861.

William H. Sackett and Edward Syres, Plaintiffs in Error, vs. Augustus G. Mansfield and Anson Sperry, Defendants in Error.	IN CHANCERY.

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BILL asks that assignment may be declared fraudulent and void as to creditors.

THE ANSWER admits judgment, execution and return; admits making of assignment, annexes copy containing provisions stated in bill, denies fraud, and asks that answer be taken as demurrer.

MOTION FOR DECREE on Bill and Answer; Denied, and Exception.

ERRORS ASSIGNED.

1 - The assignment set out in answer is fraudulent & void on its face as against creditors,
2 - The Court had Jurisdiction of the case,
3 - The Court for the reasons above stated erred in denying motion for decree.

147

Sackett
vs
Mansfield

Abstract

Filed Apr. 24th 1861
L. Leland
Clerk

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149

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Supreme Court
149
Sackett Et al
v
Mumford

Abstracts

147

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E. L. Smith
Atty

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147 — 143

Sackett

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147 - 543

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147 - 143

W. H. Sackett et al

vs

A. G. Mansfield et al

Abstract

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147 / 143

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Creditors' Bill — Filed February 14th, 1861:

Alleges that in the year 1859, plaintiff recovered judgment in the United States Circuit Court, Northern District of Illinois, against Augustus G. Mansfield for $647.49 damages and costs, the issuance of writ of fieri facias, delivery to the marshal, and returned 'no property;' that there is now due complainants the sum of $647.49, with interest from February 23, 1859; that Mansfield was in mer-

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BILL asks that assignment may be declared fraudulent and void as to creditors.

THE ANSWER admits judgment, execution and return; admits making of assignment, annexes copy containing provisions stated in bill, denies fraud, and asks that answer be taken as demurrer.

MOTION FOR DECREE on Bill and Answer; Denied, and Exception.

ERRORS ASSIGNED.

1. The assignment set out in answer is fraudulent and void on its face as against creditors.
2. The Court had jurisdiction of the case,
3. The Court for the reasons above stated erred in denying motion for decree.

147

W. H. Sackett Dec

v

A. G. Mansfield Dec

Abstract

Printed by BEACH & BARNARD, 14 S. Clark St.

SUPREME COURT,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1861.

William H. Sackett and Edward ~~Syres~~, *Symes* Plaintiffs in Error,	
vs.	IN CHANCERY.
Augustus G. Mansfield and Anson Sperry, Defendants in Error.	

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3. The Court for the reasons above stated Erred in denying motion for decree

147

W. H. Sackett Dec

vs

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147

Sackett
vs
Mansfield

Abstract

Filed Apr. 24th 1861

L. Yeland
Clerk

Supreme Court of Illinois
Third Grand Division

William H Sackett and
Edward Sykes
Plffs in Error
vs.
Augustus G. Mansfield and
Austen Sperry
Defts in Error

} In Chancery

Error from McHenry Co Circuit

Of the term of April in the year of our Lord One thousand, eight hundred and sixty-one holden at Ottawa for the Third Grand Division.

Afterwards to wit on the day of in this same term before the Judges of the Supreme Court of the State of Illinois at the Court House in the City of Ottawa come the said William H Sackett and Edward Sykes by E. S. Smith their Attorney and say that in the record & proceedings aforesaid and also in giving the judgment aforesaid there is manifest error in this to-wit,

1 The assignment set out in answer is fraudulent and void on its face as against creditors.

2 The Court had jurisdiction of the case.

3 The Court for the reasons above stated erred in denying motion for decree.

And the said William H Sackett and Edward Sykes pray that the judgment aforesaid for the errors aforesaid and other error in the record and proceedings

aforesaid may be reversed, annulled and altogether held for nothing and that they may be restored to all things which they have lost by occasion of the said judgment

E. S. Smith
Attorney for Plaintiffs.

147

Sackett et al
v
Lynes

Ass of Errors

United States of America
State of Illinois } ss.
McHenry County }

Plea before
the Honorable Isaac G. Wilson Judge
of the Thirteenth Judicial Circuit
of the State of Illinois and presiding
Judge of the McHenry County Circuit
Court at a Circuit Court begun and
held at Woodstock Court House at
Woodstock in said County on Mon=
=day the Eighteenth day of March
A.D. 1861 in the year of Our Lord
One thousand Eight hundred and Sixty
one and of the Independence of the
United States the Eighty fifth

Present Hon Isaac G. Wilson
Judge
Amos B. Coon
States Attorney
Lewis Ellsworth Sheriff
Attest
Charles A. Rypell clerk.

Ord Subpoena to writ on the fourteenth
day of February in the year last
aforesaid was filed in the Clerks
office of said Court a Creditors
Bill in which William H. Jackett

and Edward Lynes are complainants, and Augustus G. Mansfield and Anson Henry Defendants and which said Bill is in words and figures as follows that is to say

State of Illinois } ss. McHenry County
McHenry County } Circuit Court
Of the Term A.D. 1861

To the Judge of said Court in Chancery Sitting

William H. Sackett and Edward Lynes bring this bill against Augustus G. Mansfield and Anson Henry and therefore your Orators complain and say that heretofore to wit in the Term of in the year of Our Lord One thousand Eight Hundred and fifty nine in the Circuit Court of the United States in and for the Northern District of Illinois your Orators recorded a Judgement against the said Augustus G. Mansfield defendant in this Suit the Sum of Six Hundred forty Seven dollars and forty nine cents for the damage they had sustained as well as for the costs and charges of your Orators by them about

this Suit in that behalf Expended which were adjudged to your Orator in and by the said Court whereof the said Defendant Augustus L. Mansfield was convicted as by the Record of the said Judgement in the Office of the Clerk of the said Court, reference being thereto had, and to which for greater certainty your Orators pray leave to refer unto more fully at large appears.

And your Orators further shew unto your Honor, that the said Judgement so recovered in manner aforesaid remaining in full force and Effect and the costs and damages aforesaid unpaid and unsatisfied your orators on or about the 20th. day of February in the year of Our Lord One thousand Eight Hundred and Sixty, for the purpose of obtaining Satisfaction of the said Judgement sued and prosecuted out of the said Court a writ of the People called a Writ of Fieri directed to the Marshals of said District; by which said writ the Marshals was commanded that of the goods chattels lands

tenements of Augustus G. Mansfield Defendant in your District you cause to be made the Sum of Six Hundred and forty seven dollars and forty nine cents which your Orators in the said Court recovered against the said Defendant Augustus G. Mansfield and that he should have the money at the Clerks Office of said Court at Chicago in sixty days from the date thereof to satisfy the Judgment so recovered by your Orators aforesaid and that he should have then and there that writ.*

And your Orators further shew unto your Honor that the Marshall of said County aforesaid on the 20th. day of February in the year of Our Lord One thousand Eight Hundred and fifty returned on the writ to him in that behalf directed and delivered as aforesaid that no property could be found whereon to satisfy the Execution or any part thereof and that a demand was made of the Defendant who refused to turn out property to satisfy the same and that he

* And your Orators further shew unto your Honors that the said writ of Fieri Facias before the delivery thereof to the said Sheriff was duly endorsed and issued out of the Office of the Clerk of the said Court in the year of Our Lord one thousand eight hundred and fifty and delivered to the said Marshall to be executed in due form of law

Said Marshals returned said writ of Fieri Facias wholly unsatisfied for the want of property whereof to levy as by the said writ of Fieri Facias and the directions and the return of the said Marshals Endorsed thereon as aforesaid now on file in the Office of the Clerk of the said Court will more fully appear; and to which or to a copy thereof your Orators pray leave to refer.

And your Orators further shew unto your Honor that the said Judgment still remains in full force and effect not reversed or Satisfied or otherwise vacated and that the said Augustus G. Mansfield has not paid the same to your Orators but has hitherto wholly neglected and refused so to do

And your Orators further shew unto your honor that there is now actually and Equitably due to your Orators upon the aforesaid Judgment the Sum of Six Hundred and forty Seven Dollars and forty nine cents together with the interest thereon from the 28 day of February one thousand Eight Hundred and fifty nine over

and above all claims of said Defendant by the way of Set off or otherwise

And your Orators further Shew unto your Honor that on or about the first day of January and before that time in the year of Our Lord One thousand Eight Hundred and fifty Eight. the said Defendant Augustus G. Mansfield was Engaged in the Mercantile business at Marengo in the State of Illinois and that your Orators are informed and believe that in the Course of the said Mercantile business of the said Defendant Augustus G. Mansfield that divers persons became indebted to him in a large amount and that the said Defendant last named at the time of filing this your Orators bill of Complaint has debts due to him and for which he holds divers securities and Evidences to a large amount and that divers goods wares and Merchandise and other articles of personal property which belong to him or in which he is in some way or manner beneficially interested and that he has Equitable interests and things in action

of Some nature or kind which might and ought to be applied to the payment of your Orators said Judgement against him the Said Defendant Augustus G. Mansfield.

And your Orator also charges that the Said Defendant Augustus G. Mansfield is the owner of or in Some way or manner beneficially interested in Some real Estate, in this or Some other State; or Some Chattels real of Some nature or Kinds or Some contract or agreement relating to Real Estate or the rents issues and profits of Some real Estate; and also that the said Defendant is the owner of or in Some way beneficially interested in the stock of Some Company incorporated or unincorporated or in the profits of Some Company or Copartnership; and also that he has in his possession at the time of filing of this your Orator's Bill of Complaint Some money in coin or Bank Bills or that he has money deposited in Some Bank or Elsewhere to his credit or that he has money or securities for the payment of money held by Some other person in trust or otherwise

for his benefit

And if the said Defendant Augustus G. Mansfield has made any Sale assignment or transfer of his property or Effects or any part thereof your Orators expressly charge that they believe such Sale assignment or transfer is merely colorable and made with a view of protecting the property or Effects ~~or any part thereof your Orators expressly charge that they believe such Sale assignment or transfer is merely colorable and made with a view of protecting the property or Effects~~ of Said Defendant Augustus G. Mansfield so assigned and placing the Same beyond the reach of your Orators said Judgement and Enabling the said Defendant Augustus G. Mansfield to control and Enjoy the Same and the avails thereof: or to hinder and delay your Orators in the collection of their Debt now in Judgement as aforesaid: And that so it would appear if the said Defendant Augustus G. Mansfield* and of all trusts whereby any property debts or Effects are held for the use or benefit of the said Defendant last named &*

* would state and set forth when and to whom such sale, transfer or assignment was made and what was the amount in value of the property or Effects so sold assigned or transferred and what were the terms upon which such sale transfer or assignment was made and what disposition has been made of the property or effects so sold assigned or transferred, and in whose possession the same now is or what has been done with the avails thereof. And your Orators claim a full & complete discovery of all such property effects and things in action belonging to the said Defendant Augustus G. Mansfield"

and of Every Sale assignment or transfer which the said Defendant last named has made of his property debts or other Effects and of the person or persons to whom such Sale, assignment or transfer has been made; the amount and value of the property, debts or other Effects ~~and of the persons or person to whom such Sale assignment or transfer has been made the amount and value of the property debts or other Effects~~ so Sold assigned or transferred; and the trusts and other considering upon which such Sale assignment or transfer was made and all the facts and circumstances relating thereto and particulary what is the situation of the property debts or other Effects Sold assigned or transferred, at the time of filing this your Orators bill of Complaint.

And your Orators further shew unto your Honr that they have reason to believe and do believe that the said Defendant last named has property and other Equitable interest things in action or Effects of the value of more than One Hundred Dollars exclusive of all prior just claims thereon, and which your Orators have been unable to reach by Execution on said Judgement against the said Defendant last named and that this Your Orators bill of Complaint

is not Exhibited by collusion with the said Defendants, or with any other person or for the purpose of protecting the property or Effects of said Defendant Augustus G. Mansfield against the Claims of other creditors; but for the sole purpose of compelling payment and Satisfaction of the Judgement so as aforesaid recovered by your Orators against the said Defendant

And your Orators further Shew to your Honor that on or about the thirteenth day of February in the year of Our Lord Eighteen Hundred and fifty Eight the said defendant Augustus G. Mansfield under his hand and Seal made an assignment to the above named defendant Anson Spury of his property and Effects, for the benefit of the Creditors of the said Augustus G. Mansfield

Your Orators further Shew that they are advised and so charge that the said assignment so made by the said Defendant Augustus G. Mansfield is void and of no force and Effect for the reason that it provides and declares that said assignment is in trust for the uses intents and purposes that the said Anson Spury "Shall take possession of the said property assigned and Shall with

all convenient diligence sell and dispose of the same at public or private sale as he may deem most beneficial to the intrests of the Creditors of the said Augustus G. Mansfield shall due with all reasonable diligence collect get in recover all & singular the said debts dues, bills, bonds. notes, accounts, & balances of account thereby giving the assignee authority to delay your Orators in the collection of their Debt. And that said assignment contains Schedule of debts and liabilities of said Augustus G. Mansfield preferring creditors over others and providing for the payment of some before others are to be paid any thing - by which assignment and transfer your Orators were Entirely delayed in the collection of their debts and in Consequence thereof your Orators are damaged and defrauded of their rights in the premises

And your Orators well he shed that the said Defendant Augustus G. Mansfield would have paid to your Orators the amount due them on said Judgment or would have applied for that purpose any property money debts or other Equitable interests or things in action belonging to him or in which he is in any way intrested as in Equity

and good conscience he ought to have done

But now so it is may it please your Honor that the said Defendants combining and confederating together and with divers other persons 3 to your orators unknown but whose names when discovered they pray may be inserted herein with proper and apt words to charge them: and contriving how to injure and defraud your Orators in the premises, neglect or refuse to pay the Amount so due to your Orators on their said Judgement or to apply for that purpose any property money debts or other Equitable interests or things in action belonging to the said Defendant Augustus S. Mansfield and for reason whereof the said defendant set up a variety of unfounded pretences. All which actings and doings neglects and pretences are contrary to Equity and good conscience and tend to the manifest wrong and injury of your Orators in the premises. In tender Consideration thereof and forasmuch as your Orators are remediless in the premises at and by the strict and strict rules of the Common Law, and cannot have adequate relief save in a Court of Equity where matters of this and a similar nature are properly cognizable and relievable. To the end therefore that the said Defendants may if they can Show

why your Orators should not have the
relief hereby prayed and may according
to the best and utmost of their Severall
and respective Knowledge remembrance
information and belief full true direct
and perfect answer make without oath
to all and singular the matters and things
hereinbefore Stated and charged and
particularly to Such of the Severall interroga=
=tories hereinafter numbered and set forth
as by the note hereunder written are
required to answer: that is to say the said
Defendants may fully set forth and discover
according to the best of their Knowledge, rem=
=embrance information and belief the nature
and situation amount and value of all
the property interest and Effects of the said
defendant Augustus G. Mansfield
including all things in action whatsoever
nature or Kind with all the particulars
relating thereto and that they may answer
and State whether at the time of
filing this your Orators Bill of Complaint
he the Said Defendant Augustus G.
Mansfield had not debts due to him to
a considerable amount and if so that
they may State particularly the amount
of Such debts respectively and from whom
the Same are due and what Security is
held therefor; and also that they may
State which and what amount of Said

debts are good and collectable and what amount bad or doubtful and whether at the time of filing this your Orators Bill of Complaint he had not some property real or personal, in law or Equity belonging to him or held in trust for him or in which he had some beneficial interest of some kind or description and if so that they may state and set forth a full true and particular account thereof and the nature and value of his interest therein and that they may also state whether he has not money of some kind in his possession or under his control or deposited to his credit or for his use or in some way or manner held for his use and benefit and if so that they may state and set forth particularly the amount thereof and how and by whom the same is held; and that they may also State whether he has any other Equitable interest or thing in action or other means belonging to him or in which he is in any way interested whereby he could pay any part of the amount so as aforesaid due to your Orator upon their said Judgement against the Defendant Augustus G. Mansfield

And if the said Defendant last named has made any Sale assignment or transfer of his property and Effects or any part thereof, that then the said Defendants

may State and set forth each for himself jointly or separately generally, but not in items what property or Effects have been so sold assigned or transferred and the value thereof and particularly when and to whom and for what purpose and upon what terms and conditions such sale assignment or transfer was made and what has been done under such sale assignment or transfer and what has been done with the property or Effects so sold assigned or transferred and the avails thereof. And that the said Defendant may Specially State or set forth each for himself jointly or separately what were the terms and conditions of said assignment, giving a copy thereof with all the Schedules thereto attached - fully and completely and that the said defendants or some of them may be decreed to pay your Orator the amount so as aforesaid due to them for principal and interest on their said Judgement together with your Orators costs and charges in this behalf sustained; and may be decreed to apply for that purpose any money or property real or personal in law or Equity debts choses in action or Equitable interests belonging to said Defendant Augustus L. Mansfield or held in trust for him or in which he is in any way

or manner beneficially interested and that the said Defendant may be enjoined and restrained from selling assigning transferring delivering negotiating discharging receiving collecting incumbering or in any manner or way disposing of or intermeddling with any debts or demands due to them or any bills bonds notes drafts Checks book accounts mortgages Judgements or other debts due to him whether in his possession or held by some other person in Trust for him or to his use or benefit and also from selling assigning, transferring or in any manner incumbering or disposing of or intermeddling with any money in case bank bills drafts or checks belonging to him whether in his possession or held by any person in Trust for his use or benefit or any Stock or interest in any private or incorporated Company or any property real or personal things in action or chattels real held by him or by any other person for him or in which he has any interest whatever except when such trust has been created by or the fund so held in trust has proceeded from some person other than the said Defendant Augustus G. Mansfield.

And that the said Defendant last named may also be in like manner prohibited from making any assignment

of his property and from confessing any Judgment for the purpose of giving Prefe=rence to any other creditor over your Orators and from doing any other act to Enable other creditors to obtain his Prop=erty. And that a receiver may be appointed according to the course of practice in this Court and with the usual powers of receivers in like cases of all the property Equitable interests things in action and Effects of the said Defendant Augustus D. Mansfield And that your Orators may have such further or such other relief in the premises as the nature of this case shall require and as shall be agreeable to Equity and good Conscience

May it please your Honor to grant unto your Orators the People's Writ of Injunction issuing out of and under the Seal of this Honorable Court to be directed to the said Defendants Augustus D. Mansfield and Anson Spony and to their Counsellors Attorneys, Solicitors, Trustees and Agents thereof and thereby commanding and Strictly enjoining the said Defendants and the persons before mentioned, in manner aforesaid.

And may it please your Honor to grant unto your Orators the People's writ of Summons issuing out of and under the Seal of this Honorable Court to be

directed to the said Defendants, Augustus S. Mansfield and Anson Sperry thereon and thereby commanding them and each of them on a certain day and under a certain penalty to be therein inserted that they personally be and appear before the Judge of said Court at the Court Room in said County then and there to answer all and singular the premises and to stand to and abide by and perform such order and decree therein as to your Honor shall seem agreeable to Equity and good conscience. And your Orator will ever pray &c.

William H. Sackett.
Edward Lynes
by E. S. Smith
Atty. in fact

E. S. Smith
Solicitor

State of Illinois }
Cook County } ss. On this thirteenth day of February one thousand eight hundred and fifty one personally came before me Thomas Morrisey who being duly sworn saith that he is the agent for the Complainant and that they reside in the City of New York that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters and things therein stated upon information

and belief and as to those matters he believes it to be true.

Subscribed & Sworn to before me this 13th day of Feby A.D. 1861

Thomas Morrisey

Seal Philip A Boyne
Notary Public

Endorsed filed Feby 14. 1861
C. A. Rupell clerk

And at same time was filed in said Office a Bond for costs which is in words and figures as follows to wit:

William H. Sackett
Edward Sykes
of
Wayne Co. G. Mansfield
Anson Stacy.

} Circuit Court of McHenry County

I do hereby enter myself as Security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this Court in pursuance of the Laws of this State

Dated this 13th. E. S. Smith.
day of February
A.D. 1861

(Endorsed) filed February 14. 1861
C. A. Rupell clerk

State of Illinois } ss. I Charles H.
McHenry County } Rysdel Clerk of the
Circuit Court in and for said County in the
State aforesaid do hereby certify that
the Summons issued, returned and
filed in and pertaining to this cause
is lost and can not by the most
diligent search be found.

In Witness whereof I hereto set
my hand and seal of said
Court at Woodstock this the
22d day of March 1861
C. H. Rysdel Clk.

And then on the 18th. day of March in
the year last aforesaid it being one of
the days of the March Term of said
Court for the year of Our Lord one thous-
and Eight Hundred and fifty one comes
Henry one of the Defendants and files the
first and Second answer of the defen-
dants herein which is literally as
follows to wit:

State of Illinois } In the McHenry
McHenry County } County Circuit Court
of the March Term A.D. 1861

Augustus G. Mumfield &
Orson Sperry
ads.
William A. Sackett &
Edward Lynes.

Joint. Second answer of the defendants in said Cause

The said defendants Each for themselves, saving & reserving all and all manner of benefit of Exceptions to the many Errors and insufficiencies of said Bill answering unto such portions of said Bill as they are advised it is material and necessary for them to answer unto say that they do not deny but admit that the said Complainants did obtain a Judgment in the Circuit Court of the United States for the Northern District of Illinois as alleged in said Complainants Bill of Complaint and do not deny but admit that an Execution was issued thereon as in said bill alleged but the said Respondent Mumfield answering for himself directly denies that the Marshall of the Northern District of Illinois or any person for him ever made any demand upon the Execution so Charged in said complainants bill or having been issued on said Judgment of this respondent and Expressly denies that he ever refused to turn out property

to satisfy the same And the said respondent Mansfield also admits that the said Judgement is still wholly unpaid and unsatisfied And further that he was on the first day of January A.D. 1858. in Mercantile business at Mar= =engo Engaged in selling Hardware & in manufacturing tin and Iron - that finding that he was unable to pay up his creditors in full of all their demands and that there was at that time execution in the hands of the Sheriff of McHenry County which were a lien upon this Respondent Mansfield's Stock of goods & upon which the Sheriff aforesaid was about to levy and sell, and this respondent Mansfield having no money to pay up said Executions and Knowing that if said Stock was sold on said Execution the same would be almost wholly sacrificed thereby injuring the other creditors of this Respondent, this Respondent Mansfield assigned all of his property real & personal to the respondent Anson Sperry in Trust for the benefit of his creditors a copy of which said assignment is hereunto annexed and marked Exhibit "A"

And the said Respondent Sperry answering says that he did receive & take into his possession all the property & Effects named & mentioned in said assignment

described in & conveyed by said assignment
& has proceeded to carry out the purposes
of the Trust as indicated in said as-
=signment.

And the said defendants deny all
& all manner of unlawful combination
& confederacy as charged against them
in said Bill & deny each and every
allegation in said Bill contained
not herein specifically admitted

And the said Respondents pray that
their answer may be taken as a demurrer
to said Complainants Bill.

(Endorsed) Filed March 18. 1861

C. H. Rupell Clk.

And on the same day the following
final order was made by said Court in
said Cause & ordered to be entered of Record
to wit:

114

William H. Sackett
Edward Lynd
&
Augustus D. Mansfield
Anson Spony.

} Bill in Chancery

And now come
the Complainants by E. J. Smith Esq of
Chicago their Solicitor, who enters his
motion before the Court that a Decree
be ordered to issue herein in favor of

the aforesaid Complainants upon the Bill and answer herein filed. And the Court being fully advised upon the said motion of the Complainants overrules & denies the same. To which said rulings of the Court as aforesaid the Complainants by their Counsel then and there excepted.

State of Illinois
McHenry County } ss. I Chas. H. Russell Clerk of the Circuit Court in and for said County in the State aforesaid do hereby certify that the above & foregoing is a true & complete copy of the Records of this Court in a cause wherein William A. Sackett & Edward Lyne are Complainants and Augustus G. Abensfield & Anson Spury defendants as appears by a thorough Examination thereof Except the Summons, which by most diligent Search can not be found

In Witness whereof I have hereunto set my hand and the Seal of said Court at Woodstock in said County this 23d day of March A.D. 1861

C. H. Russell Clk.

4-5 ad