

No. 14262

Supreme Court of Illinois

Sackett

vs.

Mansfield

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 206

14262

Sackett

Mansfield

1862

206

Re-hearing denied

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION,

APRIL TERM, A. D. 1862.

WILLIAM H. SACKETT, AND
EDWARD LYONS,
Plaintiffs in Error,

VS.

AUGUSTUS MANSFIELD, AND
ANSON SPERRY,
Defendants in Error.

Petition for Re-hearing.

E. A. Stone Counsel
E. D. Smith
Atty for Petitioners

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PETITION FOR
REHEARING BY PLAINTIFFS
IN ERROR.

*To the Honorable, the Judges of the Supreme Court of the State of
Illinois:*

This case was put upon the docket at the April term of this court for the year 1861. The writ was not served until after the first day of the term, but the counsel for the defendant, Mr. Sperry, agreed to join in error, if he could be able to prepare an argument. When the case was reached, there was no joinder in error, and there never has since been, and the counsel for the plaintiff in error so stated to the court.

Inasmuch as the printed argument filed, was prepared to reach other classes of cases than those already presented by the record in this case, the counsel for the plaintiffs in error desired to make, and intended to have made an oral argument, and supposed that as there had been no joinder in error, the case would go over to the

present term. It was, however, taken up and decided, and an opinion filed in vacation.

After a careful examination of that opinion, the counsel for the plaintiffs in error, believing that the premises from which the conclusion therein deduced, are untenable, respectfully asks a rehearing of the case, and submits the following as the reasons upon which this application is based :

The objectionable language in the assignment sought to be set aside, is as follows : " That the said assignee 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 interests of the creditors, &c."

In the opinion to which I have alluded, it is held that such a clause is unobjectionable, and I purpose first to examine the reasons upon which that reason is predicated.

I infer, from a careful reading of the opinion, that the leading proposition established by it is, that the validity of all assignments for the benefit of creditors, must be determined solely by the express language of our statute of frauds and perjuries ; and hence, after referring to that statute, the court say, " Malice, fraud, covin collusion or guile, are necessary elements to make up the intent or purpose to delay, hinder or defraud creditors, and they must be contemplated by both parties to the deed."

The statute of frauds and perjuries of this State is almost literally copied from the English statutes, and those statutes have ever been regarded as simply declaratory of the common law. Lord Mansfield, in the very celebrated case of *Cadogan vs. Kennett*, Cowp. 434, declares that " the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes. 13 Eliz. ch. 5, and 27 Eliz. ch. 4. The former of these statutes relates to *creditors* only ; the latter, to *purchasers*. These statutes cannot receive too liberal a construc-

tion, or be too much extended in suppression of fraud." In *Hamilton vs. Russel*, 1 Cranch. 316, Chief Justice Marshall, in speaking of an act of assembly of the State of Virginia, says: "The act of assembly which governs the case appears, as far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th of Elizabeth, and these acts are considered as only declaratory of the principles of the common law. *The decisions of the English judges therefore apply to this case.*" Again, in *Barney vs. Griffin*, 4 Sand. ch. 556, the vice chancellor declares "that all transfers and conveyances made to defraud creditors, whether of real or personal property, were void by the common law, and would be void at this day, without the aid of any statutes on the subject." At common law, any conveyance made with intent to hinder, delay or defraud creditors, is void as to them. And the same rule would exist in this State, in the absence of any statute upon the subject.

But it is also declared that "malice, fraud, covin collusion, or guile, are necessary elements in making up the intent or purpose to hinder or delay."

If it is meant by this portion of the opinion, that after the intent to hinder and delay creditors has once been established, malice, fraud, covin collusion, or guile, must also be shown as independent facts, then I respectfully submit that the doctrine is both novel and dangerous. And this precise point has been so clearly settled by the authorities, that it is only necessary to refer to but a few of them, in order to show the incorrectness of such a principle. In *Nicholson vs. Leavit*, 2 *Selden*, 517, Mr. Justice Gardner says: "It was argued that an intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment legal; 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." Although the statute declares that all conveyances had or made, &c., in malice, fraud, covin collusion, or guile, with the purpose or intent to hinder and delay

pation by the assignee in the intent with which the instrument is made, there could be no case in which an assignment could be set aside, for fraudulent provisions appearing upon its face, and the whole current of authority would be repudiated and overthrown; and a doctrine more novel in its character, or more dangerous in its consequences, could hardly be conceived.

In the opinion alluded to, this further language is held: "It is a true principle that a party must be understood as having intended that which is the necessary consequence of his acts but it by no means follows that a general assignment of property made especially for the benefit of creditors, and with the avowed purpose of giving the avails of it to them was made with malice, fraud, covin, collusion or guile, with the intent or purpose to delay, hinder or defraud them. *It is a question of fact; not a legal consequence from the acts done.*"

That the intent or purpose with which an assignment is made is a question of fact, may be admitted, but that such intent must be established and necessarily by any other or further proof than such as is afforded by the assignment itself is, I respectfully submit, not the law.

Thus in the leading case of *Cunningham vs. Freeborn* 11, *Wend.* 240. Mr. Justice Nelson, in construing the statute of the State of New York concerning fraudulent conveyances, which provides that in all cases arising under that act the question of fraudulent intent, shall be deemed a question of fact and not of law, concedes that an actual fraudulent intent must be found, either by the jury or by the tribunal which acts in its place, but 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 be set aside, a verdict found in opposition to such inference "*In Burdick vs. Post* 12, *Barb.* 183, Mr. Justice Barculo, in delivering the opinion of the court upon this precise point, holds the following language: "It is also charged that we re-establish the doctrine of constructive fraud, or fraud in law.

This allegation can only be made upon the supposition that the assigner did not, *in fact*, intend to delay or hinder his creditors; a supposition which is altogether unfounded. On the contrary we determine as a matter of fact, that the assigner did intend to hinder and delay his creditors. * * * We find it as a fact, the same as we find the *factum* of execution from proof of signing and sealing the deed. 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." Again, in *Dunham vs. Waterman* 17, New York R. 1. Mr. Justice Selden, in delivering the opinion of the court, after referring to the opinion of Justice Nelson in *Cunningham vs. Freeborn*, already cited, holds this language: "It follows from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that wherever an assignment contains provisions which are calculated *per se* to hinder, delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding if in opposition to the plain inference to be drawn from the face of the instrument. A party must in all cases be held to have intended that which is the necessary consequence of his acts." Again, in *Mackie vs. Cairns* 5, Cowen 573, Mr. Senator Colden, in delivering the majority opinion of the court for the correction of errors, and in passing upon the validity of an assignment and a judgment confessed as auxillary to it, says: "Mr. Sedgwick repeatedly states that his intentions were fair and honorable, and that neither the assignments nor judgments were intended by him to have what he esteemed an undue or fraudulent operation. To this no one will more readily assent than myself. But we cannot consider declarations of this nature from parties *interested* made in exculpation of their conduct. *We must interpret acts by their consequences; and must presume persons intended to produce the effects which naturally flow from their acts.*" In *Malcolm vs. Hodges* 8, Maryland 425, the court say, "We are to look to the character with which the law stamps the deed without reference to extrinsic facts as to motive. If the law imputes to the grantor a design in making the deed, no evidence of intention can change the presumption. If the law declares the deed to be void

it is no matter how the question of fraud in fact may stand." The same doctrine has been repeatedly recognized and enforced in this State. Thus in *Howell vs. Edgar* 2, Scam. 418, the court hold this language: "Fraud not apparent upon the face of the deed or contract arising from motives referable to the mind of the party evidenced by his situation, and the circumstances under which the agreement is made, is a question of fact for the jury. *But it becomes a question of law for the determination of the court when the intention and provisions expressed in the agreement depend for their validity upon their consonance or repugnance to the principles of law and equity.*" Again, in *Ramsdell vs. Sigerson* 2, Gilman 79, *Howell vs. Edgar* was cited and approved, and an assignment was declared upon the face of it to be fraudulent and void in law. In *Nesbitt et. al. vs. Digby* 13, Illinois 293, Mr. Justice Caton held the instrument under consideration fraudulent and void; declaring with reference to a particular feature in it: "No matter what may have been the real motives of the parties, this feature of the transaction is of itself sufficient to condemn it as a legal fraud." And again, in *Davis vs. Ransom* 18, Illinois 40, in referring to a chattel mortgage, the court says: "The law gives no sanction to such arrangements, and however well intended in fact will hold them void as against creditors as tending to encourage and sanction frauds, and to hinder creditors in the collection of their just demands."

In view of the authorities, in the determination of the validity of voluntary assignments, the law is not correctly stated in saying that the question of fraudulent intent is "a question of fact, and not a legal consequence from the acts done." The question of intent may, as we have seen, become purely a question of law. And whether such intent, be fair and legitimate, or fraudulent and corrupt, may depend entirely upon the language of the instrument itself. If creditors may be hindered, delayed or defrauded through the operation of any powers conferred upon the assignee by the assignor, then as a legal consequence is presumed and thus proved to be the intent with which the instrument was made.

These then, seem to be the leading propositions established by the opinion before us:

1. That the validity of all conveyances or transfers of property, so far as the rights of creditors are concerned, is to be tested and determined by the express language of the statute of fraud and perjuries of this State.

2. That it is not sufficient to invalidate an assignment for the benefit of creditors to show that it was made and executed with intent to hinder or delay creditors, but that malice, fraud, covin, collusion, or guile, must also be proved and established as independent facts.

3. That it must also appear, that the assignee participated in the fraudulent intent of the assignor.

4. That the fraudulent intent must be established as a fact, and cannot be shown as a legal consequence from the acts done.

I respectfully submit, that neither of these propositions can be supported either upon reason or from authority. That their adoption is a very serious innovation; overthrows all past authority, places the creditor entirely at the mercy of the debtor, and must lead to the most serious consequences if attempted practically to be carried into effect.

The importance of the questions thus decided, and the magnitude of the interests which are involved in them, are, it is respectfully submitted, sufficient reasons to induce a review of the opinion in this case.

Having thus far examined so much of the opinion in this case, as enunciates principles general in their character, I deem it proper to call attention to the special reasons given for holding the assignment under consideration, valid and unobjectionable.

And first, it is urged in the opinion before us, that the language of the assignment cannot be tortured into an authority to sell upon a credit. To this it may be answered that it is entirely unimportant whether it does or does not confer such an authority. The test of validity is not whether the instrument authorizes a sale

upon credit, but whether it contains any provisions, which in their operation, and if carried out, *might hinder or delay creditors*. An authority conferred upon an assignee to sell and dispose of the assigned effects upon credit is void *because such sale postpones the time of realizing from the trust estate, and therefore delays and hinders creditors*; and also for the further reason that in the exercise of his discretion as to whom credit should be given, the assignee might extend credit to insolvent parties from whom nothing would ever be realized.

The *hindrance, delay or defrauding of creditors*, are the ultimate tests upon the application of which the validity of assignments must be determined. A sale on credit is simply one of the *means* by which creditors may be hindered, delayed or defrauded, and wherever or whenever the same result follows from any provision in the assignment, it must be held invalid, as having been made with the *intent or purpose* to accomplish that result.

It would be absurd to insist that the law declared all assignments void when made with intent to hinder and delay creditors by means of a sale upon credit, and valid when made with intent to hinder or delay them in any other way.

The court further say: "Does the stipulation contain anything more or confer greater or other authority or a larger discretion than the law would imply without this language." And again, "The execution of all such trusts is under the control of a court of chancery which will compel the assignee to use proper and reasonable diligence in converting the property into money. Some delay of creditors is a necessary consequence of all such assignments, but that alone does not vitiate them." And finally it is said, "The true test of the validity of such deed is, that whenever the law would imply a discretion, such discretion may be given in the deed. Where a discretion is given in the deed which the law would not imply, the deed is fraudulent and void."

In answer to these suggestions, it is insisted by the plaintiffs in error:

1. That the exercise of such discretion as is vested in the assignee by the clause under consideration, is not under the control of a court of chancery.

2. That the clause in the assignment referred to, does confer greater and other authority, and a larger discretion, than the law would imply without this language.

3. That a delay of creditors is not a necessary consequence of an assignment for the benefit of creditors. And

1. The exercise of the discretionary power conferred by this assignment is not under the control of the courts.

The distinction taken by the plaintiffs in error is this: A discretion which the law would *imply* is within the control of the courts, but a discretionary power *expressly vested* in an assignee or trustee, is not. Upon this point, Mr. Justice *Selden*, in *Dunham vs. Waterman*, 17 N. Y., 19, holds this language: "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 expressly 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.*" In *Nicholson vs. Leavitt*, 2 Seld. 520, Mr. Justice Gardner remarks: "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 creditor of the benefits resulting from its exercise, by compelling the trustee to sacrifice the securities taken from the purchasers, in order to raise money for immediate distribution.* This is true of an assignment like the pres-

ent, where the assignees are clothed with 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.*" In *Burdick vs. Post*, 12 Barb. 173, Mr. Justice Barculo holds this language: "*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 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.*"

The difference between a discretion conferred by an assignor, as a power accompanying the transfer of the title, and that discretion which results *ex necessitate* from the duty which the assignee has to perform, is thus clearly and distinctly pointed out by Mr. Justice Selden, in *Jussup vs. Hulse*, 21 New York Reports, 168: "The assignor, being the absolute owner of the property, and in no-manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases. *If he annex an improper condition, the court must pronounce the assignment in itself void. It cannot hold the the transfer good, and disregard the condition, because that would be to take the property from the assignor against his will, he having consented to part with his title only upon certain conditions. The transfer and the condition must stand and fall together. If, therefore, the courts uphold the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made. It cannot substitute its own discretion for that with which the assignor has in express terms invested the assignee. The discretion of the latter in such case would be absolute, and beyond the control of the court, if honestly exercised. Any bad faith on the part of the assignee would of course justify judicial interposition, but nothing short of it.*"

The same rule has been repeatedly applied in this country to every variety of cases. In *Hawley vs. James*, 5 Paige, 485, the court, in construing a will, in which the amount of commissions to be allowed to one of the trustees, for collecting the rents and profits of the estate, was submitted to the discretion of the other trustees, say :

“ 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, or control its exercise.*” In *Cochran vs. Paris*, 11 Gratt. 356, the rule is thus stated : “ 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.” As a still further exposition of the rule upon this subject, as enforced by the American courts, I would also cite :

Morton vs. Southgate, 28 Maine, 41.

Littlefield vs. Cole, 33 Maine, 552.

Leavitt vs. Burne, 21 Connecticut, 1.

Bunner vs. Storm, 1 Sand. ch. 357.

Arnold vs. Gilbert, 3 Sand. ch. 556.

4 *ib.* 623.

Gochenauer vs. Fraalich, 8 Watts, 19.

Cloud vs. Martin, 1 Dev. & Batt. 287.

Cowles vs. Brown, 4 Cal. 477.

The same principle prevails in England. Thus in *French vs. Davidson*, 3 Madd. 396, the court held that a direction in a will that the executors shall pay an annuity, *unless circumstances should render it unnecessary, impracticable and inexpedient, means, unless in the opinion of the executors it shall become so; and the court has no control over such discretion, unless they act mala fide.*

Again, in *Collins vs. Vinning*, C. P. C. 472, where a testator had reposed discretion in his trustees, as to the application of rents

and profits in the maintenance, &c., of his widow and children, the court refused to interfere.

In *Walker vs. Walker*, 5 Madd. 424, it was held that a court of equity would not interfere with, nor control, the exercise of discretion vested in a trustee, upon matter of judgment and opinion.

In *Wain vs. The Earl of Egmont*, 3 Myl. & K. 448, the master of the rolls says: "If the trustees were authorized by this deed to refuse debentures, at their discretion, to any lawful creditors, *it is plain that this court could never take upon itself the exercise of such a discretion, nor grant power to the master to ascertain the parties entitled to the benefit of this deed.*" See also

Patten vs. Chapman, Ambl. 98.

Pink vs. DeThusey, 2 Mad. 157—162.

Clark vs. Parker, 19 Ves. 11.

DeManneville vs. Crompton, 1 Ves & B. 154.

Douglas vs. Andrews, 8 Pur. 949.

In the light of these authorities, it would seem indisputable, that wherever discretionary powers are expressly vested, by the terms of the instrument under which he acts, in an assignee, or trustee, the courts cannot control its exercise; and this leads to the consideration of point

II.

That the clause in the assignment referred to does confer other and greater authority, and a larger discretion, than the law would confer without this language.

In the discussion of this proposition, it is essential to ascertain, in the first instance, the extent of the legal authority of the assignee, the duties which he owes to the creditors for whose interests

he is presumed to act, the obligations under which he rests to these creditors, for the performance of those duties, and the extent of the discretionary powers with which, in the absence of any express provisions upon that subject, the law clothes him.

And herein it is important to observe, that assignments should be in fact, what their names import, *for the benefit of creditors.*

After an assignment has been made, the entire legal interest of the debtors in the property transferred by it, *ceases.* The legal estate is vested in the assignees, with certain duties annexed; and which duties he must exercise for the *benefit of the creditors.* The assignment then being made for the benefit of the creditors of the assignors, and they having the equitable title to the property, to them should be submitted the determination of the *time and the manner* in which the assigned effects should be sold and disposed of. "When a debtor 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 interest 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." (*Nicholson vs. Leavitt*, 6 Seld. 595.) And the precise doctrine for which, I contend, is thus stated in *Dunham vs. Waterman*, 17 N. Y. : "The true principle applicable to all such cases is, that the debtor who makes a voluntary assignment for the benefit of his creditors, may direct in general terms a sale of the property, and collection of the duties assigned, and may also direct upon what debt, and in what order the proceeds shall be applied; *but beyond this, can prescribe no conditions whatever as to the management or disposition of the assigned property.* In all other respects the assignee must be left to act under the ordinary rules and principles which apply to trustees in analogous cases." And so again in *Griffin vs. Barney*, 2 Coms. 371, Mr. Justice Bronson holds this language: "An insolvent debtor cannot, under cover of providing for creditors, place the property beyond their reach, in the hands of trustees of their own se-

lection, 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." And so in *Murphy vs. Bell*, 8 How. Pr. Rep. 469, the court say: "It is the right of the creditor to have his debtor's property immediately applied to the payment of his debts, without the question of time left to any one to decide."

These authorities settle beyond all question the point insisted upon, namely, that the creditors have the legal right of determining both the time and the manner in which the assigned property should be sold and disposed of, and that the authority of the assignee in these channels is subordinate to the will of the creditors. The language of the assignment under discussion does, it is respectfully submitted, confer upon the assignee a greater authority than that given by the law, and at the same time deprives the creditors of rights which the law would otherwise give them. The authority is to sell and dispose of the assigned property with all convenient diligence, at public or private sale, as *to him shall seem most beneficial*. Thus not only the time, but also the manner of the sale, is submitted to the discretion of the assignee, a discretion expressly conferred, and which, as we have seen, is beyond the control of the courts. In the absence of this power, the creditors would have the right to determine whether the property should be sold at public or at private sale, and would have the ability, through the interposition of a court of chancery, to compel the assignee to adopt their wishes, and carry them into effect.

Of this right, so clearly defined, and so important in its consequences, they are absolutely deprived. The assignee shall sell at public or private sale, as HE may deem best, is the language of the assignment. The direction is imperative, and upon him alone does the instrument devolve the duty of exercising discretion and judgment as to which course shall be adopted. But it is said that

this is no larger discretion than the law itself confers. To this it may be answered, that the law gives no discretion whatever to the assignee, which it will not at all times control and subordinate to the rights of the creditors. The discretion given by the instrument is to sell as the *assignee* may deem best. That given by the law is, to sell as the *creditors* may deem best. The one is a discretion permitted and justified by implication, when no complaint is made by the creditors, remaining at all times subject to their control. The other is a discretion absolute and uncontrollable. The test of the correctness of this distinction may be readily seen from this suggestion. If, acting under an assignment which did not contain the words "as he may deem most beneficial," &c., the assignee should, against the will of the creditors, sell and dispose of the assigned effects at *retail, and at private sale*, at a loss to the creditors, he would render himself personally liable, even if it were a mere error or mistake in judgment, and for the express reason that he had exceeded his authority as trustee. But in the assignment before us he could not be so held liable, if the assignment were held valid, for the apparent reason that he had simply done precisely what he was not only authorized, but expressly *directed* to do, to wit, to exercise *his* judgment.

For these reasons, the whole current of modern authority has set strongly and deservedly against all assignments in which discretionary powers are vested in the assignee.

Thus in *Dunham vs. Waterman*, 17 N. Y. 16, the court, after discussing the proper offices of an assignment, say: "I make these suggestions, not for the purpose of throwing doubts upon the validity of assignments, when properly made, but to show that they should not be permitted to substitute the will of the debtor, or of his assignees, OR EVEN THEIR DISCRETION, for the judgment of the courts, as to the time or manner of appropriating the property of such debtor to the payment of his debts."

Again, in *Murphy vs. Bell*, 8 How. Pr. R. 469, where the assignment directed the assignee, within such convenient time as to him *should seem meet*, &c., to sell and dispose of the assigned ef-

fects, the court say: "*Here is a discretion* conferred upon the assignees inconsistent with the rights of creditors." In *Griffin vs. Marquardt*, 21 New York, 123, the court say: "If this direction operated to vest *any* discretionary power in the assignee not legally incident to his trust, nor to be, on the application of creditors, at all times controlled by the court, it would be our duty to pronounce the assignment fraudulent." And in *Jussup vs. Hulse*, 21 New York, 168, Mr. Justice Selden says: "If the clause in question purported in terms to invest the assignee with *any* discretion, as coming from the assignee himself, it would be fatal to the assignment; as if it had authorized the assignee to dispose of the property in such time and in such manner as in his judgment would be most conducive to the interests of the creditors, or as he should deem expedient, and best calculated to promote their interests." In *Lyons vs. Platner*, 11 N. Y. Leg. Obs. 87, the assignment provided that the assignee should take possession of the assigned 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 upon such terms, *as he should deem best* for the parties concerned," &c. The assignment was held void. In *Woodburn vs. Mosher*, 6 Barb. 257, an assignment which authorized the assignees *within convenient time as to them should seem meet*, by public or private sale to convert the property assigned into money, was held void, the court saying: "If the clause in question * * * may operate to hinder and delay creditors, as it seems plainly to me that it may, then it renders the assignment void." This case has been repeatedly approved by the Court of Appeals in New York.

The same doctrine has been expressly recognized in this State, in *Bowen vs. Parkhurst*, 24 Ills. 257. The precise reason upon which the court, in *Nicholson vs. Leavitt*, 2 Seld. 517, held the assignment void, was that the power to sell upon a credit was submitted to the discretion of the assignee. Mr. Justice Gardner says: "These insolvent debtors have authorized their trustees *according 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.*"

With reference to the clause in the assignment under consideration, it is to be remarked that it is legitimately open to a much broader construction than the mere power of determining whether the assigned effects shall be sold at public or private sale. The language is that he shall, with all *convenient* diligence, sell at public or private sale, as he may deem most beneficial. The direction is imperative to sell either at public or private sale, but the manner of the sale is left entirely to the judgment of the assignee.

The effect is, as I contend, precisely the same as if the assignee had been authorized to sell *as* he deemed best, omitting the words, at public or private sale, and such a power would be as broad as language could confer, and would invalidate the instrument under the authorities which I have already cited. Under an authority to sell *as* the assignee might deem best, he would clearly have as much right to sell upon credit as for cash. This would be the natural construction of the language used, and the authorities are full upon the point, that no liberality of construction is to be allowed in favor of voluntary assignments with preferences.

But at all events, the assignee has the uncontrollable power of determining whether the sale shall be public or private — at auction or at retail — and it is not at all difficult to see how the creditors might not only be greatly hindered and delayed by the exercise of this power, but also subjected to heavy losses.

Should the assigned property consist of a large stock of merchandise, the assignee would have the right to insist that sales be made privately, and at retail, and thus indefinitely delay and postpone the realization of the proceeds from the assigned effects. He could also insist against the wish of the creditors upon a public sale at auction, and thus greatly reduce the *amount* of the proceeds. As we have already seen, to the creditors rightfully belongs the power of determining both the *time* of sales and the manner in which sales should be made; and upon this point the language of Mr. Justice *Barculo* in *Burdick vs. Post*, is most apposite. He says: "It is true it may be said that the creditors cannot be injured by a delay in such a case. *The answer to this is, that the creditor is to*

be his own judge of what is best for himself. The law gives him the right to determine whether he will grant further indulgence. If he chooses to enforce his demand at an unfavorable season, when the whole amount cannot be realized, it is his own folly. He has the right to do as he pleases. Besides, we cannot certainly say that he will be benefitted by waiting, and receiving a larger dividend at a future time. He may be plunged into bankruptcy himself by the very postponement devised for his benefit. It is no uncommon occurrence for men to be ruined by the benefits forced upon them by others."

The effect of the clause in question is to relieve the assignee from the liabilities which by law he would be otherwise subjected to. In *Litchfield vs. White*, 3 Sand. Superior Court Reports, the court say: "Every provision in an assignment which exempts the assignee from any liability that he would by law be subject to as assignee, is of itself a badge of fraud." This case was carried to the Court of Appeals, and affirmed (3 Selden, 442), and in pronouncing the opinion of the court, Mr. Chief Justice Ruggles holds this language: "The debtor cannot be permitted, by creating a trust for his creditors, to place his property where it cannot be reached by ordinary legal remedy, and at the same time exempt the trustee from his proper responsibility to his creditors."

As we have already seen, should the assignee, in the absence of the discretionary power expressly vested in him by the assignment in this case, sell the property either at public or private sale, against the wish of the creditors, he would be compelled to respond to them for any losses which might occur, should his judgment prove to have been mistaken. From this legal liability he is, under this assignment, exempted. Thus, in *Hopkins vs. Ray et al.*, 1 Met. 79, the assignees were authorized to sell and dispose of the goods in such manner as they should think most advisable. Pursuant to this authority, they had sold the goods to various individuals on credit, and the court held that they were not personally responsible either for the goods or the proceeds.

Again, in *Neally vs. Ambrose*, 2 Pick. 185, where the assign-

ment 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.

I I I .

It is not the necessary effect of every assignment to hinder or delay creditors.

This proposition has been so conclusively met and overthrown by Mr. Justice Barculo, in *Burdick vs. Post*, that I submit his views upon that branch of the case *in extenso*. 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 passus*, is to hinder and delay creditors. Now that such delay may *often be* the effect, we shall not undertake to controvert, but that it is *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 the instructions to convert the same into money, and apply it in payment of debts, is there anything in such an instrument that imposes or implies unnecessary 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 assignee *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 apparent reason why an assignee cannot 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 any creditor.

* * * * *

It is quite a different matter when the conveyance itself *provides* for a delay. And this we apprehend to be the true distinction between lawful and unlawful assignments, in this respect. The former, although they may *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."

Accepting, then, the test which, in the opinion before us, and upon the application of which, the validity of assignments, with preferences, is to be determined, it is respectfully submitted that the assignment in this case must be held invalid.

"Where (it is said) a discretion is given in the deed which the law would not imply, the deed is fraudulent and void."

We insist, that both from authority and upon principle, any discretion as to the time or the manner of the sale of the assigned property, which by the terms of the deed is expressly vested in the assignee, is a discretion larger than the law will in any case imply. It is a discretionary power, which deprives the creditors of their rights, to control and determine the time and manner of sale, and is beyond the control of the courts; while the law would sanction the exercise of no discretion against the wishes of creditors, and would imply no discretionary powers which it could not itself at all times, upon the application of creditors, control and direct.

E. B. Smith
att'y for Petitioners

W. H. Sackell
Edward Lynes
per E. B. Smith
att'y

E. A. Storrs
Counsel

Chicago April 10, 1862

Supreme Court of Illinois
Third Grand Division

William H Sackett and
Edward Lynes

vs
Augustus Mansfield &
Anson Sperry

To Anson Sperry Esq
Deft atty, Mankgo Ill.

Take notice that on the 22^d day of
April inst. I shall apply to the Supreme
Court of Illinois at Ottawa for a rehearing
of the above entitled cause

Yours &c,

E S Smith
Compt^y Solr.

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Service of the written notice was made on the
defendants Spry & Mansfield April 11 1862

Filed April 22/62

L. S. Lane

clerk

Amos Spry

def't atty

Supreme Court of the State of Illinois
Third Grand Division

Augustus Mansfield &
Anson Spruy
Defendants in Error

ad,
William H Sackett &
Edward Symms
Plaintiffs in Error

April Term A.D. 1861

And hereupon afterwards
took; on the 17th day of April (A.D. 1861) in the year of Our
Lord one thousand Eight Hundred & Sixty one the said
Augustus Mansfield and Anson Spruy by their attorney
freely come here into Court and say that there is no error
either in the record and proceedings aforesaid nor in the
giving the judgment aforesaid and they pray that the said
Supreme Court now here may proceed to examine as
well the record and proceedings aforesaid as the matters
aforesaid above assigned for error and that the judgment
aforesaid in form aforesaid given may be in all things
affirmed &c.

Anson Spruy
Atty for Defs. in error

Augustus G. Mansfield
 of Common Pleas
 Defts. in Error

vs

William H Sackett &
 Edward Jones
 Plffs. in Error

Joinder in Error

Filed April 22 1862

L. Delancey
 Clerk.

The Clerk of Supreme Court
 will please file this joinder
 as of April 17th A.D. 1861 as

E. D. Smith
 Atty for Plffs in Error
 Common Pleas
 Atty for Defts. in Error