

No. 13003

Supreme Court of Illinois

Bowen

vs.

Parkhurst

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 86.

Buven

vs

Parkhurst

Buven

Parkhurst

2004

STATE OF ILLINOIS.

Supreme Court, Third Division.

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H. C. BOWEN et al,

Complainants in Error,

vs.

A. R. PARKHURST et al,

Defendants in Error.

ARGUMENT FOR COMPLAINANTS.

Filed April 30, 1860

L. Leland

Filed April 30 - 1860

SMITH & DEWEY,

For Complainants.

L. Leland

W. C. Coon

COON & ROGERS,

For Defendants.

STATE OF ILLINOIS,
Mc HENRY COUNTY CIRCUIT COURT, } ss.

HENRY C. BOWEN, THEODORE McNAMEE,
SAMUEL P. HOLMES, HENRY S. STONE,
ANTHONY GILKISON, DEVILLO E. WHITE,
Complainants in Error,

VS.

ASAHEL R. PARKAURST, PERRY F. PARK-
HURST, HENRY O. ROGERS, FRANKLIN
SAFFORD,

Defendants in Error.

IN CHANCERY.

DECREE AT DECEM-
BER TERM, 1859.

April 9th, 1858, the complainants filed their bill, praying discovery, and asking a decree setting aside an assignment made by the defendants, A. R. and P. F. Parkhurst, who were merchants residing in Marengo.

The bill sets up the recovery of a judgment by Bowen, McNamee & Co. against the defendants, Parkhursts, and that execution had been returned unsatisfied, upon a personal demand of defendants, within the ninety days from the date of the writ.

The bill also sets up the recovery of a judgment by White against same defendants—the issuing of an execution and return unsatisfied, after the expiration of ninety days from its date.

The bill also sets up that the defendants, A. R. and P. F. Parkhursts, had made a transfer by assignment, of a stock of merchandise to the defendant Rogers, for the benefit of creditors, by which assignment the said Rogers had the right and authority, by express terms, to sell and dispose of the assigned property upon a credit.

The bill charged that the assignment was void, in law, as to creditors, for the reason that it authorized the assignee to sell and dispose of the property upon a credit, as in his judgment might appear best.

The bill also charged that the complainants, Bowen, McNamee & Co., had the right to join with White in the bill, although the return day of the execution had not expired.

DEFENDANTS ANSWER.

1st. That the defendants claimed that the assignment was not void for the reason that it authorized a sale of the property upon a credit.

2nd. That a creditor's bill could not be sustained without a *NULLA BONA* return upon the execution after the expiration of ninety days.

TWO POINTS PRESENT THE ISSUE.

1st. Can a judgment creditor maintain his bill to reach equitable assets upon a certificate of the Sheriff that a personal demand had been made of the defendants on an execution returned *NULLA BONA*, before the expiration of the ninety days from the date of the writ?

2nd. Is the assignment valid when the assignee has the authority, by express terms of the instrument, to sell the assigned property upon a credit?

The two questions involved in this case are of considerable importance, and have more or less occupied the attention of the Courts in several States. Different opinions of the most learned in the law, have been pronounced in the several States, directly and indirectly upon the same questions, and by some are considered open questions.

With permission of the Court we will give our views of the law authorizing a judgment creditor to file his bill to discover property of his debtor.

Section 36 of the Chancery Code, provides that "Whenever an execution shall have been issued against the property of the defendant, on a judgment at law or in equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution, may file a bill in Chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant."

The return unsatisfied referred to in this Section, has reference to a *RETURN IN FACT*, without regard to the time such return must be made. The Sheriff, in making his return *NULLA BONA*, acts under a legal responsibility, and is liable to an action for a false return. His return becomes a matter of record, and is conclusive, as between the parties to the judgment, and the officer, except in an action for a false return. The statute requires that the execution shall have been returned unsatisfied in fact. The object of the statute clearly is, that before a bill can be filed there must be recorded evidence of the defendant's inability to pay the judgment.

We admit there are to be found several decisions, where it has been held that an execution returned before the return day, will not give the creditor the right to file his bill to subject equitable assets to the payment of the debt.

It will be found on examination that in all such cases the execution was returnable at the next term of Court, a common law return, and that a *NULLA BONA* return was required, which, at common law, must be a return to Court at next term, and no return before that time could be legally made by the Sheriff.

The statute in this case does not require any such return. In fact, there is no such thing as a common law return of execution under our statute.

The return is made in ninety days, and may be sooner than the term, or after a term has intervened. The statute requires a return unsatisfied in whole or in part, which cannot mean anything more than an effort on the part of the Sheriff to make the money, and a failure to do so, whether in one day or ninety days, it matters not. It shows *PRIMA FACIE* that he had exhausted his legal remedy, and the Court has jurisdiction. It is sufficient to entitle the party to file his bill and obtain a decree, unless the defendant shows the complainant *KNEW THE DEFENDANT HAD PROPERTY* out of which he might have made his debt by execution.

In New York, under the code, the execution was to be issued returnable in sixty days, and under that statute the Courts held that it was not necessary that an execution should remain in the hands of the officer sixty days. The return could not be sooner *COMPELLED*, but the officer may, at his risk, return it sooner if he is prepared to say there is no property.

Morange vs. Eedwards, 1 E. D. Smith, R. 415.

Supplemental proceedings under the code, the Courts say, is regarded as a substitute for the creditor's bill under our former system. Proceedings under this section may be taken as soon as the execution is returned, whether before or after the expiration of sixty days from the issuing the same. *Messenger vs. Fields*, 1, Code Rep., 106; *Simpkins vs. Paige*, 1, C. R., 107; *Eagle vs. Borrnea*, 2 Law of. 679, 3, Code, 205; *Livingston vs. Cleveland*, 5 Hews T. R. 396; *Sackett vs. Newton*, 10 Howard, 560.

We consider the ruling of the New York Courts upon their statute, expressly upon the point of time when the execution may be returned, pretty good authority in this case. It is true the statute requires in such cases that the creditor should make an affidavit that a personal demand had been made, in addition to a return of the Sheriff, before a warrant could issue. In the case under consideration, the Sheriff returns that he made a personal demand of the defendants for property, and then returned the writ unsatisfied. This being the record proof, can the defendant take the advantage of the return, when it was made upon a personal demand and refusal? It seems to us that such is not the rule of law. This shows that the defendant cannot impeach the return, should he have property to satisfy after he had refused to turn out property. But the question here is whether such return is *PRIMA FACIE* proof, sufficient to maintain a creditor's bill in the absence of any proof to impeach the return.

This view of the law is sustained by Section 37 of the same chapter of the statute, which provides, that the Court shall have the power to compel such discovery, and to prevent such transfer, &c., and to decree satisfaction of the judgment out of any *PERSONAL PROPERTY*, money or things in action belonging to the defendant, whether the same were originally liable to be taken on execution or not. It is clear from the provisions of this section,

that it does not matter whether the defendant has or has not property in fact, liable to sale on execution in case such a return is made, as there is an express provision subjecting any and all property that may be discovered, to the satisfaction of the judgment.

In several adjudicated cases in this State, the Court held that a creditor's bill was properly filed on a return of execution unsatisfied, without any note or comment as to the time when such return should be had.

It must be admitted that there is no common law return in this State, therefore the statute governs, and that is strictly complied with in this case. In fact, more than the statute requires has been done, as the Sheriff states that he made a personal demand of the defendants for property, and then returned the writ unsatisfied. The presumption is that the defendants had no property, or, if they had, they refused to discover it. The record presents to the Court that the complainants, Bowen, McNamee & Co., had exhausted their rights at law, and were properly in Court asking relief. We submit this point of the case, and refer to the following authorities:

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|---------------------|-------------------------|------|
| 3 McLean's Reports, | How vs. Cobb, | 270. |
| 3 Scammon | " Ballentine vs. Beal, | 206. |
| 4 Gilman | " Manchester vs. McKee, | 515. |
| 3 Gilman | " Miller vs. Davidson, | 522. |
| 13 Ills. | " Alexander vs. Tames, | 224. |
| 2 Paige | " Stoors vs. Kelsey, | 418. |

We come now to consider the second point in the case, and give that part of the assignment which we hold renders the instrument void.

The assignment of Parkhurst to Rogers, after directing the assignee to take possession of the assigned property, provides that the assignee "shall sell and dispose of the same, either at public or private sale to such person or persons, for such prices, and on such terms and considerations, and either for cash or on a credit, as in his judgment may appear best, and most for the interest of the parties concerned, and convert the same into money.

Scates Edition of R. S., 541, Section 2.

"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."

In applying the tests and well settled rules of law to the several CONSEQUENCES involved in such a power, to a trustee, it will be found that such trusts are absolutely void. By this statute all conveyances are void which possess either of the prohibitions ; that is, if made in MALICE, or FRAUD, or COVIN, or COLLUSION, or GUILT.

Trusts of personal property, in this State, are not authorized, but tolerated by law, for the purpose of paying debts. The provision of such trusts must be construed in the light of other rules of the common law and statutes of the State.

The law presumes every man to intend the legal consequences which must naturally follow from his own voluntary acts.

In all obligations to pay money, TIME is an essential part of the contract, and when that arrives, the law demands that the debtor shall immediately appropriate his property to the payment of his debts.

The law is well settled, that in cases of voluntary assignment by insolvent debtors, the creditors have a right to a speedy sale of the assigned property for cash, to be applied in satisfaction of their debts.

7 Paige, Hart vs. Crane, 37.

7 " Rogers vs. DeForest, 272.

9 " Meacham vs. Stearns, 406.

2 Comstock, Barney vs. Griffin, 366.

4 " Leetch vs. Hollister, 214.

2 Selden, Nicholson vs. Leavitt.

12 Barber, Burdick vs. Post, 168.

1 Kernan, Kellogg vs. Stansen, 302.

3 Kernan, Brigham vs. Tillinghast, 215.

Many other authorities direct upon this point might be referred to if necessary, but it is not necessary, as this rule is nowhere controverted.

When trustees are authorized to sell goods upon a credit, and having done so, they are not personally responsible either for the goods or for the proceeds.

4 Pickering, Dickinson vs. Strong, 57.

1 Metcalf, Warren vs. Wells, 79.

21 Pickering, 185.

22 Wend., 483. 11 Wheaton, 59.

If the assignment is valid, then it is good for all the powers contained in the deed, and the assignee cannot be prohibited from exercising the powers and discretions given him.

He can only be restrained by the Court when he attempts to go beyond the powers conferred in the instrument.

The assignment cannot be good for one purpose, or one line of conduct in the assignee, and bad in another.

In reviewing the authorities upon the validity of such an assignment, we find the earliest decision upon the point to have been made by Chancellor Walworth, in 1838, upon a case which arose just after the great commercial distress. In those dark times of political strife, resulting from the effect of an institution in a sister State, the learned Chancellor became blind to the true rules of law which should have been applied in such case, and ruled that an assignment giving the assignees the power to sell upon a credit, did not necessarily render it void.

The Chancellor gave as a reason for the rule he then laid down, that if the assignees do their duty, they would not sell the property on a credit without obtaining therefor the difference in value between a sale for cash and a sale upon credit. He also held the law to be, that the creditors had the right to require the securities to be sold for cash immediately, and applied towards the satisfaction of the debts.

This extraordinary doctrine did not long prevail in New York, as very soon thereafter the case of *Nicholson vs. Leavitt* was decided by the highest tribunal in the State, reversing that law, and holding that such assignments were fraudulent and void. It may be here remarked that in some of the States where assignments for the benefit of creditors are expressly authorized by statute, the Courts have held that such assignments were not void.

We propose to first consider briefly those cases, and the reasons why they do not apply to the case under consideration.

Among the authorities that can be cited to sustain such an assignment is the case of *Conkling & Shepherd vs. Coon & Crum*; 6 Ohio State Reports, 611—by Swan, Justice

From the opinion in this case it is difficult to learn what the Court did intend to decide. The case was one where the trustee had made a sale upon a credit according to the terms of the trust. The Court held, a sale by a trustee upon a reasonable time of credit, taking the USUAL SECURITY, is an act of good faith, and is recognized by the laws of the State in the settlement of the estates of deceased persons, and is frequently directed by the Court.

The Court did not recognize the law of New York, as held in the case of *Nicholson vs. Leavitt*, and considered it a law peculiar to New York, and referred to the dissenting opinion of Brown, J., as the true rule, in the case of *Burdick vs. Post*—12 Barb, 168.

The Court held that the creditors had the right to require the notes taken for the property to be sold, and might have a remedy against the assignee.

We submit that this decision is peculiar to the laws of Ohio, and those states where assignments for the benefit of creditors are regulated by statute.

It should be borne in mind that in Ohio, in 1835, there was an act passed

which provided that all assignment, if fraudulent, were made the subject of equal distribution, and Courts could not vacate, but were bound to carry out according to the provisions of the statute.

In 1838, the statute declared that the proceeds of all assignments, WHETHER FRAUDULENT OR NOT, if made in view of insolvency, should be divided PRO RATA.

In 1853, an act was passed declaring the effect of assignments to trustees, which provided, that if assignments were made with a design to prefer one or more creditors, they should inure to the benefit of all, and such trusts be subjected to the control of Courts, which may require security from trustees, or remove them and appoint others.

In the Statute of Frauds, of Ohio, the words "hinder or delay" do not appear, and as the words "HINDER, DELAY, OR DEFRAUD" are not legally synonymous, it might be considered that the power and authority to the trustee to sell on a credit would not necessarily render the assignment void PER SE, as a power to sell for cash would cause more or less delay, which could not be a fraud. This decision, in Vol. 6 Ohio Reports, was made subsequent to all the statutes regulating assignments.

The ruling point in the dissenting opinion of Judge Brown was, that the statute expressly declared that a question of fraud, was one of fact for the jury, or to be proven before the Court.

In Alabama, insolvent debtors are allowed by statute to make assignments for the benefit of creditors, and no preferences are allowed.

9 Porter, Ashurst vs. Martin, 566.

16 Alabama, Ambercrombie vs. Bradford, 560.

These authorities sustain an assignment where the assignee was empowered to sell the property for cash or on a credit as shall in his opinion most comport with the interest of all the parties concerned.

The Court held that such power to sell does not vary in legal effect from the power to sell on such TERMS as he may deem expedient, in which case the Court refused to pronounce that the reservation of such a power, within itself renders the deed void.

The Court held that it was the duty of the trustee to execute the trust speedily, but in such manner as will best subserve the interest of the creditors. He should sell for cash or on such credit as will not unreasonably delay the payment of the debts.

In this Alabama case, it appears that the Court could not see any distinction between a direct and express power to the assignee to sell on a credit, or the provision authorizing the assignee to sell on such TERMS as he may deem expedient.

We submit that there is a very great distinction between the two provisions, and the authority is very much weakened by the reason given by the Court.

It may be here stated that all the authorities where Courts have held that the practice in Chancery in reference to receivers, and the law authorizing a credit by certain statutory trustees, administrators, &c., that in such cases the assignees are not the representatives of the debtor, but are officers of the law, and that the rule in such cases does not apply in cases of voluntary assignments.

In a few cases in Virginia, North Carolina, and Tennessee, it has been held that a power to sell on a credit, did not necessarily render the deed void *PER SE*.

But in the same case the Courts held that creditors have the right to a speedy appropriation of the property of the estates, and seem to treat the cases as though the statute made fraud a question of fact in all cases.

The opinion of Judge Duer in the case of *Nicholson vs. Leavitt*, 4 Sandford Superior Court Reports, 252, where he held such assignment to be valid, may be produced as authority against us in this case—we therefore beg leave to refer to the same.

It will be observed from the Judge's remarks, that he did not consider the case in 2 Comstock, as law, because the other Judges did not concur therein—that this point was one that was not necessarily involved in that case.

In this opinion, the learned and able Judge argued at great length to sustain such an assignment, and it will be found from his opinion that the ruling point upon which he decided the case, was that the statute declared that all questions of fraudulent intent should be deemed a question of fact, and not of law.

He fully admitted the law, and the construction upon such language in the assignment to be, as we contend; while the statute of frauds retained its original form.

It will be seen from his opinion that he fell into a very great error, in considering an assignment with express power and authority, to be the same as an assignment with power and authority to sell upon *TERMS AND CONDITIONS*, as the latter implied a power to sell on a credit.

This case was reversed in the Court of Appeals. 2 Selden, 510.

In the case of *Schufeldt vs. Abernethy*, 2 Duer, 538, this same Judge ruled an assignment void which contained the power and authority to sell on such terms and conditions as in his judgment may appear best, and he placed it upon the authority of the case in 2 Selden, and held that such authority gave the power to the assignee to sell on a credit by necessary implication.

From the true rule in cases of trusts of this nature, it will be found that this learned Judge, in both cases, was innocent in his premises and the application of the law. His conclusions from his incorrect premises were no doubt correct. In the first case the judge erred in treating the fraud as a question of fact—having assumed that position there was nothing left of the

case. In the other opinion, the Judge, in assuming that a trustee would be justified in doing an act which the deed may have given implied authority for doing, he loses sight of the law which prohibits all such implications to justify an unlawful act. Express power to do an unlawful act is conclusive evidence of the fraudulent intent.

Where an assignment of itself shows that it must necessarily have the effect of hindering and delaying the creditors of the assignor, in the collection of their debts, it is conclusive evidence of a fraudulent intent.

This is so even if the defendants deny on oath all intent to defraud. The denial cannot contradict the express provision in the deed, and the necessary consequences flowing from such provisions must be deemed the legal intent, designed by the assignor.

1 Edwards Ch. R., Cunningham vs. Freeborn, 556.

2 Paige, 557.

11 Wend., 240.

5 Paige, 13-22, Ames vs. Blunt.

23 Wend., 653, Smith vs. Acker.

9 Johnson, 337, Sturtevant vs. Ballard.

11 Wheaton, 59, Etting vs. Bank U. S.

6 Hill, 438, Goodrich vs. Downs.

2 Barbers, 9, Webb vs. Doggett,

4 Barbers, 546, Strong vs. Skinner.

In the case under consideration it is immaterial what the intentions of the parties were, in fact, in making the assignment. Their actual intent cannot be inquired into here. From the deed the Court finds the intention of the parties, and declares its effect. This may be done upon a single provision, or a few words in the deed.

There does exist a distinction between a fraud in law and a fraud in fact, and in this State the decisions have been uniform upon that point.

3 Scammon, 417, Howell vs. Edgar.

2 Gilman, 79, Ramsdell vs. Sigerson.

11 Ills., 503, Conkling vs. Carson.

13 " 387, Nesbit vs. Digby.

18 " 396, Davis vs. Ransen.

Also, as to the same principle:

Vannest vs. Toe, 4 Sandford Ch. R., 4.
 Burdick vs Post, 12 Barb., 168.
 Barney vs. Griffin, 2 Com., 465.
 Nicholson vs. Leavitt, 2 Selden, 510.
 Neally vs. Ambrose, 21 Pick., 185.
 Hopkins vs. Ray, 1 Mitch., 79.
 Woodburn vs. Mosher, 9 Barb., 255.
 Gibson vs. Love, 4 Florida, 217.
 Wallack's Notes to American Leading Cases.

When a party has intentionally executed an assignment or conveyance of his property with express provisions, which, if carried out, necessarily tend to hinder or delay a creditor in the collection of his debt, the question whether the conveyance is fraudulent or not becomes a question of law and not of fact, and no evidence can be received to contradict the express provisions of the deed.

The assignment in question is one of this kind. It contains express power in the assignee to sell upon a credit as he may think best, and that without obtaining consent of the creditors. Under this assignment the assignee can place the creditors at defiance until he shall convert the property into the means of payment, AT PRIVATE SALE OR ON CREDIT ON SUCH TERMS AS HE MAY SEE FIT. Such a power to sell involves a right to delay the sale as long as the assignee thinks proper. After such delay, he may sell on such time as he may think best, and thus the creditors may be indefinitely postponed.

Judge Bronson said, in the case of Barney vs. Griffin, that "an insolvent debtor cannot, under color of providing for creditors, place his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditor to have the property converted into money for their benefit without delay."

Whitney vs. Krows, 11 Barbour's Reports, 198.

Judge Harris, in delivering the opinion of the Court, said, that "an assignment authorizing a sale on credit is void." The direct point determined in that case was that authority to sell on such terms and conditions, did not authorize the assignee to sell on a credit, OR TO DO ANY OTHER UNLAWFUL ACT. Such power and authority only gave the trustee a right to sell on lawful terms and conditions.

This authority sustains our view of the law in this case, and clearly presents the difference between a direct power and one by implication, in an assignee, to dispose of the assigned property on a credit.

Burdiet vs. Post, 12 Barbour's Reports, 171.

This was a question of fraud upon an assignment containing a provision like the one now before the Court, where the trustee was authorized to sell upon a credit, which was held to be void *PER SE*. In this case Judge Barculo, who delivered the opinion of the Court, presented the law upon the several points involved, and the very able argument and the authorities there referred to, it seems to us, must convince the mind of every man who ever entertained a doubt on this question.

This is the case in which Judge Brown gave a dissenting opinion, which we have before referred to.

The very lengthy and able opinion of Judge Duer, as reported in 4 Sandford, was by Judge Barculo considered and to our minds fully overturned, as was the case with that of Judge Brown.

The Court say that "such an assignment, if permitted to stand and be carried into effect, puts the property beyond legal process. It leaves it then "until the assignee shall determine to sell, which may be a delay of at least "some months; that, after the sale may be put off, and kept at bay during an "indefinite period, until the expiration of the term of credit, which in his "unlimited discretion, the assignee may have seen fit to give on the sale; "all this may be done within the letter and spirit of the deed. Such a "power is calculated to hinder and delay creditors, and if the deed is valid, "the discretion of the assignee must be uncontrolled, so long as fraud or "collusion cannot be truly charged against him."

We ask whether the plain import of the statute is not to prevent just such a conveyance as this. Can it be denied that such a power is not, in fact, just as effectual as any delegated power, for the benefit of a debtor.

If such trusts are permitted to stand, any person who may have fifty dollars in property to pay one dollar of debts, may, if not convenient to pay heavy rates of interest, assign his property to a friend, and thereby keep his creditors at defiance, for months and months, and then sell sufficient to pay and the assigned property is then returned to him. There can be no doubt about this being the necessary result of such power in a trustee. It is in direct conflict with the provision of the statute, and it seems to us that no other view can be taken of the question.

Kellogg vs. Slawson, 1 Kernan, 305, N. Y. Court of Appeals.

This was a question upon an assignment authorizing a sale on such terms and conditions as the assignee might see fit. Judge Parker, who delivered the opinion of the Court, says that "there is no express authority given in "the assignment to sell on credit, or to do any OTHER ILLEGAL ACT." If the general authority given in the assignment is to be regarded as contemplating and authorizing a sale on credit, it authorizes 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.

This opinion was fully concurred in by all the six Judges, as shown by the report.

This authority shows that it is illegal for a trustee to sell upon a credit, in such cases, and that an assignment giving the assignee power to sell on a credit, is authorizing him to do an unlawful act, which if done, there is no redress for the creditor, consequently it is void.

Nicholson vs. Leavitt, 2 Selden, 510.

The opinion in this case was given by Judge Gardner, and concurred in by all the other six Judges. Judge Gardner, in this opinion, fully considers all the authorities touching the question, and from his very able and convincing reasoning, it will only be necessary to examine the same to arrive at the same conclusion.

It is the law beyond all doubt, and fully sustained upon principles and authority, we respectfully beg leave to refer this honorable Court to the entire opinion.

Brigham vs. Tillinghast, 3 Kernans, 217.

This is the most recent authority upon the point under consideration. The opinion of the Court was delivered by Judge Dean, and concurred in by all the Judges, in which all the prior decisions upon this point were referred to and fully sustained.

The Court said: 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 assigns are bound to make an immediate "application of the property. And any provision contained in the assign- "ment which shows that the debtor, at the time of its execution, intended to "prevent 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.' Such an intent expressed in the instrument, or "proved ALIENDE, is fatal alike by the language of the statute, and the well "settled adjudications of the English and American Courts."

We refer to the following authorities to show such an assignment is absolutely void.

- 2 Comstocks, 365, Barney vs. Griffin.
- 2 Selden, 510, Nicholson vs. Leavitt.
- 2 Duer, 533, Schufeldt vs. Abernethy.
- 11 Barbour, 198, Whitney vs. Krows.
- 12 Barbour, 168, Burdick vs. Post.
- 1 Kernans, 302, Kellogg vs. Slauson.
- 3 Kernans, 217, Brigham vs. Tillinghast.
- 1 Wisconsin, 286, Hutchinson vs. Lord.
- 2 Wisconsin, 42, Keep vs. Saunders.
- 26 Vermont, 462, Hussey vs. Noyes.
- 28 Vermont, 465, Paige vs. Alcott.
- 2 California, 107, Billings vs. Billinger.

In submitting the case to the consideration of the Court, we claim that we have shown both from principal and authority—

1st. That every person intends all the natural consequences, flowing from his own acts.

2d. That such a transfer of property by an insolvent, places the same beyond the reach of his creditors without their consent, and entirely at the discretion of the trustee.

3d. That such transfer giving the power to the assignee to dispose of the property on credit, he cannot be prohibited from doing so as long as he follows the terms of the trust.

4th. That if the estate be lost while the assignee follows his own ideas of the trust, the creditors must suffer the loss.

5th. That such transfers and powers to an assignee, when the creditors have the rights here shown, directly tends to hinder and delay them in the collection of their debts, and are fraudulent and void as against creditors.

6th. That a judgment creditor, on the return of execution unsatisfied, may file his bill to set aside such assignment, and reach the property and effects assigned, in satisfaction of his judgment.

SMITH & DEWEY.

For Complainants.

April 20th, 1860.

State of Illinois }
McHenry County } P. Pleas before the
Honorable Isaac
G. Wilson Judge of the Thirteenth Judi-
=cial Circuit of the State of Illinois,
and Presiding Judge of the McHenry
County Circuit Court at a Circuit Court
begun and held at Woodstock at
the Court House in said County on
Monday the Nineteenth day of
December for the year of our Lord
One thousand Eight hundred and
fifty nine

Present
The Hon Isaac G. Wilson Judge
Edwin C. Thomas Sheriff.
Attest
No. T. Kaplan etc.

Henry C. Pinckney }
Isabel R. Parkhurst } P. And
now on the
20th day of October for the year last
aforesaid, ~~xxx~~ come the Complainants
by Smith & Dewey their Solicitors
and also come the Defendants by Low
Jan 12/60 & Rogers their Solicitors and by
Pl. p 4 - agreement this case is to be submitted
upon the Bill answer Replication

and proofs within thirty days.

(Copy)

~~Circuit Court of~~

And thereafter to wit on the 22^d day
of December of the year last aforesaid
being one of the days of the December
Term of said Court for the year 1859
came the parties to this Suit by their
Solicitors and file their agreement
herein which is in the words and
figures following to wit

Circuit Court of McHenry County	
Henry C. Bowen, Theodore McNamee	
Samuel S. Holmes, Henry S. Stone	
Antony Gilkinson Partners under the name	
style & firm of Bowen McNamee & Co	
and Devillo C. White Complainers	In
	Chancery
	Decem
	Term
Asahel R. Parkhurst, Perry T. Parkhurst	Ad
Henry C. Rogers, & Franklin Safford	1859
Defendants	

It is agreed by the parties to the
above intitled suit to submit to the
Supreme Court for its decision the
two following questions of Law which

now on the trial of the above entitled
cause before the Hon. Isaac G. Wilson
Chancellor on the 22^d. day of December
A.D. 1854

The Bill in this case (a usual
Creditors Bill) was filed on the 9th
day of April 1858 by two Judgement
Creditors of Defendants Asahel R.
Parkhurst & Perry T. Parkhurst to
obtain satisfaction of their respective
Judgements. The above Complainant,
forming the Copartnership of Brown
McHenry & Co recovered a Judgement
for \$286.70 upon which Judgement
an execution in due form directed
to the proper officer was issued
on the 19th. day of January 1858
and delivered to the proper Sheriff
on the 23^d. day of January 1858
and was returned by the same to
the Clerk's office of said McHenry
County on the 10th day of March
+ 1858 with the following Indorsement
by the Sheriff thereof. That on the
16th. day of February A.D. 1858
he made a demand of both the
said Asahel R. Parkhurst and
Perry T. Parkhurst for money or
property to satisfy said Execution

and was informed by them that they
had neither money or property to
turn out. The same and that after
making search he was unable to
find any property belonging to them
by the sale of which the amount
due on said Executions or any part
thereof could be made and he
therefore returned the said writ
wholly unsatisfied.

The other Executions in favor of
Complainant White was returned
unsatisfied at the expiration of ninety
days. It was contended by the
Defendants that the Bill should
be dismissed so far as the same related
to Complainants Brown McNamee
& Co. should be dismissed because
the Execution in their favor against
Said Pinkhursts was returned by
the Officer before the expiration of
90 days from its issue and the Bill
was ordered dismissed as to said
Brown McNamee & Co. to which
decision and order of the Court
the Complainants then & there excepted.

The defendants also set up in their
answer a general assignment for
the benefit of creditors made by

And defendants Parkhursts to their
Co-defendant Rogers of which the
following is a copy except the
Schedule.

(Copy)
This Indenture made this fifth day
of July in the year of our Lord
One thousand eight hundred and
fifty seven between Isahel R.
Parkhurst, and Perry T. Parkhurst
Co-partners in trade doing business
under the name style and firm
of I. R. & P. T. Parkhurst at
Marengo in the County of Mc.
Henry in the State of Illinois
of the first part and Henry O. Rogers
of the same place party of the
second part Witnesseth, That whereas
the first parties of the first part
are jointly indebted to the second
person in the schedule hereto
annexed named marked T. Z.
in the same therein respectively
named and upon the consideration
therein stated and set forth, and
are also indebted to other persons
therein named and being unable
to pay all their said debts
are desirous of making joint

distribution of their property and
Effects among their Creditors;
Now therefore this Indenture
witnesseth that the Said parties
of the first part in consideration
of the premises and of the sum
of one dollar to them in hand paid
by the said party of the Second
part receipt whereof is hereby
acknowledged have granted bargained
and sold released assigned transferred
and set over unto the said party
of the second part and to his
assigns forever all and singular
the lands tenements and heredit-
aments beginning and bearing
within the State of Illinois and
also all the goods, chattels Mer-
chandise, Bills, Bonds, notes,
Book accounts claims demands
Choses in action Books of account
Evidence of Debt and property
of every name nature and descri-
-ption whatever, and to have and
of the said Cassius R. Packhurst
and Perry T. Packhurst the said
parties of the first part more
particularly enumerated and described

in the Schedule hereto annexed must
"A" or intended so to be To Have
and to hold the same and Every
part and parcel thereof with the
appurtenances to the said parties
of the Second part his heirs
Executors administrators and
assignees in trust nevertheless and
to and for the following uses
intents and purposes that is to
say, that the said party of the
Second part shall take possession
of all and Singular the lands ~~and~~
tenements and hereditaments and
all other the property and Effects
wholly assigned either at public or
private Sale to such person or
persons for such prices and on
such terms and considerations
and either for cash or on credit
as in his judgment may appear
best and most for the interest for
the parties concerned and convert
the same into money and to collect
all and Singular the said debts
due bills bonds notes accounts
Claims demands & choses in
action or so much thereof as
may prove collectable and

thereupon to execute acknowledge
and deliver good and sufficient
deeds and bills of sale whereas
and all other instruments of
conveyance that may be necessary
and proper to effect a sale and transfer
of my and all the property and
effects hereby assigned or intended to
be and by and with the proceeds
of such sales and collections the
said party of the second part shall
first pay and discharge all the first
reasonable and usual expenses
costs charges and commissions
of making executing and carrying
into full effect the assignment and
the object thereof in doing which
the said party of the second part
is hereby authorized to employ one
or more agents or agents Attorney or
Attorneys which shall be paid out
of such proceeds a reasonable
compensation for their service,
and the said party of the second
part shall also at the charge of
the said trust fund obtain and
at all times keep suitable and
reasonable insurance on the said
property and effects hereby assigned

and conveyed and shall also pay
the rents and taxes now due and
to grow due upon the premises at
present by the said parties of the
first part until the said parties of
the first part until the said property
and effects shall be sold and dis-
posed of or as long as it shall be
necessary to retain and use the said
premises for the storage and safe
keeping of said trust property and
effects and the residue of the proceeds
of such sale and collections shall
be considered as the net avails of the
property hereby assigned and the
proceeds thereof by and with the
said net avails and proceeds the
said party of the second part shall
pay and discharge the said debts
of said parties of the first part
in the order and manner following
that is to say:

First

The said party of the ^{second} ~~first~~ part shall
pay and discharge in full the several
and respective debts, bonds, notes and
loans of money due and to grow
due from the said parties of the
first part or for which they are
liable to the several persons and

firms names and designated in
the Schedule hereunto annexed marked
"B" together with the interest due
and to grow due on said debts bonds
and notes and shares respectively
and if said net proceeds shall not
be sufficient to pay the said debts
and liabilities mentioned in said
Schedule "B" in full, then the same
shall be paid pro rata with such
notes proceeds shares and shares alike
as far as the same shall go in pro-
portion to their respective units and
Secondly by and with the rest residue
and remainder of said net proceeds,
if any shall remain after the
payments in full of said debts and
liabilities mentioned in said Schedule
"B" the said parties of the Second Part
shall pay and discharge all the
other Co-partnership debts demands
and liabilities whatsoever now existing
whether due or hereafter to become
due against the said parties of
the first Part, provided such
remainder shall prove sufficient
for that purpose and if such be
insufficient then to apply the
remainder to the payment owed;

and liquidation of such debts and
demands pro rata share and share
alike according to their respective
amounts as far as such remainder
will extend for that purpose
And thirdly by and with the rest
residue and remainder of said
proceeds if any shall remain
after partnership debts the said
parties of the second part shall
pay and discharge all of the private
or undivided debts now existing of the
said parties of the first part or either
of them whether due or to grow due
Provided the respective amounts of
the individual debts of each of
said parties does not exceed his
portion of the surplus that may
remain after paying all the said
partnership debts and such surplus
is to be divided pro rata among
individual creditors in proportion
to their respective demands it being
understood that no part of said
surplus which will belong to each
of said individual parties of the
first part respectively after the
payment of the partnership debts
is to be ~~become~~ ^{made} liable for the

individual debts of the other of
said parties of the first part
And lastly the said parties of the
Second part shall retain the Surplus
if any remains after the payment
of all debts due by the said parties
of the first part or either of them to
the said parties of the first part
their executors, administrators
assigns and for the better execution
of those presents and of the several
trusts hereby reposed the said parties
of the first do hereby make nominate
and constitute and appoint the said
party of the Second part and his
executors administrators and assigns
them and each of them true and
lawful attorney irrevocable with power
of substitution with full power authority
in the name of the said parties of
the first part and their and each
of their legal representatives or
otherwise to do transact and perform
all acts deeds matters and things
which the said party of the Second
part may deem necessary in rela-
tion to the premises and in the full
Execution of those presents and upon
and for the trust aforesaid to ask

2

demand receive and receive of
and from every person ~~and person~~
all and singular the property effects
goods & chattels, wares, Merchandise
loan & loans of money debts and
demands due and owing, and
belonging to the said parties of
the first part and upon all receipts
and deliverings in the premises
due acquittances in his name or
otherwise to make execute and
acknowledge and in default of
delivering a payment in the
premises to sue prosecute defend
and implead for the same or
any part thereof and to execute
acknowledge and deliver for the
same all deeds of conveyance for
the said premises or any part
thereof and also for all or any
of the purposes aforesaid to make
~~the said party of the second part~~
or constitute one or more, Attorney
or Attorneys under him the said
party of the second part hereby
ratifying and confirming whatsoever
our said Attorney and his Substitutes
shall do or cause to be done in
the premises and the parties of the

first part for themselves them and
Each of them their executors
administrators and assigns covenant
and agree to and with the said party
of the second part his executors and
administrators and assigns that
they will when requested make or
cause to be made such further
assignments deeds and conveyances
as shall be necessary to carry into
complete effect the of
the parties to those

In Witness whereof the said parties of
the first have hereunto set their respective
hands and seals the day and year
just above written

A. R. Parkhurst Seal
P. T. Parkhurst Seal

State of Illinois
McHenry County I Alden Jewett
a Justice of the Peace
in and for the County in the State aforesaid
do hereby certify that Asahel R. Parkhurst
and Perry T. Parkhurst who are
personally known to me as the real
persons whose names are subscribed
to the above instrument appeared
before me this day in person and

acknowledged that they executed
and delivered the said deed of
assignment as their free and voluntary
act for the uses and purposes therein
set forth

Given under my hand and
seal this 4th day of July
AD 1854

Alden Jewett J. P.
Ct.

The Complainants contend that the
Clause in said assignment authorizing
the said assignees to sell and dispose
of the assigned property which consisted
principally of a stock of goods & accounts,
upon a credit rendered the same
fraudulent & void in law as to the
Complainants who are judgment
creditors of the assignors. The Court
decided the assignment valid and
dismissed the Bill as to the remaining
Complainant White. To which
decision & order of dismissal the
said Complainant White then and
there excepted. The case was submitted
upon Bill & sworn answers called
for by the Bill which answers denies
all fraud charged in the Bill

We hereby certify that the foregoing
points of law were and are at
issue between the parties to this suit
and agree that they may be
submitted to the Supreme Court
for its decision thereon and that the
same may be certified to the said
Court. J. C. Dewey of Counsel
Dec. 22nd 1859
Attest for Clerk.

I hereby certify that the foregoing
issues of law were involved in the trial
of the above entitled cause.

Signed Isaac G. Wilson
Judge

(Endorsed.
Filed Dec. 22nd 1859
W. H. Hapson clk.

State of Illinois }
McHenry County }
George

Hapson Clerk of the Circuit Court
in & for said County in the State of Illinois
do hereby certify that the above
foregoing is a true and complete

copy of the proceedings of this Court
in the above entitled cause and
of a stipulation filed therein by
the parties thereto on the 22^d day
of December A.D. 1859



In Witness whereof I
have hereunto set my hand
and the seal of said Court
at Woodstock this the 10th
day of January A.D. 1860
W. D. Paffon etc

State of Illinois
Supreme Court

Henry C. Bowen
Etal

Plffs in Error
vs

Isaac B. Parkhurst Etal

Defts in Error

Assignment of Errors

The Plaintiffs in Error assign the following as grounds of Error -

1st The Court Erred in dismissing bill as to plaintiffs Bowen McNamee & Co

2^d The Court Erred in holding that the return of Execution before the 90 days had elapsed, under the circumstances improper and insufficient to maintain the bill,

3^d The Court Erred in holding the assignment in Controversy valid

4th The Court Erred in dismissing the bill,

5th The Court Erred in giving judgment against plaintiffs in Error

Smith & Dewey
Attys for Plffs in Error

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Henry C. Bowen
25

Asahel R. Parkhurst

Third Feb 11. 1860
L. Leland
Clerk.

CIRCUIT COURT OF McHENRY COUNTY.

HENRY C. BOWEN, THEODORE McNAMEE, SAMUEL S.
HOLMES, HENRY S. STOWE, ANTHONY GILKISON,
partners under the name, style and firm of Bowen,
McNamee & Co., and DEVILLO E. WHITE,

Complainants,

VS.

ASAHEL R. PARKHURST, PERRY T. PARKHURST, HENRY
O. ROGERS and FRANKLIN SAFFORD,

Defendants.

IN CHANCERY,

December Term, A. D. 1859.

CERTIFIED FROM McHENRY.

ABSTRACT.

PAGES
1 & 2.

This is a case in Chancery, in which the bill was filed on the 9th day of April, A. D. 1858, and was an ordinary creditor's bill, which prayed among other things, that an assignment made by defendants, Asahel R. Parkhurst and Perry T. Parkhurst to their co-defendant, Rogers, might be set aside as being fraudulent and void as to creditors.

3 & 4.

The bill was filed upon two judgments against said Parkhurst, based upon the return of two executions returned unsatisfied. The one in favor of complainants, Bowen, McNamee & Co., was issued on the 19th day of January 1858, delivered to the officer 23d of same month, and after personal demand by the officer, and refusal to turn out property to satisfy the same or to pay it, and after search for property, the officer, on the 10th of March, 1858, returned the same wholly unsatisfied. The other execution, in favor of complainant, White, was returned unsatisfied after the expiration of 90 days, and no question arises with regard to the latter execution.

On the 22d day of December, 1859, the cause was submitted to the Court for argument upon the bill, answers, and replication. On the hearing of the case, the defendants moved to dismiss the bill as to complainants Bowen, McNamee & Co., on the ground that the execution in their favor had been returned by the Sheriff before the expiration of ninety days from its TESTE, which motion the Court granted, and dismissed the bill as to said complainants, Bowen, McNamee & Co., to which decision of the Court, the complainants, Bowen, McNamee & Co., then and there excepted, which facts, and the decision thereon, present the first question involved in the case.

5 & 6.

The answer of the defendants, which was under oath called for by the bill, denied all fraud, but set up a general assignment by defendants, Asahel R. Parkhurst and Perry T. Parkhurst, to their co-defendant, Henry O. Rogers, for the benefit of their creditors, consisting of a stock of goods and notes and accounts, with preferences,—which assignment provided, among other things, that the said assignee should take possession of the property, thereby “assigned, or intended so to be, and sell and dispose of the same, “either at public or private sale, to such person or persons, for such prices “and on such terms and conditions, and either for cash or on credit, as in “his judgment may appear best and most for the interest of the parties concerned, and convert the same into money,” &c, which assignment the complainants claimed to be fraudulent and void as to themselves, creditors of said assignors, on account of the power therein contained to dispose of the property thereby assigned upon credit.

But the Court decided the assignment valid and dismissed the bill as to the remaining complainant, White, which decision and order of dismissal the said complainant, White, then and there excepted, which facts, and the decision thereon, present the second question in the case.

11.

The two foregoing issues of law presented in this case, were, in pursuance of the statute, by stipulation of the counsel of the respective parties, filed in the Office of the Clerk of the said Court, on the said 22d day of December, A. D. 1859, agreed to be certified and submitted to the Supreme Court for its decision thereon, and were duly certified thereto by the Hon. Isaac G. Wilson, Judge of said Court.

SMITH & DEWEY,

Att'ys for Plff's in Error.

86
SUPREME COURT.

—•—
HENRY C. BOWEN et al,
Plffs in Error,

vs.

A. R. PARKHURST et al,
Defendants in Error.

ABSTRACT OF RECORD.

SMITH & DEWEY,
Att'ys for Plff's in Error.

Filed April 18. 1860
L. A. Ward
Clk